CRIMINAL PROCEDURES RELEVANT TO CRIMES OF KILLING IN THE KINGDOM OF SAUDI ARABIA

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In The name of Allah, Most Gracious, Most Merciful

"Nor take life-which Allah has made sacred-except for just cause."

[Qur'an 17 verse 33.]

"...If any one slew a person-unless it be for murder or for spreading mischief in the land-it would be as if he slew the whole people..."

[Qur'an 5 verse 32.]

ABSTRACT

This thesis aims to present the contemporary legal criminal procedures in Saudi Arabia that are relevant to crimes of killing. The thesis is divided into five chapters; each chapter is divided into two or three sections; and every section contains various sub-sections.

Part one in the first section of chapter one provides a general introduction to the criminal procedures, its establishment and objectives in Islamic law. Part two discusses the general essential elements that must exist in the analysis of every crime. The general divisions of crimes have been pointed out in this part, as well as importance of this classification in Islamic law. Section two of this chapter embodies two parts which reflect respectively the sources of criminal procedure, as the ground from which it derives its legal authority; in addition, it provides miscellaneous statistics that indicate the effect of Islamic criminal law on decreasing crime rate in Saudi Arabia.

Chapter two consist of two sections in which crimes of killing are classified. Part one of the first section discuses the fundamental components of intentional killing; types of punishments imposed upon a murderer; and the infliction of the death penalty as a qisas in Saudi Arabia. The contemporary legal methods and conditions to implement capital punishments in Saudi Arabia has been discussed in the second part of this section. The second section deals with unintentional crimes of killing which comprise quasi-murder and killing by mistake. The due punishments for such crimes have been detailed in the first part of this section. The Saudi legal system of blood-money has been elaborately discussed in the second part.

Chapter three is divided into three sections, each section contains various parts. Part one and two in the first section concentrate on examining those crimes of killing that are committed by a group of people, who either directly or indirectly participated in the crime. The effect of circumstances of insanity, infancy and intoxication, on annulling

criminal responsibility has been comprehensively discussed in the second section. The last section of this chapter focuses on examining the effect of certain extenuating circumstances, such as self-defence and defence of honour, upon criminal liability .

Chapter four deals with the contemporary Saudi pre-trial criminal proceedings relevant to crimes of killing. The first section of this chapter comprises six parts. The discussion in these parts focuses upon the legal procedure of examining suspects, searching of private premises, and the rights of suspect during this stage of police investigation. Section two deals with the pre-trial legal procedure following the detection of crimes of killing. It also covers the legal process of pre-trial detention, release proceedings, and the rights of the detained person.

Chapter five embodies three sections which provide a comprehensive discussion to the trial proceeding and the consequent procedure after the trial. This includes: the Saudi courts system; the rule of evidence for proving criminal cases; the procedures of hearing cases of crimes of killing; the rights of the accused during this stage; and the ensuing legal process required to implement the judgement.

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TRANSLITERATION OF ARABIC

In this thesis, Arabic letters and words are transliterated as follows:

A- Constants.

أ	’	ض	Ḍ
ب	B	ط	Ṭ
ت	T	ظ	Ẓ
ث	TH	ع	‘
ج	J	غ	GH
ح	Ḥ	ف	F
خ	KH	ق	Q
د	D	ك	K
ذ	DH	ل	L
ر	R	م	M
ز	Z	ن	N
س	S	هـ	H
ش	SH	و	W
ص	Ṣ	ي	Y

B- Vowels.

ـَ	a	ـِ	i	ـُ	u
ـَا/ـَى	ā	ـِي	ī	ـُو	ū
ـَو	aw	ـَي	ay		

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INTRODUCTION

Crimes of killing occupy a critical position in contemporary debates throughout the wide world. Arguments over the death penalty have intensified in modern society. Some argue that the death sentence should be abolished because of its arbitrary nature and finality.

In Islamic criminal law, determining whether or not a person who kills another human being is liable to be executed depends on the degree of the crime and circumstances surrounding each individual case. There is not a single "crime" which encompasses all acts of killing. It is the fact that not every one involved in committing a crime of killing is guilty of the same crime. Some killers may be considered to have committed no crime at all, if the killing is subsequently judged to be justifiable. Other killers may be judged to have committed murder, quasi-murder, or some form of mistaken killing.

The Kingdom of Saudi Arabia maintains the most rigorous system of Islamic criminal justice and applies the criminal proceedings that are consistent with the teaching of Islam. At present, there is no detailed study that has discussed contemporary legal procedures relevant to crimes of killing in the Kingdom of Saudi Arabia. Hence, this thesis aims to outline the particulars of these criminal procedures which apply nowadays in Saudi Arabia, as well as provide insight into the procedural safe guards amid to protect the individual from any arbitrary act or judgement during his journey through the pre-trial and trial proceedings. This includes the legal process of implementing the court's decision. It also provides examples of actual cases to illustrate in detail the application of the Saudi legal system in crimes of killing. The information regarding the modern Saudi criminal procedures will be derived from its original references such as the Saudi legal system articals and royal decrees.

In order to provide a comprehensive discussion on the above, the thesis has been divided into five chapters. Section one of the first chapter defines the criminal procedure, and examines its objectives and establishment in Islamic law. In addition, it presents the general division of crimes and the importance of such classifications in varying the methods of proving guilt or innocence, and punishing the convicted person. The second section of this chapter examines the sources of criminal procedure, as the basis from which it derives its legal authority. It also focuses on the effect of applying Islamic criminal law by providing various statistics and some conclusions of certain comparative studies indicative of a decreasing crime rate in Saudi Arabia .

In both sections of chapter two, it can be seen that crimes of killing are classified into three categories: murder, quasi-murder, and killing by mistake. The discussion shows that only the first category is punishable with the death penalty as qiṣāṣ. The other two categories, and those cases in which the victim's heirs have waived the death penalty, are punishable with diyah, kaffārah and ta'zīr penalty such as imprisonment.

The first section of this chapter concentrates on discussing the types of punishment normally imposed for murder which include the death penalty, and the conditions of the execution of such a penalty at the current time in Saudi Arabia. In addition, it demonstrates that there are certain conditions that must be observed, for example in applying such a punishment to a pregnant woman or nursing mother. The last part of this section demonstrates that the application of a capital punishment in cases where there are minor heirs, must be delayed until they reach the legal age of maturity. The death penalty cannot be executed if one of the victim's heirs waives this right and accepts blood-money as an alternative. Section two particularly focuses on unintentional killing, and the system of blood-money for such crimes in the present legal procedures in Saudi Arabia. This includes the fixed amount of blood-money for a man or woman, and for various circumstances of abortion and miscarriage.

Chapter three is divided into three sections; the first deals with varying degrees of responsibility and complicity in crimes of killing. The second section looks at circumstances of insanity, infancy, or legal intoxication which annul criminal liability and would thus prevent the application of the death penalty. Section three similarly studies the effect of extenuating circumstances on criminal liability in crimes of killing, such as the plea of self-defence, the defence of honour and property, and medication.

The contemporary legal system in Saudi Arabia divides the criminal procedures, which are relevant to crimes of killing, into two stages: pre-trial and trial proceedings.

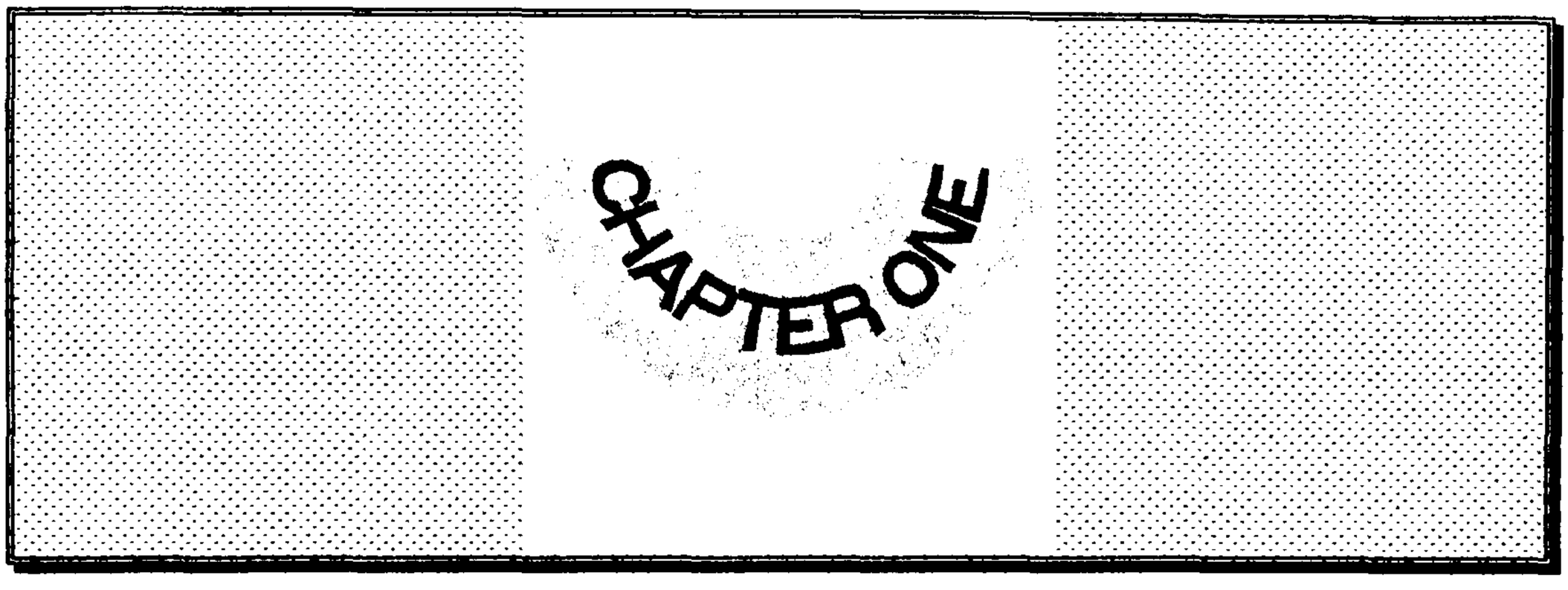
Chapter four concentrates on discussing the current regulation of pre-trial criminal procedure, such as the investigation process and the function of police in implementing such a duty. The first section of this chapter includes the legal procedures of stopping and questioning suspicious persons, searching private premises, and the rights of the suspect during this stage. Section two of this chapter deals with the pre-trial criminal procedures following the detection of crimes of killing. It presents the main factors that may help the investigator to reach a successful conclusion at the end of the investigation stage. In addition, the legal procedure of preparing the police reports which will be referred to court has been comprehensively discussed in this section. The discussion also includes the legal procedure of detaining the accused, the conditions of the detention, and the rights of the detained person.

Chapter five focuses specifically on the trial proceedings. It looks at the historical aspect of the judicial system in Saudi Arabia, and compares it with the current system. From this discussion it emerges that the authority to deal with crimes of killing is limited to certain courts: the General Courts, Courts of Appeal, and the Supreme Judicial Council. The rule of evidence in proving crimes of killing in such courts is discussed in detail in section two of this chapter.

The third section explains that all cases of crimes of killing must initially be referred to the General Court located where the crime occurred. A panel of judges must hear the

case and establish a judgement. The present legal procedure of hearing cases of crimes of killing are discussed in this section. The judgement in all crimes of killing will automatically be reviewed in the nearest Court of Appeal by a different panel of judges. The number of these judges varies depending on the original judgement. This discussion also states that judgement involving the death penalty must be deliberated and approved by certain judges in the Supreme Judicial Council. In order to implement the death penalty, the judgement must finally be sanctioned by a royal decree. The legal procedures to execute the death penalty is discussed in detail in this section. In addition, the discussion turns to the legal procedure to implement punishments less than the death penalty, and the release proceeding in cases where the convicted person is detained. At the end of this thesis, there will be an overall summary and conclusion.

Finally, in this thesis, the abbreviation "A.H." is written after each Hijrī date. Also, the statement "may peace be upon him" can be taken to follow the word "Prophet" throughout the thesis.



INTRODUCTORY CHAPTER.

General introduction.

Basically, the criminal law that is applied in the Kingdom of Saudi Arabia is based on the Sharī'ah. The Saudi constitution derives from the Qur'ān and the Sunnah. Saudi Arabia is probably the Arab country that still adheres most closely to Islamic law, because of its particularly important position in Islam as the keeper of the two Holy Mosques in Makkah and al-Madīnah. In the kingdom religion and law are inseparable, because Islamic law is not only a code of law but a code of behaviour and ethics.

The legal system of the Kingdom of Saudi Arabia is not only rooted in Islamic law but also comprises elements of criminal procedure that are regulated by the royal decrees. The government of Saudi Arabia tries to achieve an acceptable balance between Islamic law and modern society.[1]

In 1346 A.H. King 'Abd al-'Azīz b. Sa'ūd of Saudi Arabia declared his intention to formulate a code embodying the teaching of a Ḥanbalī scholar of a late period, Ibn Taymiyyah. The Ḥanbalī school (one of the four major schools of Islamic Jurisprudence) was founded by Aḥmad Ibn Ḥanbal. He was for some time the disciple of al-Shāfi'ī school. His opinions are profoundly centred on the Qur'ān and the Sunnah. The Ḥanbalī Madhhab makes few concessions to personal reasoning (ra'y) or

reasoning by analogy (qiyās). This Madhhab are strict in religious ritual but tolerant in commercial transaction.[2]

The Ḥanbalī Madhhab is that primarily followed in Saudi Arabia, provided that Ḥanbalī Fatwā does not conflict with the public interest within Islam. If so, (i.e. in some subsidiary issues) then judgement will be based on the opinions of the other Sunni schools in so far as they are consistent with the public interest within Islamic law.

In 1379 A.H. King Khālid b. 'Abd al-'Azīz in the conference of 'Ulamā' held in Riyadh suggested that it was better to solve current problems by way of ijtihād. Later on, at another conference held in Makkah, in 1404 A.H., King Fahd b. 'Abd al-'Azīz called for the reopening of the gate of ijtihād in Saudi Arabia as an instrument of legal reform based on the teaching of Islam.[3]

In consequence of this, the 'Ulamā' in Saudi Arabia, when need arises often issue a fatāwā which constitute new legal regulations that agree with the principles of Islamic law. As a rule of procedure, the fatāwā may be approved by the Council of Ministers, and promulgated by royal decree, in order to form part of the legal system.

Modern criminal procedures in the legal system of Saudi Arabia are designed to deal with the country's contemporary legal problems in an age of development. As a result, the government tries to balance Islamic precepts against modern needs when issuing the royal decrees. Although the decrees are not specifically an expression of Islamic law, it is generally maintained that they are consistent with the principles of Islam.[4]

According to a royal decree initiated by the Council of Ministers in 1409 A.H, some of the fundamental objects of applying Sharī'ah law are: to preserve Islamic values, to apply, stabilise and spread the application of Islamic law; to defend religion and the country; to maintain national security and social stability, and provide each citizen with the means of personal fulfilment during the different stages of life in order to enable each to lead a productive and effective life.[5]

CHAPTER ONE

This introductory chapter will provide, in the following two sections, a general introduction to the definitions, sources of Islamic criminal law, and the effect of punishment in Saudi society.

SECTION I: GENERAL DEFINITIONS.

Part 1: The Islamic Criminal Procedure.

According to the legal system in Saudi Arabia, criminal procedures are considered as a collection of regulations that have been established by the authority and royal decrees, in order to specify the regular relations between individuals and the relevant authorities (the executive powers), with the purpose of maintaining the legal rights consistent with human rights in Islam.[6]

These proceedings involve the criminal procedure in Saudi Arabia as to the rights of the accused, the pre-trial legal process, for example, the Saudi rules for both searching a suspicious person in the street, and for searching homes and other premises, as well as the rights of the accused on trial, the rules of detention and the Sharī'ah court systems.

The establishing of Islamic criminal procedure.

In concordance with the direction of Islamic law, any new regulations concerning criminal procedure will not be deemed part of the Sharī'ah, and would not be applied in Saudi Arabia, unless they were totally consistent with the aims of Islamic law. Accordingly, the Islamic criminal procedures in Saudi Arabia are generally considered to be historically rooted in the Qur'ān, the Sunnah, and the other Islamic sources. For instance:

Allah says: **"Allah commands justice, the doing of good, and giving to kith and kin, and he forbids all indecent deeds and evil and rebellion: He instructs you, that ye may receive admonition".**[7]

Justice as mentioned in this verse forms part of the fundamental precept of criminal procedure in Islamic law.

Allah also says: **"O ye who believe! if a sinner comes to you with any news, ascertain the truth, lest ye harm people unwittingly, and afterward become full**

of repentance for what ye have done".[8] "O ye who believe! Avoid suspicion as much as possible. For suspicion in some cases is sin".[9]

These verses conceptualise the need for impartiality and the need to investigate without pre-judgement any possible crime.

Some criminal procedures were established by the Sunnah, e.g. Bahz b. Ḥakīm reports: "The Prophet (may peace be upon him) detained a man on suspicion".[10] Also: Abū Hurayrah says: "The Prophet put a man in custody for a day and night".[11]

These Hadiths indicate that to detain or remand the suspect is a permissible procedure in Islamic law in the purpose of public interest.

Abū Hurayrah also reports: "There was a man who came to the Prophet while he was in the Mosque and called him: 'Allah's messenger. I have committed adultery'. The prophet turned away until the man did say that four times. Then, as he testified four times against him own self, the prophet called him: 'Are you married'. He said: 'yes'. Thereupon, the prophet said: 'Take him and stone him".[12]

The above Ḥadīth implies an example of a criminal procedure which should be considered in cases when a criminal has confessed to the crime of adultery.

The companions of the Prophet also applied some criminal procedures, for example: Abū Wāqid al-Laythī states: "A man came to 'Umar Ibn al-Khaṭṭāb when he was in Syria and informed him, that he had found a man sleeping with his wife. Then 'Umar sent Abī Wāqid to the wife to ask her about this and to find out the truth".[13]

Once again, to ask the accused and to confirm the allegation are part of the criminal procedure established in Islamic law.

In addition, Islamic criminal procedure is based on various other jurisprudencial sources such as those maxims known as: "al-qawā'id al-fiqhiyyah" which means "bases" or "foundation".[14] For instance, in the Qur'ān we find: **"And remember Abraham and Isma'il raised the foundation of the House".[15]**

Jurists define al-qawā'id in a legal framework as: general rules (kulliyyāt) Which apply to their particulars (juz'iyyāt).[16] Mahmassani states: "These maxims are but

general principles grouping together most particulars and based upon the majority of them".[17]

The use of these maxims is to facilitate the understanding of individual problems by propounding a principle. Therefore, a judge may not base his judgement upon these maxims unless they are supported by specific provisions in the Sharī'ah law, as in the case of the maxim "The burden of proof is on him who alleges; the oath on him who denies" which was drawn from the statement of the Prophet.[18]

The general five maxims in Islamic jurisprudence are:

1- "Necessity renders prohibited things permissible".

2- "Matters are determined according to intention".

3- "Hardship begets ease".

4- "One must choose between conflicting interests".

5- "In principle, words shall be construed according to their real meaning".

These general principles or maxims encompass most subsidiary maxims, which number about 99.[19] Jurists in Islam pay attention to these maxims as principles that comply with the intent of Islamic law.[20]

The above discussion confirms that some criminal procedures were initially established in Islam in order to protect human rights and apply justice. These procedures are still applicable, and sufficient to cope with the requirements of contemporary legal development in Saudi Arabia. However, the specific procedural details are not prescribed in detail in either the Qur'ān or the Sunnah, but left to the discretion of the ruler, who bears the responsibility for protecting the public welfare. The ruler's formulation of these procedural rules is guided by various Sharī'ah principles.[21]

The objective of Islamic criminal procedure.

Criminal procedure in Islam aims to respect and protect human rights by establishing rules for treating the individual with justice and dignity. for example, the warning against the persecution of individuals is repeated 229 times in the Qur'ān. The word 'adil (justice) is used at least fourteen times, and the phrases 'adālah and al-musāwāt (justice and equality) appear at least sixteen times.[22] This reinforces that Islamic criminal procedure also attempts to strike a fair balance between the interest of the accused and that of society.

In Saudi Arabia, the sovereign has the responsibility of safeguarding human rights of maintaining the legal system, and of observing the public interest when promulgating measures of criminal procedure by royal decrees. This would include the regulation of imprisonment, investigation, and the judicial system, in order to cope with modern requirements. This is due to the change in circumstances from the time of the Prophet, the increase in corruption, falsehood, false allegation, and evasion of criminal responsibility.

The main objects of Islamic criminal procedure are:

1- To protect human rights by defining those of the individual, and to ensure that the accused is to be presumed innocent until proven guilty.

2-To maintain that the burden of proof must rest upon the accuser, and any doubt as to guilt is to be taken in favour of the accused.[23] The Prophet (may peace be upon him) says: "If the people were given according to their claims, they would claim the lives of persons and their properties, but the oath must be taken by the defendant".[24] He also says: "The accuser is bound to produce positive evidence, and an oath is required of one who denies".[25]

3- To ensure the accused is guaranteed a certain level of treatment at the primary investigation and questioning stages, for instance, that the individual should not be subject to unreasonable searches and seizures.

4- To ensure that the accused shall not be subject to torture or other inhumane treatment.

5- To establish that it is not permissible to coerce the accused to confess under pressure or intimidation.

6- To affirm the rights of the accused during preventive detention and during the trial, and to clarify the rules of evidence.

7- To determine the duties of the police and judges in their tasks to observe the procedure that complies within the order of Islamic law.

Part 2: The Concept of Crime in Islamic Criminal Law.

Definition.

In Islamic criminal law, the term crime (jarīmah) includes any immoral, irreligious, or illegal act whether by commission or omission.[26] Therefore, the doing of any act declared unlawful and punishable in Islamic law whether by commission or omission is a crime.[27] This means that a crime is the commission of a prohibited act or the omission of a duty that is commanded.[28]

Ibn ʻĀbidīn and al-Qāḍī Zādah define "crime" as: a "forbidden act".[29] Ibn Qudāmah considers it as: "A grossly unjust act".[30] Abū Ya'lā al-Qāḍī considers it as: "an act prohibited by God and punishable either by the fixed punishments (ḥudūd) or discretionary penalties (taʿzīr)".[31]

The accepted definition by modern writers on Islamic jurisprudence and adopted by the Saudi legal system is: "Crimes are acts prohibited by the Sharī'ah discouraged by God with ḥudūd or taʿzīr punishment". [32]

Essential components of crime (arkān al-jarīmah).

The duties and prohibitions of the Sharī'ah constitute legal obligations, and are addressed to a mature, and rational person. In order to make an injunction binding, an individual must understand it is addressed to him. Addressing anything devoid

of reason and understanding makes such an act meaningless. For instance, animals and inanimate objects cannot be addressed. An individual with mental difficulties or a child cannot be bound by obligations, since obligation presupposes the capacity to grasp what is precisely addressed to him and understanding it in detail.[33]

The general essential components of crime in Islamic criminal law are as follows:

1-The existence of al-rukn al-shar'ī (legal element), i.e., an explicit text that prohibits the act and specifies the punishment. The existence of this explicit provision is not enough for the application of the penalty for any act, unless the prohibition is valid, not abrogated, and applicable to the guilty person at the time and the place of the commission of the crime.[34]

2- The existence of al-rukn al-maddī (material element), i.e., the actual performance of the forbidden act whether by commission or omission. The material element of the crime exists when the forbidden act has been completed, whether it is positive or negative. If the offender completes the act, he is liable to the prescribed punishment; if he does not complete the act, he is liable only to a discretionary punishment (ta'zīr).[35] Some crimes may be committed by more than one person, all of whom bear equal responsibility, or alternatively all but one of whom are acting as accomplices of the principal.

3- The existence of al-rukn al- adabī (human element), i.e., exclusion of certain categories of person. The principle of responsibility, which depends on the ability to distinguish between right and wrong, derives from various dicta of Allah and the Prophet. According to this, there are certain categories of person who cannot be regarded as criminals. A child, for instance, cannot be held responsible before the age of puberty, and a lunatic cannot be held responsible unless he has recovered his senses. In this regard, it is stated in the Sunnah that the Prophet says: "The pen is withdrawn regarding three [persons]: from the minor until he reach majority; from the lunatic until he regains sanity; and from the sleeper until he awakes".[36]

Thus, these three components are initially required in order to render the act criminal in addition to the other specific essential elements for each crime. The difference between general (ʻāmmah) and specific (al-khāṣṣah) elements of crimes is that the general elements are to be found in all crimes alike, while the specific elements vary according to different crimes.[37]

General division of crimes according to the gravity of the punishment.

According to complex criteria which combine the gravity of the punishment prescribed in Islamic law for the act committed, the manner and the nature of the interest affected by the prohibited act, crimes fall into three categories.[38] These are:

1- Ḥudūd crimes:

The word ḥudūd has many different meanings, e.g. "The limit of something", or "prevention".[39] As a legal term it means: "a fixed punishment".[40] Ḥudūd offences are crimes against the public interest. Ḥudūd penalties are intended to deter those who have a tendency to commit such crimes.[41] These crimes are punishable by a ḥadd which means that the penalty is established in accordance with God's rights and prescribed by either the Qur'ān or the Sunnah:

Allah Says: "**They are the limits ordained by God; so do not transgress the limits ordained by God".**[42]

Also, " **and any who transgresses the limit of God does verily wrong his own soul".**[43]

Prosecution and punishment for such crimes are mandatory, as opposed to taʻzīr offences for which they are discretionary.[44] If the requirements for proving guilt in ḥudūd crimes are met, the judge has no discretion therein. According to the Islamic criminal law, ḥudūd crimes fall into seven categories: zinā (adultery), sariqah (theft), ḥirābah (banditry), qadhf (defamation), baghī (transgression), shurb al-khamr (drinking alcohol), and al-riddah (apostasy).

2- Qiṣāṣ crimes:

Qiṣāṣ is derived from the verb qaṣṣa which means to cut, or to follow the track in pursuit.[45] In the legal sense it means: a balance between action and reaction (i.e. equality). This means that a person who has committed a specific qiṣāṣ crime will be punished in the same way and by the same means as those by which he committed the violation. Qiṣāṣ thus become not only a retaliation which has overtones of revenge, but also is the redress of a wrong, by exacting a punishment equivalent to the crime.

In Islamic law, there are five qiṣāṣ crimes: qatl al-'amd (murder), al-qatl shibh al-'amd (quasi-murder), qatl al-khatā' (killing by mistake), jarḥ al-'amd (intentional physical injury), and jarḥ al-khatā' (unintentional physical injury).[46] It is stated in the Qur'ān: **"O ye who believe, retaliation is prescribed for you in the matter of the murder; the free man for the freeman, and the slave for the slave, and the female for the female. and for him who is forgiven somewhat by his (injured) brother, prosecution according to usage and payment unto him in kindness, ..."**[47]

This verse indicates that qiṣāṣ stands for the sacrifice of a life in the case of murder, and it can be remitted only by the heirs of the victim. This also applies to cases of wounding.[48] Accordingly, the victim or the heirs may waive the qiṣāṣ and ask for compensation (diyah) or pardon the criminal. The judge has no discretion therein.

3- Ta'zīr Crime:

Ta'zīr is a punishment meted out as a deterrent and also as a means to reform the criminal.[49] In the legal usage it means: the discretionary penalties for any transgression, against God or an individual, not covered by the ḥudūd.[50] Some jurists define it as "a disciplinary, reformative, and deterrent punishment".[51] Ta'zīr punishment are left to the exclusive discretion of the judge or the governor of the country.[52] In this context, Matthew Libbman states: "Ta'zir offences are those whose penalties are not fixed by the Qur'an or the Sunnah but are within the

discretion of the qadi".[53] Bassiouni considered them as: "Offences that are not encompassed by either hudud or qisas but that result in tangible individual or social harm and for which the penalty is to be rehabilitative. Ta'zir penalties could be imprisonment, the infliction of physical punishment, or the imposition of compensation in accordance with the principle of rehabilitation".[54] Jurists maintain that ta'zīr punishments must be practised within the spirit of the general rules of the Sharī'ah, and in the public interest of Muslim society without any deviation or abuse.[55] Ta'zīr crimes include:

1- Criminal acts related to ḥudūd crimes that for some reason have been excluded from the punishment prescribed to them such as petty theft and cases of doubtful evidence.

2- Acts prohibited by the Islamic law without prescription of a specific punishment to be applied. For example, false testimony, usury, and bribery.

3- Any other acts that might cause damage to the public interest or to the individual's rights, such as forgery, fraud and traffic violations.[56]

In Saudi criminal law, the judge has the discretion of choosing the appropriate ta'zīr penalty, provided that the punishment is not fixed by royal decree, an example of which is the ta'zīr punishment of drug dealers that carries a mandatory death penalty in Saudi Arabia. According to the contemporary practice in Saudi Arabia, ta'zīr penalties may be the death penalty, flogging, imprisonment, a fine, or even simply admonition.

Importance of the classification of crimes in Islamic law.

It is now necessary to turn to the significance arising from the division of crimes into ḥudūd, qiṣāṣ, and ta'zīr crimes, discussing it from several view points:

First: from that of pardon and forgiveness (min jānib al-'afū).

In ḥudūd punishments there is no discretion to excuse. The aggrieved party, or their agent of authority, or even the judge himself cannot grant a mitigation in such cases.

In cases of qiṣāṣ punishment, pardon is admissible but only by the aggrieved party. Hence, it may waive the punishment of qiṣāṣ and ask for diyah as a compensation, or grant the criminal complete amnesty. If the victim has no heirs or guardian, the judge in such a case will act as his guardian on behalf of the sovereign, who according to Islamic law is the guardian for any person who has no heirs. Thus, only in his tutelary capacity may the judge pardon the criminal.

So far as the ta'zīr penalties are concerned, the judge is empowered to excuse the crime and remit the penalty, provided that the pardon does not prejudice the right of the aggrieved party, who can forgive only the ta'zīr crime which is detrimental to his individual rights.[57]

Second: from that of judicial power (min jānib sulṭat al- qāḍī).

In cases of ḥudūd the judge has no option other than to implement the prescribed punishment; in such crimes he cannot reduce or increase the punishment, nor can he commute the sentence. The power of the judge, therefore, is defined solely in term of carrying out the fixed punishment.

In qiṣāṣ crimes, the judge's power is generally to apply the defined punishment which is determined by the victim's heirs. The prosecution of qiṣāṣ must be initiated by the victim, or the victim's family in the case of killing. As a result, the punishment is at their discretion. Should they waive the qiṣāṣ, the judge is bound to order the payment of the diyah, unless the heirs forgo that too. As applied in Saudi Arabia, if the victim or his heirs decide to relinquish diyah, the judge, who has wide powers of awarding ta'zīr penalties, may decide on a ta'zīr penalty, since he is empowered to determine both the nature of the crime and the type of the penalty. He may award a harsh or a lenient penalty depending upon the circumstances surrounding each case.

In ta'zīr crimes, the judge has full discretion and power to choose and pass a sentence of a high or a low order, and to issue the order for its execution[58]

Third: from that of burden of proof (min jānib al-ithbāt).

In cases of ḥudūd, if there is no confession, the testimony of a certain number of witnesses is required, . The number of witnesses differs according to the type of the crime. For example, in the case of adultery, the number of required witnesses is four adult males who are Muslim and sane, who can provide a legal testimony that they have seen the actual act of sexual intercourse.[59] Allah says:

"If any of your women are guilty of lewdness, take the evidence of four (reliable) witnesses from amongst you against them".[60]

Also: "**And those who launch a charge against chaste women, and produce not four witnesses (to support their allegation) flog them with eighty stripes".**[61]

The other ḥudūd crimes require the testimony of two adult, sane Muslims witnesses in order to be proved.

In qiṣāṣ crimes, the testimony of two adult, sane Muslims, is generally required, if there is no other evidence. The same number is also required to prove the most serious ta'zīr crimes, but other normal ta'zīr offences can be proved by the testimony of a single witness.[62] This will be discussed in detail later.

[1] Ministry of Information, Twenty Years of Achievements in Development Planning, (1992), p. 98.

[2] Saleh, Samir. Commercial Arbitration in the Arab Middle East, (Graham and Trotman, 1984), p. 6.

[3] Layish, Ahron. "Saudi Arabian Legal Reform", Journal of the American Oriental Society, June, 1987, vol. 107, p. 287.

[4] Amin, S.H. Middle East Legal System, (1985), pp. 315-316.

[5] Royal decree No. 38 on 21/3/1409 A.H. Also: Ministry of Information, Twenty Years of Achievements, pp. 98-99.

[6] Ministry of Interior, Murshid al-Ijrā'āt al-Jinā'iyyah, (unpublished), p. 19.

[7] Qur'ān, 16 verse 90.

[8] Qur'ān, 49 verse 6.

[9] Qur'ān, 49 verse 12.

[10] al-Tirmidhī, 'Īsā M. Sunn al-Tirmidhī, (Maṭba'at al-Ḥalabī, ed: 2, 1398 A.H.), vol. 4, p. 311.

[11] al-Ṣan'āi, 'Abd al-Razzāq. al-Muṣannaf, (Maṭba'at al-Sa'ādah, Cairo, ed: 1), vol. 10, p. 217.

[12] Muslim b. al-Hajjaj al-Naysaburi, Sahih Muslim, (English translation, by Abdul Hamid Siddiqi, New Delhi, Kitab Bhavan, ed: 9, 1991), vol. 4, p. 913.

[13] al-Bayhaqī, Aḥmad b. al-Ḥusiynī. al-Sunn al-Kubrā, (Dār al-Ma'rifah, Beirut), vol. 8, p. 220.

[14] al-Zarqā, Muṣtafā. al-Madkhal al-Fiqhī, (Damascus University, ed: 7, 1963), vol. 2, p. 940.

[15] Qur'ān, 2.verse, 127. House in this verse means: Makkah (the city of Islam). See: 'Abd Allah 'Ali. English Translation of the Holy Qur'an , p. 51.

[16] al-Zarqā. al-Madkhal, vol. 2, p. 941,

[17] Mahmassani, Muhammad. Falsafat al-Tashrī fi al-Islām, (English translation, by Farahat J. Ziadeh, Leiden E. J. Brill, 1961) p. 151.

[18] Id, p. 152.

[19] For further details, see: al-Zarqā, al-Madkhal, vol. 2, pp. 957-1083.

[20] Id, P. 942.

[21] 'Awad, M. "The Right of the Individual under Islamic Procedure", (in: Bassioni, M Cherif. The Islamic Criminal Justice System, Oceana Publications, New York, 1982), pp. 92-93.

[22] Lippman, Matthew. Islamic Criminal Law and Procedure, (New York, 1988), p. 60.

[23] al-Saleh, Osman A. "The Right of the Individual to Personal Security in Islam", (in: Bassioni, The Islamic Criminal Justice System, p. 67.

[24] Transmitted from: Ibn 'Abbas, see: Muslim, Sahih Muslim, (English Translation) vol. 3, p. 927.

[25] al-Bayhaqī, al- Sunan al-Kubrā, p. 26.

[26] Abū Zahrah, Muḥammad. al-Jarīmah wa al-'Uqūbah fi al-Fiqh al-Islāmī, (Dār al-Fikr al-'Arabī, Cairo, 1974) p. 24.

[27] 'Awdah, 'Abd al-Qādir. al-Tashrī' al-Jinā'ī fi al-Islām, (Mu'assasat al-Risālah, Beirut), vol. 1, p. 66.

[28] Abū Zahrah, al-Jarīmah wa al-'Uqūbah, p. 24.

[29] al-Bahūtī, Manṣūr. Kashshāf al-Qinā' 'an Matn al-Iqnā', (Cairo, 1319 A.H.), vol. 6, p. 505.

[30] Ibn Qudāmah, Abī Muḥammad 'Abd Allah b. Aḥmad al-Maqdisī. al-Mughnī, (Maktabat al-Riyadh al-Ḥadīthah, Riyadh, 1401 A.H.), vol. 7, p. 635.

[31] Ibn Jubeir, "Definition of Crime" (in: The Effect of Islamic Legislation on Crime Prevention in Saudi Arabia, Ministry of Interior, proceedings of the symposiun held in Riyadh, 1396 A. H., Translated, edited, and printed in collaboration with the United Nations Social Defence Research Institute), p. 42.

[32] al-Qāḍī Abū Ya'lā, Muḥammad. al-Aḥkām al-Sulṭāniyyah, (Maṭba'at al-Ḥalabī, 1966), p. 257. .Also: al-Mawārdī, Muḥammad b. al-Ḥusayn. al-Aḥkām al-Sulṭāniyyah, (ed: 3, 1594 A.H.) p. 219.

[33] Shaheed 'Oudah, Abdul Qadir. Criminal Law in Islam, (English translation by: Aijaz, G.Zakir, New Delhi, International Islamic Publisher, 1991) vol. 1, p. 124.

[34] 'Awdah, al-Tashrī' al-Jinā'ī fi al-Islām, vol. 1, p. 112.

[35] Id, p. 342.

[36] Kahn, Muhsin M. The Translation of the Meaning of Sahih al-Bukhari, (New Delhi, 1987) vol. 2, p. 527.

[37] Shaheed 'Oudah, Criminal Law in Islam, vol. 1, p. 124.

[38] Naqati, Sanad. The Theory of Crime and Criminal Responsibility in Islamic Law, (Office of Internationl Criminal Justice, 1991) p. 50.

[39] al-Rāzī, Muḥammad b. Ibī Bakr Mukhtār al-Ṣiḥāḥ, (Dār al-Da'wah, Istanbul, 1408 A.H.) p. 126.

[40] Ibn Jubeir, "Definition of Crime" (in: The Effect of Islamic Legislation,) p. 42.

[41] Mansour , Aly. "Hudud Crimes" (in: Bassioni, The Islamic Criminal Justice System) p. 195.

[42] Qur'ān, 2 verse 229.

[43] Qur'ān, 65 verse 1.

[44] Bassioni, "Sources of Islamic Law" (in: Bassioni, The Islamic Criminal Justice System) p. 24. Also, Bassiouni, "Protection of Diplomats under Islamic Law" The American Journal of International Law, I980, vol. 74, p. 623.

[45] Ibn Manẓūr, Muḥammad b. Makram Lisān al-'Arab, (Beirut, 1375 A.H.), vol. 8, p. 341. Also: al-Rāzī, Mukhtār al-Ṣiḥāḥ, p. 537.

[46] Bassiouni, "Quesas Crimes" (in: Bassioni, The Islamic Criminal Justice System), p. 203.

[47] Qur'ān, 2 verse 178.

[48] Siddiqi, Muhammad. The Penal Law of Islam, (Lahor, ed: 2, 1985), p. 52. Also: Hughes, Thomas Patrick. Dictionary of Islam, (London, 1885), p. 447.

[49] al-Rāzī, Mukhtār al-Ṣiḥāḥ, p. 429.

[50] al-Najdī, 'Abd al-Raḥmān b. Muḥammad b. Qāsim. Ḥāshiyat al-Rawḍ al-Murbi' Sharḥ Zād al-Mustaqni', (al-Maṭābi' al-Ahliyyah li al-Ufst, Riyadh, ed: 1, 1400 A.H.), vol. 7, pp. 345-346. Also: Abū Zayd, Bakr. al-Ḥudūd wa al-Ta'zīrāt 'Ind Ibn al-Qayyim, (Maktabat al-Rushd, Riyadh, 1983) pp. 465-466.

[51] Ibn Furḥūn, Burhān al-Dīn Abrāhim b. 'Alī. Tabṣirat al-Ḥukkām fi Uṣūl al-Aqḍiyah wa Minhāj al-Aḥkām, (Maṭba'at al-Taqaddum al-'Ilmiyyah, ed: 1), vol. 2, p. 200.

[52] Ibn Jubeir, "Definition of Crime" (in: The Effect of Islamic Legislation,) p. 44.

[53] Lippman, Islamic Criminal Law and Procedure, p. 38.

[54] Bassiouni, "Sources of Islamic Law" (in: Bassioni, The Islamic Criminal Justice System), pp. 24-25.

[55] Naqati, The Theory of Crime and Criminal Responsibility, p. 64.

[56] El-Ewa, Mohammad S. Punishment in Islami Law, (American Trust Publications, 1982) pp. 100-119.

[57] 'Awdah, al-Tashrī' al-Jinā'ī fi al-Islām, vol. 1, p. 81.

[58] Id, p.81. Also: Shaheed 'Oudah, Criminal Law in Islam, vol. 1, pp. 87-88.

[59] 'Awdah, al-Tashrī' al-Jinā'ī fi al-Islām, vol. 1, p. 82.

[60] Qur'ān, 4 verse 15.

[61] Qur'ān, 24 verse 4.

[62] 'Awdah, al-Tashrī' al-Jinā'ī fi al-Islām, vol. 1, p. 83.

SECTION II: THE SOURCES OF ISLAMIC LAW AND THE INFLUENCE OF ISLAMIC PUNISHMENT.

Part 1: A summary Classification of the Sources of Islamic Criminal Law.

Islamic law in its earliest period was derived from divine revelation, either in the form of the Qur'ān or the Sunnah. Islamic criminal law is based on four agreed sources, (the Qur'ān, the Sunnah, Ijmā' (consensus), and Qiyās (analogy), and several other secondary sources which are more controversial.[1] The Saudi criminal law is mainly derived from the following sources:

First: The primary sources (al-maṣādir al-'aṣliyyah).

1-The Qur'ān, and the Sunnah.

The Qur'ān, and the Sunnah are the fundamental religious texts in Saudi Arabia. Qur'ān contains some legislative material. Approximately ten percent of its 6237 verses contain rules. The majority of these are concerned with 'aqā'id (religious matters) such as prayer, fasting and pilgrimage. One analysis of the text concludes that only about 200 verses deal with legal issues in the strictest sense of the term. For example, family and civil law are addressed in seventy verses; penal law in thirty; legal jurisdiction and procedure in thirteen; and the economic and financial order in ten. [2]

The term Sunnah refers to the statements and actions of the Prophet Muhammad as well as the statements and actions of others carried out in his presence which did not meet with his disapproval. The Sunnah is considered the second source of revelation based on God's statement in the Qur'ān,[3] Allah says:

"Nor does he say (ought) of (his own) desire. It is no less than inspiration sent down to him".[4]

3- Ijmā‘.

The word Ijmā‘ means: "assembling". In the legal usage, it expresses the unanimous consent of the mujtahidūn (scholars who have the highest degree of learning).[5] The majority of jurists have regarded it as the third source of the Sharī'ah and agreed that the meaning of Ijmā‘ is the agreement of Muslim consults jurist in any particular age on a specific juridical rule. The jurists base their recourse to Ijmā‘ upon Qur'ānic and Sunnah texts as well as upon reason.[6] For example, it is mentioned in the Qur'ān:

"**O ye who believe! obey Allah and obey the messenger, and those charged with authority among you**".[7]

It is also stated in the Sunnah that: "There can be no consensus on error or misguided conduct amongst my people".[8]

The foundations of Ijmā‘ are as follows: al-'ittifāq al-qawlī, the unanimous consent expressed in declaration of opinion; al-'ittifāq al-fi‘lī, the expressed in unanimity of practice; and al-'ittifāq al-sukūtī, in which one party of mujtahidīn signifies its tacit assent to the opinion of the other party by "silence" or non-interference.[9]

Ahmad Ibn Hanbal is rather inclined to deny the existence of Ijmā‘ later than the era of the Prophet's companions.[10] He regards only the Ijmā‘ of this period as a valid source.

It is noteworthy that some writers confuse the term Ijmā‘ with Ijtihād. But Ijtihād is the deduction made by a single Mujtahid or several Mujtahidīn.[11] The term Ijtihād will be discussed later.

4- Qiyās.

Qiyās is derived from the verb qāsa (to measure). Qiyās generally means: a comparison.[12] In the legal sense, Qiyās means: linking two things that have more or less the same cause or effect, in order to give a similar judgement about them.[13] In other words, to compare a case that is not provided in the previous three sources with another case which is similar and which does have a specific provision or judgement in these sources.[14] Consequently, in Saudi Arabia, if the Qur'ān, the Sunnah, and

Ijmā' all fail to provide a rule that adequately addresses a problem, 'Ulamā' may use Qiyās in order to establish an appropriate judgement.

Qiyās consists of four pillars: first,the new case; second, the original case mentioned in the previous three sources, to which the new case can be compared; third, the decision or judgement of the original case taken from the three sources; and; fourth, the shared cause of the original case and the new case. For example, wine (the original case) is forbidden in Islamic law (its judgement), because of the intoxication (reason). Thus, new forms of alcohol are also forbidden for the same reason (intoxication).[15]

The jurists base their recourse to Qiyās upon Qur'ānic and Sunnah texts as well as upon the statements of the Companions of the Prophet. For example: it is stated in the Sunnah that the Prophet asked Mu'āwiyah when he appointed him as a judge in Yemen: "On what basis will you judge?' Mu'āwiyah replied: 'On the basis of the Qur'ān.' Then the Prophet again asked him: 'But if you do not find your answer there what will you do?' Mu'āwiyah replied: 'I will judge according to the Sunnah; if I do not find it there (the judgement),then I will interpret (ajtahidū) according to my opinion based on Islamic order". This was approved by the Prophet.[16]

The companions of the Prophet were unanimous regarding the application of Qiyās. For instance, 'Alī b. Abī Ṭālib says: "We apply the punishment of eighty lashes for the drinker, because, if a person drinks he becomes intoxicated, As a result, sometimes he may not know what he says, and in this condition he may commit qadhf crime (calumny) which is punishable in Islam by eighty lashes. Therefore, drinking of wine has to have the same consideration as calumny, by analogy (qiyāsan).[17]

Since Qiyās is appropriate only for matters which are not mentioned in the Qur'ān, the Sunnah and Ijmā', it is not applicable for ḥudūd and qiṣāṣ crimes.

Finally, although Aḥmad b. Ḥanbal believes that Qiyās is accepted only in dire necessity, Qiyās is acceptable and applicable as a fourth source in Islamic law.[18]

Second: The secondary sources (al-maṣādir al-far'iyyah).

In addition to the previous sources there are various supplementary sources which include:

1- The public interest (al-maṣlaḥah al-mursalah).

Some jurists (such as Mālik, al-Ṭūfī al-Hanbalī, and al-Ghāzalī al-Shāfi'ī) approved the plea of public interest as one of the supplementary sources of the Sharī'ah.[19] Consequently, many legal deliberations and criminal procedures in Saudi Arabia are based on thoughtful consideration of the public interest.[20]

There are certain conditions should be met in order to apply this source in Saudi Arabia:

Firstly, the case under review should not be related to 'ibādāt (matters of spiritual nature); secondly, the public interest should be in conformity with the teaching of the Sharī'ah and should not be in conflict with any of its sources; thirdly, the interest have to be both essential and necessary, and not idealistic (luxury) such as decoration. Essential areas include the conservation of religion, life, mental offspring, and property.[21]

2- Preference (Istiḥsān):

Istiḥsān is a method for choosing between two possible legal solutions which are contained within the context of the sources of Islamic law.[22]

The jurists are in disagreement over the use of this concept.[23] However, Ibn Taymiyyah states that a number of Hanbali scholars accepted the concept of Istiḥsān.[24] In practical terms, Istiḥsān is applied in Saudi Arabia as a supplementary source in legal matters.

It is worth noting that the method of using Qiyās, Istiḥsān, and al-Maṣlaḥah al-mursalah is based upon the concept of Ijtihād.

The theory of Ijtihād in Islamic law:

Ijtihād means: "exertion",[25] or "endeavour". In the legal usage it refers to the endeavour of a jurist to find a rule of law based on evidence (dalīl) within the sources.[26] Ijtihād cannot be applied if there is an explicit provision in Islamic law.

In Saudi Arabia, the concept of Ijtihād may be applied by using such procedure as Qiyās, Istiḥsān, al-Maṣlaḥah al-Mursalah or 'Urf (customs), for new cases which are not initially prescribed by Islamic law. As mentioned previously, in 1379 A.H. King Khālid b. 'Abd al-'Azīz at the conference of 'Ulamā' held in Riyadh suggested that it was better to solve current problems by way of Ijtihād. Later on, at another conference held in Makkah, in 1404 A.H. King Fahad b. 'Abd al-'Azīz called for the reopening of the gate of Ijtihād in Saudi Arabia as an instrument of legal reform based on the teaching of Islam.[27]

Part 2: The Effect of Punishment in Islam.

Introduction:

Islamic law is primarily designed and applied as a moralising instrument and preventive agent. It is effective in a number of different ways, for example: it confronts the offender with a harsh punishment in this world and in the hereafter. It also orders Muslims to assist one another on the path of righteousness and piety by offering counsel and moral support. In addition, it prepares Muslims, in anticipation of man's moral fallibility, by urging marriage at a young age, condoning controlled polygamy, and requiring the more wealthy to contribute to the needs of those less fortunate in accordance with the concept of zakāh (tithes).[28]

Islamic law forbids all shameful, unjust, and rebellious acts. It attempts to deter people from crime by requiring moral thought and conduct.[29] It is stated in the Sunnah: "A true believer does not backbite, curse, practice lewdness, or utter obscene words".[30]

Islamic criminal law concerns public safety. Hence, individuals are protected against physical attack, public insult, and humiliation. Likewise, the stability of the

family is protected by punishing sexual activity outside of marriage. In addition, property is protected against theft or unauthorised interference, and the state and religion are protected against subversive activity.[31]

In this context, the discussion now will define the general and legal meaning of the punishment in Islam, specifying its objectives, and examining its effectiveness.

The object of al-'uqūbah (punishment) in Islamic law.

'Uqūbah is derived from verb 'Āqaba (to punish).[32] In the legal usage it means: some form of retribution. This would be imposed by the state on an offender as a consequence of an offence which he has committed. Always unpleasant, this is an integral part of the punishment, not an incidental accompaniment to it. In this way, legal punishment differs from the chastisement that a child my receive from his parents, or the pain that a patient may suffer from the surgeon.[33]

The majority of jurists define punishment as: a determined retribution for the commission of an illegal act in order to benefit the common well being.[34] Al-Mawardī describes it as: restraints imposed by Islam to prevent individuals from committing unlawful acts or omitting commanded acts.[35] This view point puts the emphasis on punishment as a determent rather than retribution. Al-'Izz b. 'Abd al-Salām says: "Usually the reason for punishment stems from sins and vice, and the punishing of the offender leads to the general good of society".[36] Ibn Taymiyyah believes that the punishment is considered as: Decreeds by God to serve as a merciful purification for human beings, to save the criminal from punishment in the Hereafter, similar to a father's disciplining his son, or a physician's treating his patient.[37] In this context, it is stated in the Sunnah that a woman called al-Ghāmidiyyah, came to the Prophet and said: "Oh Allah's Messenger, purify me' (meaning punish me for committing adultery)... after she was stoned to death, the Prophet said: "She has made so great a repentance that if it were to be shared out amongst many people it would be sufficient."[38] (He meant that it is sufficient for their own purification).

The main objects of punishment are:

1- To reform the individual and purify his conscience and soul with Islamic ideals and morals.

2- To deter individuals against committing offences, and thus prevent crime, by imposing severe punishments. To enforce this, the punishment must be executed publicly in order to visibly serve as an example for others.[39]

3- To award a punishment proportionate to the offence.

4- To protect human honour and chastity, and to preserve human life by imposing retaliation in order to accord a balance between the criminal and the victim. Moreover, to lessen the grievance felt by the aggrieved party.

5- To preserve property by legally prohibiting certain crimes such as theft and arson[40]

Finally, the infliction of punishment in Islamic law is considered a last resort, as Islam aims to block the ways that may lead to corruption and sin by guiding the people in the right way.[41]

The effect of Islamic law on decreasing the crime rate in Saudi Arabia.

Studies of comparative criminology have remarked over and over again on the low level of crime in the Kingdom of Saudi Arabia. El-Sheikh, Mohammed says: "Everyone there enjoys a security, tranquillity and peace of mind which do not exist elsewhere in the Islamic world. It is an undeniable fact that those who live in this country, regardless of their race or religion, enjoy security order and safety of life and property."[42] Sandra Mackey also says: "Saudi Arabia unquestionably enjoys a remarkably low rate of crime. With no fear, I walked the street and alleyways wearing several gold chains around my neck and carrying generous quantities of cash in my shopping basket. It was this freedom from the fear of street crime that expatriates almost universally point to as one of the pleasures of life in the Kingdom".[43]

Based on official figures from sixty four countries (collected and compared by Sam Souryal), it appears that the Kingdom of Saudi Arabia had a rate which is demonstratively lower than the others. Even when compared with the surrounding Muslim countries, which do not totally apply Shari'ah law, the Kingdom of Saudi Arabia shows a crime rate considerably lower. Souryal consequently says: " It appears fair to assume that the rule of Islamic law makes the difference".[44]

To illustrate, the following five tables show the crime rate in Saudi Arabia compared with the World and six neighbouring Muslim nations[45]:

Table one:
Official crime rates in Saudi Arabia.

Year	Population	Number of Murders	Rate per 100,000	Number of Property Crimes	Rate per 100,000	Number of Sexual offences	Rate per 100,000
1966	5,662,000	169	3	879	1.6	380	7
1967	5,815,000	154	3	905	1.6	459	8
1968	5,973,000	74	1	905	1.6	300	5
1969	6,135,000	40	1	791	1.3	321	5
1970	6,301,000	49	1	854	1.4	392	6
1971	6,472,000	41	1	791	1.2	345	5
1972	6,647,000	54	1	980	1.5	346	5
1973	6,827,000	39	1	973	1.4	323	5
1974	7,012,000	54	1	948	1.4	239	4
1975	7,201,000	70	1	873	1.2	328	5
1976	7,600,000	49	1	583	1.2	327	5
1977	8,011,000	58	1	726	1.1	330	5
1978	8,500,000	70	1	520	1.0	546	9
1979	8,940,000	46	1	671	1.1	346	5

Source: The Effect of Islamic Legislation on Crime Prevention in Saudi Arabia
Ministry of Interior, Riyadh, 1976, pp. 500-504

Table two:
World rate of reported offences (per 100,00)
1970- 1975

Intentional homicide (murder)	3.9
Assault	184.1
sex crimes	24.2
Kidnapping	0.7
Robbery and theft (property crimes)	908.5
Fraud	83.3
Illegal drug traffic	9.8
Drug abuse	28.9
Alcohol abuse	67.8
Total offences rate	**1,311.2**

Source: Report of the Secretary General on Crime Prevention and Control, UN. report A/32/199, September 22, 1977, p .9.

As shown above in tables one and two, the rates of murder, sex crimes , and property offences in Saudi Arabia are the lowest among the world rates over the same period of time (1970- 1975). For crimes of murder, the world rate is about four times the rate in Saudi Arabia (3.9/1). Concerning property crimes the world rate is about six hundred and fifty times the rate in Saudi Arabia (908.5 / 1.4). As for sex crimes, the world rate is about five times the rate in Saudi Arabia (24.2 /5).

Table three:
Number of Murder in Saudi Arabia Compared to Six Arab Countries That Apply State Law.

Country	Present population	1970	1971	1972	1973	1974	1975	1976	1977	1978	1979	Average for 10years	Rate per 100,000
Saudi Arabia	11 Million	61	41	54	39	54	70	49	58	70	45	53	4818
Syria	11 Million	314	-	351	355	324	381	481	482	488	455	403	3.6636
Sudan	22 Million	773	938	1009	967	988	1128	1089	877	949	1074	979	4.4500
Egypt	44 Million	1224	-	1229	1241	-	1289	1348	-	-	1583	1319	2.9977
Iraq	14 Million	1136	1303	1243	867	1026	890	-	1028	994	1584	1119	7.9929
Lebanon	3.5 Million	643	203	324	121	191	-	-	-	-	1187	439	12.5429
Kuwait	2 Million	51	49	59	57	57	70	69	73	58	70	61	3.0500

Source: Arab Crime Statistics, Arab Organisation for Social Defence, Baghdad, Iraq, 1981, P.55

As indicated in table three, the murder rate in the Kingdom of Saudi Arabia is lower than in the other six countries. The murder rate per 100,000 is around (1/6) compared with the rate in Kuwait and Egypt; about (1/7) compared with the rate in Syria; (1/9) compared with the rate in Sudan; (1/16) compared with the rate in Iraq; and less than (1/25) the rate in Lebanon.

Table four:
Number of property crimes in Saudi Arabia compared to six Arab countries that apply state law

Country	Present population	1970	1971	1972	1973	1974	1975	1976	1977	1978	1979	Average for 10 years	Rate per 100,000
Saudi Arabia	11 Million	854	791	980	973	984	873	853	726	520	671	818	7.4364
Syria	11 Million	5538	-	3017	4667	7084	6358	9029	8562	8804	6318	6,599	59.9909
Sudan	22 Million	40603	42304	65611	49125	57367	67425	53042	69430	60376	57141	56,242	255.6455
Egypt	44 Million	45415	38288	3339	30588	26597	-	-	-	46404	39944	33,088	75.1886
Iraq	14 Million	1788	-	2358	2427	2136	2267	2286	3515	2691	12238	3,522	25.1571
Lebanon	3.5 Million	6418	-	-	4240	3855	-	-	2099	8515	8189	5,252	150.0571
Kuwait	2 Million	1739	-	2545	4613	2125	3207	1042	4592	1178	1109	2,238	111.9000

Source: Arab Crime Statistics, Arab Organisation for Social Defence, Baghdad, Iraq, 1981, P.55

Table four indicates that the rate of property crimes in Saudi Arabia is lowest among the seven countries. As shown, the rate in Saudi Arabia compared with that of Iraq is about (1/3); and (1/8) compared with the rate in Syria; also it ranked less than (1/10) the rate in Egypt; less than (1/13) the rate in Kuwait; less than (1/20) the rate in Lebanon; and about (1/36) the rate in Sudan.

Table five:
Number of sexual offences (including rape) in Saudi Arabia compared to six Arab countries that apply state law.

Country	Present population	1970	1971	1972	1973	1974	1975	1976	1977	1978	1979	Average for 10 years	Rate per 100,000
Saudi Arabia	11 Million	392	345	346	323	239	328	327	330	546	364	352	3.2000
Syria	11 Million	333	474	426	330	578	637	596	677	701	785	553	5.0273
Sudan	22 Million	774	829	904	968	951	2364	1844	2020	1910	2678	1,524	6.9273
Egypt	44 Million	3789	-	1682	1113	-	2006	2265	-	-	-	2,171	4.9341
Iraq	14 Million	1483	1487	1569	1402	1525	1556	1549	2054	2813	2882	1,832	13.0857
Lebanon	3.5 Million	569	709	564	607	1207	901	-	-	-	-	759	21.6857
Kuwait	2 Million	373	-	389	612	699	406	711	505	682	673	561	28.0500

Source: Arab Crime Statistics, Arab Organisation for Social Defence, Baghdad, Iraq, 1981, P.55.

As shown above in table five, the rate of sexual crimes in Saudi Arabia is less than the rate in the other six countries. It reaches about (7/10) the rate in Syria and Egypt; (1/2) the rate in Sudan; (1/4) the rate in Iraq; less than (1/7) the rate in Lebanon and abut (1/8) the rate in Kuwait.[46]

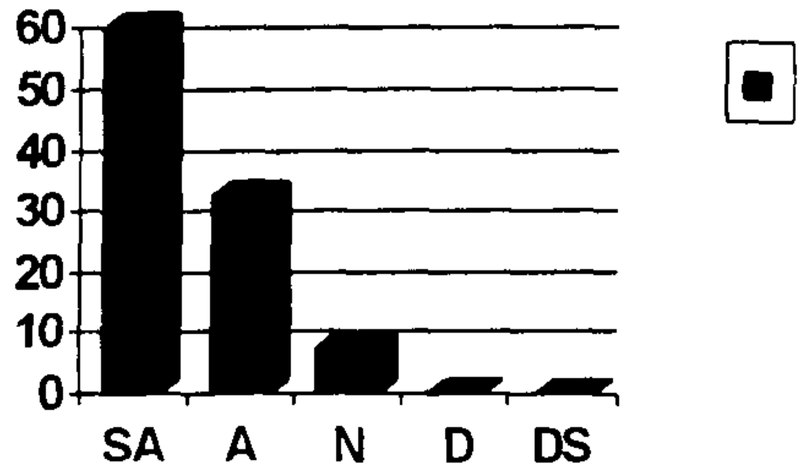
In a study by Farouk Mourad (1397 A.H.), he interviewed 22 Saudi citizens (age 60-120) living in five regions: the North, the East, the Central, the West, and the South. The aim of this study is to learn their opinions about security and the effect of Islamic law on decreasing crime rates in Saudi Arabia. He concluded that those interviewed unanimously agreed on the impact of establishing the Saudi state, as an independent sovereign country, on spreading real security all over the country. They also agreed that the main reasons for security were the implementation of the Islamic law, and the affairs of the state being in the hand of an astute ruler (King 'Abd al-'Azīz), who had lived a long time in the heart of the Arabian Peninsula, mixing with the tribes and familiarising himself with their customs, traditions, and behaviour.[47]

The other comparative study of security in the Kingdom of Saudi Arabia and America was carried out by Bakri Basha (1979) to determine the factors which created a secure and safe society in Saudi Arabia. This study consists of an attitudinal survey designed to uncover varying responses to specific statements in order to gain scientific evidence to support the literature about the significant influences of Islamic law on security and safety in Saudi Arabia.[48] This survey was a questionnaire on a randomly selected group of 40 students from Saudi Arabia and 40 students from the United States.

He illustrated the significant influences of Islamic law on decreasing crime rates in Saudi Arabian society compared with that of the United States using various questionnaire statements which include the following figures:

First: Crime Rate.

(SA): strongly agree. (A): agree. (N): neutral.
(D): disagree. (SD): strongly disagree.



K.S.A
Figure 1: The crime rate is very low in my country.

Source: The Significant Influences of Islamic Law on Decreasing Crime Rate in Saudi Arabian Society, Bakri Basha, pp. 93-94.

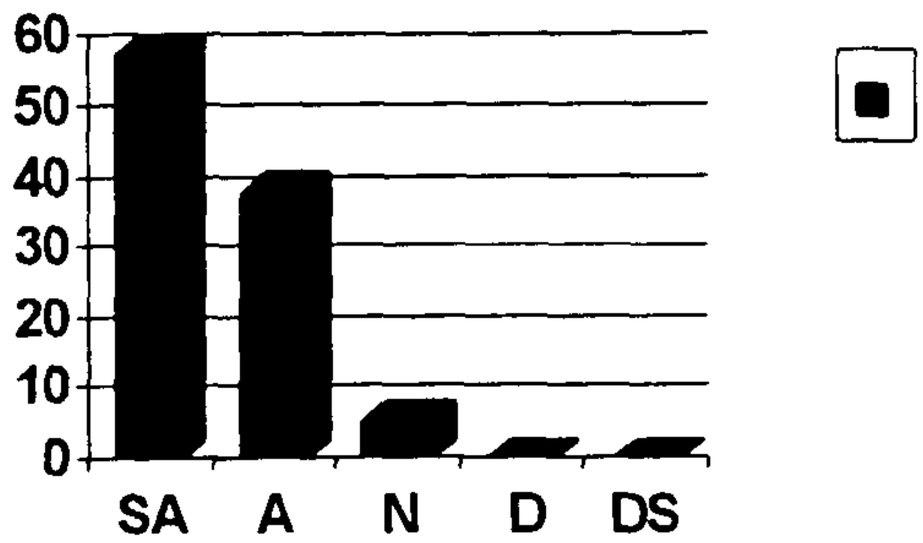
As shown above, the response of the forty Saudi Arabian students about the crime rate in their country was: 60 percent strongly agree, 27.5 percent agree, 5 percent neutral, 0 percent disagree, and 0 percent strongly disagree.

U.S.A
Figure1 : The crime rate is very low in my country.

Source: The Significant Influences of Islamic Law on Decreasing Crime Rate in Saudi Arabian Society, Bakri Basha, pp. 93-94.

The response of the United States students as shown in the above chart regarding the rate of crime in their country was: 0 percent strongly agree, 0 percent agree, 35 percent neutral, 60 percent disagree, and 5 percent strongly disagree.

Second: Attitudes Towards Religion.



K.S.A

Figure 2: My religion keeps me from breaking the law.

Source: The Significant Influences of Islamic Law on Decreasing Crime Rate in Saudi Arabian Society, Bakri Basha, pp. 90-91.

Regarding the effect of the religion on deterring the crime the above chart indicates that the response of Saudi Arabian students was: 57.5 percent strongly agree, 37.5 percent agree, 5 percent neutral, 0 percent disagree, and 0 percent strongly disagree.

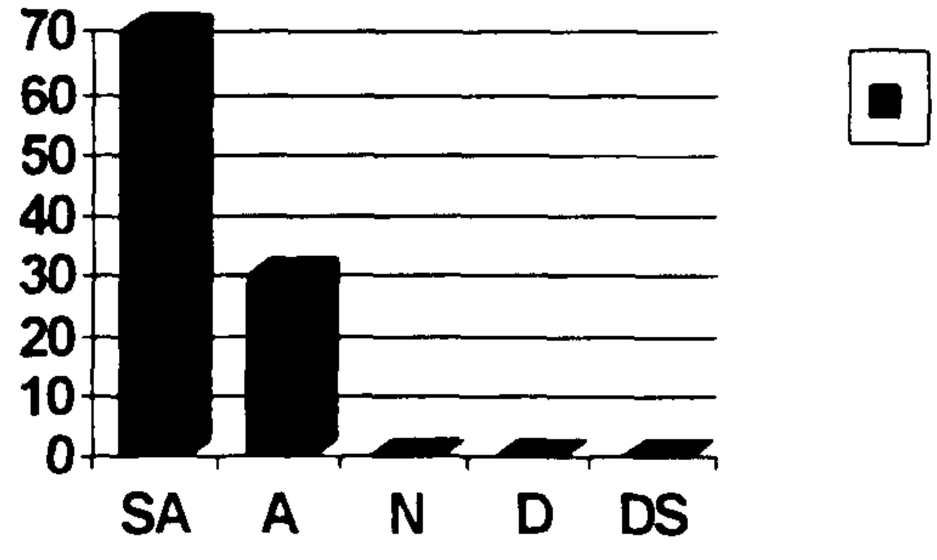
U.S.A

Figur 2: My religion keeps me from breaking the law.

Source: The Significant Influences of Islamic Law on Decreasing Crime Rate in Saudi Arabian Society, Bakri Basha, pp. 90-91.

The above chart shows that the response of the students in US. was: 0 percent strongly agree, 2.5 percent agree, 15 percent neutral, 60 percent disagree, and 22.5 percent strongly disagree.

Third: Attitudes Towards God.



K.S.A
Figure 3: Commiting crime offends both Man and God.

Source: The Significant Influences of Islamic Law on Decreasing Crime Rate in Saudi Arabian Society, Bakri Basha, pp. 91-92.

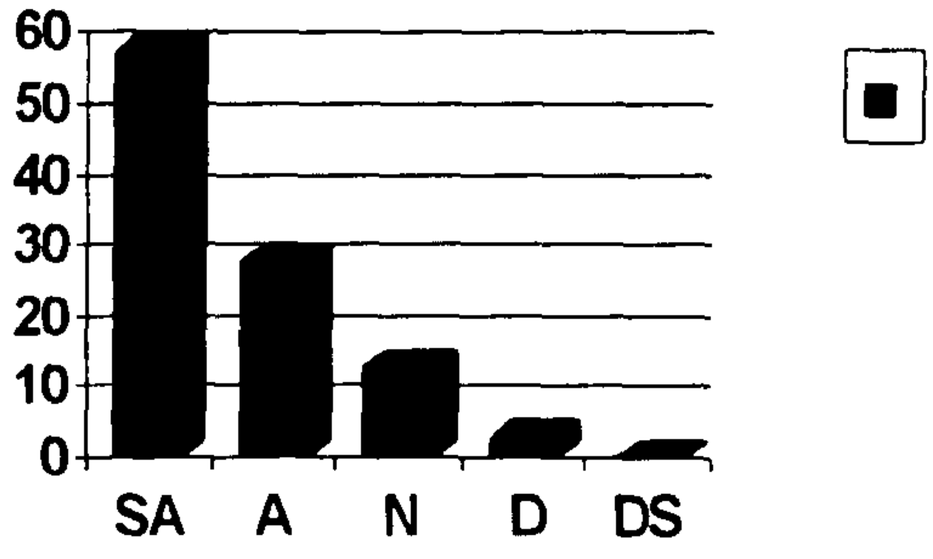
As seen in the above chart the response of Saudi Arabian students to this proposition was: 70 percent strongly agree, 30 percent agree, 0 percent neutral, 0 percent disagree, and 0 percent strongly disagree.

U.S.A
Figure 3: Commiting crime offends both Man and God.

Source: The Significant Influences of Islamic Law on Decreasing Crime Rate in Saudi Arabian Society, Bakri Basha, pp. 91-92.

As shown in the above chart, the response of United State students was: 2.5 percent strongly agree, 2.5 percent agree, 17.5 percent neutral, 62.5 percent disagree, and 15 percent strongly disagree.

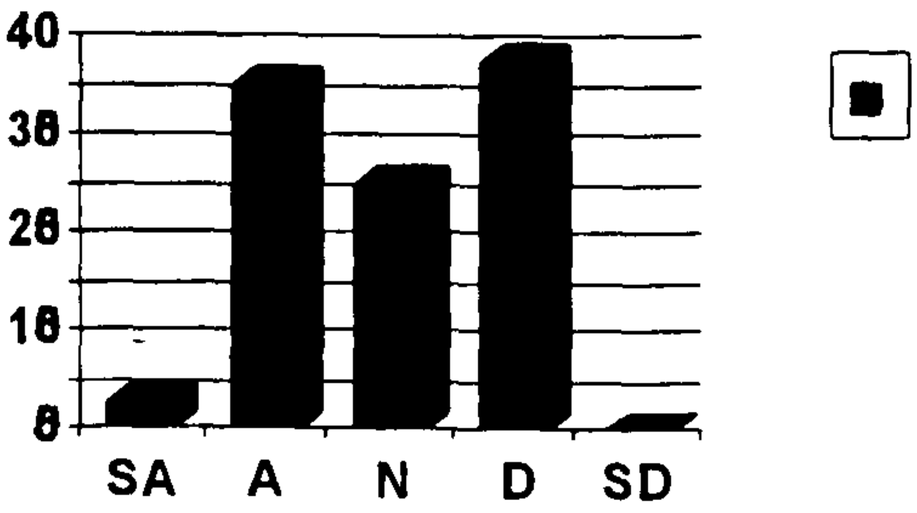
Fourth: Safety.



K.S.A
Figure 4: I feel safe walking in the street alon at night.

Source: The Significant Influences of Islamic Law on Decreasing Crime Rate in Saudi Arabian Society, Bakri Basha, pp. 73-74.

Regarding this statement, the response of Saudi Arabian students was: 57.5 percent strongly agree, 27 percent agree, 12.5 percent neutral, 2.5 percent disagree, and 0 percent strongly disagree.

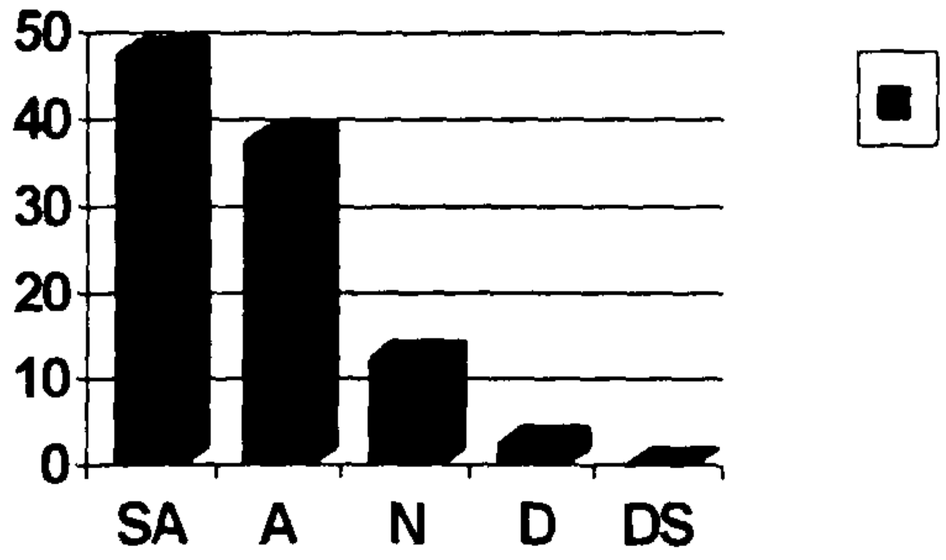


U.S.A
Figure 4: I feel safe walking in the street alon at hight.

Source: The Significant Influences of Islamic Law on Decreasing Crime Rate in Saudi Arabian Society, Bakri Basha, pp. 73-74.

The above chart indicates that the response was: 2.5 percent strongly agree, 35 percent agree, 25 percent neutral, 37.5 percent disagree, and 0 percent strongly disagree.

Fifth: Security of the Country.

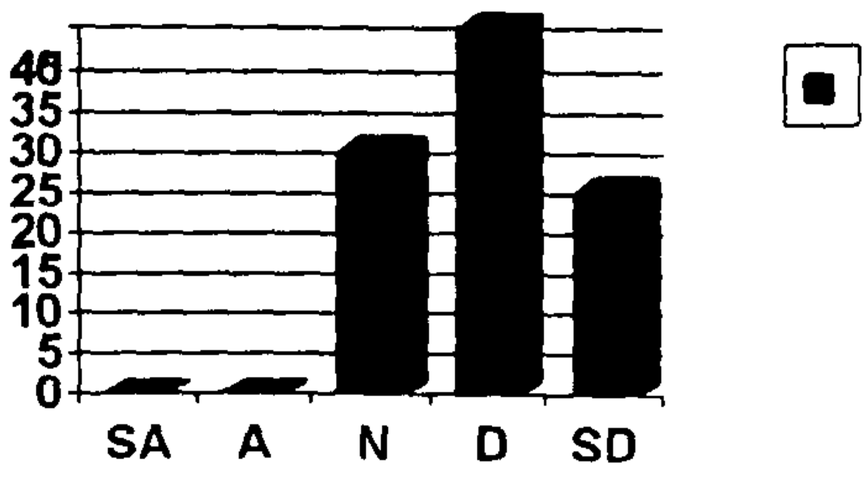


K.S.A

Figure 5: I would feel secure sleeping in my unlocked car at night.

Source: The Significant Influences of Islamic Law on Decreasing Crime Rate in Saudi Arabian Society, Bakri Basha, p. 76.

As shown in the above chart; the response of Saudi Arabian students regarding this statement was: 47.5 percent strongly agree, 37.5 percent agree, 12.5 percent neutral, 2.5 percent disagree, and 0 percent strongly disagree.



U.S.A

Figure 5: I would feel secure sleeping in my unlocked car at night.

Source: The Significant Influences of Islamic Law on Decreasing Crime Rate in Saudi Arabian Society, Bakri Basha, p. 76.

The above chart shows the response of the students in the United States. As seen, it was: 0 percent strongly agree, 0 percent agree, 30 percent neutral, 45 percent disagree, and 25 percent strongly disagree.

From these statistics, it appears that the crime rate in Saudi Arabia is lower than in other countries, and the Islamic Law seems to be an effective deterrent on the rate of crimes in Saudi Arabian society.

[1] Saleh, Commercial Arbitration, p. 8.

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[3] Philips, Bilal. The Evolution of Fiqh, (Tawheed Publcation, 1990), p. 29.

[4] Qur'ān, 53 verses 3-4.

[5] Hughes, Dictionary of Islam, p. 197.

[6] Mahmassani, Falsafat al-Tashri fi al-Islam,, p. 76.

[7] Qur'ān, 4 verse 59.

[8] The sence of this Ḥadīth is accepted, even though the Isnād is doubtful. See: al-Āmidī, Sayf al-Dīn. al-Aḥkām fi Uṣūl al-Aḥkām, (Cairo, 1936), vol. 1, p. 112. Also: Ibn Ḥazm, 'Alī. al-Iḥkām li Uṣūl al-Aḥkām, (Maṭba'at al-Sa'ādah, Cairo, 1347 A.H.), vol. 4, p. 133.

[9] Hughes, Dictionary of Islam, p. 197.

[10] Ibn al-Qayyim, al-Jawziyyah. I'lām al-Muwaqq'īn, (Dār al-kutub al-Miṣriyyah, Cairo), vol. 1, p. 24.

[11] Hughes, Dictionary of Islam, p. 197.

[12] Id. p. 482.

[13] Khallāf, 'Abd al- Wahhāb Uṣūl al-Fiqh al-Islāmī, (Dār al-Fikr, ed. 2, 1399 A.H.), p. 42.

[14] Karl, D. J. "Islmaic Law in Saudi Arabia", George Washington Journal of International Law, 1991, vol. 25, part. 1, p. 140.

[15] Khallāf, Uṣūl al-Fiqh al-Islāmī, p. 42.

[16] al-Āmidī, al-Aḥkām, vol. 3, p. 77. Also: 'Awdah, al-Tashrī' al-Jinā'ī fi al-Islām, vol. 1, p. 183.

[17] This tradition was reported by: al-Dār Quṭnī and Mālik. See: al-Shawkānī, Muḥammad Ibn 'Alī. Nayl al-'Awṭār, (Dār al-Jīl, Lebanon, 1973) vol. 7, p. 321.

[18] Ibn al-Qayyim, I'lām al-Muwaqq'īn, vol. 1, p. 26.'Awdah, al-Tashrī' al-Jinā'ī fi al-Islām, vol. 1, p. 184-185.

[19] Mahmassani, Falsafat al-Tashrī fi al-Islām, p. 88.

[20] Ibn Jubeir, "Definition of Crime" (in: The Effect of Islamic Legislation,) p. 63

[21] Mahmassani, Falsafat al-Tashrī fi al-Islām, p. 88.

[22] Makdisi, John. "Legal Logic and Equity in Islmic Law", The Amercan Journal of Comparative Law, 1985, vol. 33, p. 78.

[23] Id, p. 79.

[24] Id, p. 81.

[25] Hughes, Dictionary of Islam, p. 197.

[26] Weiss, Bernard. "Interpretation in Islamic Law: The Theory of Ijtihad", The American Journal of Comparative Law, 1978, vol. 26, p. 200.

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[29] Lippman, Islamic Criminal Law and Procedure, p. 37.

[30] al-Kattan, Manna' K. "Effect of Religion Against Crime" (in: The Effect of Islamic Legislation), p. 212.

[31] Lippman, Islamic Criminal Law and Procedure, p. 38.

[32] Ibn Manẓūr, Lisān al-'Arab, vol. 2, p. 110. Also: al-Rāzī, Mukhtār al-ṣiḥaḥ, p. 444.

[33] Kara, Mustafa Abdul Mejid. The Philosophy of Punishment in Islamic Law, (Ph.D, Claremont Graduate School, 1977), p. 198.

[34] al-Ghāmidī, Muḥammad. 'Uqūbat al-I'dām, (Maktabat Dār al-Salām, 1992), p. 15.

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[38] Muslim, Sahih Muslim, (English Translation) vol. 3, pp. 916-917.

[39] Naqati, The Theory of Crime and Criminal Responsibility, p. 50.

[40] Siddiqi, The Penal Law of Islam, pp. 10-12.

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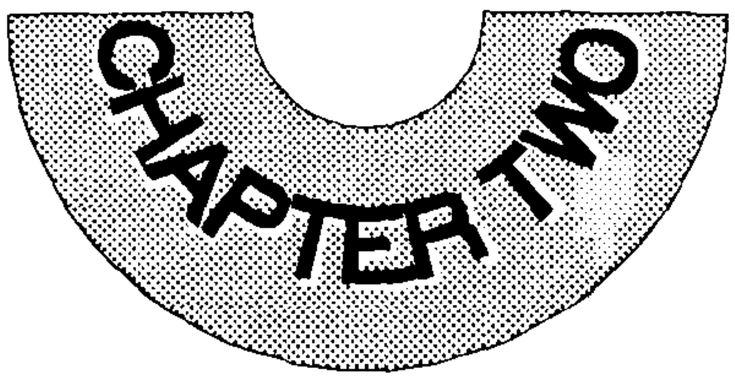


DIVISION OF CRIMES OF KILLING IN SAUDI ARABIA.

Introduction.

Crimes of killing according to the intention of the criminal fall into two categories:

First: Intentional crime (jarīmat qatl al-'amd), which is considered as: "An illegal act committed with a full knowledge of its illegality".[1] In other words, jarīmat qatl al-'amd is defined as any act performed with the express purpose of taking human life, in whatever circumstances. Jurists hold that deliberate killing comprises of an attack on a ma'sūm human being (inviolable or legally not deserving death) with a lethal weapon or with something which could be considered as a lethal weapon.[2]

Second: Unintentional crime (jarīmat al-qatl ghayr al-'amd) which is defined as: "An act committed without the desire for its consequence, whether it is a legal act or not."[3] Unintentional crimes fall into two categories:

1- Quasi- murder (jarīmat al-qatl shibh al-'amd).

2- Killing by mistake (jarīmat qatl al-khatā').

These categories will be discussed in greater detail in the following sections.

SECTION I: MURDER (Qatl al-'Amd).

Part 1: General Information.

The essential components of intentional killing.

Qatl al-'amd is considered the most serious crime against a human being.[4] The specific meaning of qatl al-'amd is: "Where the criminal wilfully kills his victim with a normal lethal weapon, or something that serves for a lethal weapon, such as a club, a sharp stone, or even fire".[5]

Ibn Qudāmah defines murder as: "A homicide committed by a normal killing weapon".[6] Al-Ḥajjāwī describes it as: "A homicide that is committed either by a normal killing weapon, or through the desire of the victim's death".[7] Ibn Duyan says: "Murder means that the criminal intentionally plans his act against someone whom he knows to be an innocent person and kills him by an instrument which is undoubtedly known to be the cause of his death".[8]

The essential components of qatl al-'amd are:

1- The victim, who must have been a live human being at the time when the crime was committed.

2-The instrument which was used to committ the crime.

3-The intention, i.e. the existence of an absolute desire for the consequence of the act.[9]

In addition to these three essential components, jurists add that the murderer must also be responsible (Mature, adult, and sane in mind), and the victim should be inviolable (ma'ṣūm al-dam).[10] According to Ibn Duyan, and also the rules in Saudi Arabia,[11] the competency of the killer (mukallaf) is one of the stipulations for inflicting qiṣāṣ as a retaliation. Thus, qiṣāṣ is obligatory only for a competent person, but not for a minor, or an insane person.[12]

Punishment of qatl al-'amd in Islamic law.

Islamic law states that Allah's first act on the Day of Judgement will be to punish murderers.[13] In this context, the Prophet says: "The first cases to be decided among the people (on the Day of Resurrection) will be those of bloodshed".[14] The Prophet also says: "The greatest of al-Kabā'ir (the great sins) are: To worship any other than Allah, to murder a human being, to be undutiful to one's parents, and to make a false statement" or, as mentioned in another hadith, "to give false witness".[15] It is stated in the Qur'ān:

"Those who invoke not, with Allah, any God, nor take life which Allah has made sacred except for just cause, nor commit fornication, and any that does this (not only) meets punishment." "But the chastisement on the day of judgement will be double to him, and he will dwell there in ingnominy"[16]

In these verses three things are expressly condemned, one of which is the taking of life. However, the prohibition against taking life has a qualification except for just cause, e.g., in legal punishment for murder.[17]

Under Islamic criminal law, if a person has wilfully committed a murder, two points are immediately established: First, that the murderer is a sinner who is deserving of Hell, unless he is punished as a mortal being.[18]

Allah says: "**If a man kills a believer intentionally, his recompense is Hell, to abide therein (for ever) and the wrath and the curse of Allah are upon him".**[19]

The second point is that his act deserves the punishment of qiṣāṣ.[20]

Types of punishments for qatl al-'amd.

1- The primary punishment.

The primary punishment for the murderer is the death penalty. It is stated in the Qur'ān:

"In the law of equality. There is (saving of) life to you. O ye men of understanding; that ye may restrain yourselves".[21] Also: "**O ye who believe! The**

law of equality is prescribed to you. In case of murder: The free for the free, the slave for the slave, the woman for the woman..."[22]

In this context, Yusuf 'Abd Allah states: "Islam has much mitigated the horrors of the pre-Islamic custom of retaliation. In order to meet claims of justice, equality is prescribed, with a strong recommendation for mercy and forgiveness; to translate qisas, therefore, by retaliation is not correct. The Latin legal term *lex talionic* may come near it, but even that is modified here. In any case it is best to avoid technical terms for things that are very different. Retaliation in English has a wider meaning, equivalent almost to returning evil for evil, and would more fitly apply to the blood-feuds of the days of ignorance. Islam says: if you most take a life for life, at least there should be some measure of equality in it".[23]

It is the fact that qiṣāṣ was prescribed for the Jews in the Torah, and by extension for Christians.[24] This is stated in the Qur'ān where Allah says : "**We ordained therein for them: life for life, eye for eye...**".[25] In this respect Bassioni states: "To properly understand qisas, one most consider the historical context of its divine revelation in the Qur'an. It should be recalled that according to Islam, the Qur'an continues the tradition of the Judeo- Christian teachings concerning the talion or the law of an eye for an eye. The policy supporting the judeo-Christian Islamic principle of talion is essentially twofold:

First, it does not allow the victim or his family to exact a greater level of retribution against the person committing the violation or from this family. By so limiting the punishment, the infliction of greater vindictive harm upon the perpetrator of the crime or members of his family or tribe is precluded. That practice proved very effective in preserving social order in the early period of Islam when there was no organised system of criminal justice whereby institutions and official personnel carried out penalties, which as a result were imposed by the victim or his family.

The second principle involves the equivalency of treatment inflicted on the offender. The principle of qisas as revealed in the Qur'an was designed to limit the harm to be inflicted against certain wrongdoers to the equivalent harm inflicted on the victim.

Thus, one of the policies of qisas is to limit the consequences of certain categories of wrongdoing. Furthermore, there are provisions in the Qur'an indicating that the infliction of qisas must be in a manner least likely to cause pain. This principle satisfies the general tendency of vindictiveness on the part of the victim, and members of his family, and tribe while precluding unnecessary harm. This sense of vindictiveness also can be satisfied by the state or the community acting for and on behalf of the victim, as most contemporary systems of criminal justice aspire to do".[26]

In light of these general observations, it is significant that in various schools of jurisprudence (e.g., the Ḥanbalī, the Shāfi'ī, the Mālikī Maddhabs), the qiṣāṣ crime for which the death penalty is applicable is limited to deliberate killing alone,[27] whether it was committed by a normal lethal weapon or by something that serves as a lethal weapon.[28] For instance:

It is stated in the Sunnah that Anas b. Mālik reported: "A girl was found with her head crushed between two stones. They asked her who had done that- has so and so (done it)- until they mentioned a Jew. she indicated with the nod of her head (that it was so), the Jew was caught, and he made confession (of his guilt). Then, Allah's Messenger commanded that his head be smashed with stones".[29]

Al-Nawawī says: " This Hadith elucidates so many points pertaining to retribution and the punishment of murder: for example, a male can be killed for killing a female, and the statement of a dying man carries enough weight to justify the arrest of the murderer, but he cannot be punished on the basis of this statement, unless there is a confession or two reliable witnesses".[30]

Aḥmad b.Ḥanbal, Al-Shāfi'ī, and Mālik, believe that a hammer, a stone, a large piece of wood, or something similar, are considered as lethal weapons. Similarly, if the criminal uses an instrument which does not normally serve as a lethal weapon, (e.g., a needle or a thorn, for instance, employed to pierce the brain or the throat), the punishment will again be the death penalty; because the usage of these instruments in such cases indicates that the intention of the killer is absolutely to kill his victim.[31]

The infliction of the death penalty as a qiṣāṣ in Saudi Arabia.

People who are liable to the death penalty in the Kingdom of Saudi Arabia are classified into three categories: Firstly, Muslims (the majority). Secondly, ahl al-kitāb, who believe in one of the heavenly revealed scriptures. Thirdly, other people who have a protective covenant (al-musta'minūn).

All these categories of residents are equally subject to the punishment of qiṣāṣ in the case of intentional killing. Hence, if the elements of qiṣāṣ are proven, the judges without any discretion are obliged to apply the penalty chosen by the victim's family, regardless of the particular circumstances, religions and even nationalities.[32]

According to the criminal law in Saudi Arabia, crimes of qatl al-'amd are: Those crimes which are wilfully committed with an awareness of its consequence (i.e., with an absolute desire for the consequence or foresight of this) whether it is committed with a normal lethal weapon or not.[33] Accordingly, Murder is considered as a deliberate killing committed by a person who know that his act undoubtedly caused the death of the victim, whether it was by commission or omission".[34] Thus, intention and foresight in such crimes are considered during the trial. This is based on the statement of the Prophet: "Acts are judged according to intentions and every person shall gain what he intended".[35] This means that the punishment of qiṣāṣ in Saudi Arabia refers only to intentional killing, whether it is committed with a normal lethal weapon or not, as long as there is an absolute desire, which confirms that the criminal planned his act in order to kill. To illustrate:

The case of Y.H. who killed M.H. with a gun after a squabble had occurred between them. The General Court declared: The killer should be sentenced to death. According to the royal decree, (No. 4\691\M issued on 17-4-1415 A.H.), the criminal was executed on 9-5-1415 A.H. in Najrān.[36]

Also: The case of M.Q who struck his victim with a stout stick on his head, several times, until he died. Consequently, he was referred to the General Court (al-maḥkamah al-kubrā) in al-Tā'if. During the trial, the criminal confessed and the judges (as reported in the Judgement document al-Ṣakk al-Shar'ī number: 8 dated 28-

4-1405 A.H) decided that he was liable to the death penalty. This judgement had to be ratified by the Court of Appeal (maḥkamat al-tamyīz) and the Supreme Judicial Council (majlis al-qaḍā' al-a'lā). Then, the royal decree (number 4\777 dated 20-4-1406 A.H.) was issued and the criminal was executed on 28-5-1406 A.H.[37]

A similar case also occurred in 'Ar'ar (in the north of Saudi Arabia), where the criminal M.J. was punished by death, pursuant to the decision of the General Court (number 360 dated 5-7-1405 A.H) which has been sanctioned by a royal decree. [38]

If the criminal uses a stone, he is considered as a murderer, and his punishment is also capital punishment, for instance:

In al-Madīnah al-Munawwarah, M.P. was sitting with A.B. and A.A., doing something evil (Mafsadah). Later, they quarrelled. The murderer, M.A., threw stones at A.B., drove his car at him and ran over him. Then, he turned to A.A. and stabbed him with a knife until the latter fell down; the murderer continued throwing stones at the second victim until he died too. Following this incident, he was referred to the General Court in al-Madīnah. The judgement which was sanctioned by the Court of Appeal and the Superior Judicial Council was the death penalty. Thus, a royal decree (No. 4\797\ M, dated 4-5- 1415 A.H.) was issued and M.A was executed on 23-5-1415 A.H. in al-Madīnah.[39]

A hammer, a large piece of wood, and similar items are also considered as lethal weapons in Saudi Arabia, for example:

In Ḥā'il, where the person called F intentionally killed N.T. He repeatedly hit his victim on the head with a hammer until he died. According to the decisions of the judges and the royal decree (No. 4\522\M. dated 21-3-1415 A.H.), the criminal was executed on 18-4-1415 A.H.[40]

A similar case took place in 'Asīr, where the crime was committed by five criminals who were in fact drunk. They abducted and abused a youth who made a several attempts to escape from them. But, they hit him repeatedly with a large piece of wood until he died. The murderers were arrested. After investigation, it became clear that they had previous convictions (min aṣḥāb al-sawābiq). The judges

pronounced that they were undoubtedly liable to the death penalty. According to the royal decree (No. 4\329\M. dated on 16-6-1415 A.H.) all five criminals were executed on 5-3-1415 A.H.[41]

If a person deliberately strangles his victim, he will also be subject to the death penalty. For instance:

In Riyadh, where A.S. and M.K. abducted and strangled a woman with a rope, under the cover of darkness outside the city. The judges decided their act deserved capital punishment as a qiṣāṣ. According to the royal decree (No. 4\799\M. dated 4-5-1415 A.H.), the stranglers were executed on 8-6-1415 A.H.[42]

If a person with premeditated malice gives a deadly poison to another person who dies thereby, this will be considered as a lethal weapon too, and the criminal will definitely be liable to qiṣāṣ punishment.[43] This is based on the Sunnah, for example, Abū Hurayrah narrated: "A Jewish woman poisoned a ewe and presented it to the Prophet Muhammad hoping to kill him. The Prophet and his Companions ate from it. Later on, the Prophet said: 'Raise your hands; the woman told me that the meat was poisoned' Bashir b. al-Bara'a died from the poison. The Prophet asked her. 'What obliged you to do what you did?'. She said: 'If you were a Prophet, it would not have hurt you'... So the Prophet issued his order and she was executed".[44]

2- Substitutionary penalties for qatl al-'amd.

As stated above, the primary punishment for qatl al-'amd is the death penalty. But if the heirs waive capital punishment, there are two alternative Substitutionary penalties: diyah (blood money) and kaffārah (expiation).[45]

Diyah is a term which means in its strictest sense: "A sum exacted for any offence upon the person, in consideration for the claim of qiṣāṣ not being insisted upon".[46] In Islamic criminal law, the death penalty in the case of murder may not be executed upon the murderer, if the victim's party, who may wish to exercise their right to select a punishment, decide to waive the death penalty and accept diyah instead,[47] or

alternatively to waive it freely (with no obligation), in fact, they are free to do so.[48] This can be clearly understood from the verses where Allah goes on to state:

"**We ordained therein for them: Life for life... But if anyone remits the retaliation by way of charity, it is an act of atonement for himself** ".[49]

Also: "**O ye who believe! the law of equality is prescribed to you in case of murder: The free for free... But if any remission is made by the brother**[50] [the victim's family or agent] **of the slain, then grant any reasonable demand and compensate him with handsome gratitude. This is a concession and mercy from your lord...**".[51]

Regarding diyah, it is stated in the Sunnah that Ibn 'Abbās says: "For the Jewish people the punishment of killing was qiṣāṣ, and the payment of blood-money was not permitted as an alternative. So Allah said to this nation (Muslims): "O you who believe qiṣāṣ is prescribed for you in case of murder ... But if any remission is made by the brother of the slain, then grant any reasonable demand and compensate him with handsome gratitude" Ibn 'Abbās added: remission in this verse means to accept blood-money in an intentional murder...".[52]

The Prophet says: "Whoever is murdered, his heirs have the option to choose the best of two choices, either to ask for the death penalty, or to redeem (to demand blood-money or to waive it freely)".[53]

The Prophet also says: "Whoever kills a believer intentionally, he is given over to the victim's party; and if they wish, they may kill, or accept blood-money".[54]

The choice of punishment for a murderer can be determined by a bargain that satisfies the victim's heirs rather than by the fixed diyah. A murderer can escape the sentence of qiṣāṣ by paying the victim's heirs blood-money, if that is the heirs' choice. But only the victim's heirs can decide, and judgement will wait for their decision.[55]

Ibn Duyan states that the above rule has been agreed upon, and if the heirs choose punishment, then they may still accept the diyah and make a compromise agreement for more than the fixed amount of it.[56] He adds that Muwaffaq says: "I do not know any conflicting view thereon". In fact, blood-money as compensation in the case of

deliberate killing is not due for the killing, but it is a substitute for retaliation. In other words, the murderer is not paying the diyah as a price for killing the victim, but rather as the price for saving his own life.[57]

The total amount of the complete diyah in Islamic criminal law was set at one hundred camels. According to the majority opinion of jurists (al-jumhūr), these camels should be: Twenty-five female camels aged between one and to two years old, twenty-five female camels between two and three years old, twenty-five female camels between three and four years old, and twenty-five female camels that are pregnant.[58]

The payer have the right to make payment in specie. Ibn Qudāmah says: "Diyah was originally one hundred camels but, it can be paid in an equivalent sum of money, or in sheep, or even garments."[59] For example:

'Umar b. al-Khaṭṭāb established the amount of the diyah at 1,000 gold dinars, or 12,000 dirhams, or one hundred cows for people who own cows, or 1,000 ewes for those who own sheep, and one hundred garments for those who deal with such garments or fabric.[60]

Consequently, in the case of murder, qiṣāṣ may be commuted for diyah or for a sum of money; if the heirs enter into a compromise with the murderer for a certain sum, the sum due must be paid. For example, it is stated in tradition ('athar): "Ḥudba b. Khashram killed a person. Then, Sa'iyd b. al-'Āṣ, al-Ḥasan, and al-Ḥussayn offered the son of the victim seven times the amount of the fixed diyah in order that he forgive him, and commute qiṣāṣ into diyah; but he refused and asked for the death penalty.[61]

Ibn Ḥanbal adds: "The criminal himself is responsible to pay the diyah, or the sum that has been agreed thereof, from his own property in case of intentional killing".[62]

The aim of establishing the precept of diyah is to satisfy the victim's heirs, by compensating them for the harm suffered. such a rule may have some retribution function similar to that of punishment, but that is only a secondary function. The idea of compensating those who have suffered harm is not only considered in Islamic law,

but also instituted in Western legal systems as part of the proceeding of the civil law.[63]

In the contemporary Saudi criminal law, qiṣāṣ may be commuted into diyah.[64] The diyah for intentional killing nowadays is to be paid in specie, whether it is the government's fixed price or more, when the heirs enter into a composition with the murderer for a certain sum.[65] For the purpose of preventing blood-shed, the authorities may intercede with the victim's heirs in order to persuade them not to ask for the qiṣāṣ, and accept diyah instead.[66]

The preferable choice in Saudi Arabia is to forgive the criminal without demanding compensation. However, according to the legal system, if the heirs waive it freely, the criminal may be subject to a discretionary penalty (ta'zīr) for the public right.[67] To illustrate:

In Riyadh where the criminal Z. asked his friend G. to go with him to his farm, pretending that he was going to check the maintenance works in the well, since they reached it, Z. wilfully pushed G. into the well hoping to drown him (as he knew that G. could not swim). Consequently, the victim died. The public prosecutor (al-mudda'ī al-'āmm) and the heirs presented their petition at the General Court; during the trial the criminal firstly denied the allegation. But after facing him with the evidentiary fact (astiqṣā' al-adillah), the criminal confessed with remorse. Thereupon, the judges decided that his act was undoubtedly deserving the death penalty but, after serious deliberation; the victim's wife waived qiṣāṣ and accepted diyah. Therefore, the judges issued the judgement document (al-ṣakk al-shar'ī) number 11 dated 22-10-1411 A.H., which stated that the criminal was to be imprisoned for five years for the public right.[68]

A similar case also occurred in Riyadh, where the killer M. deliberately fired a gun at his brother in order to kill him for a private grievance (Intiqām khāṣṣ). During the first stage of the investigation, he confessed that he committed his crime while he was angry. The suit however was referred from the police station to the General Court.

The public prosecutor presented the petition and during the trial, the criminal confessed again. As a result, the judges decided that the criminal was to be beheaded, but the victim's parents who were also the parents of the criminal waived the penalty gratuitously (majānan). Thereupon, the judges issued the judgement document No. 18 dated 16-9-1409 A.H. which stated that the killer was to be imprisoned for a period of five years in the public interest.[69]

3- Complementary penalties for qatl al-'amd.

In Islamic criminal law, there are complementary punishments which are imposed on the deliberate killer. Regardless of whether the criminal is executed, or pays the Diyah, he will be subject to these penalties.[70] These penalties are:

First: Disinheritance (al-ḥirmān min al-irth):

Deprivation of inheritance is a complementary penalty for qatl al-'amd. Jurists agree that there is no right of inheritance for the person who intended to kill his legator, It is stated in the Sunnah that Ibn 'Abbas narrated: "A killer may not inherit from his victim even if there is no other inheritor".[71] The Prophet also says: " A killer of his legator has no right to inherit" or " No inheritance for the killer".[72]

Second: Exclusion from will (al-ḥirmān min al-waṣiyyah):

Exclusion from will is also considered as a complementary penalty for deliberate killing. The Prophet says: "The will shall not be valid for a killer."[73] Also: "There shall be nothing for the killer."[74]

There are two opinions on this in al-Madhhab al-Ḥanbalī: The first opinion holds that a bequest in favour of a killer is unwarrantable, even if the heirs support it, because the obstacle to the bequest is homicide, not the heirs' interest. The second view which is applied in Saudi Arabia, holds that the bequest is valid only with the permission of the heirs. This is provided that the amount of the bequest does not exceed one-third of the total amount of the inheritance.[75]

Responsibility in case of suicide.

In Islamic criminal law, there is no particular punishment in this world for the person who intentionally kills himself. But as mentioned in the Qur'ān, suicide is forbidden in Islam.

Allah says: **"... Nor kill (or destroy) yourselves: Allah hath been to you most merciful".**[76]

If the person intentionally kills himself, the punishment will be in the hereafter. It is stated in the Qur'ān:

"If any do that [suicide] **in rancour and injustice, soon shall we cast him into the fire: and easy it is for Allah".**[77]

The Prophet says: "A man who commits suicide shall be cast into Hell and remain there for ever".[78]

Part (2): The Execution of Qiṣāṣ in Saudi Arabia (Methods and Conditions).

Instrument of execution.

As mentioned previously, Muslim jurists unanimously agree that the murderer should be sentenced to death. Their opinions vary however, concerning the means by which qiṣāṣ should be executed. For example:

Mālik, and al-Shāfi'ī held that the killer should be executed in the same manner by which he killed his victim. This view derives from the term qiṣāṣ which means "equality". Accordingly, equality should be observed in executing the murderer.[79]

Ibn Ḥanbal and Abū Ḥanīfah say: The murderer should be executed by the sword, whether or not he has killed his victim in this manner. This opinion assumes that since the purpose of prescribing qiṣāṣ is simply to put the murderer to death, he should be executed in the most efficient way.[80] This is supported by the Sunnah where the Prophet said: "There is no qiṣāṣ except by means of the sword."[81]

In Islam, the sword is considered as the quickest and least painful means of dispatching the criminal.[82] The Prophet says: "Allah prescribed Iḥsān (being delicate

and deft) in everything. So, if you kill or slaughter an animal, you should closely observe the principle of Istiḥsān".[83] (in other words, you should do it efficiently and swiftly by using a sharp instrument of killing). 'Awdah explains that the reason why the sword was specified as an ideal weapon for taking life is that the sword was the most efficient means known during the period of the Prophet. The object of using such an instrument was to avoid torturing the criminal. Therefore, any effective instrument of this nature could be chosen instead of a sword. This point of view was adopted by the fatwā of al-Azhar University in Egypt.[84] However, Shaltut believes that "whatever quick, easy, and efficient means of execution can be found, should be used."[85]

According to legal procedures in Saudi Arabia, the method by which qiṣāṣ should be executed is either a sword (most frequently) or gun.[86] The Superior Judicial Committee (al-hay'ah al-qaḍā'iyah al-'ulyā) agreed that the criminal in such cases must be sane and adult, in order to be executed.[87]

The executioner of qiṣāṣ.

In Islamic criminal law, it is permissible for the victim's family either to choose one of themselves or an agent to carry out the execution of qiṣāṣ personally, if they are willing to carry out the execution. This is provided that the person chosen is able to do so efficiently. Otherwise, an efficient executioner (headsman), officially appointed by the ruler, will carry it out instead of them.[88] In fact, the method by which qiṣāṣ is usually executed in Saudi Arabia is by an official executioner, appointed by the government. In addition, the execution should be under the supervision of competent authorities (al-sulṭāt al-mukhtaṣṣah).[89] Thus, it is lawful for that person to whom the government or judges has given the order to carry out the qiṣāṣ.

Place of execution.

According to the principle of the Sharī'ah, execution of Qiṣāṣ should be carried out in public, in order to serve as an example for others. Allah says:

"And let a party of believers witness their punishment."[90]

In Saudi Arabia, qiṣāṣ is usually executed in public places,[91] in squares, outside the central Mosques of the cities, on Fridays after Jum'ah prayer. The names of both the murderer and the victim are announced, along with a brief account to be read over the criminal at the time of execution.[92]

Based on the resolution of the Superior Judicial Committee in 1392 A.H.; it is not permitted to give any kind of drug such as an anaesthetic or pain killer to the condemned person, at the time of the execution.[93] The time of the execution should be during the day not at night. It is also preferable not to execute the death penalty during the month of Ramaḍān.

In addition to the above regulations, there are other conditions which were also stipulated by the Superior Judicial Committee in 1397 A.H. These conditions are[94]:

1- The time of execution should be in advance announced only to the criminal and to the families of the criminal and the victim.

2- The execution should be under the supervision of the competent authorities.

3- Photography is prohibited in such cases.

4- Each case should be published in the local newspapers the day following the execution.

Execution day in Riyadh.

The following eye witness story, illustrates an actual execution of qiṣāṣ in Saudi Arabia, which was carried out in 1981:

"Riyadh, M. Y. was beheaded here after Friday noon prayer for the murder of his wife. The Ministry of the Interior, which upheld the sentence pronounced by a Shari'ah (Islamic law) court, vowed to rid the Kingdom of moral pollution and strike with an iron fist those who violate the laws of the Holy Qur'an ... A young Saudi, dressed in dazzling white, was being helped from the back of the van by two soldiers who grasped his arms tightly as he negotiated the step. Once safely on the ground, the

guards released him, although it was immediately obvious that he was hobbled hand and foot by wrist manacles and leg irons.

The condemned man appeared to be under thirty. He had pleasant clean-cut features; nothing in his appearance or demeanour suggested the thug or desperado... I stared intently at his face as he walked, slowly but deliberately, toward the knot of soldiers and officials waiting under the clock tower. His expression bore no trace of terror or confusion; neither did he affect a defiant manner in these last moments, when all social sanctions become meaningless. The only assault on his dignity were the leg irons, which caused him to proceed in a halting, lurching parody of the slow march. About halfway to his destination, he reached and caught the tail end of his gutra (headpiece) and, with a toss of his head, let it flutter to the ground, where it lay on the macadam. I momentarily entertained the thought that the Saudi government was eliminating one of its very finest citizens.

When the condemned man reached the spot, he faced the Mosque and knelt on the ground. An official stepped forward and as in the preliminary to the floggings, read a brief notice over the prisoner. A soldier then grasped the man's collar and in two or three short jerks tore the thobe partway down his back, leaving the neck exposed to the first several vertebrae. As if by a signal the crowd began chanting "Allah akbar, Allah akbar"("God is great, God is great"), continuing until the sentence was carried out. Meanwhile, the condemned man had assumed a nearly prostrate position, as in prayer; the upper part of his body bent well forward, and his chin rested on his chest, so that he was looking at the ground. Throughout, he neither moved nor flinched. The guttural, monotonous cadence emanating from the crowd lent a medieval atmosphere to the scene beneath the clock tower; it was a weirdly anachronistic tableau- each figure carefully arranged and precisely delineated, as in a tapestry.

Instinctively, I turned may head to see a huge black Saudi, his stern face creased with tribal scars, walking slowly but with great purpose across the square. It was al-Johar... Johar stationed himself to the right of the kneeling prisoner. He suspended

the sword about eight inches over the criminal's neck, holding the weapon steady and taking careful aim. He then raised the blade vertically and with one powerful blow struck at the base of the neck, nearly severing it through... A Saudi doctor with a stethoscope came forward and pronounced the man dead, while soldiers arranged the body. Someone had retrieved the gutra and, after aligning the head, wrapped the cloth around the neck. Instantly, it turned a deep purple. The body lay in state for a moment, looking quite peaceful, until the ambulance pulled up and the corpse was roughly placed on a crude stretcher made of wooden slats, thrust in the rear of the vehicle, and driven away. When the ambulance left, the soldiers were dismissed." [95]

Justification for qiṣāṣ (as death penalty).

Whenever anyone mentions the punishment of qiṣāṣ for intentional killing, a vision of the horror of capital punishment almost automatically comes to mind. It is a distressing vision. In fact, it is designed to be distressing and a deterrent to those who might also be tempted to kill. Some people judge the death penalty as harsh and in no way fitting the crime. In this matter Mishan says: "The criminal is not only being punished for causing his victim to suffer, he is being punished for taking life. The degree of suffering of the condemned murderer is of course, not irrelevant in any system of justice."[96]

Souryal states that the Saudis' approving attitude towards capital punishment stems from the historical context of its divine revelation in the Qur'ānic principle of qisas, and from its social impact. Given the Qur'ānic emphasis on the equality of retaliation, the Saudi citizen seems unconcerned with its harshness since it ensures the equivalency of pain and loss inflicted on the victim. Also, given the old tribal practice of raids and counter- raids over trivial matters, qiṣāṣ comes to be viewed as a reasonable alternative to a greater retribution against the offender. In terms of social impact, it is agreed that capital punishment is not to be perceived as a means of frightening believers, but rather as a necessary by-product of an effective means of justice designed to suppress a climate conducive to the existence or spread of social

disruption. Severe as it may seem, many citizens find in capital punishment what amounts to an act of mercy to those who have a strong tendency to commit crime.[97]

A number of possible justifications may be advanced whenever this type of punishment is imposed, for example: The first and most often cited is deterrence.[98] The second is protection of the public from repeated crimes by the same criminal. The third is retribution. Capital punishment as a qiṣāṣ is a penalty in which the criminal is made to suffer harm to the same degree as that inflicted upon his victim. In other words, the key to retribution is that the criminal suffers, as far as possible, in proportion to the objective harm he has caused.[99]

Finally, The question is: Is not the death penalty acceptable if its use is restricted to the most serious crimes that harm innocent human beings and society?

Qiṣāṣ in case of the pregnant woman and the nursing mother.

Jurists agree on the necessity of delaying the execution of punishment if the time is not proper for execution. Concerning the pregnant woman and the nursing mother, some jurists maintain that the death penalty should be delayed until delivery, while others insist that such a punishment should be delayed for two years after delivery in order to give enough time for the mother to nurse her child.[100] It is stated in the Sunnah that 'Abd Allah b. Buraydah reported: "...A woman from Ghamid came to the Prophet and said 'Allah's messenger, I have committed adultery, so purify me.' The Prophet turned her away. On the following day, she came again and said: 'Allah's messenger, why do you turn me away?... I have become pregnant.' He said : 'Well, if you insist upon it, then go away until you give birth'. When she delivered, she came with the child ... and the Prophet said : 'Go away and suckle him until you wean him'. When she had weaned him, she came to the Prophet with the child who was holding a piece of bread in his hand, she said: 'Allah's Apostle, here is he, I have weaned him and he eats food.' The Prophet entrusted the child to one of the Muslims, and then pronounced punishment .... and she was stoned".[101]

Ibn Mājah reported that the Prophet says: "If a woman intentionally kills, she is not to be killed until she gives birth to what is in her womb, and until she has nursed her child".[102] This is also the practice of the Prophet's Companions. For example: by the authority of 'Alī b. Ibī Ṭālib, execution of Shurāḥah was delayed until she delivered.[103] This is also the teaching of the Qur'ān. Allah says:

"The mothers shall give suck to their offspring for two years, for him [the father] **who desires to complete the term..."**[104]

Ibn Duyan maintains that the death penalty as a qiṣāṣ is subject to strict limitations in order not to exceed the just limits of killing. Therefore, if such a punishment is legally decided against a pregnant woman, she shall not be killed until she gives birth, and feeds her child.[105] It is stated in the Qur'ān:

"...But let him not exceed bounds in the matter of taking life..."[106]

It is concluded from the above that the period required for delaying the execution of qiṣāṣ in such cases may extend to two years and half.

Qiṣāṣ application in case of minor heirs.

As mentioned previously, in Islamic law only the victim's heirs can choose and decide the punishment of intentional killing, and judgement will wait for their decision. Thus, in case of minor heirs, the murderer is to be imprisoned until they attain competency (come of age) and can choose the punishment.[107] For example:

Mu'āwiyah imprisoned Ḥudbah b. Khashram in a matter involving qiṣāṣ until the son of the victim reached maturity. Ibn Duyan says: "This was in the time of the Prophet's Companions and it was not denied. "[108]

If the victim has no heirs, or his heirs are not known, the judge in such cases has the discretion of choosing qiṣāṣ or diyah depending on the circumstances. Diyah in such cases is to be paid to the public treasury (Bayt al-māl).[109] This is also the practice in Saudi Arabia.[110] For instance:

At Makkah, in 1400 A.H., the criminal H.K. killed W.H. with a stone. The judgement (as reported in al-Ṣakk al-Shar'ī No. 13042 dated 3-6-1402 A.H.) was:

"The act is deserving of the death penalty." The implementation of the death sentence was delayed until the heirs reached maturity and chose the death penalty. The killer was beheaded on 9-5-1415 A.H..[111]

Similarly, in two cases, in 1983, the murderers in crimes committed in 1966 and 1968 were beheaded in Riyadh. In both instances the execution of qiṣāṣ was delayed until the victims' sons reached maturity to make their choices.[112]

As a rule in Saudi Arabia, if only one of the victim's heirs waives the capital punishment, qiṣāṣ will not be executed. To illustrate:

J.S. who killed M.N. was imprisoned for 17 years until the youngest heir reached maturity. In 1415 A.H., all the heirs chose capital punishment (as a qiṣāṣ), and the killer was nearly executed, but at the last moment, at the place of execution, just as the executioner turned to kill him, one of the heirs suddenly rushed through the crowd and shouted the executioner to stop and announced that he wanted to waive the death penalty.[113]

[1] 'Awdah, al-Tashrī' al-Jinā'ī fi al-Islām, vol. 1, p. 83.

[2] Id.

[3] 'Abd al-Muḥammad Fāris, al-Tashrī' al-Jinā'ī, (1411 A.H.) pp. 33-34.

[4] Lippman, Islamic Criminal Law and Procedure, p. 49.

[5] 'Awdah, al-Tashrī' al-Jinā'ī fi al-Islām, vol. 1, p. 83. Also: Hughes, Dictionary of Islam, p. 421.

[6] Ibn Qudāmah, al-Mughnī, vol. 7, p. 637. Also: al-Najdī, Ḥāshiyat al-Rawḍ al-Murbi', vol. 7, p. 167.

[7] al-Ḥajjāwī, al-Iqnā' li Ṭālib al-Intifā', (Cairo, 1319 A.H.) vol. 9, p. 163.

[8] Ibn Duyan, Ibrahim M. Manar al-Sabil, (Translated by Baroody, George M. Under title "Crime and Punishment under Islamic Law"), vol. 2, p. 5.

[9] Ibn Qudāmah, al-Mughnī, vol. 7, p. 637. Also: al-Qaṭṭān, Mannā'. al-Tashrī' al-Jinā'ī al-Islāmī, (1411 A.H.) pp. 16-20. Farahāt Muḥammad N. al-Tashrī' al-Jinā'ī al-Islāmī, (Silsilat al-Kitāb al-Jami'i, 1984) pp. 251-264.

[10] al-Hewesh, Muhammad I. "Shari'ah Penalties and Ways of their Implementation in the Kingdom of Saudi Arabia" (In: The Effect of Islamic Legislation) p. 372.

[11] Resolution (qarār) of the Supreme Judicial Council, No. 214 dated on 23-8-1392 A.H., sanctioned by the royal decree No. 2071 dated 12-11-1392 A.H.

[12] Ibn Duyan, Manar al-Sabil, vol. 2, p. 16.

[13] Lippman, Islamic Criminal Law and Procedure, p. 49.

[14] Khan, The Translation of the Meaning of Sahih Al-Bukhari, vol. 9, p. 2.

[15] Id, vol. 9, p. 5.

[16] Qur'ān, 25 verses 68-69.

[17] 'Abd Allah, Translation of the Holy Qur'an, p. 1052.

[18] Hughes, Dictionary of Islam, p. 421.

[19] Qur'ān, 4 verse 93. This is the punishment for murder, on the day of judgement, provided that he was not punished in this world, or the victim's family did not forgive him.

[20] Hughes, Dictionary of Islam, p. 421.

[21] Qur'ān, 2 verse 179.

[22] Qur'ān, 2 verse 178.

[23] 'Abd Allah, Translation of the Holy Qur'an, p. 72.

[24] El-Ewa, Punishment in Islamic Law, p. 86.

[25] Qur'ān, 5 verse 45.

[26] Bassioni, Que'sas crimes, (in: Bassioni, The Islamic Criminal Justice System), pp. 204-205.

[27] Id. p. 205.

[28] al-Ghāmidī, 'Uqūbat al-I'dām, p. 168.

[29] Muslim, Sahih Muslim, (English Translation) vol. 3, p. 896. Also: Kahn, The Translation of the Meaning of Sahih Al-Bukhari, vol. 9, p. 11.

[30] Siddiqi, The Penal Law of Islam, pp. 149-150.

[31] Ibn Qudāmah, al-Mughnī, vol. 7, pp. 637-638. Also: al-Ghāmidī, 'Uqūbat al-I'dām, p. 168.

[32] Article 1 from the Resolution of the Suprem Judicial Council, No. 153 dated 25-8-1397 AH.

[33] Faraḥāt, al-Tashrī' al-Jinā'ī al-Islāmī, pp. 261.

[34] al-Qaṭṭān, al-Tashrī' al-Jinā'ī al-Islāmī, pp. 15.

[35] Khan, The Translation of the Meaning of Sahih Al-Bukhari, vol. 9, p. 60.

[36] See: "Ṣaḥīfat al-Riyadh" (Riyadh Newspaper), No. 9609, on 10-5-1415 A.H.

[37] See: "Ṣaḥīfat al-Jazīrah" (Jazirah Newspaper), No. 4881, on 29-5-1406 A.H.

[38] See: "Ṣaḥīfat al-Jazīrah", No. 4797, on 4-3-1406 A.H.

[39] See: "Ṣaḥīfat al-Riyadh", No. 9623, on 24-5-1415 A.H.

[40] See: "Ṣaḥīfat al-Riyadh", No. 9588, on 19-4-1415 A.H.

[41] See: "Ṣaḥīfat al-Riyadh", No. 9546, on 6-3-1415 A.H.

[42] See: "Ṣaḥīfat al-Riyadh", No. 9637 on 9-6-1415 A.H.

[43] Bahnassi, F. al-Mas'ūliyyah al-Jinā'iyyah fi al-Fiqh al-Islāmī, (Dār al-Qalam, Cairo, 1961) p. 138.

[44] al-Ghāmidī, 'Uqūbat al-I'dām, p. 171.

[45] al-Kaffārah will be descussed in the following section.

[46] Hughes, Dictionary of Islam, p. 128.

[47] El-Qhirani, The Legal Concept of Human Rights in Islam, (LL.M. thesis, Universty of Glasgow, 1986) p. 41. Also: Sharif, Mohammad. Crime and Punishment in Islam, (Lahor, 1972), p. 13.

[48] El-Ewa, Punishment in Islamic Law, p. 89. Also: ʿAwdah, al-Tashrīʿ al-Jināʾī fi al-Islām, vol. 1, p. 666. and al-Mawārdī, al-Aḥkām al-Sulṭāniyyah, p. 20. Jād, Sāmiḥ al-Sayid. al-ʿAfū ʿAn al-ʿUqūbah fi al-Fiqh al-Islāmī wa al-Qānūn al-Waḍʿī, (1398 A.H.) p. 31.

[49] Qur'ān, 4 verse 45. ʿAbd Allah comments: " This is not of the Mosaic law, but the teaching of Juesus is gradually introduced as leading up to the Qur'an". See: ʿAbd Allah, Translation of the Holy Qur'an, p. 299.

[50] The term "brother" is a common usage in Islam, which indicates that all human beings generally are brothers in Islam.

[51] Qur'ān, 2 verse 178.

[52] Khan, The Translation of the Meaning of Sahih Al-Bukhari vol. 9, p. 13.

[53] al-Shawkānī, Nayl al-'Awṭār, vol. 7, p. 148.

[54] Id.

[55] Mackey, The Saudis inside the Desert Kingdom, p. 270.

[56] Ibn Duyan, Manar al-Sabil, vol. 2, p. 3.

[57] Id.

[58] al-Qaṭṭān, al-Tashrīʿ al-Jināʾī al-Islāmī, pp. 29.

[59] Ibn Qudāmah, al-Mughnī, vol. 7, p. 758. Also: ʿAwdah, al-Tashrīʿ al-Jināʾī fi al-Islām, vol. 2, p. 177.

[60] Ibn Qudāmah, al-Mughnī, vol. 7, p. 759. Also: Ḥasanīn, ʿIzzat. Jarāʾim al-Qatl, (Dār al-Riyadh li al-Nashir, Riyadh) p. 73.

[61] Ibn Duyan, Manar al-Sabil, vol. 2, p. 4.

[62] Ibn Qudāmah, al-Mughnī, vol. 7, p. 764. Also: ʿAwdah, al-Tashrīʿ al-Jināʾī fi al-Islām, vol. 2, p. 79.

[63] El-Ewa, Punishment in Islamic Law, p. 89.

[64] Resolution of the Supreme Judicial Council, No. 88 dated on 29-3-1396 A.H., sanctioned by royal decree No. 9264 dated 18-4-1396.

[65] Fatwā of the chief justice (ra'īs al-quḍāt) in Saudi Arabia, No. 2372 dated 21-6-1389 A.H., sanctioned by the royal decree, No. 17016 dated 26-8-1389 A.H. Also: Ministry of Interior, Murshid al-Ijrā'āt al-Jinā'iyyah, p. 266.

[66] al-Hewesh, "Shari'ah Penalties and Ways of their Implementation in the Kingdom of Saudi Arabia" (In: The Effect of Islamic Legislation) p. 377.

[67] Royal decree, No. 17155 dated 17-7-1393 A.H. Also: Ministry of Interior, Murshid al-Ijrā'āt al-Jinā'iyyah, p. 267. al-'Alfī, Aḥmad. al-Niẓām al-Jinā'ī fi al-Mamlakah al-'Arabiyyah al-Sa'ūdiyyah, (1396 A.H.) p. 46.

[68] Personal interview with al-qāḍī A. S., 1414 A.H. Similar case was also judged by the Companions of the Prophet, at the time of 'Umar b. al-Khaṭṭāb. See: Ibn Duyan, Manar al-Sabil, vol. 2, p. 23.

[69] Personal interview with al-qāḍī A. S.

[70] al-jindī, Ḥasan. Fikrat al-'Uqūbāt al-Taba'iyyah wa al-Takmīliyyah fi al-Sharī'ah al-Islāmiyyah, (Dār al-Nahḍah, Cairo, 1993) pp. 64-77.

[71] al-Shawkānī, Nayl al-'Awṭār, vol. 7, p. 139. Also: al-Ghāmidī, 'Uqūbat al-I'dām, p. 281.

[72] al-Tirmidhī, Sunan al- Tirmidhī, Ḥadīth, 2110.

[73] 'Awdah, al-Tashrī' al-Jinā'ī fi al-Islām, vol. 2, p. 187.

[74] Id.

[75] Abū Ḥassan, Muḥammad. Aḥkām al-Jarīmah wa al-'Auqūbah fi al-Sharī'ah al-Islāmiyyah, (Maktabat al-Manār, ed. 1, 1987) p. 493.

[76] Qur'ān, 4 verse 29.

[77] Qur'ān, 4 verse 30.

[78] al-Kattan, Manna' K. "Effect of Religion Against Crime" (in: The Effect of Islamic Legislation, p. 212.

[79] al-Shīrāzī, Abū Muḥammad. al-Muḥadhab, (Maṭba'at al-Bābī al-Ḥalabī, ed. 1), vol. 2, p. 186. Also: al-Qurṭubī, Muḥammad b. Aḥmad al-Anṣārī. al-Jāmi' li Aḥkām al-Qur'ān, (Dār al-Qalam,

cairo, ed: 3, 1386 A.H.) vol. 2, p. 258. Ibn Ḥazm, Abu Muḥammad ʿAlī b. Saʿīd. al-Muḥallā, (Maṭba'at al-'Imām, Cairo, ed: 1), vol. 12, p. 55. El-Ewa, Punishment in Islamic Law, p.72.

[80] al-Kāsānī, 'Alā' al-Dīn Abū Bakr b. Masʿūd. Badā'iʿ al-Ṣanā'iʿ, (al-Maṭba'ah al-Jamāliyyah, Cairo, ed: 1, 1328), vol. 7, p. 245. Also: al-Qurṭubī, al-Jāmiʿ li Aḥkām al-Qur'ān, vol. 2, p. 258.

[81] 'Awdah, al-Tashrīʿ al-Jinā'ī fi al-Islām, vol. 2, p. 758.

[82] El-Sheikh, The Application of Islamic Penal Law, p.129.

[83] Muslim, b. al-Ḥajjāj al-Naysabūrī. Ṣaḥīḥ Muslim, (Dār al-'Ilm li al-Malāiyn, Beirut, 1375 A.H.), Ḥadīth No. 1955. Also: al-Tirmdhī, Sunan al-Tirmidhī, Ḥadīth No. 1409.

[84] 'Awdah, al-Tashrīʿ al-Jinā'ī fi al-Islām, vol. 1, p. 760. Also: El-Sheikh, The Application of Islamic Penal Law, p. 129.

[85] El-Sheikh, The Application of Islamic Penal Law, p. 129.

[86] Resolution of the Ministry of Interior, No. 2\S\6302 dated 26-8 1392 A.H. Also: Ministry of Interior, Murshid al-Ijrā'āt al-Jinā'iyyah, p. 246.

[87] Resolution of the Superior Judicial Committee (qarār al-hay'ah al-qaḍā'iyyah al-ʿulyā) No. 88 dated 29-3-1396 A.H., sanctioned by royal decree No. 9264\M dated 18-4-1396 A.H.

[88] al-Najdī, Ḥāshiyat al-Rawḍ al-Murbiʿ, vol. 7, p. 202. Also: Ibn Qudāmah, al-Mughnī, vol. 7, p. 690. al-Ghāmidī, 'Uqūbat al-Iʿdām, p. 259.

[89] Resolution of the Ministry of Interior, No. 2\S\6302 dated 26-8 1391 AH. Also: Ministry of Interior, Murshid al-Ijrā'āt al-Jinā'iyyah, p. 246.

[90] Qur'ān, 24 verse 2.

[91] Article two from the Resolution of the Superior Judicial Committee No. 153 dated 25-8-1397 A.H.

[92] al-Hewesh, "Shari'ah Penalties and Ways of their Implementation in the Kingdom of Saudi Arabia" (In: The Effect of Islamic Legislation) p. 377.

[93] Resolution of the Superior Judicial Committee No. 82 dated 14-3-1392 AH., sanctioned by royal decree No. 7192\M dated 25-2-1393 A.H.

[94] Articles 3, 4, 5, and 7, from the Resolution of the Superior Judicial Committee No. 153 dated 25-8-1397 AH.

[95] Hallam, clifford. "Execution Day in Riyadh" Commentary, 1986, vol. 81, pp. 39, 44, and 45.

[96] Mishan, E. J. "The Lingering Debate on Capital Punishment", Encounter, London, 1988, vol. 70, p. 67.

[97] Souryal, "The rule of Shari'ah Law in detering Criminalty in the Kingdom of Saudi Arabia", International Journal of Comparative Applied Criminal Justice, 1988, vol. 12, p. 18.

[98] Camal, Taymour. "The Principle of Legality and its Application" (in: Bassioni, The Islamic Criminal Justice System), p. 164.

[99] Forte, Divid. "Islamic Law and Crime of Theft", Cleveland State Law Review, 1985, vol. 34, pp. 47-51.

[100] al-Najdī, Ḥāshiyat al-Rawḍ al-Murbi', vol. 7, p. 199. Also: Ibn Qudāmah, al-Mughnī, vol. 7, pp. 731-732. Alfi, Ahmad. "Punishment in Islamic Criminal Law" (in: Bassioni, The Islamic Criminal Justice System), p. 243.

[101] Muslim, Sahih Muslim, (English Translation) vol. 3, p. 916. Also: Ibn Qudāmah, al-Mughnī, vol. 8, pp. 171-172.

[102] Ibn Mājah, muḥammad b. Yazīd al-Qazwīnī. Sunn Ibn Mājah, (Maṭba'at `Īsā al-Ḥalabī, 1372 A.H.), vol. 2, p. 899.

[103] al-Bayhaqī, al-Sunn al-Kubrā, vol. 8, p. 220. Also: Ibn Qudāmah, al-Mughnī, vol. 8, p. 171. and al-Ghāmidī, 'Uqūbat al-I'dām, p. 534.

[104] Qur'ān, 2 verse 232. Also,: Qur'ān, 46 verse 2.

[105] Ibn Duyan, Manar al-Sabil, vol. 2, pp. 24-25.

[106] Qur'ān, 17 verse 33.

[107] al-Sayyd Sābiq, Fiqh al-Sunnah, (Dār al-Fikr, Bairot, ed. 4, 1983) vol. 3, p. 353. Also: Jād, al-`Afū `An al-`Uqūbah, p. 32.

[108] Ḥasanīn, Jarā'im al-Qatl, p. 57. Also: Ibn Duyan, Manar al-Sabil, vol. 2, p. 20.

[109] Ibn Qudāmah, al-Mughnī, vol. 7, p. 791-792. Bayt al-Māl will be descussed in the following section.

[110] Resolution of the Superior Judicial Committee No. 88 dated 29-3-1396 A.H., sanctioned by royal decree No. 9264\M dated 18-4-1396 A.H.

[111] See: "Ṣaḥīfat al-Riyadh", No. 9609, on 10-5-1415 A.H.

[112] Mackey, The Saudis inside the Desert Kingdom, p. 270.

[113] See: "Ṣaḥīfat al-Riyadh", No. 9620, on 21-5-1415 A.H.

SECTION II: QUASI-MURDER (al-Qatl shibh al-'Amd) AND KILLING BY MISTAKE (Qatl al-Khatā').

Part 1: General Information.

Definition.

Quasi-Murder in Islamic criminal law entails killing with an instrument not recognised as a lethal weapon, and the act does not amount to murder.[1] The definition given to this category by Aḥmad b. Ḥanbal indicates that al-qatl shibh al-'amd is: Killing by an object that does not usually kill, such as a whip, a light stick or a small stone. For example, if the criminal illegally strikes another person on the chest with his clenched fist, or hits him in a vital organ, and the person dies thereby, according to al-Madhhab al-Ḥanbalī, this is considered to be a quasi-murder.[2]

Ibn Qudāmah and al-Hajjāwī also describe al-qatl shibh al-'amd as: A homicide committed with a non-lethal instrument.[3] But Ibn Qudāmah adds: The criminal in such cases is assumed to have intended the illegal act but not to have sought to kill the victim.[4]

The difference between al-qatl shibh al-'amd and (qatl al-'amd), therefore, lies in either the instrument or the means used by the criminal to kill his victim or the intention of the doer. For instance, If A intentionally attacks B with a non-lethal weapon and B dies thereby, this will not be considered as a murder as long as there is no reliable evidence to prove the existence of the desire to kill. Accordingly, 'Awdah says: "The desire of consequence is one of the main distinguishing marks between murder and quasi-murder."[5]

On the other hand, qatl al-khatā' is an act that inadvertently results in death. There may be error in the act or in the intention.[6] The difference between qatl al-khatā' and al-qatl shibh al-'amd lies in the legality of the committed act; e.g., with reference to legal usage in Saudi Arabia, al-qatl shibh al-'amd occurs when the accused intentionally commits a certain wrongful act not amounting to murder. For example,

If the criminal attacks his victim by hitting or slapping him in a non-vital part of the body without intending to kill him, but the attacked person dies thereby, the crime is considered as al-qatl shibh al-'amd. On the other hand, qatl al-khatā' is where the accused commits a lawful act and inadvertently kills another person, e.g., striking a person with a door while he is opening it, and causing a fatal injury.[7]

The defence of mistake is determined in the Qur'ān. For example: Allah says: **"But there is no blame on you if you make a mistake therein. (what counts is) The intention of your hearts."**[8]

It is also stated in the Qur'ān: **"Our lord ! Condemn us not if we forget or fall into error."**[9]

In accordance with this principle, the Prophet says: "My community will be pardoned for error and forgetfulness."[10] Thus, mistake is considered as a defence, since the criminal does not have the mens rea which the law requires for the crime with which he is charged. Finally, in Islamic law, although the mistake is excusable, compensation must still be paid to the victim's heirs for their loss unless they forgo it.[11]

Division of qatl al-Khatā'.

Killing by mistake in Islamic criminal law falls into various categories:

First: Error in the act:

This category occurs, for example, when a person intends a particular act as part of his normal activity, but the outcome of the act not as intended, as where, a worker throws a piece of wood from a house under instruction and erroneously kills someone else.[12] The same applies nowadays in Saudi Arabia, for instance, when a driver runs over a pedestrian while he is crossing the main road or the motor way illegally.[13] By way of illustration, it is noteworthy to mention the following case.

Riyadh, in 1414 A.H. where M.N. was killed while he was crossing a main road not at a pedestrian crossing. The driver was referred to the general court. Later, when the Judge examined the incident report presented by the traffic police, he declared (according to the judgement document No. 522 dated 14-3-1413 AH.) that the

killing was involuntary and the driver was liable to the specific penalties of qatl al-khatā'.[14]

Second: Error in intention:

Error in intention is where the mistake occurs not in the act, but with respect to the intention, as when a individual shoot at an object which he believes to be an animal but in fact turns out to be a human being.[15]

Third: Unconscious act

Qatl al-khatā' has been extended to encompass killing resulting from unconscious acts, for instance, where a person rolls over or walks in his sleep upon another person who dies thereby.[16]

Fourth: killing by intermediate cause (al-qatl bi al-tasabbub):

Homicide by intermediate cause is where, for instance, a person digs a well, and another passing by falls into it and dies.[17] The same applies if a person leaves his animal on the public road, and then the animal causes harm to another person, for instance, by hitting out with its feet. The owner in such a case is held responsible, because leaving the animal on a public road is prohibited.[18] The practice in Saudi Arabia when concerning animals which are left in the area near the main road outside cities, is that if an animal crosses the motor way and causes a crash, the owner is considers to be responsible for any harm to others, provided that the animal was left during the night at dark and the crash was also during this time.[19] To illustrate:

In Sudayr (a city in Saudi Arabia.), a vehicle (Make G.M.C.) ran into a camel while it was crossing the motor way at night. Two persons were killed. According to the judgement issued on 5-9-1403 A.H. and recorded in al-şakk al-Shar'ī No: 5221, the owner of the camel was held responsible to pay the fixed fine for al-qatl bi al-tasabbub, i.e. the fixed blood-money for killing by mistake.

The person who uses an animal for transport or is otherwise in charge of it, may also be criminally responsible for homicide arising from the acts of the animal, which may occur as the result of a mistake or neglect. In this context Bahnasi states: " The rider of an animal is responsible for all that it treads on and all that it injures on the

public road. But if he is riding on his own land when the injury occurs, he is not liable. if he rides on land owned by another with the owner's permission, then too he is not liable. But if he does not have the owners permission, he is liable".[20]

According to the legal practice in Saudi Arabia, if a person illegally parks his car, and another car runs into it, he will be responsible for any damage occurring.

Concerning responsibility for the act of another person, an individual cannot be held liable for a crime he has not committed since punishment is personal. However, an individual's error or negligence may be a cause for holding him responsible for another's criminal act. The owner of a construction company, for example, is responsible for the safety of his employees. This is equally true of the owner of a car who allows someone without a licence to drive his car unsupervised. Similarly, the owner of a building may be responsible if he interferes in the work or employs unqualified and untrained personnel.[21]

The essential elements of al-qatl shibh al-'amd and qatl al-khatā'.

Jurists unanimously agree that there are specific essential elements for each crime in Islamic criminal law. Concerning quasi-murder and killing by mistake, there are various essential elements which have been settled (by those jurists) in order to establish the difference between quasi-murder and killing by mistake. These essential elements are included in the following points:

Firstly: al-qatl shibh al-'amd:

There are four fundamental elements for quasi-murder: The first concerns the direct unlawful aggression which caused the death of the victim. It is provided here that the criminal did not use a lethal weapon in, e.g., slapping or hitting a non-vital organ. The second is that the criminal must intentionally commit the act (aggression) but not seek the result i.e., the death of the victim. The third, is a clear connection between the act committed and the death. Fourth, the victim must be a live human being at the time when the crime was committed.[22]

Secondly: qatl al-khatā':

There are also four basic elements for killing by mistake: The first, is the act which caused the death of the victim. The second, is the mistake itself. The third is the clear link between the act committed and the death. Fourth, the victim must also be a live human being at the time the crime is committed.[23]

It is noteworthy that the most crucial factor involved in the division of qatl al-khatā' is how to confirm that the criminal was really mistaken. In order to reach an equitable decision on this point, certain factors must be taken into consideration at the court. For instance:

1- The judge must inquire thoroughly into the nature of the relationship between the offender and the victim, if any, in order to eliminate any suspicion of ill intent; there must be no previous hostility or even conflict of interest between them.

2- The scene where the crime was committed is also to be taken into account, e.g., is it an unfrequented or uninhabited site or not ? In addition to the police criminal report about the incident, it will help the judge (in some cases) to view the scene of the crime personally.[24]

The penalties for al-qatl shibh al-'amd and qatl al-khatā'.

Primary penalties.

1-Diyah.

Diyah for unintentional killing is blood-money payable by the person charged with the offence and by his relatives, to the victim's family, as a reconciliatory compensation in peaceful settlement. It is considered as a substitute penalty when the case involves murder where the criminal is to be sentenced by qiṣāṣ to death, and the heirs of the victim or some of them, forgo their right of qiṣāṣ against him and accept diyah.[25]

Diyah is also prescribed in Islamic law as a primary retribution against the guilty party, when the crime is classified as unintentional killing.[26] The Prophet says: "killing

with a rod or stick is not murder, but only quasi-murder, and the fine for it, is a hundred camels".[27] It is also stated in the Qur'ān:

"And whoever kills a believer by mistake, it is ordained that he should free a believing slave and pay blood- money to the deceased's family unless they remit it freely...".[28]

The payment of diyah in such cases, according to the Islamic law, is to be made by relatives of the criminal, because he committed it by mistake and against his free will. He is, therefore, entitled to the assistance of his family members. [29] According to al-Madhhab al-Ḥanbalī, the criminal may be responsible for at least one-third of the total amount of diyah, and the full payment or settlement is due within three years.[30]

Some jurists (e.g., Mālik) say: The criminal is responsible for paying the full amount of diyah from his own wealth.[31]

When the criminal is low income or poor his family or his kin assume collective responsibility for paying diyah. This rule is based on the principles of social solidarity and of lessening further hardship by providing compensation to the victim's family. [32]

In this context, Lippman states: "...Diyah is questioned in another regard since some contemporary jurists suggest that because of the weakening and even disintegration of family ties in modern times, it is proper to relieve the criminal's family of the payment. Other scholars continue to insist that financial penalties should pass to the criminal's heirs".[33]

2- Kaffārah.

Kaffārah means "atonement" or "purification".[34] According to the Islamic law, it is considered as a mercy for the criminal and as giving him an opportunity to purify himself from the sin he has committed. The difference between diyah and Kaffārah is, that diyah relates to private interest (al-ḥaqq al-khāṣṣ), while Kaffārah is imposed for the right of God (ḥaqq Allah).[35]

Jurists hold that the purpose of Kaffārah is to protect the offender against his feeling of guilt and to eradicate the offence. They also believe that Kaffārah is

applicable as a primary penalty for al-qatl shibh al-'amd and qatl al-khatā', and as an alternative penalty for qatl al-'amd if the heirs commute qiṣāṣ into diyah.[36]

Therefore, the criminal shall free a believing slave (as a Kaffārah), but if he cannot find a slave, he must fast two consecutive months instead of freeing a slave as an alternative penalty. If for medical reasons, the criminal is unable to fast, he must provide food for sixty poor people. 'Abd Allah says: "If the man who took life unintentionally has no means from which to free a believing slave he must still by an act of strict self-denial (fasting for two whole months running) show that he is cognisant of the grave nature of the deed he has done and is sincerely repentant".[37]

Kaffārah occurs in the Qur'ān as a penalty for a various sins. The Qur'ān prescribes a combination of two things as a penalty for unintentional homicide: diyah to be paid to the victim's family, unless they willingly remit it, and freeing a believing slave by the offender.[38] Allah says:

"And whoever kills a believer by mistake, it is ordained that he should free a believing slave and pay blood- money....To a people with whom ye have a treaty of mutual alliance, blood-money should be paid to his family, and a believing slave be freed. For those who find this beyond their means, (is prescribed) A fast for two months running: by way of repentance to Allah...".[39]

Justification of freeing a slave as a kaffārah in Islamic law.

It is known that Islamic law developed during a time when slavery was deeply rooted and commonly practised. It was not possible to abolish the system of slavery at once from society. So Islam implicitly and explicitly manifested that the system of slavery was inhuman and gradually began to eradicate it. Besides encouraging people to free their slaves and promising their salvation and emancipation from hell fire in the hereafter, Islam demanded that offenders who unintentionally kill another person should free a believing slave. Therefore, Islam endeavoured to eradicate the system of slavery. It was logical to impose a permanent system of penalty to be combined with diyah.[40]

It is worthy of notice that the systems of slavery and concubinage in Saudi Arabia were abolished during the time of king Faysal b. 'Abd al-'Azīz, in 1962.[41]

Complementary penalties.

The complementary penalties for al-qatl shibh al-'amd may be: al-ḥirmān min al-irth (deprivation of inheritance) and al-ḥirmān min al-waṣiyyah (exclusion from will). Muslim jurists unanimously agree that disinheritance and exclusion from will are considered as a complementary penalties for intentional killing (al-qatl al-'amd). Their opinions vary, however, concerning disinheritance and exclusion from will to be imposed as a complementary penalties for unintentional killing.[42] The application of such penalties in Saudi Arabia, is left to the discretion of the judge, depending on the circumstances surrounding each case.[43]

Part 2: System of Diyah for Killing in Saudi Arabia.

Historical Background.

In early Islamic law, diyah for homicide was fixed by one hundred camels by the Prophet as an inducement to a peaceful settlement. The basic monetary unit upon which the assessment of diyah is based is the camel, simply because it was common, available, and accessible to the individuals at that time. Before Islam, diyah for killing was only ten camels. This number increased to be one hundred camels during the process of ransoming 'Abd Allah b. 'Abd al-Muṭṭalib, the father of the Prophet. Later, at the beginning of Islam, this rule was adopted by the Prophet Muhammad without any modification. However, in late times, the Companions of the Prophet permitted diyah to be paid in two pecuniary items, gold and sliver, as an alternative to camels. [44]

Accordingly, 'Umar b. al-Khaṭṭāb established the amount of the diyah at 1,000 gold dinars, or 12,000 dirhams, or one hundred cows for people who owned cows, or 1,000 ewes for the owners of sheep, and one hundred garments for those who dealt in such garments or fabric.[45]

From the above, it seems that the payment of diyah was restricted on an occupational basis but in fact, there is no evidence in the Qur'ān or the Sunnah to indicate that the payment of diyah is varied on an occupational ground. It should be understood that 'Umar meant to facilitate the procedure of diyah payment rather than impose a certain monetary unit on certain sectors of the population. The option to pay diyah in whatever kind one chooses should remain open to everyone regardless of occupation.[46]

In the sixteenth century, the legal amount of diyah according to the Ottoman currency, was set at 40,000-60,000 akee. Later, it rose steadily until it amounted to 2,500 kurus or 7500 francs.[47]

Assessment of diyah in Saudi Arabia.

Criminal law in Saudi Arabia extends back to the early days of the Islamic state, dating back to the city-state of al-Madīnah al-Munawwarah during the time of Prophet Muhammad. Thus, the principles upon which diyah payment is based in Saudi Arabia are the same as those in the Sunnah which decrees that diyah for unintentional killing is one hundred camels or the equivalent. Some 'Ulamā' in Saudi Arabia prefer that the payment be made in camels. However, due to the contemporary scarcity of the required camels, an amount equivalent to one hundred camels is acceptable. Due to this fact, joint efforts have been made to establish a fixed amount of money for the diyah. However, because of numerous complications involved in the contemporary world economic system and the impact of world-wide inflation and deflation of the value of local currency, it has been impossible to maintain a fixed amount for diyah. Therefore, it was decided that the fixed amount of the diyah payment should be based on the current value of camels. The value of a camel in gold or silver varies from time to time.[48]

Due to this and to the gradual depreciation of the Saudi currency, the equivalent of the legal amount of diyah has risen in various stages, as follows:

1- In the eighteenth century, during the time of Imām 'Abd al-'Azīz b. Muḥammad al-Sa'ūd, the amount of diyah was set at 800 French riyals. Later, it rose to 4,000 riyāls.[49]

2- In 1955 (according to the fatwā of al-Shaykh Muḥammad b. Ibrahīm), the amount of diyah was set at 16,000 Saudi riyals for mistaken killing (qatl al-khatā'), and 18,000 Saudi riyals for the murder and quasi-murder.(qatl al-'amd and al-qatl shibh al-'amd).[50]

3- In 1970, it rose to 24,000 Saudi riyals for mistaken killing, and 27,000 Saudi riyals for murder and quasi-murder.[51]

4- In 1976, it rose again to 40,000 Saudi riyals for mistaken killing, and 45,000 Saudi riyals for murder and quasi-murder.[52]

5- In 1981, diyah was set at 100,000 Saudi riyals for mistaken killing, and 110,000 Saudi riyals for murder and quasi-murder.[53]

It is worthy of note that some writers mention that in 1987, the amount of the diyah was set at 120,000 Saudi riyals for unintentional homicide and 140,000 Saudi riyals for intentional killing.[54] In fact, there is no legal regulation which mentions such amounts. The amount of diyah applied nowadays is still the same as the amount fixed in 1981.[55]

According to legal practice in Saudi Arabia, the victim's heirs have the right to claim the fixed diyah at its value at the time of judgement. In other words, the value of diyah at the time of the crime is not considered at the time of judgement.[56] As far as diyah payment is considered, there is no discrimination pertaining to race, wealth or even nationalities. So, blood-money for a non-Saudi person has been equated with that of a Saudi person.

The principle of the fixity of the diyah for murder is qualified by the fact that the judge may issue a judgement for more than the government's fixed price, if that is the choice of the heirs.[57] He may also issue a judgement for less than the government's fixed price for unintentional killing in some specific circumstances which are left to the discretion of the judge.[58]

It is noteworthy that the criminal in the case of al-qatl shibh al-'amd, may be also subjected to a discretionary penalty (ta'zīr) on the ground of the public interest.[59] Thus, a killer in such cases shall have to pay diyah and in addition be liable to imprisonment.[60] For instance:

In 1411 A.H., in al-Dir'iyyah (a city located close to al-Riyadh), where a foreman A was supervising some workers and struck the worker M with a small piece of wood rendering him unconscious and exhausted by loss of blood. He died after three days at the hospital. Both the public prosecutor and the ambassador of the worker's country instituted legal proceedings against the foreman in the court. After examination, it appears that there was no hostility, or even a desire to kill. Thereupon, the case was reported as a quasi-murder. So the judge (as stated in judgement document No. 8925\3 dated 10-11-1414 A.H) announced: "In addition to quasi-murder penalties, the criminal is also to be imprisoned for a period of thirty months on the ground of the public interest.[61]

Diyah for a woman in Saudi Arabia.

The amount of diyah required for a woman is half the payment for a man in the case of unintentional killing .[62] This is based on the Qur'ān: **"Allah (thus) directs you. As regard your children's (inheritance): to the male, a portion equal to that of two females..."**[63]

Correspondingly, in 1401 A.H., the Supreme Judicial Council decided that the amount of diyah for the female is equivalent to half that for a male.[64]

"This is justified by the fact that in Islam, men are the economic foundation of society. They are the breadwinners of the family. They are the only ones responsible for earning the family living. Women carry no responsibility in this regard, even if they have their own income and are more wealthy than the men".[65]

Responsibility of Kin (al-'āqilah) and the government.

According to the legal system in Saudi Arabia, al-'āqilah is considered as the group which may stand two thirds of the payment of the diyah within three years of the unintentional killing of another person by one of its members, if they are able to do so.[66]

As mentioned previously, this rule is founded upon principles of social solidarity. It is considered that the present disintegration of family ties justifies relieving al-'āqilah from such responsibility. Accordingly, al-'āqilah in Saudi Arabia is, nowadays, not obliged to pay.

If the killer has no 'āqilah, he may be responsible for the payment of the whole diyah if he is able to do so, otherwise, the government may pay the diyah if the criminal proves his poverty.[67] In this respect Layish states: "The state assumes responsibility for the payment of blood-money where the 'aqilah, the mutual-liability group of agnatic relation, is unable to pay it to the heirs of the victim and in certain other circumstances. It might appear possible to bring the liability of the state into line with the Shari'ah through the mechanism of the bayt al-mal...".[68]

Responsibility of Bayt al-Māl.

Bayt al-māl means: "The house of property". In legal usage it means: The public treasury of a Muslim state, which the sovereign is not allowed to use for his personal expense, but only for the public interest.[69] For instance, it is stated in the Sunnah that 'Abd Allah b. Sahl was killed in Khaybar by an unknown person. The relatives of the victim came to the Prophet and informed him of the incident. The Prophet gave one hundred camels to the heirs from bayt al-māl.[70]

There are various sources of income for bayt al-māl, for example:

1- The legal tax raised upon money (zakāt), personal property and merchandise, which after deducting the expense of collecting it, should be expended in support of the needy.

2- Property for which there is no owner.

3- The produce of mines and of buried treasure.[71]

The circumstances in which the public treasury is responsible for paying diyah in Saudi Arabia are:

1- If the criminal has no ʿāqilah able to pay the diyah, and the criminal is poor.

2- If the killer is unknown and the victim is a Saudi Arabian person.

3- If the criminal is a government employee, the state as employer may be responsible to pay all or part of the diyah, if the liability arises in the performance of the employee's duties.[72]

On the other hand, the circumstances in which the Saudi Arabian public treasury is not responsible for paying the diyah are:

1- If the criminal is not a Saudi Arabian person.

2- If the crime was committed with intentional negligence, or recklessness, or if the crime was the result of an illegal act.[73]

3- If a corpse is found, but there is no evidence of suspicious circumstances and normal death therefore is pronounced.[74]

Finally, the public treasury is also considered to be an inheritor in the case where no heirs are available, or, for instance, when the victim has been involved in a fire or vehicle accident and cannot be identified.[75]

Abortion of the unborn child.

The abortion of an unborn child, whether intentionally or accidentally, is a crime in Islamic law.[76] There is authority in Islamic criminal law for the legalisation of abortion in extreme cases which may affect the survival of the mother. When a choice has to be made between saving either the mother or the fetus, the general principle of Islamic law is to follow the course of lesser harm, which in this case is to sacrifice the unborn child as the mother is the source and origin; she is also a fully developed human being whereas the unborn child does not yet enjoy full human rights and obligations.[77]

Accordingly, 'Ulamā' in Saudi Arabia agree that an exemption may be made in cases where failure to abort the baby would cause severe harm to the mother. As a rule, this must be confirmed by two consultant physicians.

Jurists agree that certain types of conduct may result in the abortion of the unborn child. This conduct may be physical or moral. In the past, the unborn child had to be separated from the mother in order to prove its existence and abortion, but nowadays, in Saudi Arabia medical developments can determine this fact, e.g., by ultrasound scans. Hence, to punish the agent of an illegal abortion, the link between it and the act of the accused must be clear.[78] The type of punishment imposed depends on the result of the act, which may fall into one of the following categories:

1- If the fetus separated from or miscarried by the mother is dead, the punishment should be blood-money. The blood fine for feticide, according to the majority of jurists, is one twentieth of the ordinary diyah (i.e. five camels or the equivalent). The diyah in the case of an embryo or fetus is called: arsh.

2- If the fetus is alive when separated or miscarried, then dies as a result of the act, the punishment imposed is the full diyah.

3- In cases where the fetus is separated from the mother as a result of an illegal act and remains alive, the agent of an illegal abortion may be subject to a ta'zīr penalty.[79]

An illustration of the above distinctions is the case where a person shoots, with intent to kill, a woman pregnant with twins. The woman gives birth to the twins, one of whom is still-born. The other is alive, but soon dies, and the mother also dies. The agent of an illegal abortion is required to pay arsh for the one who is was still-born, and the full diyah, for quasi-murder, for the one who is a live birth but dies shortly after words. As for the mother, the agent may be punished with death if the woman's heirs demand it or he may pay the diyah.[80]

[1] Lippman, Islamic Criminal Law and Procedure, p. 51.

[2] al-Shawkānī, Nayl al-`Awṭār, vol. 7, pp. 23-24.

[3] Ibn Qudāmah, al-Mughnī, vol. 7, p. 650. Also: al-Najdī. Ḥāshiyat al-Rawḍ al-Murbi`, vol. 7, p. 175. al-Hajjāwī al-Iqnā' li Ṭālib al -Intifā`, vol. 4, p. 164.

[4] Ibn Qudāmah, al-Mughnī, vol. 7, p. 651.

[5] `Awdah, al-Tashrī` al-Jinā'ī fi al-Islām, vol. 2, p. 83.

[6] Lippman, Islamic Criminal Law and Procedure, p. 51.

[7] `Abd al-Majīd, al-Tashrī` al-Jinā'ī, pp. 33-34.

[8] Qur'ān, 33 verse 5.

[9] Qur'ān, 2 verse 286.

[10] al-Shawkānī, Nayl al-'Awṭār, vol. 7, p. 22.

[11] al-Naṣāfī, `Abd Allah Aḥmad. Kashshāf al-Asrār fi Sharḥ al-Manār, (1886) vol. 2, p. 99.

[12] al-jindī, Fikrat al-`Uqūbāt al-Taba`iyyah, p. 65.

[13] Ministry of Interior, Murshid al-Ijrā'āt al-Jinā'iyyah, p. 45.

[14] Personal interview with al-qāḍī A. S. in 1414 A.H.

[15] al-jindī, Fikrat al-`Uqūbāt al-Taba`iyyah, p. 65.

[16] `Abd al-Majīd, al-Tashrī` al-Jinā'ī, pp. 33-34. Also: Lippman, Islamic Criminal Law and Procedure, p. 51.

[17] Hughes, Dictionary of Islam, p. 421. Also: `Abd al-Majīd, al-Tashrī` al-Jinā'ī, pp. 33-34.

[18] Bahnasi, Ahmad. "Criminal Responsibility in Islamic Law" (In: Bassiouni, The Islamic Criminal Justice System), p. 175.

[19] Ministry of Interior, Murshid al-Ijrā'āt al-Jinā'iyyah, p. 49.

[20] Bahnasi, Ahmad. "Criminal Responsibility in Islamic Law" (In: Bassiouni, The Islamic Criminal Justice System), p. 175.

[21] Id.

[22] al-Qaṭṭān, al-Tashrī' al-Jinā'ī al-Islāmī, pp. 33-34.

[23] Id, p. 41.

[24] Ibn Qudāmah, al-Mughnī, vol. 7, p. 764. Also: El-Sheikh, The Application of Islamic Penal Law, p. 153.

[25] Ibn Qudāmah, al-Mughnī, vol. 7, p. 765. Also: al-Najdī, Ḥāshiyat al-Rawḍ al-Murbi', vol. 7, p. 284.al-Sayyd Sābiq, Fiqh al-Sunnah, vol. 2, p. 465.

[26] Ibn Qudāmah, al-Mughnī, vol. 7, pp. 766-767. Also: El-Sheikh, The Application of Islamic Penal Law, p. 168.

[27] Ibn Qudāmah, al-Mughnī, vol. 7, pp. 767-768. Also: al-Shawkānī, Nayl al- Awṭār, vol. 7, P. 167.

[28] Qur'ān, 4 verse 92.

[29] Ibn Qudāmah, al-Mughnī, vol. 7, p. 491. Also: al-Najdī, Ḥāshiyat al-Rawḍ al-Murbi', vol. 7, p. 280. El-Sheikh, The Application of Islamic Penal Law, p. 170.

[30] Ibn Qudāmah, al-Mughnī, vol. 7, p. 491. Also: al-Najdī, Ḥāshiyat al-Rawḍ al-Murbi', vol. 7, pp. 286-287.al-Qaṭṭan, al-Tashrī' al-Jinā'ī al-Islāmī, p. 35.

[31] al-Kāsānī, Badā'i' al-Ṣanā'i', vol. 7, p. 255. Also: Ibn Qudāmah, al-Mughnī, vol. 7, p. 767. al-Najdī, Ḥāshiyat al-Rawḍ al-Murbi', vol. 7, p. 286. Hasanīn, Jarā'im al-Qatl, p. 112.

[32] Alfi, Ahmad. "Punishment in Islamic Criminal Law" (in: Bassioni, The Islamic Criminal Justice System), p. 230.

[33] Lippman, Islamic Criminal Law and Procedure, p. 81.

[34] al-Rāzī, Mukhtār al-Ṣiḥāḥ, p. 574.

[35] Ibn Qudāmah, al-Mughnī, vol. 8, p. 92. Also: al-Najdī, Ḥāshiyat al-Rawḍ al-Murbi', vol. 7, p. 288-290. Qarā'ah, 'Alī. al-'Uqūbat al-Shar'iyah, (Dār Miṣr li al-Ṭibā'ah, Cairo) p. 378. Nawāwī, 'Abd al-khāliq. al-Tashrī' al-Jinā'ī fi al-Sharī'ah al-Islāmiyyah, (al-Maktabah al-Miṣriyyah, Cairo) p. 385. Abū Hassān, Ahkām al-Jarīmah wa al-'Uqūbah fi al-Sharī'ah al-Islâmiyyah, p.493. Hughes, Dictionary of Islam, p. 503.

[36] Ibn Qudāmah, al-Mughnī, vol. 8, p. 92. Also: al-Najdī, Ḥāshiyat al-Rawḍ al-Murbi', vol. 7, p. 288-290. Qarā'ah, 'Alī. al-'Uqūbat al-Shar'iyah, p. 378. Nawāwī, 'Abd al-khāliq. al-Tashrī' al-

Jinā'ī fi al-Sharī'ah al-Islāmiyyah, p. 385. al-Hewesh, "Shari'ah Penalties and Ways of their Implementation in the Kingdom of Saudi Arabia" (In: The Effect of Islamic Legislation) p. 382.

[37] 'Abd Allah, Translation of the Holy Qur'an, p. 243.

[38]Ibn Qudāmah, al-Mughnī, vol. 8, pp. 92-93. Also: al-Najdī, Ḥāshiyat al-Rawḍ al-Murbi', vol. 7, p. 288-290. El-Sheikh, The Application of Islamic Penal Law, p. 152.

[39] Qur'ān, 4 verse 94.

[40] El-Sheikh, The Application of Islamic Penal Law, p. 152. Also: al-Sayyd Sābiq, Fiqh al-Sunnah, vol. 2, p. 439.

[41] Layish, "Saudi Arabian Legal Reform", International Journal of Comparative Applied Criminal Justice, 1988, vol. 12, p. 382.

[42] al-Shirāzī, al-Muhadhab, vol. 2, p. 26. Also: al-kash'akī, Muḥammad 'Abd al-Rahīm. al-Mīrāth al-Muqāran, (ed. 1) p. 48. Qāsim, Yūsuf. al-Huqūq al-Muta'alliqah bi al-Mīrāth, (1404 A.H.) p. 87. Ibn al-Najīm, al-Baḥr al-Rā'iq Sharḥ Kanz al-Haqā'iq, (ed. 1) vol. 8, p. 449.

[43] Personal interview with al-qāḍī A. S. in 1414 A.H.

[44] El-Sheikh, The Application of Islamic Penal Law, p. 173.

[45] al-Sayyd Sābiq, Fiqh al-Sunnah, vol. 2, p. 440. Ibn Qudāmah, al-Mughnī, vol. 7, p. 759. Also: al-Najdī, Ḥāshiyat al-Rawḍ al-Murbi', vol. 7, p. 242.

[46] El-Sheikh, The Application of Islamic Penal Law, p. 175.

[47] Heyd, Uriel. Studies in Old Ottoman Criminal Law, (London and Oxford Press, 1973) p. 308.

[48] El-Sheikh, The Application of Islamic Penal Law, pp. 180-181.

[49] Hasanīn, Jarā'im al-Qatl, p. 79. Also: Lerrick, A and Mian, Q. J. Saudi Business and Labor Law, (Graham and Trotman, London, 1982) p. 80.

[50] Id.

[51] Resolution of the Supreme Judicial Council, No. 100 dated 6-11-1390 A.H. , sanctioned by royal decree No. 21347 dated 24-11-1390 A.H.

[52] Resolution of the Superior Judicial Committee No. 50 dated 25-8-1396 A.H., sanctioned by royal decree No. 4\4\2021 dated 18-10-1396 A.H.

[53] Resolution of the Supreme Judicial Council, No. 133 dated 3-9-1401 A.H.

[54] Richter, H. and More, J. R. "Court, Law, Justice, and Criminal Trials in Saudi Arabia" International Journal of Compartive and Applied Criminal Justice, 1987, vol. 11, p. 63. Also: Walker, J. k. "The Rights of the Accused in Saudi Criminal Procedure", Loyola of Los Angeles International and Comparative Law, 1993, vol. 5, part: 4, p. 881.

[55] Personal interview with al-qāḍī A. S. in 1414 A.H.

[56] Resolution of the Supreme Judicial Council, No. 65 dated 25-4-1397.

[57] Fatwā of the chief justice in Saudi Arabia, No. 2372 dated 21-6-1389 A.H., sanctioned by royal decree, No. 17016 dated 26-8-1389 A.H. Also: Ministry of Interior, Murshid al-Ijrā`āt al-Jinā`iyyah, p. 266.

[58] Resolution of the Council of Ministers, No. 734 dated 5-5-1396 A.H.

[59] Layish, "Saudi Arabia Legal Reform", International Journal of Comparative Applied Criminal Justice, 1988, vol. 12, p. 382.

[60] Royal decree, No. 17155 dated 17-7-1393 A.H. Also: Ministry of Interior, Murshid al-Ijrā`āt al-Jinā`iyyah, p. 267.

[61] Personal interview with al-qāḍī A. S. in 1414 A.H.

[62] al-Shawkānī, Nayl al-'Awṭār, vol. 7, pp. 224-227.

[63] Qur'ān, 4 verse 11.

[64] Resolution of the Supreme Judicial Council, No. 133 dated 3-9-1401 A.H.

[65] Naqati, The Theory of Crime and Criminal Responsibility, p. 62.

[66] Fatāwā of the chief justice in Saudi Arabia, frist: No. 692 dated 24-7-1380 A.H., second: No. 1025 dated 3-11-1380A.H., third: No. 829 dated on 3-8-1381A.H. Also: Resolution of the Supreme Judicial Council, No. 65 dated 25-4-1397A.H.

[67] Ḥasanīn, Jarā'im al-Qatl, p. 85.

[68] Layish, "Saudi Arabia Legal Reform", International Journal of Comparative Applied Criminal Justice, 1988, vol. 12, p. 282.

[69] Hughes, Dictionary of Islam, p. 35.

[70] Muslim, Sahih Muslim, (English Translation) vol. 3, pp. 891-892. Also: Kahn, The Translation of the Meaning of Sahih al-Bukhari, vol. 9, p. 25.

[71] Hughes, Dictionary of Islam, p. 35.

[72] Resolution of the Superior Judicial Committee No. 18 dated 6-1-1396 A.H., sanctioned by royal decree No. 4\Z\12752 dated 27-5-1397 A.H.

[73] Royal decree No. 3\SH\11112 dated 6-5-1396 A.H.

[74] Fatwā of the chief justice in Saudi Arabia, No.1124 dated 7-4-1378 A.H.

[75] Resolution of the superior judicial committee No. 79 dated 10-3-1393 AH., sanctioned by royal decree No. 8972 dated 10-5-1393 AH.

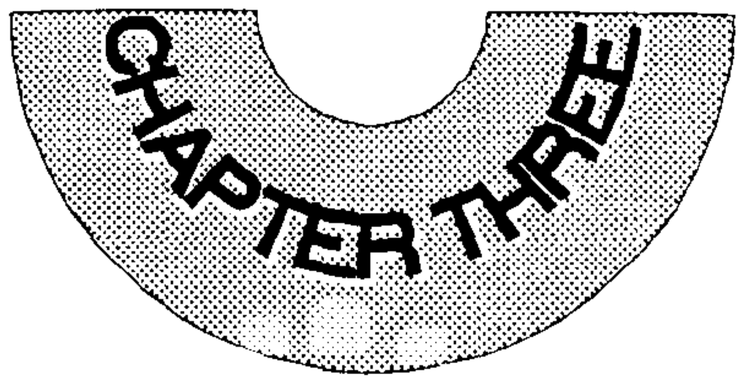
[76] 'Awdah, al-Tashrī' al-Jinā'ī fi al-Islām, vol. 1, p. 446.

[77] Ghanem, Isam. "The Response of Islamic Jurisprudence to Ectopic Pregnancies, Frozen Embryo Implantation and Euthanasia" Journal of Medicen Science and the Law, 1987, vol. 27, p.189.

[78] 'Awdah, al-Tashrī' al-Jinā'ī fi al-Islām, vol. 1, p. 446.

[79] Id. pp. 446-447.

[80] al-Hamad, Saud Ahamad. A Comparative of American and Islamic Criminal Homicide Laws, (University of Kansas, M.A., 1990) p. 184.



FORMS OF COMPLICITY IN CRIMES OF KILLING AND THE CIRCUMSTANCES AFFECTING CRIMINAL RESPONSIBILITY IN SAUDI ARABIA.

Introduction.

Murder can be committed by one person or by a group of people. Those people who participate in murder are considered to be accomplices in the crime. The forms of complicity in murder vary according to the different circumstances. In Islamic criminal law, there are two forms of complicity: al-ishtirāk al-mubāshir (direct complicity) and al-ishtirāk ghayr al-mubāshir (indirect complicity).

The degrees of responsibility for murder in Islamic criminal law also vary. For instance, diminished responsibility, which may reduce or commute liability and punishment may be claimed if the accused is a lunatic or a minor killer. In addition, extenuating circumstances may be put forward in cases involving self-defence or the defence of honour or money and may justify the killing.

These forms of complicity, diminished responsibility, and extenuating circumstances will be discussed in detail in the following sections of this chapter.

SECTION I: COMPLICITY IN CRIMES OF KILLING (al-Ishtirāk fi Jarīmt al-Qatl).

Part 1: Direct Complicity (al-ishtirāk al-mubāshir).

Direct Complicity occurs, for instance, when a group of people intentionally share in the actual attack that causes the death of the victim.[1] This kind of complicity, according to Islamic criminal law in Saudi Arabia, fall into two categories, as follows:

Premeditated direct complicity (al-ishtirāk al-mubāshir fi ḥālat al-tamālū').

Premeditated complicity occurs, for example, when a group of people conspire to kill someone else, and share in the physical act of the murder. Responsibility in such a case will be based on the mens rea (original intention) of the criminals in this combined attack, who will then be liable to an equal punishment.[2]

Muslim jurists unanimously agree that the murderer in the case where there is no complicity deserves the death penalty as a qiṣāṣ. However, their opinions vary concerning the case where there is a premeditated participation in murder. Some jurists (e.g., al-Zuhrī, Mu'ādh b. Jabal, and Ibn Sīrīn) hold that while a killer should be sentenced to death for intentional killing, a group of killers should not.[3] The other opinion, which is held by the majority, (e.g., Mālik, Shāfi'ī, Abū Ḥanīfah, and Ibn Ḥazm) is the opposite of this, i.e. that the accomplices of criminals in such a case are equally liable to capital punishment.[4]

Those jurists who believe that non of those involved directly in the murder should be beheaded, support their view with an interpretation of some Qur'ānic verses (e.g., 5\45 and 2\178) in which it is stated that a person should be sentenced to death for killing another person. Thus, they claim that the execution of only one person is required, not that of two or more.[5] They also claim that, as the law of qiṣāṣ is based on equality, it is not proper to kill more than one person as retribution for the killing of just one victim. Actually, it is easy to refute this claim by saying that qiṣāṣ is a punishment for a specific crime (i.e. the killing of a person) and, logically, a

punishment must be applied to all those involved in the crime for which it was prescribed, regardless of the number of people concerned.[6]

Practically, the Prophet's Companions agree that the group of people who shared in killing are responsible and thus, they will be subjected to the death penalty.[7] For instance: Sa'īd b. al-Musayyib reports that 'Umar b. al-Khaṭṭāb killed seven people who directly shared in killing a man in Ṣan'ā' and thereupon said: "If all the people in San'a' had assisted in the killing, I would have executed them all."[8] The same was also done by 'Alī b. Abī Ṭālib, when three men murdered another person.[9] Ibn 'Abbās also says: " If one hundred persons kill another person their punishment is the death penalty as qiṣāṣ."[10]

In fact, if the opinion of al-Zuhrī, Mu'ādh b. Jabal, and Ibn Sīrīn were accepted and applied, it would give occasion to anyone intending to kill someone else to seek one or more accomplices in order to escape the punishment of death.[11]

As the view held by the Ḥanbalī Madhhab is not clear since it incorporates both previous views,[12] the legal system in Saudi Arabia has adopted the majority opinion to be applied in such cases. To illustrate:

Makkah al-Mukarramah, in 1414 A.H., where A. and his wife K., conspired to kill S. During the trial, it was proven that they shared in this crime and were physically involved in the act, as they directly attacked the victim with a hammer and strangled him with a nylon rope until he died. Thereupon, the judges who heard the case in the General Court declared: "Their act is deserving of capital punishment as a qiṣāṣ, and all the accomplices are to be sentenced to death." This judgement was sanctioned by the royal decree (number 4\688\M on 17-4-1415 A.H) and therefore, the killers were beheaded on 2-5-1415 A.H., in Makkah al-Mukarramah.[13]

A similar case occurred in Riyadh, where a man killed another person, and according to the victim's wife's choice (which commuted the death penalty into blood-money), the criminal was not executed. As a result, the victim's son, called F, and his cousin called M, conspired together to kill the murderer in revenge. On several occasions, they tried to kill him but they could not. Accordingly, they

attempted to get into the killer's house in order to kill him but in fact, they killed two persons instead of the killer, the killer's son and grandson, with a submachine gun. Later, the criminals F and his cousin M. were arrested and referred to the General Court. The judge declared that they were liable to the death penalty. This judgement was approved by royal decree (number 4\523\M on 12-3-1415 A.H.) and accordingly, F and M were beheaded on 4-4-1415 AH.[14]

To sum up, the opinion accepted by the majority of modern Islamic writers holds that a group of people who directly share in a killing are liable to the same punishment. The judgement in such a case is not only based on the direct commission of the act but the mens rea of the accomplices is also considered during the trial. Thus, when a group of people act in unison to kill another person and take a physical part in the actual commission of the crime, they are equally responsible and, therefore, subject to the death penalty, regardless of what they each actually do at the place of the crime, in so far as the mens rea was to kill. In a such complicity, if one of the accomplices cuts off the hand of the victim and the second person only hits him but the third accomplice shoots him with a gun, all of them are equally responsible for the death, as they participated with the explicit intention of killing the victim.[15]

Incidental direct complicity (al-ishtirāk al-mubāshir fi ḥālat al-tawāfuq).

Incidental complicity occurs, for instance, where the complicity happens by accident not by plan or intention, as for instance, when A accidentally participates with others in a brawl that causes the death of D.[16] The complicity in this particular circumstance was not planned or prepared beforehand, and each accomplice did whatever he felt and thought necessary.[17]

This is also the practice in Saudi Arabia. For example, C sees A kicking B and thereupon, without being in any way invited to do so by A joins in himself and attacks B, cutting off B's finger, while A stabs B in such a way as to cause B's death. Although the result of their combined activity will be considered, each accomplice will be responsible only for his actus reus, and his involvement in the crime.[18]

Part 2: Indirect Complicity (al-ishtirāk ghayr al-mubāshir):

This category occurs, for instance, where the killing is planned by more than one person but not all those involved are physically present at the place of the crime.[19] According to Islamic criminal law, there may be two degrees of criminal responsibility in such complicity. These degrees are as follows:

Full responsibility on the part of the indirect accomplice in the killing (al-mas'ūliyyah al-tāmmah).

An indirect or casual accomplice (al-sharīk al-mutasabbib), according to Islamic criminal law, may be held fully liable although he has taken no physical part at all in the actual commission of the crime.[20] For example, if A hands a gun to a simpleton, or an infant, or any person who is mentally deficient, to kill someone else, and he does so; according to the Ḥanbalī, Mālikī and Shāfi'ī Madhhabs, the man who hands over the gun will be treated as a direct accomplice although he does not commit any direct act in the essential part of the crime. The justification for this which is given by these jurists is that the person who directly kills in these circumstances, is considered as a person who cannot foresee the consequence of his act. Unable to make a choice in this situation, he serves as a mere tool in the hand of the person who orders him to kill.[21]

A person who has caused some innocent person to kill should be held fully responsible for the crime. For example, when a man secretly adds poison to food or drink which he knows or expects another person will present to someone else. In such a case the person who hands on the poisoned food or drink will not be implicated as long as he was completely unaware of the poison.[22]

Partial responsibility on the part of the indirect accomplice in the killing (al-mas'ūliyyah ghayr al-tāmmah or al-nāqiṣah).

This degree of responsibility occurs, for instance, where a group of people participate in order to kill another person, and some of them are physically involved at the scene of the crime while others are not. In other words, when a person procures or incites another person to commit a murder directly but does not take any physical part in the actual commission of the crime.[23] The distinction between this and the previous category concerns the person who directly commits the crime. Thus, if the latter is an infant or an insane person, the inciter or the instigator only will be held fully responsible. On the other hand, if the latter is an adult and sane person who has full knowledge of the illegality of his act, both accomplices will be held responsible,[24] but the direct killer will be held fully liable and his act will attract the death penalty, while the instigator or the abettor who does not commit any physical act at the scene will be liable to face a discretionary penalty (ta'zīr) consistent with his act, depending on the circumstances. The ta'zīr penalty here may be capital punishment or less.[25]

From the foregoing observations, it is clear that the law relating to such situations involves cases of accessories, incitement and conspiracy. The indirect accomplice in such a situation is a person who agrees with, or incites, or abets another person to kill. In other words, the distinction between the direct and the indirect accomplice is based on the fact that first was physically involved at the scene, while the other shared only in the planning of the crime, either by incitation or instigation, or through co-operation, but did not participate directly in the commission of the physical act of murder.

Based on the degrees of responsibility, 'Awdah states that there are three categories of indirect complicity. These categories are:

1- When the causation dominates the direct commission of the murder (taghallub al-sabab 'alā al-mubāsharah). This occurs in some cases where the direct commission is not wrongful but is, in fact, lawful. For example: in the case of an executioner fulfilling his function.[26] If false evidence is then intentionally given against an innocent

person in order to prove that he killed unlawfully, and he has consequently being executed, the persons who gave this false evidence are fully liable therein.[27]

2- When the direct commission of the murder dominates the causation (taghallub al-mubāsharah 'alā al-sabab). As mentioned above, this happens in some cases where, for example, A agrees with, or incites, or abets C to kill someone else, but A does not take any physical part in the actual commission of the crime. In such a case, the act of C is deserving of capital punishment while A is liable to face a ta'zīr penalty .

3- When the causation and the direct complicity are equal (al-tasāwī bayn al-mubāsharah wa al-sabab). This category occurs in cases of coercion, for example, when a person holding a gun to another person's head compels that person to kill by threatening him with his own death if he fails to comply.[28] According to Mālik and some jurists of Shāfi'ī Madhhab, both the compelled and the compellor are liable to the death penalty.[29] Later on, this category will be discussed in detail.

[1] Ibn Qudāmah, al-Mughnī, vol. 7, p. 671. Also: al-Najdī, Ḥāshiyat al-Rawḍ al-Murbi', vol. 7, p. 179. 'Abd al-Majīd, al-Tashrī' al-Jinā'ī, p. 78. 'Awdah, al-Tashrī' al-Jinā'ī fi al-Islām, vol. 1, p.357. Abū Zahrah, al-Jarīmah wa al-'Uqūbah, p. 401. al-Zaynī, Maḥmūd Muḥammad. Naẓariyyat al-Ishtirāk fi al-jarīmah fi al-Sharī'ah al-Islāmiyyah wa al-Qānūn, (Mu'assasat al-Thaqāfah al-Jāmi'iyyah, Cairo, 1993) p. 75.

[2] Ibn Qudāmah, al-Mughnī, vol. 7, p. 671. Also: al-Najdī, Ḥāshiyat al-Rawḍ al-Murbi', vol. 7, p. 180. al-Kāsānī, Badā'i' al-Sanā'i', vol. 7, p. 278. al-Shīrāzī, al-Muhadhab, vol. 2, p. 174.

[3] Ibn Qudāmah, al-Mughnī, vol. 7, p. 671. Also: Ibn Qudāmah, 'Abd al-Raḥmān b. Abī 'Umar Muḥammad b. Aḥmad. al-Sharḥ al-Kabīr 'alā al-Mughnī, (Maṭba'at al-Manār, Cairo, 1348 AH.), vol. 5, p. 157. al-Najdī, Ḥashiyat al-Rawḍ al-Murbi', vol. 7, p. 179.

[4] al-Shīrāzī, al-Muhadhab, vol. 2, p. 174. Also: al-Ṣan'ānī, Muḥammad b. Ismā'īl. Subul al-Salām Sharḥ Bulūgh al-Marām, (al-Maktabah al-Tijāriyyah, Damasks, ed: 4, 1960) vol. 3, p. 243. Ibn Qudāmah, al-Mughnī, vol. 7, p. 671. Ibn Ḥajar al-'Asqalānī, Abū al-Faḍl Aḥmad b. 'Alī. Fatḥ al-Bārī Sharḥ Saḥīḥ al-Bukhārī, (al-Ṭab'ah al-Salafiyyah, Egypt), vol. 12, p. 227. Ibn Ḥazm, al-Muḥallā, vol. 10, p. 511.

[5] El-Ewa, Punishment in Islamic Law, p. 78. Also: al-Ghāmidī, 'Uqūbat al-I'dām, p. 231.

[6] al-Zaynī, Naẓariyyat al-Ishtirāk fi al-Jarīmah, pp. 89-90. Also: El-Ewa, Punishment in Islamic Law, p. 78. al-'Awā, Fi Usūl al-Nizām al-Jinā'ī, (Dār al-Ma'ārif, Cairo) p. 229. 'Akkāz, Fikrī Aḥmad. Falsafat al-'Uqūbah fi al-Sharī'ah al-Islāmiyyah, ('Ukāẓ li al-Nashir, Riyadh, 1982) p. 228.

[7] al-Ghāmidī, 'Uqūbat al-I'dām, pp. 232-233. Also: Ibn Duyan, Manar al-Sabil, vol. 2, p. 5.

[8] Ibn Anas, Mālik. al-Muwaṭṭā', (Riwāyat Muḥammad b. al-Ḥasan al-Shaybanī, al-Maktabah al-'Ilmiyyah, Beirut, 1979) vol. 2, p. 871. Also: al-Ṣan'ānī, Subul al-Salām, vol. 3, p. 242. and al-Zaynī, Naẓariyyat al-Ishtirāk fi al-jarīmah, pp. 74.

[9] Ibn Qudāmah, al-Mughnī, vol. 7, p. 672.

[10] al-Ghāmidī, 'Uqūbat al-I'dām, p. 234.

[11] Shaltūt, Muḥammad. al-Islām ʿAqīdah wa Sharīʿah, (Dār al-Qalam, Cairo, ed: 3, 1966) p. 61. Also: al-Ghāmidī, ʿUqūbat al-Iʿdām, p. 234. El-Ewa, Punishment in Islamic Law, p. 78.

[12] al-Qurṭubī, al-Jāmiʿ li Aḥkām al-Qurʾān, vol. 2, p. 258. Also: El-Ewa, Punishment in Islamic Law, p. 78. Ibn Ḥajar, Fath al-Bārī, vol. 12, p. 227. Ibn Ḥazm, al-Muḥallā, vol. 10, p. 227.

[13] See: "Sahīfat al-Riyadh", No. 9602, on 3-5-1415 A.H.

[14]See: "Sahīfat al-Riyadh", No. 9547, on 5-4-1415 A.H.

[15] Ibn Qudāmah, al-Sharḥ al-Kabīr, vol. 4, p. 217. Also: al-Ramlī, Muḥammad b. Aḥmad. Nihāyat al-Muḥtāj ila Sharḥ al-Minhāj, (Maṭba'at al-Ḥalabī, Cairo, 1358 A.H.) vol. 7, p. 263. ʿAbd al-Majīd, al-Tashrīʿ al-Jināʾī, p. 80. al-Zaynī, Naẓariyyat al-Ishtirāk fi al-jarīmah, p. 99.

[16] ʿAwdah, al-Tashrīʿ al-Jināʾī fi al-Islām, vol. 1, p. 360. Also: ʿAbd al-Majīd, al-Tashrīʿ al-Jināʾī, p. 79.

[17] al-Zaynī, Naẓariyyat al-Ishtirāk fi al-jarīmah, p. 109.

[18] Personal interview with al-qāḍī A. S. in 1414 A.H.

[19] al-Zaynī, Naẓariyyat al-Ishtirāk fi al-jarīmah, p. 112.

[20]ʿAwdah, al-Tashrīʿ al-Jināʾī fi al-Islām, vol. 1, p. 363.

[21] Shaheed ʿOudah, Criminal Law in Islam, vol. 2, p. 59. Also: al-Zaynī, Naẓariyyat al-Ishtirāk fi al-jarīmah, p. 139.

[22] al-Ramlī, Nihāyat al-Muḥtāj, vol. 7, p. 370. Also: al-Shīrāzī, al-Muhadhab, vol. 2, p. 186. Ibn Najīm, al-Baḥr al-Rāʾiq, (1320 A.H.) vol. 8, p. 310.

[23] ʿAwdah, al-Tashrīʿ al-Jināʾī fi al-Islām, vol. 1, p. 365. Also: al-Zaynī, Naẓariyyat al-Ishtirāk fi al-jarīmah, p. 112. ʿAbd al-Majīd, al-Tashrīʿ al-Jināʾī, p. 81.

[24] al-Zaynī, Naẓariyyat al-Ishtirāk fi al-jarīmah, p. 123.

[25] al-Kāsānī, Badāʾiʿ al-Ṣanāʾiʿ, vol. 7, p. 239. Also: al-Shawkānī, Nayl al-ʾAwṭār, vol. 7, P. 169. al-Zaynī, Naẓariyyat al-Ishtirāk fi al-jarīmah, p. 123.

[26] ʿAwdah, al-Tashrīʿ al-Jināʾī fi al-Islām, vol. 1, p. 367.

[27] al-Zaynī, Naẓariyyat al-Ishtirāk fi al-jarīmah, p. 125. al-Anṣārī, Abū Yḥya Zakariyya. Asnā al-Maṭālib Sharḥ Rawḍat al-Ṭālib, (ed: 1) vol. 4, p. 6.

[28] `Awdah, al-Tashrī` al-Jinā`ī fi al-Islām, vol. 1, pp. 367-370. Also: Shaheed `Oudah, Criminal Law in Islam, vol. 2, pp. 66-68. al-Zaynī, Naẓariyyat al-Ishtirāk fi al-jarīmah, p. 126.

[29] Bahnasi, Ahmad. "Criminal Responsibility in Islamic Law" (In: Bassiouni, The Islamic Criminal Justice System), p. 191.

SECTION II: DIMINISHED RESPONSIBILITY.

Introduction.

A person who wilfully kills another person is liable to be punished by the death penalty as a qiṣāṣ, as far as he is an adult and sane person at the time of crime's commission. This means that the murderer must be a competent person in order to be beheaded. The competency of the criminal means: the full possession of one's mental ability or faculties.[1]

Thus, a person who lacks such competency, or any necessary elements for being liable for criminal responsibility (such as, consciousness, or intention), may raise some defences which allow the judge to withhold capital punishment on the basis that the criminal lacks the capacity to be held legally responsible.

In Islamic criminal law, a person who, for instance, cannot discriminate between good and evil and cannot understand the nature of the act or even the outcome of his action, may not be held fully liable for the killing. According to these observations and the legal system in Saudi Arabia, there are some defences which lessen the responsibility and, therefore, commute the punishment.

Diminished responsibility is attributed to the personality of the criminal on the basis of his inability to choose, or discriminate between right and wrong, such as, insanity, unconsciousness, and infancy.

For the purpose of this section, these defences that vacate the infliction of qiṣāṣ, will be discussed in detail in the following parts.

Part 1: Insanity (junūn).

Definition.

In legal usage, junūn is defined as "A defect of reason from disease of the mind, which results in the inability to choose or to understand the difference between good and evil".[2] In other words, junūn means: A derangement which affects one's power to discriminate between what is good and what is bad, or in the ability to recognise such a choice.[3]

In the terms of Islamic criminal law, this comprises lunacy and idiocy which are considered as defects of reason from disease of the mind whether it is congenital (junūn fiṭrī) or accidental insanity (junūn muktasab).[4]

From the definition cited above, it can be understood that the defence of insanity in Islamic law demands a defect of reason on the part of the criminal resulting from disease of the mind. It also demands that the criminal does not know the difference between good and evil.

Categories of insanity (anwā' al-junūn).

Insanity according to Islamic law fall into two degrees as follows:

First: Prolonged insanity (al-junūn al-kāmil).

Prolonged insanity is considered as a disease which may totally and permanently block or damage a person's mental capacity to recognise and understand the difference between right and wrong as, for example, when a person does not understand that it is wrong to kill, or to harm another. Criminal responsibility in such cases is completely vacated.[5]

However, concerning crimes of killing, for which a person must be held fully responsible, if an insane person kills another person, the responsibility may not be completely vacated, because the defence of insanity in this particular case does not totally relieve an individual's responsibility. Thus, insanity will be an effective reason for withholding the death penalty (as a qiṣāṣ), but not for failing to compensate the victim's heirs for the harm they are suffering.[6]

Second: Sporadic insanity (al-junūn al- mutaqaṭṭi‘ or al-juz’ī).

Sporadic insanity occurs, for example, in some situations where insanity attacks a person only occasionally. Islamic criminal law also vacates the criminal's responsibility in cases of intermittent insanity, such as, when a person commits a criminal act during a temporary bout of insanity.[7] Thus, during the period in which the criminal is insane, responsibility is vacated, but if he commits a killing, the victim's family still has the right to claim the fixed diyah as blood compensation, on the grounds of private interest.[8]

This is the same in cases when a person lacks any knowledge of the nature and quality of his act, as when an individual kills another person during a period of unconsciousness. It is noteworthy that lack of knowledge of the illegality of the act is not considered as a defence. Thus, jurists suggest the criminal is fully responsible even if he does not know that his act is contrary to the law at the time of commission, as far as he understands the nature of the action and has the full capacity to be hold responsible.[9]

A person who commits a crime during a temporary bout of mental disease is also not to be held responsible if the disease totally affects his mind as in the cases of epilepsy.[10]

According to the Superior Judicial Committee resolution in Saudi Arabia (issued in 1392), insanity is considered as a defence reason which results in withholding of the death penalty.[11] This is based on the statement of the Prophet, which explains that the responsibility of an insane person shall be suspended until he recovers his sanity.[12]

The victim's family in such cases has the right to ask for the fixed diyah or remit the crime freely. The burden of payment in such circumstances will be on either the bayt al-māl in Saudi Arabia or ‘āqilah, and the insane criminal should be held in custody on the grounds of public interest.[13]

The status of insanity according to the time of its appearance or occurrence.

Jurists agree on the effect of insanity on criminal responsibility. Their opinion vary regarding insanity that occurs after the commission of a crime, for example, when a sane and competent person commits murder and after the commission becomes insane.[14] The Hanbalis and the Shafi'is agree that insanity prior to trial should not be considered as a reason for dismissing the case or suspending the trial. This is based on the grounds that the capability of the criminal is considered only at the time of the crime's commission.[15]

Abū Ḥanīfah and Mālik, on the other hand, hold an opposite opinion which indicates that the insanity in such case is considered as an efficient reason for suspending the trial until the accused's sanity returns. In view of the fact that the person must possess legal capacity at the time of the trial, this is the opinion accepted by the majority of modern writers in Islamic criminal law.[16]

Concerning insanity which occurs after the trial, jurists also disagree as to whether such insanity should cause the execution of capital punishment to be suspended. However, the majority view (held, for example, by Ḥanafī, Shāfi'ī, Mālikī) holds that insanity following the trial should not suspend the execution of the death penalty in cases when guilt is proven through witness. But in cases when guilt is proven by confession, the trial should be suspended due to the accused's insanity. This is justified by the fact that the convicted person, according to Islamic criminal law, has the right to retract his confession, insanity may prevent his doing so.[17]

Similarly, in Saudi Arabia, an accused's sanity during the period following the commission of the crime may become relevant to criminal law at two stages. These stages are:

1- Insanity before the trial (al-junūn qabl al-muḥākamah).

There are two stages where the accused's sanity may become relevant during the period following the commission of the crime and before the trial.

The first stage is when the accused has been committed to custody for trial. If, at this time, the police are satisfied by a report from at least two medical practitioners

that the accused is suffering from mental illness, and his condition is such that immediate admission to a mental hospital is necessary,[18] and it would not be practicable to bring him before a court, as the trial would be likely to have an injurious effect on his mental state, [19] he may be ordered to be detained in a hospital on grounds of public interest. This is subject to approval by the ministry of the interior.[20]

The second stage is when the accused is brought up for trial. At this time, the inability of the accused to understand the charge and the difference between pleas of guilty and not guilty, and his inability to challenge the judge, instruct counsel and follow the evidence so as to avert the prosecution, are considered as a reason to suspend the trial until recovery. This is provided that the guilt is not proven by two competent witnesses.[21]

2- Insanity after the trial (al-junūn ba'd al-muḥākamah):

At this stage, the judge will only consider the fact that the accused was sane at the time when the crime was committed. Thus, a person insane at this stage will be held fully liable regardless of whether the crime was proven by witness or the criminal's confession as far as the death penalty is considered. The reason for this is that the criminal has been found fit to plead his case, to instruct counsel and to understand the charge at the time of the trial. Accordingly, the criminal's insanity occurring after the judgement is not considered as a reason for preventing the execution of the death penalty.[22]

In so far as a murderer's sanity is concerned, a person is presumed to be sane and possess legal capacity to be responsible for his crimes until the contrary is proven. This defence of insanity must be proven by at least two medical practitioners in order to confirm that when the criminal committed the crime he was suffering from a disease of mind that made him unable to differentiate between good and evil. Therefore, if the above condition is met, the death penalty should be withheld and the punishment will be diyah instead of qiṣāṣ.[23]

Part 2: Intoxication (al-Sukr)

According to the Islamic criminal law, a person who consumes enough of an intoxicating substance such as alcohol, hashish or opium, is considered to be intoxicated, as far as it causes unconscious.[24] Intoxication is forbidden in Islam. Because of the harm it can cause even the slightest amount of any intoxicating substance is not allowed. In this context Allah says:

"They question thee concerning wine and gambling. Say: "In them is great sin, and some profit, for men; but the sin is greater than the profit."[25]

Allah also says: **"O ye who believe! Intoxication and gambling, sacrificing to stones, and (divination by) arrows, are an abomination, -of Satan's handiwork: Eschew such (abomination), that ye may prosper." "Satan's plan is (but) to excite enmity and hatred between you, with intoxication and gambling."**[26]

'Abd Allah states: "Wine (khmar): literally understood to mean the fermented juice of the grape; applied by analogy to all fermented liquor, and by further analogy to any intoxicating liquor or drug. There may possibly be some benefit in it, but the harm is greater than the benefit, especially if we look at it from a social as well as an individual point of view".[27]

The question is, what is the punishment for the person who commits murder while he is intoxicated when he commits the crime as a result of drinking or taking any kind of drug or alcoholic beverage either voluntarily or involuntarily ?

There are some jurists (e.g. Ibn Ḥazm, Abū Yūsuf and Zafar among the Ḥanafis, al-Māzinī from the Shāfi'ī Madhhab, and Ibn al-Qayyim) who believe that intoxication is considered as a defence. This view is based on the ground that the criminal was not in control of his actions when he committed the crime and was also unaware of the nature of the act. Accordingly, there is no qiṣāṣ due against the killer, regardless of the substance that intoxicated him and regardless of whether the killer was coerced into intoxication or he drank voluntarily. All that is examined is the intoxication itself which caused the absence of mens rea at the time when the crime was committed.[28]

Thus, in such a case, the intoxicated person is subject to eighty lashes as a ḥadd penalty if he took the intoxicating substance voluntarily. In cases of killing, blood-money is due as compensation to the victim's family on the basis of the private interest.[29] As 'Awdah says: "This view has been abandoned by the majority of jurists".[30]

The other opinion, which has been accepted by the majority of jurists in the four schools (al-madhāhib al-arba'ah), holds that intoxication is not considered as a defence in cases where the person takes the intoxicating substance voluntarily. Therefore, the intoxicated person will be held fully liable for his criminal act and the imposition of the death penalty (as a qiṣāṣ) for murder will, therefore, still be due because the inability to choose or to discriminate between good and evil in such cases has been caused by the criminal himself in a way that is prohibited by the Sharī'ah. They add that the responsibility of the voluntarily intoxicated criminal should not extend to cases where, for instance, the criminal does not know that it is an intoxicating substance, takes it by mistake, for medical reasons, or is coerced into taking it. These persons are exempted from being held responsible during the period of intoxication, but, as mentioned heretofore, in crimes of killing, blood-money is still due on grounds of private interest.[31]

The Saudi legal system forbids alcoholic beverages or any other intoxicating substances too. Accordingly, taking alcohol is prohibited in Saudi Arabia, where it is by itself a crime of ḥudūd, whether it causes intoxication or not. Other intoxicating drugs such as hashish are also prohibited but are considered as a crime of ta'zīr.[32]

Accordingly, the resolution of the Council of Ministers, No. 1798 dated 27-9-1394 A.H. states: "It is prohibited to import any kind of intoxicating drug into Saudi Arabia, except for medical reasons, which requires advance permission from the competent authorities."[33]

The penalty of ta'zīr is left to the discretion of the judge, but in any case it is not less than the penalty for alcohol which is eighty lashes.[34] As mentioned previously, the penalty for dealers in prohibited drugs, is capital punishment.[35]

In Saudi Arabia, the rule about crimes of killing committed by an intoxicated person can be summarised as follows:

There are two possible types of intoxication:

The first is where the criminal voluntarily consumes the prohibited intoxicating substance for pleasure. In such a case, he will be held criminally responsible. This is to protect the interest of society.

Similarly, when a person commits a crime while under the influence of narcotics, he is legally responsible. In fact, addiction to narcotics is considered to be worse than alcoholism.[36] However, the distinction between a person who voluntarily takes an alcoholic beverage or narcotic drug for medical reasons, and a person who voluntarily takes such a substance for pleasure is considered at the trial. Thus, on medical grounds, the former is exempted from criminal responsibility, as opposed to the latter, who is held criminally responsible. In this context, the medical reason, will not annul the civil liability which gives the victim's family the right of compensation as diyah.[37]

The second is involuntary intoxication. Intoxication is considered involuntary if it is due to coercion, necessity, or even mistake. Thus, if before committing a crime of killing a person was , for instance, compelled to drink alcohol or he took it by mistake, used the substance for medical treatment, or for any other necessity, he is exempted from criminal responsibility on the ground that he committed the crime without knowledge.[38] In Saudi Arabia, killing in such circumstances may be considered under the rules of homicide by mistake. Hence, justifiable intoxication, which rules out the possibility of intention or recklessness, may be given in evidence to prove a killing by mistake.[39]

Finally, from the above observations, it can be concluded that intoxication is considered as a defence in cases where it is caused by a lawful act and it is not considered as a defence where it was taken illegally. These defences are considered at the trial in order to annul criminal responsibility in cases when involuntary drunkenness negates mens rea, but not civil responsibility.

As mentioned previously, insanity can be either congenital or accidental. It can also be prolonged or sporadic insanity. Similarly, excessive drink in cases of habitual drinking may occasionally bring disease of the mind. Thus if strong drink causes prolonged insanity, the defence of insanity will be relevant here in the same way as when insanity causes from other cases.[40]

Part 3: Infancy (al-ṣughur)

According to Islamic criminal law an individual passes through five stages; the period of gestation (marḥalat al-ḥaml or al-ijtinān), the period prior to the age of distinction (marḥalat al-ṭufūlah or 'adm al-tamyīz), the age of distinction (marḥalat al-tamyīz), the age of puberty (marḥalat al-bulūgh), and the age of maturity (marḥalat al-rushd).[41]

The period of gestation is not relevant to criminal responsibility, as it is, of course, not possible to attribute any act to the foetus.[42] In fact, it is considered as a relevant period only in cases of murder, where the jurists agree that the execution of the death penalty should be delayed in the case when the victim's wife is pregnant, until reaches full age maturity.

Similarly, the period under the age of distinction is also not relevant as far as criminal responsibility is concerned, because in a such period the child is presumed to be incapable of criminal responsibility.[43]

Jurists agree that the period prior to the age of distinction extends from birth to the age of seven in the normal situation of childhood.[44] This is based on the statement of the Prophet: "Ask your children to pray when they reach seven years of age and, beat them if they do not do so from the age of ten."[45]

Accordingly, children under seven years of age are presumed to be under the age of reason. Thus, Islam does not order them to pray, as they lack the full capacity to understand what is right and wrong. They are considered unqualified or incompetent either to worship or to bear any criminal responsibility if they commit any illegal act.

But, where crimes of killing are concerned, the child's family is liable to pay compensation as diyah.[46]

Bahnasi states: "This age extends from birth to the age of seven. In this stage, the law regards the child as non-discriminating. Like the insane person, he is considered unfit and is not held responsible if he commits an act which requires legal punishment or one which requires ta'zīr. But he would be held responsible on civil grounds as far as his money is concerned so that others may not be harmed by whatever harmful acts he might commit against others."[47]

The period of distinction extends from seven years of age until the age of puberty.[48] A child in this stage may have a fair understanding of the difference between good and evil. Thus, he must be held generally responsible to a certain extent and may also be partially liable on criminal grounds, but he is not capable of being criminally responsible if he commits ḥudūd or qiṣāṣ crimes. [49]

Jurists determine this period by age or by signs of puberty. These signs may appear from the age of nine for females or twelve for males, especially in warm environments.[50] In some situations, (e.g. in cold environments), the signs of puberty may occur later than these ages. However, according to the view of the majority of jurists, the maximum age for this period is fifteen. Due to the fact that the age of puberty is different from person to person, this maximum age has been determined in order to help the judge during the trial.[51]

Concerning criminal responsibility for killing, a child at this period cannot be held criminally responsible.[52] This is based on the statement of the Prophet which explains that the responsibility is suspended and shall not be borne for a minor person until he attains puberty.[53] As in the previous period, there is still a civil responsibility which maintains the right of the victim's family to claim diyah as compensation. The payment of diyah in such cases is to be taken either from the child's account or from his family.[54]

Al-Zayla'ī suggests that premeditation on the part of a child at this period should be considered as a mistake, while al-Shāfi'ī suggests that such premeditation should

be regarded as ordinary premeditation and, therefore, a child should be disciplined.[55] He also believes that qiṣāṣ should be required in the case where the child commits the crime intentionally, but due to the fact that the child is not fit for such punishment in this period, qiṣāṣ is annulled. Consequently, he should be disinherited, as the killing was not committed by mistake. In addition, he is still responsible for paying diyah on the grounds of civil responsibility.[56]

The third stage is the period of puberty. As mentioned previously, the majority of jurists agree that this stage is reached when a youth attains fifteen, or when the signs of puberty appear.[57] Hence, this stage may begin from the age of nine for females and of twelve for males. It may also begin later or earlier, according to the different environments. In the opinion of Abū Ḥanīfah, this stage may extend to the age of eighteen years.[58]

In this stage a person who reaches puberty, may also become a mature person. This means that he may reach both the stage of puberty and the stage of maturity (al-rushd) at the same time. If so, he will be considered as a completely competent person who is fully liable to the death penalty; otherwise, he will be considered incompetent to be punished by the death penalty, even if he has reached the age of puberty, as far as his behaviour and attitude is still immature.[59] A person may also reach the age of puberty while he is in fact an idiot. In this case, he is not capable of being held fully responsible, and the death penalty should be annulled. This is, in fact, related to the defence of insanity.[60]

The crucial question here is how it can be proved that a person has attained maturity? According to the majority opinion of the jurists, there is no determined age for maturity. In fact, it is left to the judge who has the discretion to examine the person to determine whether he is a mature person or not.[61] This is (by analogy) based on the Qur'ānic verse:

" Make trial of orphans until they reach the age of marriage; if then ye find sound judgement in them, release their property to them...".[62]

Abū Ḥanīfah suggests that this period may extend to the age of twenty five years which he believes to be a sufficient period to display evidence of maturity.[63]

The defence of infancy in Saudi Arabia

In Saudi Arabia, a person under eighteen years is considered as an incompetent person, where crimes of killing are concerned. However, for the purpose of criminal responsibility, a person passes through three stages. These stages are:

1- Birth until seven years of age.

Children under seven years are considered as persons under the age of discretion (ghayr mumayyiz). Thus, it is presumed that a child under seven lacks the capability of knowing what is good and what is evil. Hence, he is unfit to be criminally responsible and, therefore, he is exempted from such responsibility in all situations. This is a conclusive judgement based on the idea that in this period the child is incapable of doing wrong (*doli incapax*).

According to the resolutions of the superior judicial council issued in 1389 A.H., it is not permissible to put such a child in detention even if he commits a serious crime, except in cases of dire necessity which should be determined by the judge himself.[64] This means that the above resolutions do not prescribe any action at all which could be taken against a child in this period, including taking him into care proceeding before a juvenile court (maḥkamat al-aḥdāth).

This is justified by the fact that legal action may psychologically affect the child's personality during this period. However, if a child at this stage commits a crime of killing, his family is responsible for paying diyah as compensation to the victim's family for the death on the ground of civil responsibility.[65]

Since a child is exempted from criminal responsibility during this period, the rule is subject to no exception; even if a child knows his act was wrong, he must be exempted from responsibility.[66] To illustrate:

In al-Dir'iyyah, S. and his son A. went to visit N's farm. They were enjoying themselves with N. shooting birds. Later, when they came back from shooting they

hung their rifle on its holder in the farmhouse and took a nap. During this nap, A. who was a child under seven, took the rifle in order to play with it and frighten N's children. He aimed the rifle at them several times. Then, he shot N. in the head with the rifle, thus killing him. The case was referred to the juvenile court where the public prosecutor took legal action. According to judgement document No. 1612 dated 13-7-1410 A.H., the child A. was acquitted of the charge of murder as he was under the age of reason, but the child's family was obliged to pay diyah on the grounds of civil responsibility and private interest.[67]

2- Persons over seven and under eighteen.

An individual in this period is also exempt from responsibility. In terms of the Saudi Arabian legal system such a person is considered as a Ḥadath (juvenile).[68]

A juvenile is considered as a person who has attained the age of distinction, although he is still unfit to be held criminally responsible, regardless of whether he intentionally commits the killing or not. The distinction between this period and the previous period is the child's fitness to be brought to court. In this period, the juvenile may be brought under care proceedings. This is considered as a measure which can be applied by the judge if he is satisfied that the juvenile is in need of care and control.[69]

In accordance with this procedure, if a juvenile at this stage commits a crime of killing, he should not be held criminally responsible, but diyah is due on grounds of civil responsibility.[70]

According to the resolution of the Ministers' Council (majlis al-wuzarā'), issued in 1395 A.H, this period fall into two stages as far as detention is concerned: Persons over seven and under fifteen, and persons over fifteen and under eighteen. For a person who is over seven and under fifteen to be taken into custody, the judge must be satisfied that this is the best course of action. This not applicable to a person who is aged between fifteen and eighteen. Thus, the police may only remand a person aged over fifteen and under eighteen who commits a serious crime into custody in Dār al-aḥdāth (juvenile home), until trial.[71]

In cases where the criminal is a female aged over fifteen and under eighteen, there is a separate institution called Dār ri'āyat al-fatayāt (girls' care house). A girl of this age who commits a serious crime such as killing should be remanded into custody in this particular place until trial.[72]

The Ministry of Justice (Wazārat al-'adil) established a separate courts for such persons in 1400 A.H. in Riyadh, Jiddah, and al-Mantiqah al-Sharqiyyah. These courts are called The Juvenile Courts (Maḥākim al-aḥdāth). Trial in such courts should be held after working hours,[73] because these courts are located in the actual care houses, where both investigator and judge should perform their duties in the presence of the deputy of the care house (Mandūb dār al-aḥdāth or Mandūb dār ri'āyat al-fatāyat).[74]

3- Persons over eighteen.

As stated previously, a person at this stage is presumed to be an adult and a sane person possessing a sufficient degree of reason to be held fully responsible for his crime, until the contrary be proven. Consequently, he will be held fully responsible and will, therefore, be liable to the death penalty as a qiṣāṣ.

[1] 'Akkāz, Falsafat al-'Uqūbah, p. 172.

[2] 'Awdah, al-Tashrī' al-Jinā'ī fi al-Islām, vol. 1, p. 585.

[3] Bahnasi, Ahmad. "Criminal Responsibility in Islamic Law" (In: Bassiouni, The Islamic Criminal Justice System), p. 186. Also: Bahnassi, F. al-Mas'ūliyyah al-Jinā'iyyah fi al-Fiqh al-Islāmī, p. 201. Also: 'Abd al-Majīd, al-Tashri' al-Jinā'ī, p. 186.

[4] Bahnassi, F. al-Mas'ūliyyah al-Jinā'iyyah fi al-Fiqh al-Islāmī, p. 210. Also: 'Awdah, al-Tashrī' al-Jinā'ī fi al-Islām, vol. 1, p. 587.

[5] Bahnasi, Ahmad. "Criminal Responsibility in Islamic Law" (In: Bassiouni, The Islamic Criminal Justice System), p. 186. Also: Lippman, Islamic Criminal Law and Procedure, p. 54.

[6] al-Shawkānī, Nayl al-'Awṭār, vol. 7, p. 244.

[7] 'Abd al-Majīd, al-Tashrī' al-Jinā'ī, p. 121. Also: Bahnasi, Ahmad. "Criminal Responsibility in Islamic Law" (In: Bassiouni, The Islamic Criminal Justice System), p. 54.

[8] 'Abd al-Majīd, al-Tashrī' al-Jinā'ī, p. 121.

[9] 'Awdah, al-Tashrī' al-Jinā'ī fi al-Islām, vol. 1, pp. 585-586. Also: Abdul Majid, Mahmood Zuhdi. Criminal Responsibility in English and Islamic Law, (U.K., University of Kent, 1984) p. 209.

[10] Lippman, Islamic Criminal Law and Procedure, p. 54.

[11] Resolution of the Supreme Judicial Council, No. 214 dated 23-8-1392 A.H., sanctioned by royal decree No. 2071 dated 12-11-1392 A.H..

[12] Ibn Qudāmah, al-Mughnī, vol. 7, p. 664. Also: Ḥasanīn, Jarā'im al-Qatl, p. 56.

[13] Ḥasanīn, Jarā'im al-Qatl, p. 57.

[14] 'Awdah, al-Tashrī' al-Jinā'ī fi al-Islām, vol. 1, p. 595. Also: 'Abd al-Majīd, al-Tashrī' al-Jinā'ī, p. 122.

[15] 'Awdah, al-Tashrī' al-Jinā'ī fi al-Islām, vol. 1, p. 596. Also: Bahnasi, Ahmad. "Criminal Responsibility in Islamic Law" (In: Bassiouni, The Islamic Criminal Justice System), p. 186. Lippman, Islamic Criminal Law and Procedure, p. 54. Naqati, The Theory of Crime and Criminal Responsibility, p. 91.

[16] 'Abd al-Majīd, al-Tashrī' al-Jinā'ī, p. 122.

[17] 'Awdah, al-Tashrī' al-Jinā'ī fi al-Islām, vol. 1, p. 597. Also: Bahnasi, Ahmad. "Criminal Responsibility in Islamic Law" (In: Bassiouni, The Islamic Criminal Justice System), p. 176.

[18] Ministry of Interior, Murshid al-Ijrā'āt al-Jinā'iyyah, p. 165.

[19] Resolution of the Superior Judicial Committee No. 88 dated 29-3-1396 A.H., sanctioned by royal decree No. 9264\M dated 18-4-1396 A.H.

[20] Ministry of Interior, Murshid al-Ijrā'āt al-Jinā'iyyah, p. 165.

[21] Resolution of the Superior Judicial Committee No. 88 dated 29-3-1396 A.H., sanctioned by royal decree No. 9264\M dated 18-4-1396 A.H.

[22] Resolution of the Superior Judicial Committee No. 21 dated 8-3-1391 A.H.

[23] Ministry of Interior, Murshid al-Ijrā'āt al-Jinā'iyyah, p. 166.

[24] Ibn Qudāmah, al-Sharḥ al-Kabīr, vol. 4, p. 219. Also: al-Najdī, Ḥāshiyat al-Rawḍ al-Murbi', vol. 7, p. 342. Ibn Qudāmah, al-Mughnī, vol. 8, pp. 305-306. Ibn Ḥajar, Fatḥ al-Bārī, vol. 12, p. 226. al-Shawkānī, Nayl al-'Awṭār, vol. 7, p. 315. al-Qaṭṭān, al-Tashrī' al-Jinā'ī al-Islāmī, p. 87. Naqati, The Theory of Crime and Criminal Responsibility, p. 91.

[25] Qur'ān, 2 verse 219.

[26] Qur'ān, 5 verse 90.

[27] 'Abd Allah, Translation of the Holy Qur'an, p. 93. See also: al-Qaṭṭān, al-Tashrī' al-Jinā'ī al-Islāmī, pp. 87-88. Qudāmah, al-Sharḥ al-Kabīr, vol. 4, p. 217. Also: Ibn Ḥajar, Fatḥ al-Bārī, vol. 12, p. 227. al-Shawkānī, Nayl al-'Awṭār, vol. 7, p. 315. Muslim, Sahih Muslim, (English Translation) vol. 3, p. 923.

[28] Ibn Qudāmah, al-Mughnī, vol. 8, p. 307. Also: al-Najdī, Ḥashiyat al-Rawḍ al-Murbi', vol. 7, p. 342. Ibn Farḥūn, Tabṣirat al-ḥukkām, vol. 2, p. 227. al-Ramlī, Nihāyat al-Muḥtāj, vol. 4, p. 118. al-Shīrāzī, al-Muhadhab, vol. 2, p. 82.

[29] Abū Zayd, Bakr. al-Ḥudūd wa al-Ta'zīrat 'Ind Ibn al-Qayyim, (Saudi Arabia, Maktabat al-Rushd, 1983) pp. 251-342.

[30] 'Awdah, al-Tashrī' al-Jinā'ī fi al-Islām, vol. 1, p. 583.

[31] Ibn Qudāmah, al-Mughnī, vol. 8, p. 307. Also: al-Najdī, Ḥāshiyat al-Rawḍ al-Murbi', vol. 7, p. 342. Ibn Furḥūn, Tabṣirat al-Ḥukkām, vol. 2, p. 228. al-Ramlī, Nihāyat al-Muḥtāj, vol. 4, p. 120.

al-Shīrāzī, al-Muhadhab, vol. 2, p. 82. Abdul Majid, Mahmood Zuhdi. Criminal Responsibility, p. 294.

[32] Ministry of Interior, Murshid al-Ijrā'āt al-Jinā'iyyah, pp. 156-171.

[33] To know these kinds of intoxicating drugs, see: Ministry of Interior, Murshid al-Ijrā'āt al-Jinā'iyyah, pp. 163-164.

[34] Ibn Jubeir, "Definition of Crime" (in: The Effect of Islamic Legislation,) p. 44.

[35] See: Chapter one, section II.

[36] Ibn Taymiyyah, al-Siyāsah al-Shar'iyyah, p. 54.

[37] Personal interview with al-qāḍī A. S. 1414 A.H.

[38] Ibn Qudāmah, al-Mughnī, vol. 8, p. 307. Also: al-Najdī, Ḥāshiyat al-Rawḍ al-Murbi', vol. 7, p. 340.al-Shīrāzī, al-Muhadhab, vol. 2, p. 82.

[39] Personal interview with al-qāḍī A. S. 1414 A.H.

[40] 'Awdah, al-Tashrī' al-Jinā'ī fi al-Islām, vol. 1, pp. 585-586. Also: Abdul Majid, Mahmood Zuhdi. Criminal Responsibility, pp. 215-216.

[41] al-Zarqā, al-Madkhal, vol. 2 p. 748.

[42] Id, vol. 2, pp. 750-787.

[43] Abdul Majid, Mahmood Zuhdi. Criminal Responsibility, p. 193.

[44] al-Zarqā, al-Madkhal, vol. 2 p. 762.

[45] Ḥasanīn, Jarā'im al-Qatl, p. 56.

[46] al-Zarqā, al-Madkhal, vol. 2 p. 762. Also: Fawzī, Sharīf. al-Tashrī' al-Jinā'ī fi al-Islāmī, (Dār al-'ilām, Jiddah), p. 131.

[47] Bahnasi, Ahmad. "Criminal Responsibility in Islamic Law" (In: Bassiouni, The Islamic Criminal Justice System), p. 192.

[48] al-Zarqā, al-Madkhal, vol. 2 p. 762.

[49] 'Awdah, al-Tashrī' al-Jinā'ī fi al-Islām, vol. 1, p. 600. Also: Fawzī, Sharīf. al-Tashrī' al-Jinā'ī fi al-Islāmī, p. 132.

[50] al-Zarqā, al-Madkhal, vol. 2 p. 778.

[51] al-Kāsānī, Badā'i' al-Ṣanā'i', vol. 7, p. 171. Also: 'Awdah, al-Tashrī' al-Jinā'ī fi al-Islām, vol. 1, p. 603.

[52] 'Awdah, al-Tashrī' al-Jinā'ī fi al-Islām, vol. 1, p. 603.

[53] Ibn Qudāmah, al-Mughnī, vol. 7, p. 664.

[54] 'Awdah, al-Tashrī' al-Jinā'ī fi al-Islām, vol. 1, p. 601. Also: Fawzī, Sharīf. al-Tashrī' al-Jinā'ī fi al-Islāmī, p. 132.

[55] Bahnasi, Ahmad. "Criminal Responsibility in Islamic Law" (In: Bassiouni, The Islamic Criminal Justice System), p. 192. Also: Naqati, The Theory of Crime and Criminal Responsibility, p. 90.

[56] 'Abd Majīd, al-Tashrī' al-Jinā'ī, p. 125. Also: Bahnasi, Ahmad. "Criminal Responsibility in Islamic Law" (In: Bassiouni, The Islamic Criminal Justice System), pp. 192-193. Fawzī, Sharīf. al-Tashrī' al-Jinā'ī fi al-Islāmī, p. 132.

[57] 'Abd Majīd, al-Tashrī' al-Jinā'ī, p. 126.

[58] al-Zarqā, al-Madkhal, vol. 2 p. 779. Also: 'Abd Majīd, al-Tashrī' al-Jinā'ī, p. 126.

[59] al-Zarqā, al-Madkhal, vol. 2 p. 785.

[60] Ibrāhīm, Aḥmad. Risālat al-'Ahliyyah wa 'Awāriẓuhā wa al-Wilāyah, (al-Maṭba'ah al-Salafiyyah, Cairo, 1373 A.H.) p. 26.

[61] al-Zarqā, al-Madkhal, vol. 2 p. 788.

[62] Qur'ān, 4 verse 6.

[63] Ibrāhīm, Risālat al-'Ahliyyah, pp. 17-18.

[64] Resolution of the Supreme Judicial Council, No. 46\3\T dated 29-4-1389 AH. Also: Resolution of the Ministry of the Interior, No. 2104 dated 26-8 1389 A.H.

[65] Ministry of Interior, Murshid al-Ijrā'āt al-Jinā'iyyah, p. 88.

[66] Resolution of the Superior Judicial Committee No. 214 dated 23-8-1392 A.H., sanctioned by royal decree No. 2071 dated 12-11-1392 A.H.

[67] Personal interview with al-qāḍī A. S. in 1414 A.H.

[68] Resolution of the Ministry of the Interior, No. 16\S\4382 dated 8-11- 1400 A.H.

[69] al-Kāsānī, Badā'i' al-Ṣanā'i', vol. 7, p. 64.

[70] Ḥasanīn, Jarā'im al-Qatl, p. 57.

[71] Resolution of the Council of the Ministres, No. 611 dated 13-5- 1395 A.H.

[72] Resolution of the Ministry of the Interior, No. 16\S\4382 dated 8-11- 1400 AH. Also: Ministry of Interior, Murshid al-Ijrā'āt al-Jinā'iyyah, pp. 32-33.

[73] Articles 1 and 2, from the Legal system of the Imprisonment and Detention in Saudi Arabia (Niẓām al-Sijin wa al-Tawqīf), issued by royal decree No. 31\M dated 12-6-1398 A.H. Also: Resolution of the Ministry of Juctice, No. 119\1\89 dated 13-2-1400 A.H. Ministry of Interior, Murshid al-Ijrā'āt al-Jinā'iyyah, p. 89.

[74] Resolution of the Ministry of the Interior, No. 16\S\4382 dated 8-11- 1400 AH. Also: Ministry of Interior, Murshid al-Ijrā'āt al-Jinā'iyyah, pp. 32-33.

SECTION III: EXTENUATING CIRCUMSTANCES.

Introduction.

As mentioned in the previous section, diminished responsibility is attributed to the person such as an insane person, on the grounds of his inability to choose or discriminate between right and wrong. In Islamic criminal law there are extenuating circumstances which mitigate criminal responsibility and reduce the punishment. Unlike diminished responsibility, these extenuating circumstances are attributed to the context of the act itself, but not to the personality of the criminal.

A person in such a situation is considered as competent and fully liable, but as a result of these extenuating circumstances, he may not be held fully responsible. These extenuating circumstances may be put forward in cases involving self-defence or the defence of honour or property.

In addition, there may also be other excusable circumstances which are attributed to either the person himself or to his act. These may, in some cases, involve paternity, medication, coercion, and necessity. -

All these circumstances will be discussed in detail in the following parts.

Part 1: Self-defence (al-difā' 'an al-nafs).

As mentioned formerly, suicide is forbidden in Islamic Law. Since it is forbidden for a human being to kill himself, making it easier for someone to kill himself or another person is also forbidden. By the same reasoning, Islamic law commands people to defend their lives. This is known in Islamic criminal law as self-defence.[1]

Self-defence is considered as a natural right for human beings. According to the Ḥanbalī Madhhab, it is permissible (jā'iz) for any person to defend his own life,[2] but the majority of jurists (Mālik, Shāfi'ī, and Abū Ḥanīfah) consider it as an obligatory right (wājib).[3] This means that a person must defend his own life. Accordingly, this majority of jurists maintains that if a person is attacked by another person intending to kill him and there is no way of avoiding such aggression except by killing the attacker, no punishment will be imposed on the attacked person. The same judgement is also applied in cases where, for instance, a person defends the life of another person and, therefore, kills the aggressor.[4]

These jurists sustain their opinion by both the Qur'ān and the Sunnah. For example Allah says:

"There is the law of equality. If then any one transgresses the prohibition against you, transgress ye likewise against him."[5]

Abū Hurayrah narrates: "A man came to the Messenger of Allah and asked: 'What is your opinion if a man comes wishing to seize my wealth?' The Prophet replied: 'Do not give it to him.' The man asked: 'What is your opinion if he fights me?' The Prophet answered: 'Fight with him.' The man inquired: 'What is your opinion if he kills me?' The Prophet said: 'Then you are a martyr.' The man asked: 'And what is your opinion if I kill him?' The Prophet said: 'He will be in hell-fire'."[6]

Concerning the defence of the life of another person, the Prophet says: "Any one of you who sees vice should change it with his hand; if he cannot do so, then with his tongue; and if he cannot do so, then with his heart, and this is lowest degree of belief." [7] In this context jurists maintain that if a person attacks another person with

intention to kill, then any observer is entitled by Islamic law to assist in repelling such aggression.[8]

It can be concluded from the above observations that it is obligatory for any person to defend those who are in distress as far as possible. This is considered in Islamic law as a jihād (strife in the cause of God) and, therefore, anyone who obeys a jihād in a such case is subject to neither punishment, diyah, nor atonement.[9]

This is also the rule in Saudi Arabia, but there are certain conditions for self-defence which may totally annul responsibility. These conditions are:

1- There must be illegal aggression which is considered as a murderous attack. Therefore, if the assault against a person is legal, the assaulted person is not entitled to a legal defence.[10]

2- The danger of unlawful harm must be immediate.

3- The aggression must be repelled by the least harmful means possible. In other words, for killing to be justified, force must be the only means available of preventing harm.[11] Bahnasi states: "The force used must be only that necessary. If an armed man enters a house and the person in the house orders him to leave but he refuses, the person has the right to beat him with whatever makes it easiest for him to drive off the intruder. Thus, if he knows that the intruder can be repelled by the use of a stick, then it is not justifiable for him to beat the intruder with a piece of iron because to do so would amount to the use of excessive force. If the intruder escapes, then he has no right to deal him a second blow because the intruder can do no further harm."[12] If so, he will be responsible for using the excessive force.[13] Hence, if the man in the house beats the intruder and, as a result, drives off the intruder, but then follows and kills him, this is not considered as an extenuating circumstance. Therefore, the man should be held fully responsible because the intruder was in a situation where killing was no longer justified.[14]

4- The force used in defence must be the minimum reasonable force to prevent the attack of the adversary. If the defence exceeds the minimum reasonable amount of force, the defender will be held criminally responsible.[15] In addition, it must be

impossible, at the time of the aggression, for the attacked person to seek any other resort or assistance such as another person, the police, or any other competent authorities.[16]

Finally, the aggressor has the right to self-defence, if the person originally attacked illegally exceeds the minimum force necessary to defend himself.[17]

Part 2: Defence of Honour (al-difā‘ ‘an al-‘irḍ or al-sharaf).

Sexual relationships outside marriage in Islamic law, are considered as a ḥadd crime called zinā (adultery).[18] Accordingly, the defence of honour is regarded as sufficient reason to annul responsibility. Hence, in cases where a crime is committed in order to defend honour, there will be no punishment against the criminal.[19]

This kind of killing (i.e. killing for honour) is often committed by husbands - and occasionally by wives - who suspect unfaithfulness on the part of their spouses, or by fathers or brothers who discover their daughter or sister pregnant without a marriage contract,[20] or even by a woman herself when her honour is threatened.[21] Ibn Hanbal says: "A woman who, for example, kills a man as he intends to rape her, is blameless and, therefore, there is no punishment to be imposed on her".[22]

The Prophet says: "If any person spies on you without your permission and you poke him with a stick and injure his eye, you will not be blamed."[23]

It is stated in Ṣaḥīḥ al-Bukhārī that if somebody peeps into the house of someone else, whereupon his eye is poked out; he has no right to claim blood-money.[24]

In accordance with the above, jurists agree that if anyone looks attentively into someone else's house without permission, the owner may legally put out his eye.[25]

Regarding honour, the Prophet indicates that illegal sexual intercourse is one of the greatest sins in the eyes of Allah.[26] Correspondingly, it is permissible for a person to kill any other person who intends to besmirch his honour.[27] For instance: "A man who was running with a blood-stained sword and group of people running after him, came to 'Umar b. al-Khaṭṭāb and sat near him. The people said: 'Verily this man has killed our companion.' 'Umar asked the man: 'What do you say?' He replied: 'I

struck the thighs of my wife and if there was someone between them, then I killed him'. 'Umar said: 'What do you all say?' The people replied: 'He did strike with the sword and it fell on the middle of the man and the thighs of the woman.' Thereupon, 'Umar took his sword and waved it, then he gave it to the man and said: 'If he returns, then do it again" ('Umar meant: If any one else is found committing such an act, he should be likewise killed).[28]

From the above, it is concluded that the defence of honour is considered as a reason to annul responsibility in Islamic law.

In Saudi Arabia, there is still segregation between males and females, in schools, universities, and also inside houses. Hence, it is illegal, for instance, for a man to stay alone with another woman unless she is one of his maḥārim such as, a wife, sister, aunt, mother, and so forth.[29] Accordingly, if a man, for example, enters a house without permission where there is a woman who is not one of his maḥārim and the woman is frightened and in order to protect herself kills him, as using minimum reasonable force, this may be considered as an extenuating circumstance which may also annul criminal responsibility.[30]

The same also applies in cases where, for instance, a killer pleads that he committed a killing in order to defend his honour. If proven, a killer will, therefore, be subject to neither punishment, diyah, nor atonement.[31] It is stated in Manar al-Sabil that it is obligatory for a person to defend his harem and when necessary, the harem of others if they were threatened with an immoral act or killing.[32]

Finally, similar as for self-defence, the plea of the defence of honour requires the following conditions[33]:

1- Honour must be endangered in what is considered an immoral attack.

2- The danger of unlawful harm must be immediate.

3- The aggression should be repelled by the least harmful means possible.

4- The force used for the defence of honour should be the minimum reasonable force to prevent the attack of the adversary. In addition, it must be impossible, at the

time of the aggression, for the attacked woman to seek any other resort or assistance from another person, the police, or any other competent authorities.[34]

Part 3: Defence of Property (al-difā' 'an al-māl).

In Islamic law, a person who dies in the defence of his own property is also considered as a martyr. The Prophet says: " He who fights to protect his family or property and is killed thereby, is a martyr"[35]

If a person, for example, intends to steal another's property, according to Abū Ḥanīfah, it is permissible to pursue him and the pursuer, as minimum reasonable force in protecting property, kills the thief during this crucial moment, this will be considered as an extenuating circumstance which may annul responsibility.[36]

Jurists disagree whether the defence of property is an obligatory right (wājib) or is only a permissible right (jā'iz). In the opinion of the majority of jurists, the defence of property is only a permissible right. Thus, a person is not obliged to protect his property if, for example, someone else intends to steal it. This is justified by the fact that any person has the right to donate or to give his money to others. Accordingly, unlike in the defence of honour or self, letting a thief take the money is not prohibited.[37]

In this context Ibn Duyan comments that it is not obligatory for a person to defend his own wealth, as he is not prohibited from giving it to whoever intends to take it from him by force.[38] Aḥmad b. Ḥanbal believes that it is better to give the money to the aggressor than to kill him.[39]

In Saudi Arabia, the plea of the defence of property is considered as an extenuating circumstance that may justify killing. This is provided that, in a such case, the killer meets all the following conditions:

1- There must be an illegal attack on the property.

2- The danger of unlawful harm must be immediate.

3- The aggression should be repelled by the least harmful means possible.

4- The force used for the defence of property should be the minimum reasonable force to prevent the attack of the adversary and it is impossible, at the time of the aggression, to seek any other assistance from another person, the police, or any other competent authorities.[40]

Finally, it is worth noting that the evaluation of the necessary degree of force used in repelling the aggression and whether it is exceeded or not, is left to the competent authorities, depending on the circumstances surrounding each case.[41]

Part 4: Paternity or Parenthood (al-'ubwwah).

The majority of jurists (Ḥanafī, Shāfi'ī, and Ḥanbalī) hold that there is no qiṣāṣ to be imposed on a father for killing his son or daughter.[42] However, Mālik holds an opposite view which indicates that both father and mother are liable to qiṣāṣ if , for example, they intentionally kill their son or daughter.[43]

The opinion of the majority is based on the statement of the Prophet which explains that no qiṣāṣ is due for a parent who kills his son, but not vice versa[44]

It is stated in al-Muwaṭṭā: "A man who was from bnī Mudlij called Qutādah threw a sword at his son and injured his leg. Then the wound bled until the son died. 'Umar b. al-Khattab decided that no qiṣāṣ should be imposed on the father."[45]

This majority of jurists also justify their opinion by the fact that the purpose of qiṣāṣ is to prevent the commission of murder, and that parental sympathy, tenderness, and love would prevent them from such a killing. They also claim that since the parent is the direct cause of his child being alive, it is not acceptable for either the son or daughter to cause the death of their parent.[46]

In this context El-Ewa comments that the above justifications are not based on any legal principle but are emotional statements which have nothing to do with legal topics. He also adds that it is not true that the son or the daughter is the cause of the parent's death if they are executed for killing that son or daughter; it is the parent's own deed which results in his death.[47]

On the other hand, Mālik supports his opinion with the fact that the verses which describe the punishment of qiṣāṣ do not distinguish between a father or any other killer.[48] El-Ewa states that this opinion is supported by the majority of contemporary writers, as it is in harmony with the Islamic legal principle of equality. He also adds that it is clear that this opinion conforms to the principle of punishment administered by the state for the sake of justice, which allows no distinction between offenders based on their relationship to the victim.[49]

However, in Saudi Arabia, qiṣāṣ is not imposed against the parent. In such a case; the punishment will only be a ta'zīr penalty, on the grounds of public interest. Evaluation of the degree of this ta'zīr penalty is left to the judge's discretion depending on the circumstances surrounding each case.[50]

Part 5: Medication (al-taṭbīb).

A patient may die as the result of treatment by a doctor. In such a case no punishment may be imposed on the doctor. In Islamic law, a person who acts in accordance with a legal immunity has no criminal responsibility. For example, Mālik states that a physician who treats a patient will not be held criminally responsible if the patient dies, as long as he is entitled to carry out such treatment and has made no mistake. If the doctor is entitled to carry out the treatment but makes a mistake that results in the death of the patient, blood money must be paid to the victim's family. Al-Sha'bī and 'Aṭā' believe that there is no redress for a patient who suffers harm during treatment supervised by a competent doctor.[51]

In Saudi Arabia, a doctor may not be held responsible if a patient dies during a course of treatment as long as he acts in accordance with the laws of his profession.[52] According to a royal decree (issued in 1382 A.H.), situations that involve a death during an operation are left to the judgement of the Legal Medical Committee. This committee consists of mandatory members (mandūbīn) nominated from both the Ministry of Health and the health departments of the Ministry of Defence and the Ministry of Education. In addition, there is another mandatory member from the

court.[53] A later royal decree (issued in 1399 A.H.), adds another member to this Medical Committee nominated from the Faculty of Medicine in the University of al-Riyadh (nowadays called the University of King Sa'ūd).[54]

It is worth noting here that the legal system in Saudi Arabia states that a doctor may not be detained or remanded into custody in cases where, for example, the patient's family takes legal action against him to inquire about a death. In such a case a doctor is answerable only to this Legal Medical Committee,[55] but the first stage of investigation is held under the supervision of the Ministry of the Interior.[56]

Immunity from criminal responsibility on the grounds of medication is subject to certain conditions. These are:

1- It must be proven to the Legal Medical Committee that the doctor in charge was qualified to treat or operate on the patient as he did. Layish states that in Saudi Arabia, the public interest principle is also applied in medicine. He adds "A person who has not proved his qualifications is forbidden to practice medicine lest he cause damage to the public interest."[57]

2- It must be proven that there is no malpractice by the doctor in the performance of his duty.[58]

3- It must be confirmed that the agreement of the patient or his agent was obtained before the performance of the treatment or the operation that caused the death of the patient. The patient or his agent must sign a formal declaration before treatment.

4- The doctor must be authorised by the government at the time of the treatment. This means that even if he is qualified, he is not entitled to perform an operation unless he is authorised by the government to do so. Otherwise, he may be subject to punishment. [59]

Part 6: Gymnastics or Sports (al-al'āb al-riyāḍiyah).

People are encouraged by Islamic law to play many kinds of sports in order to maintain their well-being. The Prophet participated in many sports; for instance, he raced with his wife 'Ā'ishah on foot and also raced with some of his Companions on

horseback. In this respect, 'Umar b. al-Khaṭṭāb says: "Teach your children archery (rimāyah), swimming and riding."[60]

There are some sports which in themselves may require some violence, such as boxing, wrestling, American football and rugby. Therefore, if a person is fatally injured while participating in such a sport, the person causing the injury is not be held criminally responsible, provided that he does not transgress the rules of the game and plays it in conformity with its principles.[61]

Al-Qurāfī (of the Mālikī Madhhab) believes that causing death in such sports should be considered as killing by mistake if the killer is playing properly. In other words, if the killer does not break the rules of the sport, no qiṣāṣ will be imposed against him, but compensation will be due on the grounds of civil responsibility and private interest.[62]

According to the legal system in Saudi Arabia, the rules of each sport and the opinion of the Legal Gymnastic Committee will be considered in the court when the case is heard. Correspondingly, cases of killing which occur in such sports are considered as having extenuating circumstances, and therefore the killer is not be held criminally responsible, as long as he does not transgress the principles of the sport.[63]

Part 7: Coercion and Necessity (al-ikrāh and al-ḍarūrah).

First: Coercion:

In legal usage, coercion or duress occur, for example, when a person is forced to commit a crime by another person. This means that the compelled person was deprived of his free will and unwillingly committed the crime.[64]

Jurists agree that harm should not be prevented by an equivalent or greater harm.[65] This means that coercion is not considered as a defence in crimes against human life. Accordingly, it is not permissible for a person to kill another person under compulsion, even to save his own life. However, the opinions of these jurists vary regarding the punishment for a person who kills under coercion.[66] For instance:

Mālik, the majority of jurists of the Ḥanbalī Madhhab, Ibn Ḥazm, and some jurists of the Shāfi'ī Madhhab hold that both the compellor and the compelled person are liable to the death penalty. This means that these jurists do not consider coercion as an extenuating circumstance.[67]

Abū Ḥanīfah however holds that the compellor is liable to qiṣāṣ, while the compelled person is liable to a ta'zīr penalty. Ibn Rajab (of the Ḥanbalī Madhhab) and Abū Yūsuf (of the Ḥanafi Madhhab) believe that both the compellor and the compelled person are liable to pay diyah but not to be executed.[68]

In Islamic criminal law, there are certain conditions relevant to coercion. These are:

1- The compellor must be capable of carrying out the threatened harm.

2- The compelled person must believe that he must obey the order of the compellor to avoid immediate death.

3- Coercion must threaten gross violence which will undoubtedly cause the death of the compelled person. Thus, threats of insult, beating, or injury, are not considered to be gross violence.[69]

In Saudi Arabia, if the above conditions are met, the compellor is liable to the death penalty. On the other hand, the rule regarding whether the compelled person is liable to the death penalty or not is not clear and, therefore, punishment for a person who commits killing under coercion is left to the judge, who has the discretion to determine whether coercion is an extenuating circumstance or not, depending on the circumstances surrounding each case.[70]

Second: Necessity.

The effect of necessity on one's free will is similar to that of coercion, but in necessity there is no participation by another person.[71] As mentioned previously, a person is obliged to protect his own life in self-defence. Allah says:

"... Make not your own hands contribute to (your) destruction..."[72]

"Necessities permit what are forbidden" (al-ḍarūrāt tubīḥ al-maḥẓūrāt) is one of the main maxims in Sharī'ah law,[73] provided that the person subject to necessity does not exceed the essential limit of necessity.[74] In this context, Mahmasani states: "Although necessities render prohibited things permissible yet this rule is not absolute but is subject to many limitations. Permissibility is limited by the texts, by the extent of the necessity and by the time of the necessity..."[75]

The essential limits of necessity is applicable to most crimes but not to crimes of killing. Accordingly, even the greatest necessity does not permit crimes against human life.[76]

In this matter 'Awdah says: "Necessity does not allow any person to kill another person even if he acts to protect his own life, Thus, if, for example, a boat's crew at sea throws a passenger overboard to prevent the sudden sinking of the boat, which may cause the death of other passengers, the crew will be liable to the charge of murder."[77]

In Saudi Arabia, the rule regarding necessity is not clear when, in order to justify the killing, a person pleads that he committed the crime under dire necessity. Such a case is left to the discretion of the judge.[78]

Finally, it is worthy of note that both the compelled person who commits killing under duress and the person who kills under dire necessity are not excluded in any case from civil responsibility, which requires diyah.[79]

[1] Qāsim, Yūsuf. Naẓariyyat al-Difā‘ fi al-Fiqh al-Islāmī, (ed: 1, 1982) p. 36. Also: Fawzī, Sharīf. al-Tashrī‘ al-Jina’ī al-Islāmī, p. 110.

[2] Ibn Qudāmah, al-Mughnī, vol. 7, p. 649. Also: ‘Abd al-Majīd, al-Tashrī‘ al-Jinā’ī, p. 99. Ḥasanīn, Jarā’īm al-Qatl, p. 95.

[3] al-Dusūqī, Muḥammad ‘Arafah. Ḥashiyat al-Dusūqī, (Maṭba‘at Muṣtafā Muḥammad, Cairo) vol. 4, p. 357. Also: ‘Abd al-Majīd, al-Tashrī‘ al-Jinā’ī, p. 99. Ḥasanīn, Jarā’im al-Qatl, p. 95.

[4] Fawzī, Sharīf. al-Tashrī‘ al-Jina’ī al-Islāmī, p. 110. Also: Abū Zahrah, al-Jarīmah wa al-`Uqūbah, pp. 505-506. Qāsim, Naẓariyyat al-Difā‘ fi al-Fiqh al-Islāmī, p. 38.

[5] Qur’ān, 2 verse 194.

[6] Ibn Duyan, Manar al-Sabil, vol. 2, p. 109. Also: al-Sharqī, ‘Alī Ḥasan. al-Bā`ith wa ’Atharuhū fi al-Mas’ūliyyah al-Jinā’iyyah, (al-Zahrā li al-I‘lām al-‘Arabī, ed. 1: 1986) p. 257.

[7] Muslim, Sahih Muslim, (English Translation) vol. 1, p. 39. Also: al-Sharqī, al-Bā`ith wa ’Atharuhū fi al-Mas’ūliyyah al-Jinā’iyyah, p. 263.

[8] Ibn Qudāmah, al-Mughnī, vol. 7, p. 649.

[9] Ibn Duyan, Manar al-Sabil, vol. 2, p. 111.

[10] al-Kāsānī, Badā’i‘ al-Ṣanā’i‘, vol. 7, p. 92. Also: Fawzī, Sharīf. al-Tashrī` al-Jinā’ī al-Islāamī, p. 112. ‘Awdah, al-Tashrī‘ al-Jinā’ī fi al-Islām, vol. 1, p. 476. ‘Abd al-Majīd, al-Tashrī` al-Jinā`ī, p. 99. Ḥasanīn, Jarā’im al-Qatl, p. 100. al-Hamad, A Comparative of American and Islamic Criminal Homicide Laws, p. 188.

[11] ‘Abd al-Majīd, al-Tashrī‘ al-Jinā’ī, p. 100. al-Hamad, A Comparative of American and Islamic Criminal Homicide Laws, p. 188.

[12] Bahnasi, Ahmad. “Criminal Responsibility in Islamic Law” (In: Bassiouni, The Islamic Criminal Justice System), p. 185.

[13] ‘Awdah, al-Tashrī‘ al-Jinā’ī fi al-Islām, vol. 1, p. 478. ‘Abd al-Majīd, al-Tashrī` al-Jinā`ī, p. 101

[14] al-Kāsānī, Badā’i‘ al-Ṣanā’i‘, vol. 7, p. 93. Also: al-Sharqī, al-Bā`ith wa ’Atharuhū fi al-Mas’ūliyyah al-Jinā’iyyah, p. 260. ‘Abd al-Majīd, al-Tashrī` al-Jinā`ī, p. 101. Qasīm, Naẓariyyat al-Difā‘ fi al-Fiqh al-Islāmī, p. 41.

[15] al-Hamad, A Comparative of American and Islamic Criminal Homicide Laws, p. 188.

[16] al-Kāsānī, Badā'i' al-Ṣanā'i', vol. 7, p. 93. Also: Fawzī, Sharīf. al-Tashrī' al-Jinā'ī al-Islāmī, pp. 115-116. al-Dusūqī, Ḥashiyat al-Dusūqī, vol. 4, p. 482. 'Abd al-Majīd, al-Tashrī' al-Jinā'ī, p. 101.

[17] al-Hamad, A Comparative of American and Islamic Criminal Homicide Laws, p. 188.

[18] Dandal, Jabr. al-Zinā, (Maktabat al-Manār, Jordan, ed: 2, 1987) p. 18.

[19] Qāsim, Naẓariyyat al-Difā' fi al-Fiqh al-Islāmī, p.59. Also: Fawzī, Sharīf. al-Tashrī' al-Jinā'ī al-Islāmī, p. 114.

[20] Souryal, "The rule of Shari'ah Law in detering Criminalty in the Kingdom of Saudi Arabia", International Journal of Comparative Applied Criminal Justice, 1988, vol. 12, p. 14.

[21] Qāsim, Naẓariyyat al-Difā' fi al-Fiqh al-Islāmī, p.59. Fawzī, Sharīf. al-Tashrī' al-Jinā'ī al-Islāmī, p. 114.

[22] Ibn Qudāmah, al-Mughnī, vol. 7, p. 649. Also: Bahnasi, Ahmad. "Criminal Responsibility in Islamic Law" (In: Bassiouni, The Islamic Criminal Justice System), p. 185. Fawzī, Sharīf. al-Tashrī' al-Jinā'ī al-Islāmī, p. 114. Qāsim, Naẓariyyat al-Difā' fi al-Fiqh al-Islāmī, p. 59.

[23] Khan, The Translation of the Meaning of Sahih al-Bukhari, vol. 9, p. 31.

[24] Id, p. 30.

[25] Ibn Duyan, Manar al-Sabil, vol. 2, p. 26.

[26] Khan, The Translation of the Meaning of Sahih al-Bukhari, vol. 9, p. 1.

[27] Ibn Qudāmah, al-Mughnī, vol. 7, p. 649. al-Sharqī, al-Bā'ith wa 'Atharuhū fi al-Mas'ūliyyah al-Jinā'iyyah, p. 258.

[28] Ibn Duyan, Manar al-Sabil, vol. 2, p. 19.

[29] Dandal, al-Zinā, p. 84.

[30] Fawzī, Sharīf. al-Tashrī' al-Jinā'ī al-Islāmī, p. 114.

[31] Personal interview with al-qāḍī A. S. in 1414 A.H.

[32] Ibn Duyan, Manar al-Sabil, vol. 2, p. 110.

[33] Fawzī, Sharīf. al-Tashrī' al-Jinā'ī al-Islāmī, p. 114. al-Hamad,A Comparative of American and Islamic Criminal Homicide Laws, p. 188.

[34] 'Abd al-Majīd, al-Tashrī' al-Jinā'ī, p. 101.

[35] Bahnasi, Ahmad. "Criminal Responsibility in Islamic Law" (In: Bassiouni, The Islamic Criminal Justice System), p. 185. Also: Fawzī, Sharīf. al-Tashrī' al-Jinā'ī al-Islāmī, p. 114. Qāsim, Naẓariyyat al-Difā' fi al-Fiqh al-Islāmī, p. 60.

[36] Bahnasi, Ahmad. "Criminal Responsibility in Islamic Law" (In: Bassiouni, The Islamic Criminal Justice System), p. 185. Qāsim, Naẓariyyat al-Difā' fi al-Fiqh al-Islāmī, p. 60.

[37] al-Anṣārī, Asnā al-Matālib, vol. 4, p. 198. Also: [37] 'Awdah, al-Tashrī' al-Jinā'ī fī al-Islām, vol. 1, p. 76. 'Abd al-Majīd, al-Tashrī' al-Jinā'ī, p. 100.

[38] Ibn Duyan, Manar al-Sabil, vol. 2, p. 112.

[39] Id, p. 110.

[40] Fawzī, Sharīf. al-Tashrī' al-Jinā'ī al-Islāmī, p. 114. al-Hamad, A Comparative of American and Islamic Criminal Homicide Laws, p. 188. 'Abd al-Majīd, al-Tashrī' al-Jinā'ī, p. 101.

[41] Personal interview with al-qāḍī A. S. in 1414 A.H.

[42] Ibn Qudāmah, al-Sharḥ al-Kabīr, vol. 5, p. 175. Also: al-Shīrāzī, al-Muhadhab, vol. 2, p. 178. al-Kāsānī, Badā'i' al-Ṣanā'i', vol. 7, p. 235. al-Ghāmidī, 'Uqubat al-I'dām, p. 192.

[43] Ibn Rushd, Abū al-Walīd Muḥammad b. Aḥmad. Bidāiyat al-Mujtahid wa Nihāiyat al-Muqtaṣid, (Maṭba'at al-Istiqāmah, Cairo, 1952) vol. 2. p. 40. Also: Ibn Qudāmah, al-Sharḥ al-Kabīr, vol. 5, p. 175. al-Ghāmidī, 'Uqubat al-I'dām, p. 192. al-Qurṭubī, al-Jāmi' li Aḥkām al-Qur'ān, vol. 2, p. 250.

[44] al-Tirmidhī, Sunan al- Tirmidhī, Ḥadīth, 1401.

[45] Ibn Anas, Mālik. al-Mūwaṭṭā', vol. 2, p. 867.

[46] El-Ewa, Punishment in Islamic Law, p. 78. Also: al-Ghāmidī, 'Uqubat al-I'dām, p. 195. Abū Zahrah, al-Jarīmah wa al-'Uqūbah, p. 421.

[47] El-Ewa, Punishment in Islamic Law, p. 78.

[48] al-Ghāmidī, 'Uqubat al-I'dām, p. 195. Abū Zahrah, al-Jarīmah wa al-'Uqūbah, p. 421.

[49] El-Ewa, Punishment in Islamic Law, p. 81.

[50] Personal interview with al-qāḍī A. S. in 1414 A.H.

[51] 'Abd al-Majīd, al-Tashrī' al-Jinā'ī, p. 102. Also: Bahnasi, Ahmad. "Criminal Responsibility in Islamic Law" (In: Bassiouni, The Islamic Criminal Justice System), p. 185. Naqati, The Theory of Crime and Criminal resposibility, p. 97.

[52] Ministry of Interior, Murshid al-Ijrā'āt al-Jinā'iyyah, p. 103.

[53] Royal decree, No. 1293 dated 29-3-1382 A.H.

[54] Royal decree, No. 4\13201 dated 13-6-1399 A.H.

[55] Royal decree, No. 7153 dated 23-4-1382 A.H.

[56] Resolution of the Ministry of the Interior, No. 22525 dated 28-5-1395 A.H. Also: Ministry of Interior, Murshid al-Ijrā'āt al-Jinā'iyyah, p. 104.

[57] Layish, "Saudi Arabia Legal Reform", Journal of the American Oriental Society, June, 1987, vol. 107, p. 385.

[58] al-Sayyd Sābiq, Fiqh al-Sunnah, vol. 2, p. 490.

[59] 'Abd al-Majīd, al-Tashrī' al-Jinā'ī, p. 102.

[60] 'Awdah, al-Tashrī' al-Jinā'ī fi al-Islām, vol. 1, p. 527. Also: 'Abd al-Majīd, al-Tashrī' al-Jinā'ī, p. 106.

[61] Fawzī, Sharīf. al-Tashrī' al-Jinā'ī al-Islāmī, pp. 106-107. Also: 'Awdah, al-Tashrī' al-Jinā'ī fi al-Islām, vol. 1, p. 527. 'Abd al-Majīd, al-Tashrī' al-Jinā'ī, p. 106.

[62] Fawzī, Sharīf. al-Tashrī' al-Jinā'ī al-Islāmī, p. 107.

[63] Personal interview with al-qāḍī A. S. in 1414 A.H.

[64] 'Awdah, al-Tashrī' al-Jinā'ī fi al-Islām, vol. 1, p. 563. Also: Fawzī, Sharīf. al-Tashrī' al-Jinā'ī al-Islāmī, p. 120. Naqati, The Theory of Crime and Criminal resposibility, p. 97.

[65] al-Zarqā, al-Madkhal, vol. 2, p. 977.

[66] Fawzī, Sharīf. al-Tashrī' al-Jinā'ī al-Islāmī, p. 124.

[67] Ibn Rushd, Bidāiyat al-Mujtahid, vol. 2. p. 396. Also: Ibn Qudāmah, al-Mughnī, vol. 7, p. 645. Ibn Ḥazm, al-Muḥallā, vol. 12, p. 297.

[68] al-Kāsānī, Badā'i' al-Ṣanā'i', vol. 7, p. 235. Also: Ibn Qudāmah, al-Sharḥ al-Kabīr, vol. 5, p. 260. al-Ghāmidī, 'Uqūbat al-I'dām, p. 179.

[69] Ibn Qudāmah, al-Mughnī, vol. 7, p. 645. Also: 'Awdah, al-Tashrī' al-Jinā'ī fi al-Islām, vol. 1, p. 565. 'Abd al-Majīd, al-Tashrī' al-Jinā'ī, p. 113. Fawzī, Sharīf. al-Tashrī' al-Jinā'ī al-Islāmī, p. 121. Abdul Majid, Mahmood Zuhdi. Criminal Responsibility, p. 238.

[70] Personal interview with al-qāḍī A. S. in 1414 A.H.

[71] 'Abd al-Majīd, al-Tashrī' al-Jinā'ī, p. 117.

[72] Qur'ān, 2 verse 195.

[73]al-Zarqā, al-Madkhal, vol. 2, p. 989.

[74] 'Abd al-Majīd, al-Tashrī' al-Jinā'ī, p. 117.

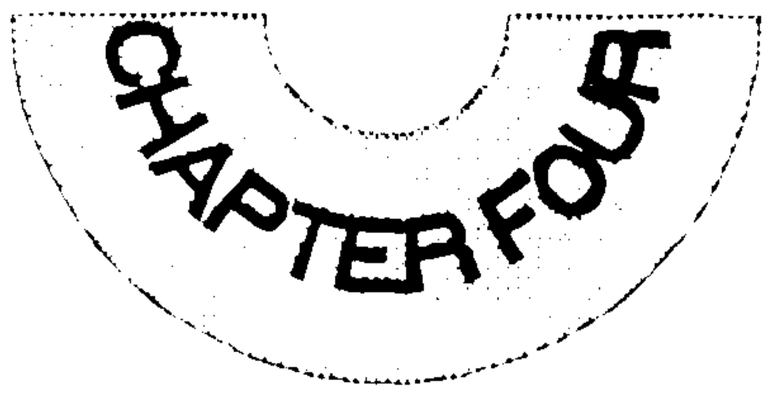
[75] Mahmasani, M. Falsafat al-Tashri fi al-Islam, p. 155.

[76] Fawzī, Sharīf. al-Tashrī' al-Jinā'ī al-Islāmī, p. 129.

[77] 'Awdah, al-Tashrī' al-Jinā'ī fī al-Islām, vol. 1, p. 565. Also: Abdul Majid, Mahmood Zuhdi. Criminal Responsibility, p. 238.

[78] Personal interview with al-qāḍī A. S. in 1414 A.H.

[79] 'Abd al-Majīd, al-Tashrī' al-Jinā'ī, p. 118. Also: Bahnasi, Ahmad. "Criminal Responsibility in Islamic Law" (In: Bassiouni, The Islamic Criminal Justice System), pp. 190-193. Naqati, The Theory of Crime and Criminal Responsibility, pp. 92- 93.



CRIMES OF KILLING AND THE FUNCTION OF THE POLICE ACCORDING TO PRE-TRIAL LEGAL PROCEDURE IN SAUDI ARABIA.

Introduction.

Ministry of the Interior.

In Saudi Arabia, the competent authority which upholds the first stage of criminal investigation in crimes of killing or any other crimes, is the Ministry of the Interior This ministry was established in 1345 A.H At this time, it was only a general department called: Department of Public Security (mudīriyyat al-amn al-ʿāmm) Later, in 1350 A.H., this department became the Ministry of the Interior [1]

In 1370 A.H. the power of this ministry was extended from merely supervising public safety to supervising many other departments such as Immigration, Passports, Intelligence (al-mabāḥith), and the Coast Guard (silāḥ al-ḥudūd), which is responsible for the protection and defence of the border and coastal areas.[2]

Under the supervision of this ministry, each department is obliged to submit a written report containing information about its achievements, plans, and development. Each department has a General Directorate whose responsibilities are to maintain contact with every sub-department in each town The General Directorate has its duties assigned by the Ministry of the Interior, which should be strictly fulfilled If

faced with a situation which is beyond its limited authority, the General Directorate must request further instructions from the Minister of the Interior.[3] In 1395 A.H., the duties of this Ministry were also extended to cover responsibility for finding fugitive criminals.[4]

Police departments which may be involved with the investigation and prevention of crimes of killing are:

1- Patrol division (al-dawriyyāt).

The patrol division is mainly responsible for the preservation of the peace, the tranquillity of the community and law enforcement. In addition, there are many different duties which should be carried out by this division. For example:

A- The patrol of specific districts and observation of the occurrence of abnormal behaviour.

B- Miscellaneous field services that may include rendering assistance or first aid.

C- The preliminary investigation of crimes and accidents.

D- Collection and preservation of evidence and, arrest of criminals or traffic law violators.

This division consists of patrolmen and their supervisors, in the smaller departments, lieutenants who provide overall supervision from the office usually called the watch commander's office, and in the larger departments, captains or higher ranking officers.

2- Traffic division (al-murūr).

Some of the different duties of this division, which are also carried out by lower and higher ranking officers similar to those officers of the patrol division, include the following:

A- The following up of investigation of traffic accidents, traffic flow control, and the control of pedestrian crossings.

B- The investigation of and the reporting on traffic dangers to the appropriate agencies.

C- The enforcement of regulations concerning buses, ambulances, and taxis.

D- Investigating and penalising the traffic law violators.

3- Investigation division (al-taḥqīq al-jinā'ī).

The primary purpose of this division is to follow up investigation of all crimes that have not been cleared up by the patrol and traffic division. Other duties assigned to this division include a variety of investigations that require an officer who is not in uniform. This means that some officers assigned to the investigation division may work in civilian clothing as a matter of routine so that they may move about inconspicuously and with some degree of anonymity.

Under the direction of a divisional commander, who holds the rank of lieutenant or higher in most police departments, the officers of the investigation division carry out, for example the following duties:

A- The interviewing of victims and witnesses, and the apprehension and interrogation of persons guilty of or suspected of violations of the criminal law.

B- The examination of the scenes of crimes and obtaining of warrants of arrest.

C- If required by a judge, the given of testimony in court.

4- Intelligence division (al-mabāḥith).

The purpose of this division is to perform, for instance, whatever investigations are necessary to keep the chief of police completely informed as to the movement and activities of criminals, and to prevent the existence of organised crime in Saudi Arabia.

5- Technical services division (al-'adillah al-jinā'iyyah).

This division consists primarily of the forensic and identification function of the police department. Some of the different functions of the technical services division are as follows:

A- The scientific and chemical analysis of evidence.

B- The processing and classification of fingerprints and other traces left at the scenes of crimes.

C- The photographing and fingerprinting of persons suspected of, or arrested for, the commission of crimes.

D- The developing and printing of photographs, serving in an advisory capacity to the other divisions to assure the proper collection and preservation of evidence at the scenes of crimes.[5]

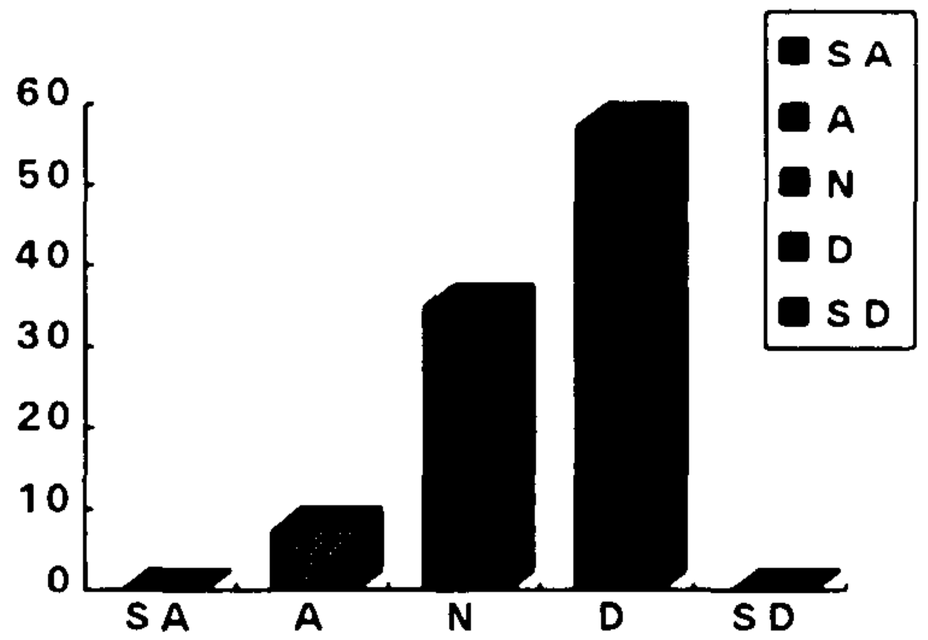
Attitudes towards police.

Saudi Arabian people maintain a notable deal of respect toward the security forces.[6] This respect may stem from their belief that the security forces are fair enforcers of the law, as they have the authority to execute the law, but do not abuse this power in the eyes of society.[7]

The comparative study of security in Saudi Arabia and America which was carried out by Basha to determine the factors that create a secure and safe society in Saudi Arabia, depended upon a questionnaire distributed to a randomly selected group of 40 students from Saudi Arabia and 40 students from the United States.

It asked, amongst other things, about respect for the police in both countries and their fairness in enforcing the law. The results of the survey showed that in Saudi Arabia respect for the police was particularly high in comparison with that in the United States. This is illustrated in the following figures:

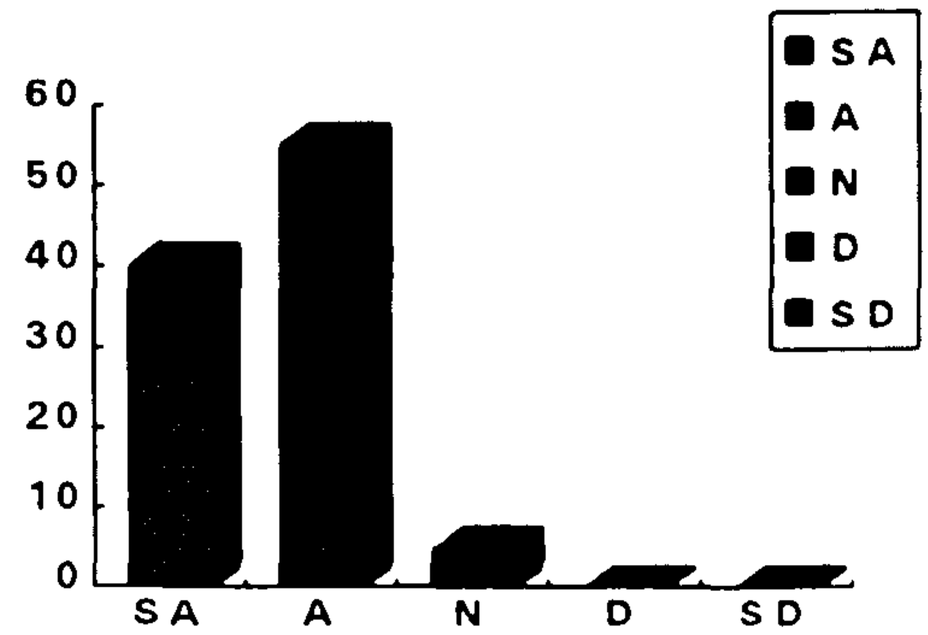
Figure six: There is a great respect for the police department in my country.



U.S.

Source: Basha, Bakri. The Significant Influences of Islamic Law on Decreasing Crime Rate In Saudi Arabian Society, p. 77.

The response of the United States students as shown in the above chart regarding respect for the police in their country was: 0 percent strongly agree, 7.5 percent agree, 35 percent neutral, 57.5 percent disagree, and 0 percent strongly disagree

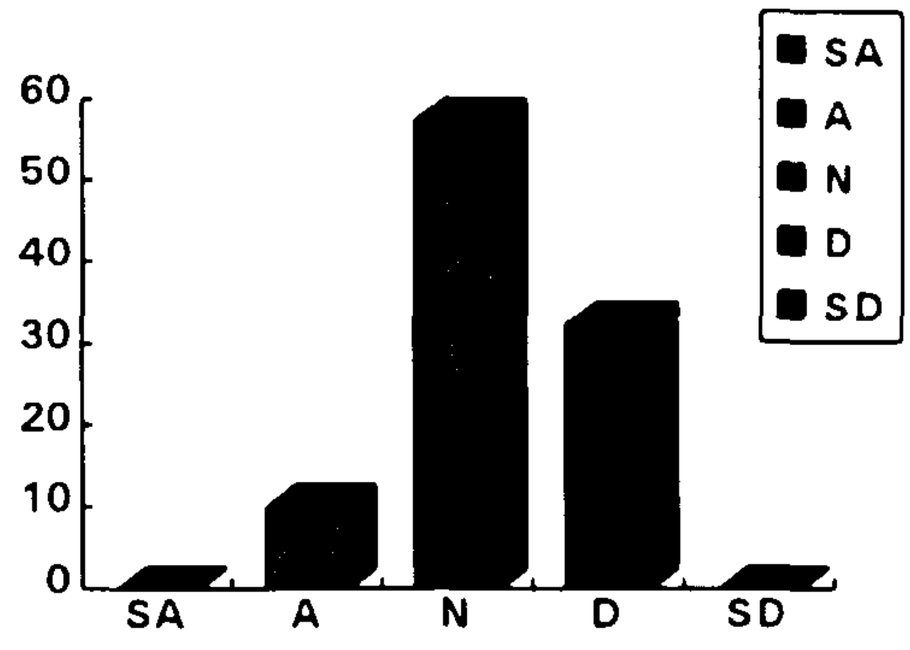


K.S.A.

Source: Basha, Bakri. The Significant Influences of Islamic Law on Decreasing Crime Rate In Saudi Arabian Society, p. 77.

Conversely, the response of Saudi Arabian students regarding this statement as shown in the above chart was: 40 percent strongly agree, 55 percent agree, 5 percent neutral, 0 percent disagree, and 0 percent strongly disagree.

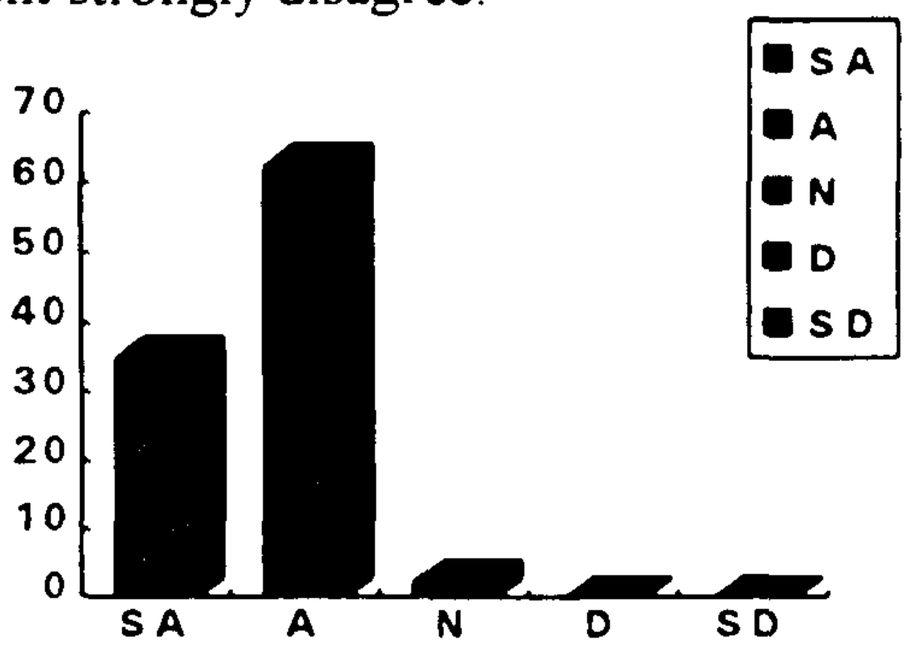
Figure seven: I feel that the police in my country are fair enforcers of the law.



U.S.

Source: Basha, Bakri. The Significant Influences of Islamic Law on Decreasing Crime Rate In Saudi Arabian Society, p. 78.

The above chart shows the response of the students regarding their feeling about whether the police in the United States are fair enforcers of the law or not. As can be seen, it was: 0 percent strongly agree, 10 percent agree, 57.5 percent neutral, 32.5 percent disagree, and 0 percent strongly disagree.



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Source: Basha, Bakri. The Significant Influences of Islamic Law on Decreasing Crime Rate In Saudi Arabian Society, p. 78.

On the other hand, the above chart shows that the response of Saudi Arabian students to this proposition was: 35 percent strongly agree, 62.5 percent agree, 2.5 percent neutral, 0 percent disagree, and 0 percent strongly disagree.

As mentioned previously, some practices exist which were established from the beginning in Islamic criminal law, in order to protect human rights and apply justice. The modern specific procedural safeguards are not prescribed in detail in either the Qur'ān or the Sunnah, but are left to the discretion of the ruler, who bears the responsibility for protecting the public welfare. The criminal procedures that apply today in Saudi Arabia can be considered to be based on the principles of the Shari`ah. These are legislated as measures to be followed by the competent authorities before and during trial in court in order to spread justice and maintain human rights [8]

Accordingly, there are some pre-trial criminal procedures legislated by the government in Saudi Arabia which should be followed by the police when executing their duty. These legal procedures should be observed, for example, in the following points:

1- At the stage of crime prevention when, for instance, watching and following a suspicious person, examining, and referring such a suspect to the police station, or when searching private premises either with a warrant or not. These criminal procedures are applied to both cases involving serious crimes and less serious crimes, including crimes of killing.

2- At the stage of crime detection when, for example, the police or any other competent authorities either receive reliable information or uncover a crime themselves. There are also particular criminal procedures which should be followed by the authorised investigator following a such detection, for example, when examining the accused, gathering related material evidence, including marks from the scene of the crime, and identifying the victim. These procedures may also be relevant to crimes of killing, including those connected with the driving of motor vehicles

3- Preventive detention, conditions of detention, and the rights of the accused.

These pre-trial criminal procedures will be discussed in detail in the following sections of this chapter.

SECTION I: CRIME PREVENTION (al-Wiqāyah min al-Jarīmah) AND THE DUTIES OF THE POLICE OR ANY OTHER COMPETENT AUTHORITIES.

Introduction.

Whenever anyone mentions the function of protecting society and the state from crime, it may be supposed that it is the job of the police. Of course, it is mainly the job of the police to tackle crime. But, in fact, other bodies can also play their part and co-operate in preventing crime. As is known, some crimes are against the person such as crimes of violence and killing. Most crimes are not carefully planned. They are carried out on the spur of the moment when a criminal sees an opportunity, for instance, an unlocked car or a house left open. Such a car or a house may give the criminal an open invitation. This may lead to a serious crime such as a crime of killing. Taking some simple precautions may prevent such crimes. Hence, it is the job of police and the other relevant bodies which can be called: crime prevention groups. In Saudi Arabia, these groups can be the local people, government officials and the business sector, all working with the police. These groups are, for example, concerned with developing local solutions to local problems and are an important link in the inter-agency approach to crime prevention. By their combined efforts, these groups can have a significant effect on crime levels.[9]

Their basic aims are:

1- To identify the main crime problems within their area, and to develop solutions

2- To work to prevent crime, and to reduce the fear of it.

3- To discourage crime by raising awareness of it throughout the community.[10]

As mentioned above, preventing crimes is mainly the job of the police, who act as experts in tackling crime. Thus, stopping and questioning someone whom they say they consider to look or act suspicious or to be acting suspiciously is the duty of the police or other competent authorities, as are the subsequent actions of searching,

interrogating, or arresting such a person. Accordingly, the discussion in this section will concentrate only on the function of the police in preventing crime and the legal criminal procedure relevant to such a performance.

Part 1: Stopping and Questioning Suspicious Persons:

Policemen are trained to sense both danger and illegality, and to distinguish in their minds people whom they believe to be suspicious from ordinary citizens. This is a vital sense and one of the main factors that maintain safety and security in the country. Sometimes, police may be alerted to danger or illegality because of what someone does or says. For the purpose of the public interest, it is not acceptable to ask the police to ignore their sense of either danger or illegality. On the contrary, the police should remain free to follow up their suspicions by commencing investigations that may include watching and following suspicious persons; questioning them about their actions and, if absolutely necessary, detaining them temporarily.[11]

In Saudi Arabia, the police or any other competent authorities bear the duty of protecting the state and society from crime, by fulfilling their task which aims to prevent the occurrence of crime initially, for instance, by watching and guarding public areas and assisting people who are in danger. In such circumstances the police have wide authority that gives the policeman sufficient power to perform such a duty. This power entitles him or any other authorised person to ask questions of, and evaluate answers given by suspicious persons; and when absolutely necessary (as, for example, in cases relevant to crimes of killing), to detain suspicious persons temporarily. This is considered as a precaution to maintain public security. This power is subject to some limitations which should not be exceeded by the police. Therefore, policemen or any other authorised persons should be trained to carry out such a duty and should be experienced in their work. In addition, they should be patient and kind, and should deal with suspicious persons in accordance with the teachings of Islamic law, which places great emphasis on the observance of human rights.[12]

According to legal procedure, if, for example, a policeman or any other authorised person observes unusual conduct which leads the observer to conclude, in light of his experience, that criminal activity may be in the offing or in progress and that the persons with whom he is dealing may be armed and dangerous, the police have the duty to commence investigations, for example, observing and following suspicious persons, interrogating them and evaluating their answers, and taking them into custody within the specified limits to enable further investigations to be made.

Thus, any person wandering about the streets or other public areas, or found outside at late or unusual hours in the night without any obvious reason or legal business, who does not give a satisfactory explanation, will be considered as a suspicious person. If so, the police officer, after identifying himself as a policeman, should ask the suspect a number of questions: his name , his address, and his reason for being there.[13]

In Islamic law, the question of whether a person is suspicious or not can be inferred from his behaviour or his attitude when he speaks. In this context Allah says:

"Had we so willed, we could have shown them up to thee, and thou shouldst have known them by their marks: but surely thou wilt know them by the tone of their speech ! And Allah knows all that ye do."[14]

If necessary, the police also have the right to refer a suspicious person to the nearest police station and to present him to the investigator who will carry out the next stage of investigation, which should also observe human rights. For example, he should not affect an individual's liberty unless there is a probable cause, as that is guaranteed by Islamic criminal law. Once an interview has been carried out, the investigator should write a report containing a number of items of information: the name of the policeman who initially seized and referred the suspicious person, the date and time of the arrest, the reason for referring him, and the result of the preliminary investigation.[15]

In addition, the police may not inspect the clothes of another person to determine what may be concealed therein without good cause. However, it is legal for a police officer to inspect the clothes of another person, if he reasonably believes that it is necessary. For example, it is prohibited by law in Saudi Arabia to carry a lethal weapon. It is an offence for anyone to be in possession of any offensive weapon, without lawful authority or excuse (the proof of which rests on the accused), in any public place. "Public place" includes any street and any premises or place to which the public have free access. "Offensive weapon" means any article made or adapted for causing injury to the person, or intended by the person carrying it for such use by him, or by some other person. It is also an offence to import or manufacture, sell or hire or offer for sale or hire, or lend or give to any person, any firearms weapon Accordingly, in order to find out whether a suspicious person is carrying a lethal weapon or not, the police have the right to inspect his pockets, and if such a weapon is found to confiscate it. In such a case the suspect will be convicted for unlawfully carrying a concealed weapon.[16]

The legal system also stipulates that no one has the right to stop and question, or inspect, another person unless authorised by the government to do so The authorised persons in such situations are [17]:

1- Policemen and their assistants in the various regions and emirates.

2- Commanders of both the Public Security Forces (ḍubbaṭ quwāt al-amn al-ʿāmm), Secret Police detectives (al-mabāḥith), and Intelligence (al-istikhbārāt).

3- Officers and Commander of the Border Guard (silāḥ al-ḥudūd), and National Guard (al-ḥaras al-waṭanī), Non-Commissioned or Warrant officers (ḍubbāṭ al-ṣaff), and Soldiers of Public Security Forces (junūd quwāt al-amn al-ʿāmm).

4- Commanders of Saudi Arabian Marine Vessels (rwʾasāʾ al-marākib al-baḥriyyah al-Saʿūdiyyah).

5- Emirs of towns and villages, and Headmen of districts (ʿumad al-maḥallāt)

6-All employers and individuals who are authorised by the government under special regulations.

As mentioned previously, pursuant to the legal system in Saudi Arabia, any of the above authorised persons has the right to stop, question, and inspect any suspicious person to obtain information such as name, occupation, address, driving licence if the suspicious person drives a car, and any necessary information that may help in confirming the suspicion.

Referring a suspicious person to a police station is not considered as an arrest, because the investigator in such circumstances is obliged by law to perform his duty as quickly as possible. Thus, in order to observe the liberty of the suspicious person, the legal system stipulates that the period of such an investigation must not exceed twenty-four hours.[18]

To sum up, two essential conditions must be met before any suspicious person can be legally interrogated. These are:

First, an interrogation may be carried out only by the competent authorities. Second, the interrogator should only commence his duty if sufficient evidence of suspicious behaviour is provided.[19]

Part 2: Searching Private Premises.

Islamic law restrains any person who may violate the right to privacy. Thus, private premises cannot be searched without a reason.[20] Dwelling-houses are considered as places due particular consideration.[21] For example:

Allah says: **"O ye who believe! Enter not houses other than your own, until ye have asked permission and saluted those in them: that is best for you, in order that ye may heed (what is seemly).[22] If you find no one in the house, enter not until permission is given to you: if ye are asked to go back, go back: that makes for greater purity for yourselves: and Allah knows well all that you do.[23] It is no fault on your part to enter houses not used for living in, which serve some**

(other) use for you: And Allah has knowledge of what ye revel and what ye conceal."[24]

It is concluded from the above passage that entry into dwelling-houses is prohibited in Islamic law unless the occupant consents. This prohibition also extends to properties where the owner is absent, or where there is no reply to a knock at the door.

In this context, 'Abd Allah states: "That is, if no one replies, there may be people in the house not in a presentable state. Or, even if the house is empty, you have no right to enter it until you obtain the owner's permission, wherever he may be. The fact of your not receiving a reply does not entitle you to enter without permission. You should wait, or knock twice or three times, and withdraw in case no permission is received. If you are actually asked to withdraw, as the inmates are not in a condition to receive you, you should *a fortiori* withdraw, either for a time, or altogether, as the inmates may wish you to do. Even if they are your friends, you have no right to take them by surprise or enter against their wishes. Your own purity of life and conduct as well as of motives is thus tested."[25]

He also state: "The rule about dwelling-houses is strict, because privacy is precious, and essential to a refined, decent, and well-ordered life. Such a rule of course does not apply to houses used for other useful purposes, such as an inn or caravanserai, or a shop, or a warehouse. But even here, of course implied permission from the owner is necessary as a matter of common-sense. The question in this passage is that of refined privacy, not that of right of ownership."[26]

In Saudi Arabia, inviolability of the dwelling-house is based on the Islamic social system which aims to protect individual privacy and freedom. This, in fact, does not interfere with the duty of the police to search and investigate in order to detect any crime.[27] Hence, the inviolability of premises is subject to some exceptions as, for example, when there is a necessity for a reasonable search in order to maintain social order and security.[28]

Since fasād (unlawful worldly pleasures) are forbidden in Islam, people in Saudi Arabia are expected to observe the law of Sharī'ah when at home with their families Therefore, the private home is considered inviolable.[29] Correspondingly, reasonable searches of such houses are governed by strict conditions that are based on the grounds of public interest. These conditions are[30]:

1- Houses must only be searched by the competent authorities.

2- These authorities should have a warrant issued by an officially empowered person such as the Emir of the Region, Directors of the Public Security forces, Commanders (rw'asā') of Police Stations, and Directors of any other relevant criminal department.

3- The warrant should be predicated upon reasonable grounds obtained. In fact, there are some exceptional circumstances which balance the need for effective law enforcement against the right of privacy, as when, for example, a person intends to take a woman aside to rape her, or when a policeman hears a noise that indicates a crime, a call for help,[31] or even a tip off from a reliable informant of good personal character, or any compelling circumstantial evidence of criminal activity.[32]

4- If the purpose of searching the house is only to seize the accused, the executing officer designated within the warrant must call on him three times to give himself up But, if the suspect does not surrender himself, the executing officer can enter the house. This should be in the presence of the Headman of the district and the Emir of Region or their agent.[33] It will require sometime to procure the presence of one of these, and the suspect has been previously convicted of criminal activity, the house may in the main time be placed under surveillance.[34]

5- Females may be interrogated and searched only by females. Regulations specify that such investigation must be carried out by two women of good personal character who have sworn by God to be honest when performing their work.[35] If no suitable female is available to carry out the questioning, a male may do it instead of a female but, this must be done in the presence of one of her maḥārim, such as her father,

brother, or husband.[36] A male is not in any circumstances allowed to search a female.[37]

Legal procedures in Saudi Arabia have recognised the need, for searches to be conducted without a warrant, on certain occasions, even within buildings, including dwellings, under emergency conditions. Accordingly, the police or any other competent authorities have the right to enter any private premises even without a warrant if the executing officer has reasonable cause to believe that such action is necessary to prevent, for example, the escape of a persons having committed a crime involving serious bodily harm or the threat or danger thereof. The same also applies if an officer believes that it is essential for him to enter private premises, and that waiting to obtain a warrant would endanger life, or would cause evidence to be destroyed or property damaged or lost.[38]

Where the premises of members of the diplomatic corps are concerned, this emergency rule provides for only limited entry, and does not grant permission for a search, inasmuch as the legal rule concerning such diplomatic premises states "No search or seizure may take place except pursuant to a warrant; to be valid, a warrant must be predicated upon probable cause and issued only by royal decree."[39]

Legal procedure following search of property.

Once a search warrant has been executed, the executing officer designated within the warrant is required to write an immediate report to the person who issued the warrant initially. This report should contain a number of items of information, including the date, time and place the warrant was executed, the name of the persons to whom a copy of the warrant was given, and a complete inventory of all properties seized during the execution of the warrant.[40]

Such an inventory must be made in the presence of an occupant of the premises at the time of the search, such as the owner, tenant, or one of their relatives. In addition, the presence is required of the Headman of the district where the warrant was executed, or his agent, and two other disinterested persons such as neighbours who

can attest to the fact that only the items mentioned in the inventory were seized by the executing officers. The name of the persons in whose presence the inventory was made should appear in the report. The report should be signed by the executing officers and all the other witnesses in whose presence the inventory was made.[41]

Part 3: Categories of Suspected Persons.

Jurists state that suspects fall into three categories. These categories are:

First: Pious and righteous persons.

If the suspected person is well-known as a person of complete integrity and famed for his moral virtue, it is the opinion of the majority of Islamic jurists that he should be considered as a person who is not liable, nor should his rights and liberty be restricted merely on the ground of unproven (hearsay) allegations against him, because such allegations are not acceptable to the court.[42]

A similar rule is also applied in Saudi Arabia. For example: the legal system states that if there is no probable cause or sufficient circumstantial evidence, such a person should be allowed to remain free[43] because, his complete integrity and piousness cast doubt on the possibility of his being involved in suspects behaviour and protect him from being considered as a suspect until the contrary is proven. But, if the allegations against him prove to be well-founded, he will be liable.[44]

Second: Persons whose character is unknown.

It is admissible in Islamic law to restrict the rights and the liberty of such suspects to the extent required by the need to determine the truth.

This differentiation between the above categorises of suspect is based on the concept of istiḥsān, which refers to the presumption in the law of evidence that a state of affairs known to exist in the past continues to exist until the contrary is proven. Jurists use this concept well and are sensitive to the distinction between its role in the sphere of punishment and the sphere of procedure. As to punishment, the rule of presumed innocence makes every person immune from penalty until guilt is proven

This presumption is not contradicted by any degree of doubt. As for suspicion against persons whose character is unknown, allegations should be treated with caution; whereas, allegations should carry no weight at all against persons known as pious and righteous, unless there is a reliable evidence. Accordingly, persons of unknown character may be placed in custody until the truth is discovered.[45]

In Saudi Arabia, the liberty of suspects who belong to this category may be restricted. Hence, it is admissible for the authorised interrogator to refer such suspects to the nearest police station if he believes that it is necessary. The denial of such a suspect carry no weight in the police station and may not be sufficient grounds to free him. Accordingly, the police have the right to detain him on remand until the truth is discovered, but as mentioned previously, the detention should not exceed the tolerable limit which is twenty-four hours. This limit is considered as an adequate time to confirm whether the allegation is justified.[46]

Third: Persons who are known recidivists (aṣḥāb al-sawābiq) or of dubious or disorderly character.

In no circumstances are a person's previous convictions considered in any legal system as evidence to prove a suspicion. However, such convictions may be deemed as an indication that the suspicion may be justified. In other words, it may be regarded as a factor which increases the possibility of suspicion and, therefore, as a ground for further investigation, and, if necessary, to detention of such a person. Ibn Taymiyyah states that such a suspects may, if necessary, be subject to ta'zīr, but this remains the discretion of judge not of the police. Some jurists believe that suspicion against such a person is more likely to be true because of his previous life style.[47]

In Saudi Arabia, such circumstances entitle the interrogator to carry out a more thorough investigation to establish whether such a person was involved in the alleged crime as suggested by his previous record or not. In case of serious crimes, an interrogator is empowered to arrest such a suspect and detain him, but this must be supervised by the Commander of the police station where the interrogation is carried

out. In addition, the period of detention in this situation should not exceed tolerable limits, which must not be more than a maximum of three days. These regulations are based on grounds of public interest in order to maintain social order and safety.[48]

Part 4: The Rights of the Suspect at this Stage.

At this primary stage of preventing crime, it can be concluded from the previous discussion that a suspect has certain rights. On the other hand, the police interrogator also has certain rights.

As mentioned earlier, in Islamic criminal law every person is assumed innocent until the contrary is proved. Thus, the rights of an ordinary person may not be forfeited unless reasonable grounds are established. Mere suspicion is not enough to invalidate this presumption, since suspicion by its nature is not devoid of doubt. Accordingly, a mere suspicion is inconsequential, unless it leads to indictment, which is a procedural function carried out by a specific agency.

However, in Saudi Arabia, if a person looks suspects, his inviolability and privacy may be forfeited on the ground of the interest of the whole society in maintaining peace and social security. Correspondingly, policemen and any other competent authorities have the right to examine a suspects person. It is illegal for such a person to refuse to give his name, address, and his reason for being there to any authorised person stopping him and requesting this information.[49] A person may have nothing unlawful in his possession but if he refuses to give such information, he may be referred to the nearest police station and be charged solely with refusing to identify himself, when there were a reasonable grounds for believing that he was engaged or had been engaged in criminal conduct.

When commencing this primary examination, an executing officer should not behave in a threatening manner toward a suspect.[50] When dealing with a suspect, an executing officer must be mindful of the fact that the required criminal procedure in such cases should be followed with regard to the suspect as soon as possible before the end of the legal limited time.[51] If the executing officer finds no evidence that

indicates criminal activity, the suspect must be released immediately.[52] The executing officer will be responsible for any arbitrary and abusive practice exceeding tolerable limits.[53]

If a suspect is referred to the police station for the purpose of investigation, he must be given the opportunity to defend himself and, if necessary, to consult with any body who may be able to assist him if he is not in a position to defend himself.[54]

In this context, it is stated in the Qur'ān that Moses said: **"And my brother Aaron, he 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 said: We will certainly strengthen thy arm through thy brother, and invest you both with authority, so they shall not be able to touch you..."**[55]

A suspect has the right to be given sufficient time to challenge and answer the questions given by the interrogator. It is also his right to have the opportunity to present his defence.[56]

A policeman or any other executing officer should initially identify himself as an authorised person before commencing the legal interrogation. A suspect should be informed of the reason why he is being questioned.[57] Finally, if the suspect is a woman, such a primary interrogation should be carried out by a female,[58] or at least in the presence of one of the suspect's maḥārim.[59]

As far as the searching of dwelling-houses or any other private premises is concerned, the following limitations, which are favourable to the suspect, must be observed[60]:

1- Searches of dwelling-houses or any other private premises should not be conducted without a warrant. Hence, The occupier has the right to see such a warrant. except in emergency.

2- The warrant must be issued by the competent authority.

3- The provision of a such warrant should be predicated upon reasonable grounds

4- The zeal of executing officer designated within the warrant should not exceed tolerable limits.

5- All the information and objects found in the searched premises must remain confidential.[61]

Part 5: Foreign-Language Speakers and Deaf Persons.

The legal system in Saudi Arabia states that, except in case of necessity, a person may not be interviewed in the absence of a person capable of acting as interpreter if the suspect has difficulty in understanding Arabic. The interrogator must ensure that the interpreter makes notes of the interview. In the case of a person making a statement in a language other than Arabic, the interpreter must take down the statement in the language in which it is made, the maker must sign it, and an official translation must be made in due course.[62]

If a suspect is deaf or in doubt of his hearing ability, he may not be interviewed in the absence of a sign-language practitioner, unless he agrees in writing, or unless a police officer or any other competent person designated to carry out such an interrogation believes that this must be done as a matter of urgency.[63]

Part 6: Findings.

Following the criminal procedure in this section, an official interrogator may establish certain facts that indicate either the probability or the improbability of criminal activity. Thus, a suspect may be judged innocent of criminal activity or he may be formally charged with it. In the former case, the person, as mentioned previously, must be discharged at once. In the latter case there are two possibilities

Firstly, he may be summoned to appear at either the police station or the court at a certain time. To be allowed to leave the police station, he must provide a guarantor for his answering the summons; otherwise, he will be detained.

Obviously, this procedure is only used in less serious cases where the official interrogator (under the supervision of the Commander of the Police Station where the

case was brought) is entitled to refer him directly to the court without seeking the approval of the Emir of the Region or the Ministry of the Interior.[64]

Secondly, he may be detained, having being charged with a serious crime, in which case a summons and surety would be inappropriate.[65] This will be discussed in detail in the following section.

[1] Ministry of Interior, Murshid al-Ijrā'āt al-Jinā'iyyah, p. 7.

[2] Id.

[3] Basha, The Significant Influences of Islamic Law on Decreasing Crime Rate, pp. 18-19.

[4] Resolution of the Council of Ministers (Majlis al-Wūzarā'), No. 83 dated 1-2-1395 A.H. Also: Resolution No. 4099 dated 5-2-1395 A.H. Ministry of Interior, Murshid al-Ijrā'āt al-Jinā'iyyah, p. 7.

[5] Thomas, F. Adams. Law Enforcement: an introduction to the police role in the community, (Prentice-Hall, INC, Englewood Cliffs, U.S., 1986), pp. 117-126.

[6] Basha, The Significant Influences of Islamic Law on decreasing Crime Rate, p. 99.

[7] Id, p. 155.

[8] See: Chapter one, section two.

[9] Ministry of Interior, Murshid al-Ijrā'āt al-Jinā'iyyah, p. 24 and p. 101.

[10] Id, p. 102.

[11] Jones, David A. The Law of Criminal Procedure, (Boston Torento, Littil, Brown and Company, 1981) p. 120.

[12] Department of Islamic Law in King Fahad Security College, al-Ijrā'āt al-Jinā'iyyah fi al-Sharī'ah al-Islāmiyyah, (unpublished) pp. 49-50.

[13] Department of Islamic Law, al-Ijrā'āt al-Jinā'iyyah, p. 66.

[14] Qur'ān, 47 verse 30.

[15] Article 2, from the Legal System of the Imprisonment and Detention in Saudi Arabia Also: Resolution of the Ministry of the Interior, No. 233 dated 17-1-1404 A.H. Department of Islamic Law, al-Ijrā'āt al-Jinā'iyyah, p. 98.

[16] Articles 82, 128, and 129, from the Legal System of the Public Security Administration in Saudi Arabia (Niẓām mudīriyat al-amn al-'āmm), issued by royal decree No. 3594 dated 29-3-1369 A.H. Also: Ministry of Interior, Murshid al-Ijrā'āt al-Jinā'iyyah, p. 68.

[17] Article 1, from the Legal System of the Imprisonment and Detention in Saudi Arabia. Also: Department of Islamic Law, al-Ijrā'āt al-Jinā'iyyah, p. 68.

[18] Chapter three, Section 4, in the Legal System of the Committee of Investigation and Public Prosecution in Saudi Arabia (Niẓām Hay'at al-Taḥqīq wa al-Iddi'ā' al-'āmm). Also: Article 3, from the Legal System of the Imprisonment and Detention in Saudi Arabia. Resolution of the Ministry of Interior, No. 233 dated 17-1-1404 A.H. Department of Islamic Law, al-Ijrā'āt al-Jinā'iyyah, p. 161.

[19] Department of Islamic Law, al-Ijrā'āt al-Jinā'iyyah, p. 127.

[20] al-Saleh, Osman A. "The Right of the Individual to Personal Security in Islam" (in: Bassioni, M. The Islamic Criminal Justice System, p. 68.

[21] Walker, "The Rights of the Accused in Saudi Criminal Procedure", Loyola of Los Angeles International and Comparative Law, 1993, vol. 5, part: 4, p. 873.

[22] Qur'ān, 24 verse 27.

[23] Qur'ān, 24 verse 28.

[24] Qur'ān, 24 verse 29.

[25] 'Abd Allah, Translation of the Holy Qur'an, p. 1011.

[26] Id, pp. 1011-1012.

[27] Articles 145 and 306, from the Legal System of the Public Security Administration in Saudi Arabia. Also: Resolution of the Ministry of Interior, No. 105462 dated 21-7-1385 A.H. Ministry of Interior, Murshid al-Ijrā'āt al-Jinā'iyyah, p. 68.

[28] Ministry of Interior, Murshid al-Ijrā'āt al-Jinā'iyyah, p. 69.

[29] Walker, "The Rights of the Accused in Saudi Criminal Procedure", Loyola of Los Angeles International and Comparative Law, 1993, vol. 5, part: 4, p. 873.

[30] Ministry of Interior, Murshid al-Ijrā'āt al-Jinā'iyyah, p. 69.

[31] Id, p. 65.

[32] Walker, "The Rights of the Accused in Saudi Criminal Procedure", Loyola of Los Angeles International and Comparative Law, 1993, vol. 5, part: 4, p. 873.

[33] Articles 177, and 288, from the Legal System of the Public Security Administration in Saudi Arabia. Also: Ministry of Interior, Murshid al-Ijrā'āt al-Jinā'iyyah, p. 71.

[34] Article 170, from the Legal System of the Public Security Administration in Saudi Arabia. Also: Ministry of Interior, Murshid al-Ijrā'āt al-Jinā'iyyah, p. 71.

[35] Article 150 from the Legal System of the Public Security Administration in Saudi Arabia. Also: Ministry of Interior, Murshid al-Ijrā'āt al-Jinā'iyyah, p. 68.

[36] Promulgation (Ta'mīm) of the Ministry of the Interior, No. 2\S\5614 dated 2-6-1399 A.H. Also: Ministry of Interior, Murshid al-Ijrā'āt al-Jinā'iyyah, p. 62.

[37] Ministry of Interior, Murshid al-Ijrā'āt al-Jinā'iyyah, p. 72.

[38] Article No. 149, from the Legal System of the Administration of the Public Security in Saudi Arabia Also: Ministry of Interior, Murshid al-Ijrā'āt al-Jinā'iyyah, (1409 AH) p. 70.

[39] Article 146, from the Legal System of the Public Security Administration in Saudi Arabia. Also: Ministry of Interior, Murshid al-Ijrā'āt al-Jinā'iyyah, p. 69.

[40] Article 82, from the Legal System of the Public Security Administration in Saudi Arabia.

[41] Articles 147 and 148, from the Legal System of the Public Security Administration in Saudi Arabia. Also: Promulgation (Ta'mīm) of the Chief Director of the Public Security in Saudi Arabia, No. 261 dated 4-1-1399 AH. Ministry of Interior, Murshid al-Ijrā'āt al-Jinā'iyyah, p. 70.

[42] Ibn al-Qayyim, Muḥammad al-Jawziyyah. al-Ṭuruq al-Ḥakamiyyah fi al-Siyāsah al-Shari`iyyah, (al-Maṭba'ah al-Munīriyah, ed. 1, 1372 A.H.) pp. 93-104. Also: Ibn Furḥūn, Tabṣirat al-Ḥukkām, vol. 2, p. 153. Sa'īd, Muḥammad Ra'fat. al-Muttaham wa Huqūquh fi al-Sharī`ah al-Islāmiyyah, (Maktabat al-Manār, Jordan, 1403 A.H.), p. 9.

[43] Article 4, from the Legal System of the Imprisonment and Detention in Saudi Arabia. Also: Department of Islamic Law, al-Ijrā'āt al-Jinā'iyyah, p. 105.

[44] Articles 54-59, from section 4 in chapter 3, in the Legal System of the Committee of Investigation and Public Prosecution in Saudi Arabia. Also: Department of Islamic Law, al-Ijrā'āt al-Jinā`iyyah, p. 149.

[45] Sa'īd, al-Muttaham, p. 29. Also Ibn Furḥūn, Tabṣirat al-Ḥukkām, vol. 2, p. 154.

[46] Article 5, from the Legal System of the Imprisonment and Detention in Saudi Arabia. Also: Department of Islamic Law, al-Ijrā'āt al-Jinā'iyyah, pp. 106-107.

[47] Ibn Taymiyah, Majmū' al-Fatāwā, (By: 'Abd al-Raḥmān al-Qāsim, Idārat al--Buḥūth al-'Ilmiyyah wa al-Iftā', Riyadh) vol. 34, p. 236. Also, see the same opinion in: Ibn Furḥūn, Tabṣirat

al-Ḥukkām, vol. 2, p. 154., and al-Mawārdī, al-'Aḥkām al-Sulṭāniyyah, p. 220. Department of Islamic Law, al-Ijrā'āt al-Jinā'iyyah, pp. 107-108. Sa'īd, al-Muttaham, pp. 32-33.

[48] Article 3, from the Resolution of the Council of Ministers (Majlis al-Wuzarā'), No. 725 dated 23-12-1380 A.H. Ministry of Interior, Murshid al-Ijrā'āt al-Jinā'iyyah, pp. 77-78.

[49] Ministry of Interior, Murshid al-Ijrā'āt al-Jinā'iyyah, p. 64.

[50] Department of Islamic Law, al-Ijrā'āt al-Jinā'iyyah, pp. 137-138.

[51] Ministry of Interior, Murshid al-Ijrā'āt al-Jinā'iyyah, p. 82.

[52] Article 4, from the Legal System of the Imprisonment and Detention in Saudi Arabia. Also: Department of Islamic Law, al-Ijrā'āt al-Jinā'iyyah, p. 105.

[53] Article 231, from the Legal System of the Imprisonment and Detention in Saudi Arabia. Also: Ministry of Interior, Murshid al-Ijrā'āt al-Jinā'iyyah, p. 77.

[54] Department of Islamic Law, al-Ijrā'āt al-Jinā'iyyah, pp. 102-103. Also: al-Bahūtī, Kashshāf al-Qinā', vol. 3, p. 464. Ibn Furḥūn, Tabṣirat al-Ḥukkām, vol. 2, p. 156.

[55] Qur'ān, 28 verses 34-35.

[56] Department of Islamic Law, al-Ijrā'āt al-Jinā'iyyah, pp. 102-103.

[57] Article 3, from the Legal System of the Imprisonment and Detention in Saudi Arabia. Also: Department of Islamic Law, al-Ijrā'āt al-Jinā'iyyah, p. 161.

[58] Ministry of Interior, Murshid al-Ijrā'āt al-Jinā'iyyah, p. 72.

[59] Promulgation of the Ministry of the Interior, No. 2\S\5614 dated 2-6-1399 A.H. Also: Ministry of Interior, Murshid al-Ijrā'āt al-Jinā'iyyah, p. 62.

[60] Ministry of Interior, Murshid al-Ijrā'āt al-Jinā'iyyah, pp. 68-72.

[61] Promulgation of the Chief Director of the Public Security Forces, No. 261 dated 4-1-1399 AH. Also: Ministry of Interior, Murshid al-Ijrā'āt al-Jinā'iyyah, p. 72.

[62] Resolution of the Ministry of the Interior, No. 2440 dated 28-11-1396 AH. Also: Ministry of Interior, Murshid al-Ijrā'āt al-Jinā'iyyah, p. 226.

[63] Personal interview with al-Muḥaqiq (Investigator) 'Abd Allah al-'Alī, in al-Riyadh, 1414 A.H.

[64] Resolution of the Council of the Ministers, No. 725 dated 23-12-1380 A.H. Also: Article 3, from the Promulgation of the Ministry of the Interior, No. 3735\S dated 2-9-1390 AH. Ministry of Interior, Murshid al-Ijrā'āt al-Jinā'iyyah, p. 77.

[65] Resolution of the Council of the Ministers, No. 725 dated 23-12-1380 A.H. Also: Ministry of Interior, Murshid al-Ijrā'āt al-Jinā'iyyah, p. 77.

SECTION II: PRE-TRIAL CRIMINAL PROCEDURE FOLLOWING THE DETECTION OF CRIMES OF KILLING.

Introduction.

The police can be alerted to crimes of killing either by means of information or when performing their own patrol duties at the stage of crime prevention, or when gathering evidence following the occurrence of a lesser crime.

Evidence may be obtained by the law enforcement authorities from public places such as streets and park lands to which the police as well as other citizens enjoy free access. Some evidence may be gathered from private premises such as those owned by the victim of a crime, the suspect, or anybody else having possible connection with the crime. These places are known as "places of the crime" where evidence may be found.[1]

Persons who see a crime committed are known as eyewitnesses to that crime and are expected to come forward to the police and co-operate with them or any other competent authorities in seizing the criminal.[2] Some eyewitnesses may not come forward to the police in person but may merely telephone them to inform them of the occurrence of the crime. These methods of informing the police of the occurrence of a crime are known as notification of a crime (al-balāgh 'an al-jarīmah).[3]

Concerning the investigative process, a police investigation into crimes of killing consists of a number of stages and may involve several different methods of information gathering. The first stage, as mentioned above, involves the reporting of the crime to the police or the police observing a crime being committed. The police then have to decide whether the alleged crime is to be investigated, and if it is, to whom the case will be assigned. Then, a team of officers will be selected to bring to the investigation their individual and collective skills.

In inquiries into crimes of killing a forensic doctor may perform an autopsy on the corpse and, in most cases, discover the cause of death and other important information. At the same time, police photographers, fingerprint experts and scientists from a forensic science laboratory carefully examine the scene of the crime for evidence. A police investigator may also look for witnesses to the crime. The importance of different sources of information will depend on the circumstances surrounding each case. For example: in some cases, the investigator assigned to the case may need the forensic doctor to perform an autopsy. In other cases, the investigator may be satisfied with information obtained from interviews which may lead to confessions, which on their own are sufficient evidence for conviction.[4]

In Saudi Arabia, crime investigation procedures are regulated by the authorities. These procedures should be considered by the police when performing their duties. Some of these procedures cover the following:

1- Receiving notification of a crime.

2- Going to the venue of the crime.

3- Gathering or collecting evidence from that venue or from any other relevant places.

4- Looking for witnesses, and identifying the victim.

5-Searching for criminals and detaining them.

All these procedures will be discussed in detail in the following parts of this section.

Part 1: Notification of a Crime (al-balāgh 'an al-jarīmah) and the Informant (al-mublligh).

According to the legal system in Saudi Arabia, al-mublligh is a person who gives information to the police, or any other competent authorities, to notify them of a crime. This notification may be made in a telephone call, a letter, or in person by the informant who has observed or discovered a crime. In some circumstances, the informant may be required to co-operate with the police or any other competent authorities, in apprehending the criminal.[5]

Such notification should be officially received and reported regardless of whether the informant is known or not.[6] The regulation states that such information can also be officially received only by competent persons. These persons are [7]:

1- Policemen and their assistants in the various regions and emirates.

2- The officers of the Public Security Forces (ḍubbāṭ al-amn al-'āmm), Secret Police (al-mabāḥith), and Intelligence officers (al-istikhbārāt).

3- Officers of the Coast Guard, and National Guard (al-ḥaras al-waṭanī) , Non-commissioned or Warrant officers (ḍubbāṭ al-ṣaff), and Soldiers of the Public Security Forces.

4- Commanders of Saudi Arabian Marine Vessels (rw'asā' al-marākib al-baḥriyyah al-Sa'ūdiyyah).

5- Emirs of towns and villages, and Headmen of districts ('umad al-maḥallāt).

6- All employers and individuals who are so authorised by the government under special regulation.

Once these competent persons receive such information they should immediately fulfil their task of transferring this information to the nearest police station which will bear the main responsibility for following up such a notification.[8]

Saudi Arabian people believe that such notification may help protect society from crime. These people are encouraged by the Sharī'ah to prevent any criminal activity and ,therefore, to co-operate in restraining any wrong-doing. For example:

The Prophet says: "Any one of you who sees vice should change it with his hand; if he cannot do so, then with his tongue; and if he cannot do so, then with his heart, and this is the lowest degree of belief." [9]

However, there are some who see a crime but never telephone or come forward to the police, perhaps because they fear getting involved in official procedures following such an act, or because they believe they are busy and would prefer not to waste their time doing so.

According to the circular of the Ministry of the Interior issued in 1390 A.H., the police must identify any informant who notifies them of a crime.[10] This circular was amended in 1395 A.H. to allow the police to receive and act on any notification of crime even if it is given by an unknown person.[11]

It can be concluded from this amendment that those people who see a crime and prefer not to come forward in person to the police can also fulfil the teaching of Islam that encourages people to co-operate in protecting society from crime, by notifying the competent authorities of a crime, for example, by a letter or call from a public telephone without an obligation to give their names or to co-operate with the police in apprehending the criminal. In order to discourage such anonymous notifications, the government has encouraged the citizens to identify themselves and co-operate in protecting society from crime by offering a reward for any notification of criminal activity.[12] This was published in 1400 A.H.[13]

The amount of this reward varies depending on the degree of co-operation. For instance:

1- A person who notifies the police of a crime and identifies himself is entitled a reward ranging from one thousand Saudi riyals to five thousand riyals.

2- A sum of money ranging between five thousand riyals and ten thousand riyals is awarded to a person who sees a crime, and comes forward to the police station and co-operates with them in apprehending or attempting to apprehend those who are responsible for committing the crime.

3- A sum of money ranging from ten thousand riyals to fifteen thousand riyals is awarded to a person who, pursuant to police directions, works or accompanies the police in their duty and paves the way for the police to arrest the criminal before he leaves the scene of the crime.

The amount of such a reward is fixed by the police or any other competent authorities that are controlled by the Ministry of the Interior in accordance with the degree of co-operation .[14]

It should be noted that any informant giving false information is liable to a ta'zīr penalty but the degree of this penalty must be determined by the judge.[15]

Once the police or any other competent authorities are notified of a crime of killing, they should immediately report the name and the address of the informant, and the time, date and place where the crime was committed.[16] In addition, they should, in due course, contact the superior investigator who should immediately appoint the most suitable investigator to carry out the following procedures[17]:

1- This investigator must instantly go to the scene of the crime identified by the informant in order to confirm the occurrence of the crime.

2- Once the investigator has reached the scene of crime, and has actually establishes that a crime has taken place, he should contact the police station where the first notification of the crime took place in order to confirm the occurrence of the crime. Following this, he should commence his task by opening an official report (maḥẓar) and considering the subsequent steps to be taken in the investigation.

Nowadays, to take advantage of the advances of modern technology, the police or the investigator should record all this primary information as well as the list of evidence found at the "place of the crime" on an official computer form. This record should contain the information shown on the following table [18].

Table: 6

Criminal Incident Report.

Information on incident.

Case No..... Type of incident.....

Date of crime..... Time of crime .....

Date crime discovered..... Time crime discovered .....

Place of crime ..... Police station involved.....

Investigator's identity card No..... Number of suspects.....

Number of victims.....

Important items found at the place of the crime .....

.....

.....

If the incident includes damage to any other property, please note that below:

.....

.....

.....

Passport numbers.....

Registration number and make of vehicle.....

Items **with** serial numbers.....

.....

Items **without** serial numbers.....

.....

Other information.....

In case of closing the investigation, write number **1**. and mark the reason:

A- Solved (tamm ḥalluh).

B- Dropped (ausqiṭ).

C-No basis for proceeding (la asās lahā).

The legal criminal procedure concerning the investigation reports (niẓam maḥāẓir al-taḥqiq al-jinā'ī) in Saudi Arabia states that it is important for the investigator to mention in his report the actual time of commencing the investigation and the exact time of receiving notification of the crime. In these records all times should be written in hours and minutes.[19]

Following the initial information, the investigator should report in detail information about the victim. Such information should also be recorded on an official computer form This record should contain the information shown on the below table.[20]

Table: 7

Criminal Incident Report.

Information about the victim

Case No..... Date of notification.....

Victim's name..... First name.....

Father's name..... Grandfather's Name.....

Family name (surname).....

Sex ..... Age..... Nationality.....

Marital status..... Number of identification card.....

Level of education ..... Occupation .....

Victim's condition .....

The exact time of receiving notification of the crime may be an essential factor enabling the investigator to know the elapsed time between the occurrence of the

crime and its notification. The length of this elapsed time may raise doubts as to the reliability of the informant. In some cases, the informant may be suspected of having been involved in the commission of the crime and having destroyed or hidden the evidence of the crime before notifying the police of it. On the other hand, there may be a hidden reason, related to the crime, for delaying such notification.

By way of illustration, the following case confirms the importance of mentioning the exact time of the notification and the commencement of the investigation of the crime.

In 1387 A.H. an informant called A. came to the police station in al-Khubar, saying that while he was lying in his bed and reading a magazine, at the flat where he lived alone, he felt that an unknown person had opened the bedroom door and, as he could not see anyone, he shouted: "Who is it?". Thereupon, this unknown person attempted to escape, firing two shots from the interior passageway between the rooms and the main door of the flat, in order to deter A. from following him.

The police officer recorded this notification and the date but did not write down the time. Then, as a primary procedure, a police officer went to the scene of the crime reported by the informant. The policeman found two spent bullets in that passageway and another bullet lodged in the inside of main door of the flat. Unfortunately, this policeman did not examine the place carefully; he just made a general report of his findings.

Later, after two days, the corpse of a person who had been shot by a gun was found amongst old tyres at the side of al-Dammam motorway. The director of the department of criminal investigation in that region was assigned to investigate the case. The autopsy indicated that the corpse was, in fact, the body of the guard of the building where the informant lived. This was sufficient evidence to accuse the informant and, therefore, the investigator wanted to know the time when the informant contacted the police, as this was important to reinforce the accusation. After great efforts by the investigator to establish the time, he found that the informant came to the police at quarter to ten in the evening after 'ishā' prayer. This

means that the elapsed time between the commission of the crime as reported by the informant and his contacting the police was more than three hours, while the distance between the scene of the crime and the police station was only about two kilometres, which could be walked in about half an hour. Thus, if the policeman who received the notification had mentioned the time at which the informant contacted the police, this would have saved time and facilitated the investigation, because the length of the elapsed time suggested that the informant intended to get rid of the corpse and cover his criminal activity. This elapsed time was one of the main factors with which the criminal was faced and which led to his confession.[21]

Part 2: Assistants to the Investigator (a'wān or musā'idū al-muḥaqiq)

In crimes of killing the investigator may require an assistant. In all cases, however great his efforts, the investigator can never gather all the facts of the crime without making use of the experience of other specialists, each in his field, and without taking advantage of the assistance of eyewitnesses who happened to be in the vicinity of the crime when it is occurred.

According to legal practice in Saudi Arabia, the assistants required to take part in such an investigation depend on the circumstances of the case. For example: the investigator may not be able to confirm with his own eyes the cause of death, the time it occurred, the instrument used, the blood-group of the stains found, for example, on the victim's clothes, or the origin of fingerprints. It is essential for such things and similar ones to be examined by the specialised experts before a scientific opinion can be given.[22]

Given the importance of these assistants in discovering the facts of a crime and the identity of a criminal by scientific aids and forensic science laboratories, it is worth mentioning those people who may assist the investigator and their active or vital role in bringing about a successful conclusion to an investigation.

Tracker of footsteps (qaṣṣāṣ al-'athar)

In Saudi Arabia, qaṣṣāṣ al-athar is a person who has a special natural ability to recognise or distinguish between the impression of feet at first sight and can, therefore, follow the direction of that impression to determine, for example, the direction from which the criminal approached the venue of the crime. This, of course, is one of the factors that may help in discovering the criminal.[23]

Following and comparing the impression of footprints in Saudi Arabia is an extremely effective way of identifying criminals, by looking at footprints left at the scene of a crime, and then comparing them with those of suspects.[24] Sometimes, a tracker can say, from his past experience, that footprints left at the scene of a crime belong to a person previously convicted. Although it is a traditional practice, many criminals have been discovered with the assistance of such trackers.[25]

The famous traditional trackers in Saudi Arabia are descended from the families called al-Marrī and al-Qurashī. These trackers are extremely skilled in following up the direction of footsteps. This makes some people think that some sort of magic must be involved. For example, it is believed that there are jinn who supply these trackers with information leading to the discovery of criminals, as they have an unbelievable and surprising ability to identify footprints and describe the persons to whom they belong. They can also recognise whether they belong to a person who is male or female, married or virgin, and so forth. This makes it seem as if these trackers had witnessed the occurrence of the crime. Hence, if the crime has been committed, for instance, in a dusty area, it is important for the investigator to ask for the assistance of such people.[26]

In addition to these traditional untrained experts, there are also specialised scientific officers trained in this subject. These officers use modern methods, e.g. plaster casts, to compare and identify footprints.[27]

The Pathologist (ṭabīb al-tashrīḥ al-jinā'ī).

Ṭabīb al-tashrīḥ al-jinā'ī, in Saudi Arabia, is a person who is qualified to carry out an autopsy. It is the pathologist to whom the investigator turns when a post-mortem is required.

However, according to Islamic law, the corpse of the victim is considered inviolable. Accordingly, it is stated in the Ḥanbalī Madhhab that breaking the bone of a dead person is like breaking the bone of a living person. But, according to the rule of necessity, there is a maxim which states that necessity permits the forbidden. In the past, this maxim was invoked in the investigation of crime and came to be considered as permitting the performance of an autopsy.[28]

Consequently, the superior committee of scholars in Saudi Arabia issued a fatwā in 1396 A.H, which gives permission for performing an autopsy. But, as a crime of killing is often a family affair, the practice in such a step must not be taken without the consent of the victim's next of kin in order of priority, such as son and descendants, father and ascendants, brothers, nephews, uncles, and cousins.[29]

In addition to the consent of the victim's relatives, the administrator of the hospital where such an autopsy will be executed must also obtain a legal consent issued by either the Emir of the region, or the general director of the police in that region.[30]

To obtain permission for performing an autopsy, an investigator must initially write a report containing the following [31]:

1- Date and place of the notification of the crime.

2- Date of confirming the death.

3- Description of the victim's clothes.

4- Position of the corpse.

5- The place where it was found.

6- The weather condition.

7- The prima facie reason (al-sabab al-ẓāhirī) of death.

8- Reasons for considering the case as a criminal incident.

9- The manner in which the crime was committed.

After performing an autopsy and issuing the final forensic opinion about the causes of death, the investigator can grant permission for the corpse either to be buried or to be given to the victim's family. This is provided that no objections are raised by the relevant superior authority.[32]

If a case is referred to court without an autopsy having been carried out, the judge may issue permission for the performance of a post-mortem if he considers that one is required. He need not obtain the consent of any of the above.[33]

It is noteworthy that the permission for performing an autopsy in the fatwā does not include autopsies for teaching purposes. Accordingly, it may be concluded that autopsies cannot be performed for such purposes in Saudi Arabia. Only necessity arising, for instance, from the needs of a criminal investigation, coupled with due consent may justify a post-mortem.[34]

The police photographer (al-muṣawwir al-jinā'ī).

An investigator is not expected to be an expert photographer of scenes of crime. Therefore, the Ministry of the Interior has trained some officers to carry out such a function. These specially trained officers are responsible for producing photographic evidence and are considered as assistants in the investigation. Their main task is to provide an initial view of the scene of the crime, e.g. the position of a victim's body, the position of weapons, and any other important points.

It is said that one photograph is better than a thousand words, as it is capable of fixing certain details which may perhaps be of subsequent importance although not considered as such at the time of the inspection of the scene of crime. Therefore, it is important for the police photographer to take several views from different angles, in order to record aspects of the crime which cannot be preserved in their primary state but which may become relevant as the investigation proceeds. This means that the photograph may help in obtaining another way of looking at things that may provide an explanation and lead to the successful conclusion of the investigation.[35]

Photography is also employed to identify persons, particularly criminals, by showing witnesses photographs of likely suspects. Nowadays, in order to supply the investigator with the necessary photographic evidence to enable the case to be brought to a successful conclusion, the police use a colour video-camera along with a photographic camera in cases where such action is required.[36]

Other experts (al-khubarā').

As mentioned previously, it cannot be too strongly emphasised that the ultimate responsibility in all criminal cases, which include crimes of killing, rests upon the investigator. He alone possesses specialised knowledge gained from his past experiences and he alone has an overall picture of the case in his mind.

In some cases of crimes of killing, it is not necessary to refer material to the expert, but there are some cases in which scientific help of one kind or another is important, and in such cases much depends upon the appreciation by the investigator of the sort of help he is likely to obtain and from whom he can obtain it. Such help varies widely in character; it may constitute the potential keystone of the case, it may provide confirmatory evidence, or it may assist by resolving doubts regarding points of minor importance or by sorting out the important from the unimportant.[37]

Some of the various ways in which experts can be of service are: First, by confirming at the preliminary stage of an investigation points which may or may not be significant at a later stage. Second, by providing missing links in a chain of evidence, or by strengthening weak links in chain of evidence. Third, by checking, for example, the accuracy of statements made by the suspect, or by witnesses, as well as the accuracy of material evidence.[38]

To sum up, scientific aid to criminal investigation in Saudi Arabia is largely centred in the forensic science laboratories (ma'āmil jinā'iyyah) established by both the Ministry of the Interior and the Ministry of Health. Many forensic science laboratories are in operation throughout the Kingdom of Saudi Arabia. The staffing of these

laboratories has been planned to carry out the examination of a wide range of material. The main object of the laboratories is to assist the police as follows:

A- In the instruction and training of police officers in this department of police work, covering, in particular, the nature of the assistance that can be rendered by experts, the methods of searching for traces that can be put to good use by the expert, and the handling and packing of such materials as may be found so as to ensure their being preserved in a proper condition for the ensuing scientific investigation.

B- In the practical application of scientific aids to police work in the investigation of all crimes and in the use of laboratory research for the development, in collaboration with police officers, of fresh applications of science to police work.[39]

The investigator should have a clear grasp of the type of material likely to produce evidence of value when submitted to expert examination and, how to collect and pack such material. Material found on suspects or their effects have to be compared with material present at or connected with the scene of a crime. This involves taking many different samples such as blood-stains, fingerprints, foot impressions, hair, left at the scene of the crime, to be compared with samples found on the suspect.[40] Later on, the importance of such procedures will be discussed in detail.

Witnesses (al-shuhūd).

Witnesses are also considered as assistants in the investigation as they are the people who are potentially able to provide the police with information about the crime or the criminal that may be essential to the successful outcome of an investigation. These witnesses may be informants, eyewitnesses, or alibi witnesses.[41] Thus, it is the duty of the investigator to decide who should be examined as a witness in any matter. The object of an investigator's interrogation of witnesses is to obtain such complete and accurate information, as to enable him to understand the case as if he had actually witnessed the events he is investigating.

Witnesses may know the name of the person who has committed the crime. Often, however, witnesses do not know the criminal's name but may recall his bodily

features, clothing, and so forth. Such witnesses may be able to identify the offender's picture from police files even before the suspect has been brought into police custody. They may also give a general description of what happened, for example, the method or instrument used in the crime. Such information gives a general idea of the sequence of events involving in the crime. Accordingly, identification by witnesses is very important to the police, whether they confirm or eliminate suspicions about someone who is thought to have committed a crime.

Headmen of districts or their assistants (‘umad al-maḥallāt or al-aḥyā’)

As a famous proverb says: "Residents of Makkah are the best people to know about its defiles" (ahl makkah adrā bishi‘ābihā) . Accordingly, Headmen of Districts in Saudi Arabia work with the police because they know more about their district and its inhabitants than them. Hence, the investigator can save time by asking such Headmen about their districts. Headmen or their assistants may supply vital information about a criminal or a crime which happened to be committed in a place within their district boundaries.[42]

Part 3: At the Scene of Crimes of Killing.

On arrival at the scene of a crime of killing, certain things must be attended to which are common to all cases; murder, quasi-murder, killing by mistake and vehicle accidents. When the investigator reaches the spot, he must concentrate on working in an organised and rational manner rather than acting randomly.[43]

The first duty of the police officer who arrives at the scene of the crime is to determine whether the victim has actually died or not. He must never presume that a victim is dead without utilising his training and experience to check for signs of life and then attempting to resuscitate the victim if any doubt remains. The officer should call for a medical doctor to make the final decision and to confirm that the victim is dead. He should also handle every death as a murder in the absence of any proof that

the death was accidental or from natural causes other than the criminal act of another person.[44]

The second duty of the investigator is to draw up a report giving the location of the crime, stating, for example, whether it is a house, field or street, giving directions as to how it can be found. Next, the actual scene of the crime should be described in detail, always having regard to its connection with the case under inquiry.[45]

The extent of such a description naturally depends on the nature of the crime. In most crimes of killing the following, in particular, must be described: briefly the place itself; the direction from which the criminal came; that in which he went away; the spot from which the witnesses viewed the crime, or could have seen something, all points where traces of the crime are to be found or where they might have been expected to be found, but where, in fact, there are none. After the general sketch, a detailed description must be prepared of, for example, the places where the body of the victim and the instrument used by the criminal were found. The investigator should then pass on to all his assistants important details that may throw light on the case, for example, footprints, marks caused by firearms or tools, impressions of all kinds; in short, everything which may have been produced by the criminal, and everything which may have been left behind by him.[46]

Experience of practical of investigation in Saudi Arabia has shown that it is important for the investigator , for instance, to observe the following procedures in crimes of killing:

Immediate inspection of the scene of the crime.

As mentioned previously, following the initial report of the incident to the police, an investigator should immediately go to the scene of the crime. This may give the investigator an opportunity to interview the victim before he dies. A statement taken from the victim may save time and help the investigator establish the cause of death and any motive, it may also enable him to identify the criminal, or at least produce a description or information leading to his identification. To illustrate:

In Makkah, while a pedestrian was crossing the main road from Makkah to Jiddah, a car ran over him. He was transferred to hospital by a person living near the site of the accident. The relevant authority was informed promptly and then an investigator went to the hospital in order to question the fatally injured person who, in spite of his condition, was able, with difficulty, to give a description of the car involved in the accident. The investigator then hurried to the scene of the accident, where he found scattered fragments of the car's headlights and side lights. Based on this and the description given by the victim the same day, the investigator telephoned the police station and gave all the information he had obtained. The police station immediately circulated the description of the car by radio to all patrols, who then started searching for the car. By acting swiftly to interview the victim before he died and by visiting the scene of the crime before any evidence could disappear, it was possible to find the car on the same day as the accident.[47]

Accordingly, if the investigator had not carried out these prompt examinations and had delayed his investigation, he would certainly have missed the opportunity of questioning the victim, since he died on the same day as the accident, and he would, therefore, have failed to obtain the important description of the car. If so, the case would probably have had to be reported against an unknown criminal, because a delay might have enabled the driver to repair the damage to his car or hide the car. A delay would also have meant that any evidence left at the scene of the crime could have been destroyed.

A similar case also took place in Makkah; whilst a person was sleeping at a cafe in the Misfalah district, another person came and stabbed him several times with a knife. The victim woke up in terror and attempted to catch the criminal but failed. However, he just recognised that his attacker was one of his friends. Fortunately, at this moment, a police patrol car was passing the cafe and saw a crowd that drew attention to the crime. The policeman stopped, approached the stabbed person and promptly took him to the hospital. On the way to the hospital, the policeman asked the fatally injured man what had happened, and with difficulty the victim was able to mention the

name of the criminal before he died. Hence, the criminal was arrested the next day and confessed to the murder.[48]

It may be concluded from the above that if the policeman had not acted so promptly and had not reached the scene of the crime so quickly, it might have been more difficult for the police to find the criminal.

A quick visit to the scene of the crime is important to protect that scene from contamination so that evidence may be collected. In other words, it gives no opportunity for the criminal, or even natural factors such as the weather, to change or destroy any evidence of the crime.[49] The following case illustrates the importance of such a precaution:

In al-Ṭā'if, a shepherd was looking after his sheep in the Valley of Na'mān. At that moment, two persons intending to kill him came forward to do so. They stabbed the shepherd with a dagger (khanjar). Thinking that the victim was deed, they left him lying on the ground, and escaped. In fact, the shepherd was able to walk and, therefore, went towards the al-Hadā highway. When he reached that highway, he flagged down a car which was heading towards al-Ṭā'if city centre. He asked the passengers to take him with them but, as there was no space, they went on to an emergency centre which was not far away and notified the authorised person. Immediately, an ambulance went to the assistance of injured man and took him to the hospital. At the same time, the police were notified of the crime and an investigator accompanied by a tracker subsequently went to the scene of the crime. When they arrived at the scene of the crime they found some keys, an 'iqāl (head-cord), and a ghitrah, belonging to the criminals. Next, the tracker followed up the tracks of the criminals which headed towards a nearby village where the criminals later were arrested. However, as there was a strong wind and as it started to rain heavily just fifteen minutes after this quick response, the tracker would not have been able to follow up the tracks, nor would the police officer have been able to collect the

evidence left at the scene, which was located in a valley (wādī) if the investigator had not gone promptly to the scene of the crime.[50]

It is also an important to reach the scene of the crime quickly in order to interview any witnesses who happened to be in the vicinity of the crime[51]. For instance:

In Jiddah, a man stabbed another man with a knife until he died. This was near a primary school at the time the pupils were leaving. One of the pupils, who witnessed the crime got a good look at the criminal, and the make and colour of the criminal's car. The police were notified of the crime and an investigator arrived shortly after words. He was, thus, able to interview the eyewitness and obtain a description of both the criminal and the car in which the criminal speedily drove off. The eyewitness statement enabled the police to find the criminal the same day. [52]

It can be concluded from the above example that if the investigator had not instantly come to that scene, and if, as a result, the eyewitness had gone home, the police might not have been able to find the criminal with such speed.

The investigator should bear in mind that witnesses may have additional information which they could not provide instantly as a result of the initial shock and excitement of the circumstances surrounding the crime. As a consequence, he should, if necessary, be prepared to re-interview witnesses at a later stage. The investigator should also devote some of his efforts to finding out whether anyone else was a witness to the crime. The regulation stipulates that all witnesses should be questioned politely for any knowledge they may have about the crime. In addition, he should ensure that all that witnesses are asked all questions relevant to the case and must check that witnesses are speaking the truth.[53]

An investigator should, therefore, understand that the questioning of witnesses is not merely the taking of information at face value, i.e. verbatim (ḥarfiyyan) and accepting it as a fact, as such an information or statement may be incomplete, erroneous, exaggerated or even false.[54] It is the investigator's duty to establish the facts and, if necessary, to re-examine such a statement when back at the police

station. If the investigator decides that it is necessary to cross-examine witnesses, they must be questioned with care and accuracy, and no coercion should be applied.[55]

In addition, swift action following notification of a crime may also help in seizing criminal before he can escape from the scene of crime, or catching him in the vicinity of the scene as he is attempting to escape. For instance:

In Makkah, on 8-12-1398 A.H., exactly at the time of sunset, a pilgrim attacked two persons with a krīk (spade) until they died, The reason was that he was nervous and angry because these victims had thrown cold water on him while he was passing water under the building where the victims live. The police came to the scene of the crime immediately, but they could not find the criminal. As the criminal was a pilgrim, it was not easy for the police to find him, because he and all the other pilgrims were wearing their ihrām. Thus, in order to find the criminal, the whole area around the scene of the crime, which was very hilly, was swiftly cordoned off. A search was promptly carried out and the criminal was found in this cordoned off area.[56]

This example indicates how prompt action helped the police to overcome the difficulty of recognising the murderer among the large number of pilgrims.

The time of the occurrence of the crime.

An investigator should, if possible, find out what is the actual time of the commission of the crime. This may be an important step in discovering the truth of what happened at the scene of the crime.[57] To illustrate:

In Riyadh a girl, aged twelve, was found murdered in a very horrifying situation, as her head was severed from her body. The girl's corpse was wrapped in an 'aba'āh.[58] The victim's mother and oldest sister alleged that the girl had got up early, at seven o'clock, and after she had had her breakfast, had gone to buy some biscuits but had not returned. Later, after an autopsy had been performed, it was clear that the victim had died at approximately three o'clock in the morning and that her stomach was empty. This was considered as evidence that the victim's mother and sister had given

a false statement and, thus, they became suspects. After a thorough investigation, it became clear that the victim had seen a stranger sleeping with her oldest sister and having illegal sexual relations. The oldest sister was afraid of the scandal that would ensue if her sister disclosed what she had seen and, hence, the oldest sister planned to kill the victim. Having killed her sister, she wrapped her up in the ʻaba'āh and left the body in the place where it was found.[59]

Finally, an investigator may also find it useful to know the actual time of the commission of the crime in cases where the criminal has an alibi.

The movements of the criminal.

It may be helpful if an investigator at the scene of the crime directs his efforts towards discovering the direction from which the criminal came to the scene of the crime and that in which he went away. This will probably require the assistance of a tracker. For instance:

In 1390 A.H., in Makkah, a guard was killed whilst he was sleeping and his money was stolen. The crime was committed at dawn, when the victim's friend usually came to wake him up in order to pray the fajir prayer together. On the day of the crime the friend came, as usual, and found the corpse of the victim. The police were notified immediately and, thereupon, arrived at the scene of the crime. Subsequently, the tracker accompanied by the investigator who was in charge of the case, followed the impressions of the criminal's feet and found that the criminal went away from the back door and continued walking towards the hill which was not far from the scene. They followed these impressions to the top of this hill which was rocky, and here the footprints disappeared. However, the tracker continued over the hill and, fortunately, found the impressions of the criminal's feet again, as the ground at the foot of the hill was sandy. After they had followed these impressions for seven kilometres, the criminal was found sleeping under a tree. On searching him, the investigator found the stolen money and a knife stained with blood. This was at about three hours after the commission of the crime. From the investigation, it was clear that the criminal was

heading towards the highway of al-Sīl which was about five kilometres away from the place where he was seized. He admitted that he intended to escape by heading towards the highway, as it was far away from buildings and, as he said, he was intending to stop a passing car in order to get a lift to al-Ṭā'if city. However, when he had walked seven kilometres, he became tired and decided to take a rest for a while; but in fact, when he lay down on the ground, he fell into a deep sleep and was still asleep when the police seized him.[60]

Vehicles used in the crime.

The tracks of vehicle may sometimes be important. The difficult thing in this connection is to identify the impressions of the four wheels that match together. However, investigators that are not able to do this perfectly must refer to specialists. The marks made by vehicles can be identified, for instance, by the width of the tyre, the distance between the right and left wheels and the use made of the brake by the driver.[61]

Impressions of wheels may indicate the direction of the vehicle used in the crime. They may also indicate the size or make of the car. Sometimes, at scenes where the ground is hard, the marks of the wheels cannot be found. This may not apply in certain situations, especially when the vehicle is heavily loaded. Nowadays, modern science can find such impressions even in ground which is so hard that no visible marks can be found.[62]

As vehicles, especially motor-cars, are the universal method of transport at the present time in Saudi Arabia, they may play an important part in detection of crimes of killing, particularly, at scenes where tracks are left behind. Tyre marks must, thus, be examined in an attempt to identify which make of car was used in the crime. This can be done by comparing impressions at the scene of the crime with the tyres of the suspect car.[63] This procedure may be a potent factor in saving police time in their hunt for cars which have been involved in crime. For instance:

In al-Madīnah al-Munawwarah an unknown corpse was found in a cafe located in the suburbs. One of the employees at this cafe discovered the corpse and immediately summoned the police, and an investigator came to the scene of the crime. After he had examined and inspected the scene, the cause of death was obvious, as the weapon which had been used was there, beside the body, but there were no fingerprints on it. Later, the body of the victim was examined, and a forensic doctor confirmed that the death was not from natural causes. The employees were interviewed; one of them mentioned that three persons whom he did not know came to the cafe after midnight in a small white car, the make of which he did not know. After drinking tea and smoking a hookah, they asked him to bring some mattresses (firsh), as they wanted to sleep. He brought the mattresses, and they went to sleep. When the other employee (the informant) came out in the morning, all he found was the corpse covered by a quilt.

Later, another expert came to examine the place where the criminals' car had been parked. He made a copy of the impressions of its tyres and found a pattern that is often used on Peugeot cars. One of the tyres had also a defect, as its tread on one side was worn. Apart from these few facts, the police still had no obvious evidence about the identity of the criminal. The investigator, therefore, asked a brother of the victim if he suspected anybody. The brother mentioned that as the victim usually went out with friends, these friends might be suspects. On interviewing the friends, the investigator found another clue: one of the friends had a white Peugeot car. The clue here was the colour. The car was examined, and it transpired that the car had the same impression as the one found at the scene of the crime; also, one of its tyres was worn in the same place. Accordingly, the owner of the car was arrested, and after being faced with these facts, he confessed.[64]

The actual scene of the commission of the crime.

An investigator should direct some of his efforts to finding out whether a crime has been committed at the scene where a corpse has been found. In addition, he should

also establish whether the corpse is still in the same position as when the crime was committed, as any mistaken conclusions regarding the details of the crime could radically affect the outcome of his investigation. For example, in some cases, where the scene of the crime has been minutely described in an official report, and the position of the corpse has been photographed, and a final report has been drown up, evidence discovered at a later stage has shown that the corpse has been moved there by the criminal before the arrival of the investigator.[65]

Friends, enemies and colleagues.

In some cases, where, for example, the scene of the crime is located in a company building or complex, a big store, or shop, it is important for the investigator to interview persons working there. This may save his time and quickly lead to the discovery of the criminal. To illustrate:

An engineer was shot twice with a gun while he was taking a shower in his house which was located in a company complex. The police were notified and, consequently, an investigator was appointed to examine the scene of the crime. The investigator accompanied by some experts including a tracker, went to the scene and after careful examination found that the criminal was probably one of the people living in the complex.

Evidence suggested that the criminal shot twice through the window of the bathroom. As the window was open and there were no signs indicating that the window had been forced open from the outside, it was concluded that somebody had entered and had opened the lock of the window in order to enable it to be opened from outside. This assumption was strengthened by the fact that it was freezing at the time of the crime and anyone taking a shower would have been unlikely to open the window himself in such weather. The police also found a third bullet and footprints outside under the window

After much effort and in-depth investigation, eleven persons, working for the same company and also living in the complex, were suspected. They were interviewed

individually and it came to light that three of them were competing with the victim for promotion to a vacant senior managerial post. One of these three suspects used to be a commanding officer in the police and did not get on with the victim. This was sufficient evidence to suggest that he might be the criminal and he was, thus, considered as the main suspect. This person was re-examind, but then the investigator found another clue, and a fourth person came under suspicion. This was based on the statement of the main suspect, who mentioned that he had met one of his friends, a week prior to the occurrence of the crime, who was well-known for his ability to open locked doors without causing any damage. This person was placed under observation by police detectives.

Later, an undercover police officer, with the ability to recognise footprints, was to get close enough to see the foot of this suspect, and confirmed that the footprints that had been found at the scene of the crime had the same impression. This suspect was arrested but, after being faced with the facts, he denied the accusation and refused to confess.

At a later stage, the investigator discovered from the company's signing-in book that this suspect was absent from his work on the day the crime was committed. In addition, a witness mentioned that he had seen this person near the scene of the crime at the time it was committed. The suspect was faced with this evidence again and, eventually, he confessed that he had agreed with the main suspect to kill the victim. To do this, he had entered the victim's house in the afternoon of the day of the crime, when the victim was at work, in order to open the window lock. He waited until the victim had come back, had gone into the bathroom, had put on the light and turned on the shower, whereupon he opened the window and shot the victim twice. The criminal claimed that the gun had been given to him by the main suspect two days before the commission of the crime, and that the crime had been planned in advance by the main suspect. The main suspect was again re-examined and faced with these facts. Thereupon, he confessed that he had given the direct killer a sum of money and promised that he would promote him to a higher position.[66]

The instrument used in the crime.

In order to distinguish between whether a crime of killing is murder, quasi-murder or killing by mistake, an investigator must identify the means by which the crime was committed. To do so, he should have some knowledge of what is considered as a lethal weapon or not. An investigator must report any weapon found on the scene of the crime. It is important to submit such information to the judge when referring the case to the General Court, because if the criminal has used, for instance, a firearm, a knife, a hammer, or any other instrument considered as a lethal weapon, the crime will be considered as murder. A murderer in such cases will be liable to the death penalty, provided that there are no extenuating circumstances or any other legal reason which diminishes responsibility, or excuses the criminal.[67]

In cases where firearms have been used, the investigator should determine from what distance the weapon was fired. This fact will profoundly affect the actions of the investigator. It is obvious that a shot from close quarters would not normally be considered as accidental, while a shot from a distance could be either accidental or intentional. In addition, the distance from which the shot was fired may support or negate a statement made by the accused. Knowing of the distance between the victim and the weapon at the time of the shot may also ease the difficulties of the investigation. For example, the use of a lethal weapon justifies pre-trial detention. Accordingly, the police can, in such cases, immediately detain the accused until trial.[68]

Furthermore, the investigator should establish that the weapon found at the scene of the crime is the actual weapon used in the crime. For instance, if a gun is involved, the investigator's duty is to compare the identifiable marks made on bullets by the weapon with those on bullets found at the scene of the crime and to determine whether or not these bullets have been fired from the gun found. This is, of course, something in which the police investigators are trained. The fact of whether or not the weapon found is the actual weapon of the crime, should also be confirmed by an expert before the final report is made.[69]

It is important for the investigator to ascertain the condition of the weapon. For example, a plea that a weapon was faulty, making it liable to go off on its own, was not safe when loaded or would not fire at all, will, if true, materially affect the court's view of the case. This should, therefore, be considered by the investigator before he reports his own final conclusions concerning the case, since such a defence, if raised, would probably be rejected, if the final report stated that the weapon was not defective.

The cause of death.

As mentioned previously, in the absence of any evidence that a death was accidental, from natural causes, or anything other than the criminal act of another person, an investigator should initially investigate every death as a murder. Thus, it is the function of the investigator to determine the cause of the death in order to establish for example, whether the victim killed himself, was killed by another person either intentionally or accidentally, or was killed accidentally in any other way. This should be confirmed by experts. The investigator should bear in mind that witnesses or even relatives of the victim may not give a truthful account of what happened. They may pretend, for example, that a murder was a natural death or suicide. Thus, he must examine any statement with care and do everything possible to determine the actual cause of death. To illustrate:

In Riyadh, a wife shot and killed her husband in their bedroom. She then put the gun near the victim and, pretending to be frightened, she shouted loudly for his parents, who were living in the same house and told them that her husband had killed himself. The parents believed her, since she looked frightened, and as they knew that her husband easily became angry and that he had already threatened several times, in fits of anger, that he would kill himself.

However, the police was notified and, therefore, came to the scene of the crime. The parents and the wife told the police investigator that the case was suicide. But, when he and other experts examined the scene of the crime, they observed that the

shot was in the left side of the victim's head, just beside the left ear and, there were no signs of gun-powder or burnt hair in the wound. This indicated that the shot was discharged from a distance and could not have been fired by the victim. It is also common that people who kill themselves usually use their right hand and, therefore, the shot will usually be in the right side of the head, as this is easier. In addition, the gun was found about a meter and half away from the corpse on the left hand side of the body, whereas if the victim had killed himself, the gun would be expected to be in his right hand or at least close by.

Another clue was also discovered: there were no other footprints at the scene except those of the wife, which indicated that she could have been the killer. Thus, the wife was arrested and when faced with these scientific facts, she confessed that she was fed up with living with a such an ill-tempered husband and had, therefore, killed him.[70]

Another example which occurred also in Riyadh, is the case of a Philippine maid-servant who killed a two-months-old child while his parents were away visiting a friend. She killed him by repeatedly sticking a medium sized needle into the tender part of the baby's head and hid the needle between some papers in the same room. She then started crying until the parents came back. She told them that she put the baby in his bed to sleep and after a while, when she came back to feed him, she found him dead. The parents were shocked and could not believe it, as they had left the baby in good condition. The extreme love and remarkable care pretended by the maid-servant towards the baby kept the parents from suspecting her. Thus, they believed without any doubt that the death was natural, and in consequence of this, they went to the hospital in order to get a death certificate. Such certificate should be issued after the examination of a corpse. Accordingly, the corpse of this baby was examined by the forensic doctor. The examination established that the baby had been killed, since the forensic doctor discovered the marks in the tender part of baby's head. The police were accordingly notified and, as a result, the scene of the crime was examined and the needle which was stained with blood was found. Tests confirmed that this blood

came from the baby. The investigation also confirmed that nobody had been with the child apart from the maid-servant who was, therefore, arrested.

Later, when the maid-servant was faced with the scientific facts, she confessed that she had killed the baby, as since its birth, she was no longer allowed to accompany her mistress on her visits, as she had done before, because she now had to stay at home to look after the baby.[71]

Finally, the instrument used in the crime and the cause of death should be recorded on an official computer form. This record should comprise the information shown on the following table.[72]

Table: 8

Criminal Incident Report.
Method of commission

Case No..... Date of notification.....

Type of offence.....

Method of commission .....

Instrument used .....

Death as a result of motor accidents.

In Saudi Arabia, the traffic police is the first division responsible for investigating motor accidents and whether they result in death or not.[73] An investigator must go immediately to the scene of a collision. His main function in such cases is to determine the cause of the accident. He should produce a description of what has happened

along with a plan of the scene. The position of tyre marks and the condition of the vehicle or vehicles may be a useful guide for him in reaching a successful conclusion. He should also make a computer record of the registration number and any other relevant information[74] as listed on the table below.[75]

Table: 9

Criminal Incident Report.
The vehicle.

Case No..... Date of notification.....

Damages.....

Registration number..... Make..... Model.....

Date of registration..... Colour (s).....

Chassis number..... Cylinder capacity.....

Weight..... Gross weight.....

Number of vehicle's licence.....

Owner's name..... Number of his identification card .....

Owner's address.....
.....
.....

Value of the vehicle.....

Careless or reckless driving must be established by the investigator as well as the fact that the death occurred as a result of such driving. The investigator should also obtain statements from the drivers, passengers and any other witnesses.[76]

If the driver is unfit to drive, it must also be reported: for instance, if the driver is found to be under the influence of drink or any other drugs, or under the legal age for driving.

Various other things should be checked: whether the driver holds a legal driving licence and in cases where the accident involves a parked car, whether it was legally parked or not. An investigator should accompany a forensic doctor and tracker to examine the corpse and the scene of the accident. In cases where the accident causes a baby to be miscarried, an investigator must call for a female doctor. Other police officers should also work with the investigator to preserve the scene of the crime.[77] The forensic doctor must write a report about any dead person. This report should include a general description of the condition of the corpse at the scene of the accident and a determination of the time of death in hours and minutes, since this may be important for matters of inheritance.[78]

The investigator should help any injured persons and, if necessary, see that they are taken quickly to the nearest hospital by ambulance. Next, he should inform the families of the injured and dead persons.[79] Any bodies should be removed from the scene of the accident, after the end of the examination under the supervision of the investigator, in an official vehicle belonging to the government. If the accident is not in a city area, any bodies should be removed, under the supervision of the investigator and the emir of the nearest town or one of his assistants.[80] The corpse should be preserved by the investigator in a safe place until a legal order is obtained from the Emir of the Region. This order may give permission either to perform a post-mortem examination upon the corpse, to return it to the victim's family or to bury it.[81]

In conclusion, when the investigator arrives at the scene of an accident he should observe the following: First, he should park the police car in such a way as to protect the people and vehicles at the scene of the accident and keep the public away. Second,

if required, he should give first aid and then call for ambulances or rescue services. Third, he should then begin his investigation and ask drivers and witnesses about the accident. Forth, he should inspect the scene of the accident, take photographs for it and collect all relevant evidence, to enable him to determine what has actually happened.

Death as a result of drowning.

Deaths as a result of drowning may be criminal, accidental, or cases of suicide. In such cases, the inquiry should establish two things:

The first of these is determining whether the person was forced into the water, fell, or went in of his own accord. This, in part, can be deduced by the clothes found on the body. If the body is clad in appropriate swim wear, this may suggest that entry to the water was voluntary. However, if the victim is found fully dressed, this may suggest involuntary entry to the water or a fall. The second point concerns the circumstances surrounding the situation. For example:

A person was found drowning in his vehicle which was used for transporting sewage. One possibility is that when he went to check the level of sewage in the tank, he was overcome by fumes, fell in, and subsequently drowned. Alternatively, he may have been trying to retrieve something, such as money, which had fallen into the tank, and had then fallen in himself. Experts did not find any fingerprints, traces etc. to suggest that another person had been present to cause the death. Thus, it may be concluded that the death was accidental and that no criminal activity was involved.[82]

Death as a result of suffocation.

Accidents with burning coal, wood, usually happen in winter when people are trying to keep their houses warm. Some people leave their fire burning when the go to sleep. If the gases given off by the fire are inhaled excessively by someone while sleeping, he may gradually become unable to revive himself and, thus, he may die. The following case is an illustration of this.

A man was found dead in his bed. Initially, his relatives thought that he had died of natural causes. However, one of his relatives had some doubt about the death and mentioned this to the investigator. He thought that the man might have taken some kind of poison as a result of poor social and economic circumstances. Thus his body was taken to hospital so that a post-mortem could be conducted. Blood tests revealed that the victim had taken in a fatal dose of carbon monoxide gas. As a result, the investigator explored how this could have happened. At the time of discovering the corpse, there had been no obvious smell of gas in the room as one of the windows was very slightly open. However, a portable fire with some ashes in it was found next to the victim's bed. This suggests that the victim had used the fire to keep himself warm, as it had been a cold night. He had fallen asleep with the fire still burning and had died of suffocation from the poisonous fumes.[83]

Collection and preservation of evidence.

The duty of the investigator at the scene of a crime is entirely different from the duty of the expert. It is the investigator's responsibility to protect evidence found there. Accordingly, an investigator must bear in mind that he should not alter the position of any material evidence, pick up or even touch any of it until a photograph has been taken and an exact description has been reported on the official forms. The collection of such evidence must be made under the supervision of the experts who are employed to gather, list, assess, examine minutely and preserve evidence to be presented in court. [84]

To sum up, all evidence must be carefully examined, packed and, if required, submitted to a laboratory. Such evidence should be examined and packed by experts, as it is important to prevent material evidence being destroyed or damaged.[85]

Finally, no one method can be absolutely recommended for every case; the choice of method must ultimately depend on the circumstances surrounding each case.

Part 4: Analytical Cases.

The cases detailed in the following notes are typical examples of the investigation of crimes of killing in which collaboration between the investigator and laboratory experts has led to a successful conclusion.

Case 1:

The police were notified about a dead person found out in the open about 300 meters away from the main road and half a kilometre from the nearest inhabited area.

When the investigator arrived at the scene of the crime, examination revealed the following points:

1- There was no evidence to suggest that any violence had taken place and the victim's shoes were placed neatly next to the body.

2- A gun was found, along with three empty cartridges. The first of these was found under the body, the second about one metre away from the left leg, and the third about three metres from the right foot. In addition, a holster for the gun was found.

3- The bullet had entered the body near the navel and a ghutrah had been tied over the injury. The right arm of the victim was lying over his face.

4- Two additional cartridges, money amounting to thirty riyāls and some identification papers were found in the victim's pockets.

Close examination of the body by criminal experts including the forensic doctor established the following facts:

A- Death had occurred approximately two weeks previously and the body was in a state of decay. The bullet had been fired from a distance of less than twenty-five centimetres, and results from ballistics suggested that the bullet had entered the body in a horizontal front to rear direction.

B- Further ballistics evidence demonstrated that the empty cartridges had been fired from the gun found at the scene.

C- When examining the victim's blood, it came to light that the victim had been drinking alcohol, and chemical analysis confirmed a blood alcohol level sufficient to have caused poor concentration and lack of motor co-ordination.

Analysis of the case:

Three questions need to be answered:

First, was death the result of criminal activity? This possibility was eliminated for the following reasons:

A- There was no evidence to suggest that any violence had taken place or that anyone else had been present at the scene.

B- Murderers usually remove any weapons from the scene, but in this case the gun and its holster had been found next to the victim's body. In addition, the holster was the correct size for the gun found.

C- The site of injury was inconsistent with murder, as murder victims are usually shot around the vital organs such as the head and heart.

D- If another person had fired the gun, the distance involved would probably have been more than one metre rather than less than twenty-five centimetres.

E- The victim's relatives were not aware of any enemies or hostile relationships.

Second, was the death accidental? This was possible for the following reasons:

A- Investigation revealed that the gun belonged to the victim. It was, therefore, possible that he had removed the gun from the holster to practise with it or to clean it and had accidentally shot himself. In order to stop the bleeding, he had quickly tied the ghitrah around himself.

B- The nearest village was half a kilometre away. It is unlikely that he would have been strong enough to walk that far. As a result, he may have fired the remaining bullets to draw attention to himself. This deduction is plausible, based on the finding that the remaining cartridge cases were around the body and in the direction of the

village. The gun was found near his right hand suggesting that he may have dropped it after losing too much blood and becoming weak.

C- The injury was in the stomach, further supporting the idea of accidental death since people attempting suicide usually choose to shoot themselves in the head or the heart.

Third, was the death a suicide? This was also possible for the following reasons:

A- The victim was found out in the open and away from civilisation. This may have been a deliberate move by the victim to avoid discovery. This is typical of intended suicide.

B- The amount of alcohol in his blood may have been enough to affect his judgement and lead him to the decision to commit suicide. An alternative is that he used the alcohol to help him through the act of suicide.

C- From the investigation it was clear that the gun had been purchased only a short while before the incident. This suggests that the gun may have been bought for a specific reason, i.e. suicide.

Finally, this discussion points to death as a result of an accident or suicide, and the investigation was closed with the conclusion that there was no criminal involvement.[86]

Case 2:

An overweight person, about 50 years old, was found dead on the bedroom floor of his flat. He was found by one of his colleagues who had arrived to pick him up for work as usual. He rang but received no reply. As he had a spare key, he let himself in. On opening the door he saw his friend lying unconscious on the floor. In an attempt to save his life, he phoned his friend's doctor and notified the police immediately. The doctor decided that the death had occurred recently and that the victim had been suffering from arteriosclerosis (taṣallub al-sharāyin), which might have been the cause of death. However, the police officer needed to examine the scene, in order to exclude other possibilities. Three such possibilities were addressed.

First, was there any evidence of foul play? This possibility was excluded for the following reasons:

1- There was no evidence to suggest that the victim had had to defend himself. There were no cuts or bruises on the body and no damage to the clothes; the room was neat and tidy. If there had been a struggle, the bottles on the table would probably have been knocked over.

2- Inquiries did not reveal any information about enemies or hostile relationships.

Second, was there any evidence of suicide? This second possibility was also excluded for the following reasons:

1- No suicide note was found.

2- The investigator demonstrated that the victim was in a good state psychologically before the death.

3- The door had been found open.

4-Nothing was found that could be used in a suicide act.

Third, was the death accidental? This was possible for the following reasons:

1- As the victim was found lying on the ground, he might have slipped while getting ready in the morning and hit his head on the floor. Given his excess weight, the impact would have been great.

2- The body was not stiff (i.e. rigor mortis had not yet set in), which suggested that he had died that morning.

3- The discovery of the body on the floor was consistent with a fall, and it was likely that the victim had lost consciousness because of this.

4- The victim was known to be suffering from arteriosclerosis and a fall might have been sufficient to precipitate heart failure. This suggested that he might have died of natural causes resulting from an accident.

The investigator was thus able to eliminate the possibilities of murder and suicide. Thereupon the case was closed.[87]

Part 5: Preparing Final Reports.

Report writing is one of the most important aspects of an investigator's work. Virtually, every action he takes must be recorded in writing along with each observation that he makes. In most cases, a judge does not go to the scene of a crime, but he plans his work and bases his initial conclusions upon what he reads in the reports, which form the basis for most prosecutions (da'āwī).

As a rule, the investigator's findings must be summarised on the official forms which must be countersigned by the General Director of the police. As the information summarised in these final reports will be submitted to the Ministry of the Interior for approval and will be referred to the General Court,[88] it is essential that investigators and the General Director of the police endeavour, before writing and signing any final report, to make sure that the information is as accurate as possible. Care should also be taken to arrange that all the documents to be submitted to the court and to be read at the trial should be completed in as clear and comprehensible a manner as possible.

In cases where road accidents result in death, the final report should contain the investigator's assessment of the driver's degree of responsibility, placed conspicuously at the end of the report, together with a brief summary of the reasons behind this assessment. Such report and assessment must be signed by the person who assembled it and must be countersigned by the supervising authority who must check and confirm the accuracy of its findings and the wisdom of its assessment. Following this, such a report will be referred to the Ministry of the Interior for approval and then to the General Court.[89]

Part 6: Detention or Release Proceedings.

Police detention.

During the initial stages of an investigation a suspect may be detained by the police in a police station. This type of detention is referred to as police detention.

Police detention means: "Depriving the accused of his liberty in order to enable further investigation to be made."[90] It is one of the most serious orders that can be issued during the pre-trial investigation stage and is considered an exception from the general principles of Islamic law, which state that no person may be deprived of his liberty, except for the enforcement of lawful penalty intended to maintain the public interest.

Police detention may be an essential factor during the investigation since, for example, if the accused is free, he may attempt to influence witnesses, change or destroy evidence, or abscond. The purpose of such detention is to maintain social order and the interests of law enforcement.

Ibn al-Qayyim states that such detention is permissible as long as it is carried out within the limited conditions intended to protect the individual and to balance the interests of the accused and the law enforcement authorities.[91] This is based on the action of the Prophet in putting an accused person in custody. In this context, Bahz b. Hakīm reports: "The Prophet detained a man on suspicion."[92] Abu Hurayrah also says: "The Prophet put a man in custody for a day and a night".[93]

Most people accused of crimes of killing in Saudi Arabia are detained.[94] A police investigator has the right to take any person suspected of a crime of killing into custody, provided that the initial period of detention does not exceed the specified limits, in order to enable further investigation to be made. During the primary investigation, the investigator may discover some evidence which either absolves the suspect from suspicion or increases the likelihood of his guilt. A suspect, therefore, may be absolved of suspicion, or he may be accused and, thereupon, be detained on a charge of a crime of killing.[95]

As mentioned in the previous section, the legal system in Saudi Arabia stipulates that a suspicious person must not be kept in police detention for more than twenty-four hours without reasonable grounds for doing so. For instance, when the police interrogator believes that it is necessary to keep the suspect more than twenty-four hours in order to enable the investigator to obtain or protect evidence that may confirm that the suspect is involved in a serious crime, and he is sure that the investigation is being conducted diligently and expeditiously. If so, the length of such an extended period of police detention should not exceed thirty-six hours, which is generally considered as sufficient time to confirm the suspicion. To keep a person for thirty-six hours, the police investigator must obtain, in advance, the assent of the Commander of the Police Station where the investigation is carried out.[96]

If required, a warrant may be obtained from the Emir of the Region or his deputy authorising further detention[97] On being taken into detention, a suspect should be informed of the reasons for his being detained and, as soon as possible, should be allowed to contact a relative or friend to inform them of his arrest.[98]

Release or pre-trial custody.

There are two possible outcomes to an investigation into a suspect's involvement in a crime:

Firstly, if there is no evidence of the suspect's guilt or, if evidence is found to confirm his innocence the investigator must immediately obtain the authority of the Commander of the Police Station to release the suspect. Following this, all case documents must be submitted to the Emir of the Region or his assistants for the purpose of information.[99]

In addition, the information shown on the following table should be reported and recorded on an official computer form.[100]

Table: 10

Release Report.
General information

Number of the detained person.....

Name..... ....

Type of suspicion..... Date of detention.....

Date of release..... Type of release.....

Issued by (sulṭat al-ifrāj).....

Number and date of release document.....

In cases of escape give the date of escaping.....

Secondly, if evidence collected during the primary investigation confirms or strongly indicates the suspect's guilt, two courses of action may be taken:

1- If the crime is serious, which of course includes murder or quasi-murder,[101] the investigator must take the following actions:

A- Charge the suspect with the crime and inform him in detail of the charge.

B- Issue a written order for the accused to be taken into pre-trial custody.

C- Supervise the transfer of the accused to a general detention centre or, if the accused is a woman, to a female detention centre.

D- Following the above, all case documents must be submitted to the Emir of the Region who will refer the case to the General Court. In such a case, bail or surety is not offered.[102]

2- If the crime is less serious, for example: killing by mistake, the accused will charged and taken into pre-trial custody whilst the case is referred directly to the General Court by the commander of the police station where the investigation is being carried out. However, the option of bail or surety will be offered and, if accepted, the accused will be released conditionally until the time of the trial.[103]

In every case of detention, the information shown on the following table should be reported and recorded on an official computer form.[104]

Table: 11

Detention Report.
Information about the detained person

Detention number ..... Number of the incident.....

Name of the accused..... First name.....

Father's name..... Grandfather's name.....

Family name (surname).....

Number and date of identification card..... Nationality.....

Place of birth..... Date of birth.....

Occupation..... Level of education .....

Type of suspicion..... Other suspicion.....

Other previous convictions (maximum three) .....
.....

Name of the police officer involved.....

Date of detention.....

Name of the guardian of the detained person .....

In addition, the description of the detained person should also be reported and recorded on an official computer form. This record should contain the information shown on the below table. [105]

Table: 12

Detention Report.
Description of the detained person

Number of detention.....

Name of the accused..... ....

Nickname (s)..... Sex..... Height..... Wight.....

Colour of eyes..... Colour of hair..... Marital status.....

Peculiarities..... Type of fingerprints.....

Like police detention, pre-trial custody is a form of preventive detention (al-tawqīf al-iḥtiyāṭī) aiming to prevent the accused from absconding and to secure his attendance at the court when required. The purpose of such detention is to maintain social order and the interests of law enforcement. When necessary, it also allows further investigation to be made into the accused's involvement in the crime.[106]

In Saudi Arabia, preventive detention is permissible only if supported by evidence establishing or strongly indicating guilt.[107] Such evidence includes, for example:

1- A legally admissible confession on the part of the accused.

2- A legally admissible statement from a witness establishing the guilt of the accused.

3- The capture of the accused in *flagrante delicto*.

4- Material evidence strongly indicating the accused's involvement in the crime.[108]

Pre-trial detention must also be justified in terms of the public interest, for example:

A- If on being released, the accused's life would be at risk at the hands of the victim's family.

B- If he is thought likely to threaten informants or witnesses.

C- If his release would endanger public security.

D- If he has no permanent or known address within the country.

E- If he is thought likely to abscond, thus hindering the course of justice.

Such pre-trial detention must also be subject to a currently valid written order issued by the commander of the police station where the investigation is being carried out. Such an order must specify the period of detention which should fall within the legal limits.[109]

Legal limits of pre-trial detention.

In Islamic law, some jurists (such as al-Zubayrī) believe that the maximum length of preventive detention during the investigation stage should be one month, while Ibn Farhun believes that the maximum period of such a detention must be less than one month.[110]

In Saudi Arabia, the legal system stipulates that the period of pre-trial detention should initially not exceed twenty-one days. However, if more time is required the period may be extended for a further thirty days or less, commencing from the last day of the initial period of pre-trial detention. Such an extension must be requested and approved by either the emir of the region or his assistant or by the judge at least three days before the expiry of the initial period. A copy of this approval should be sent to the director of the detention centre.[111]

Preventive detention is not meant to be a punishment but a help to the investigator. As it is not a punishment, because the person is still awaiting sentence, the accused person should not placed in prison along with people who have already been convicted.[112] Thus, separate detention places are used.

General principles of release proceedings.

The legal system in Saudi Arabia stipulate a number reasons for release. Some of these reasons are:

A- If the person is found to be innocent.

B- If there is evidence of diminished responsibility or any extraneous circumstances to the crime, such as self-defence.

C- If the accusation is withdrawn.[113]

D- If the investigation is unable to produce sufficient evidence for the crime.

E- In less serious crimes, when bail or surety is appropriate.

F- If the accused is under ten years old.

G-If the accused is under eighteen years old and the judge does not feel detention is necessary.[114]

It should be pointed out, as mentioned earlier in chapter three, that children under ten years old shall not be detained at all. Children under eighteen may only be detained by order of the judge.

Appeal against the extension of the period of pre-trial detention.

It has been mentioned previously, that the period of pre-trial detention may be twenty-one days and, in case of necessity, may be extended for a further thirty days. The process by which the accused can appeal against such an extension is as follows:

1- The accused should write a letter to the Emir of the Region where he is being detained. This letter should include his grounds or justification for appeal.

2- The emir or his assistant will study the letter of appeal and provide an opinion.

3- This will be followed by a committee meeting to provide a final decision. The committee will consist of an expert in law and a mandatory member from the police. These two people may also interview the accused. This procedure should take no longer than seven days from the date of the letter.

4- After the seven days a final decision will be presented to the emir. This should be done within three days of making the final decision.[115]

Conditions of detention.

In cases involved with crimes of killing, an accused person may be detained in an isolation cell (applicable only to serious crimes which include murder). This should be for no more than seven days. Such detention should be approved by the commander of the police station where the investigation is being carried out. If required, a warrant may be obtained from the Emir of the Region or his deputy authorising further solitary confinement.[116] On the other hand, an accused may be put in a shared cell. This depends on the circumstances surrounding each case.

There are some other conditions which should be observed when detaining the accused (some of these may not be applicable to solitary confinement).[117] These conditions state that within the boundaries of safety and security, the cell should be well lit, ventilated, clean, and, when necessary, adequately heated. Unless required for specific reasons, the use of handcuffs and additional restraints should be avoided. Appropriate bedding and clean clothes should be provided and three meals offered daily. Toilet and washing facilities must be provided.[118]

The detained person should also have access to newspapers and be allowed to accept food from his family or friends. This is, of course, at the accused's own expense. Access visits for family and friends may also be allowed.[119]

All medical and dietary matters must be considered. If the detained person appears to need medical attention or requests a medical examination, the police doctor or the nearest available medical doctor must be called and, if necessary, the doctor must

send him to hospital. Alternatively, he may be examined by a doctor of his own choice at his own expense.[120]

Quiet prayer facilities must be provided. Special cases, such as pregnant women, are considered individually by the law in Saudi Arabia. All detained persons should be treated humanely. The use of force is only appropriate when preventing escape, injury, or damage to property, or when such force is used to ensure compliance with important instructions.[121]

Finally, if detention is ordered without sufficient evidence, the officer in charge will be placed in detention for the same amount of time.[122]

[1] Jones, The Law of Criminal Procedure, p. 22.

[2] Id, p. 170.

[3] Department of Islamic Law, al-Ijrā'āt al-Jinā'iyyah, p. 77.

[4] Gudjonsson, Gisli H. The Psychology of Interrogation, Confessions and Testimony, (John Wlley and Sons, England, 1992) pp. 5-6.

[5] Ministry of Interior, Murshid al-Ijrā'āt al-Jinā'iyyah, p. 19. Also: Department of Islamic Law, al-Ijrā'āt al-Jinā'iyyah, p. 77.

[6] Promulgation of the Ministry of the Interior, No. 2\S\4682 dated 22-4-1395 A.H. Also: Article 72, from the Legal System of the Public Security Administration in Saudi Arabia. Ministry of Interior, Murshid al-Ijrā'āt al-Jinā'iyyah, pp. 21-22.

[7] Article 1, from the Legal System of the Imprisonment and Detention in Saudi Arabia. Also: Department of Islamic Law, al-Ijrā'āt al-Jinā'iyyah, p. 68.

[8] Department of Islamic Law, al-Ijrā'āt al-Jinā'iyyah, p. 80.

[9] Muslim, Sahih Muslim, (English Translation) vol. 1, 39.

[10] Promulgation of the Ministry of the Interior, No. 5381 dated 21-11-1390 A.H. Also: Ministry of Interior, Murshid al-Ijrā'āt al-Jinā'iyyah, p. 21.

[11] Promulgation of the Ministry of the Interior, No. 2\S\4682 dated 22-4-1395 A.H. Also: Ministry of Interior, Murshid al-Ijrā'āt al-Jinā'iyyah, p. 21.

[12] Royal decree No. 7\D\ 8776 dated 9-4-1400 A.H. Also: Ministry of Interior, Murshid al-Ijrā'āt al-Jinā'iyyah, p. 24.

[13] Promulgation of the Ministry of the Interior, No. 10\117491 dated 29-4-1400 A.H. Also: Ministry of Interior, Murshid al-Ijrā'āt al-Jinā'iyyah, p. 24.

[14] Id

[15] Article 30, the Legal System of the Committee of Investigation and Public Prosecution in Saudi Arabia. Also: Department of Islamic Law, al-Ijrā'āt al-Jinā'iyyah, p. 80.

[16] Promulgation of the Ministry of the Interior, No. 5381 dated 21-11-1390 A.H. Also: Article 24, from the Legal System of the Committee of Investigation and Public Prosecution in Saudi Arabia.

Ministry of Interior, Murshid al-Ijrā'āt al-Jinā'iyyah, p. 21. Department of Islamic Law, al-Ijrā'āt al-Jinā'iyyah, p. 80.

[17] Promulgation of the Ministry of the Interior, No. 28562 dated 11-7-1395 A.H. Also: Ministry of Interior, Murshid al-Ijrā'āt al-Jinā'iyyah, p. 25.

[18] al-Sadḥān, 'Abd Allah and al-Misfir, A. Ijrā'āt Niẓām al-Sijillāt, (unpublished) p. 7.

[19] Artical 4, from the System of Investigation's Reports (niẓām maḥaḍir al-taḥqīq al-jinā'ī).

[20] al-Sadḥān, Ijrā'āt Niẓām al-Sijillāt, p.10.

[21] al-Mimān, Jamīl. 'Ahmmiyyat Mu'āyanat Masraḥ al-Garīmah wa 'Āmil al-Zaman wa al-Athar fi al-Ijrā'āt al-Jinā'iyyah, (Saudi Arabia, Riyadh, Maṭabi' Aṭlas, 1411 A.H.), pp. 28-29.

[22] Sirāj al-Dīn, Kamāl. al-Qawā'id al-'Āmmah li al-Taḥqīq al-Jinā'ī wa Taṭbiqātih fi al-Mamlakah al-'Arabiah al-Sa'ūdiyyah , (Maṭba'at al-Ijtihād), p. 30.

[23] al-Mimān, 'Ahmmiyyat Mu'āyanat Masraḥ al-Garīmah, p. 20.

[24] Badr al-Dīn, 'Abd al-Wahhāb M. al-Taḥqīq al-Jinā'ī wa Mahām al-Muḥaqiq fi Jrarīmat al-Qatl. (Riyadh, ed. 3, 1407 A.H.), p. 224.

[25] al-Mimān, 'Ahmmiyyat Mu'āyanat Masraḥ al-Garīmah, p. 20.

[26] Id.

[27] Badr al-Dīn, al-Taḥqīq al-Jinā'ī, p. 229.

[28] Ghanem, Isam. "Permossion for performing an autopsy", Journal of Medicin Science and the Law, 1988, vol. 28, p. 241.

[29] Fatwā the Committee of Superior Scholars (hay'at kibar al-'ulama') in Saudi Arabia No. 47 dated 20-8-1396 A.H. This fatwā is sanctioned by royal decree No.1030 dated 13-1-1397 A.H. Also: al-Zaynī, Maḥmūd M. Mas'ūliyyat al-'Aṭibbā' 'an al-'Amliyyāt al-Ta'wiḍiyyah fi al-Sharī'ah al-Islāmiyyah, (Mu'assasat al-Thaqāfah al-Jāmi'iyyah, Cairo, 1993) p. 46.

[30] Promulgation of the Ministry of the Interior, No. 154 dated 2-1-1398 A.H. Also: Ministry of Interior, Murshid al-Ijrā'āt al-Jinā'iyyah, p. 45.

[31] Promulgation of the Ministry of the Interior, No. 3156 dated 24-6-1390 A.H. Also: Ministry of Interior, Murshid al-Ijrā'āt al-Jinā'iyyah, pp. 45-46.

[32] Promulgation of the Ministry of the Interior, No. 154 dated 2-1-1398 A.H. Also: Ministry of Interior, Murshid al-Ijrā'āt al-Jinā'iyyah, p. 46.

[33] Id.

[34] al-Zaynī, Mas'ūliyyat al-'Aṭibbā', p. 46. Also: Badr al-Dīn, al-Taḥqīq al-Jinā'ī, p. 104.

[35] al-Mimān, 'Ahmmiyyat Mu'āyanat Masraḥ al-Garīmah, p. 21.

[36] Personal interview with al-Muḥaqiq 'Abd Allah al-'Alī, in al-Riyadh, 1414 A.H.

[37] al-Mimān, 'Ahmmiyyat Mu'āyanat Masraḥ al-Garīmah, p. 22.

[38] Ḥamdī, 'Abd al-'Azīz. Kashf al-Jarīmah bi al-Wasā'il al-'Ilmiyyah, (ed: 1, 1961), p. 38.

[39] Id, pp. 40-41.

[40] Badr al-Dīn, al-Taḥqīq al-Jinā'ī, pp. 90-95

[41] al-Mimān, 'Ahmmiyyat Mu'āyanat Masraḥ al-Garīmah, p. 22.

[42] Sirāj al-Dīn, al-Qawā'id al-'Āmmah li al-Taḥqīq al-Jinā'ī, p. 32. Also: al-Mimān, 'Ahmmiyyat Mu'āyanat Masraḥ al-Garīmah, p. 23.

[43] Badr al-Dīn, al-Taḥqīq al-Jinā'ī, p. 88.

[44] Article 164, from the Legal System of the Public Security Administration in Saudi Arabia. Also: Sirāj al-Dīn, al-Qawā'id al-'Āmmah li al-Taḥqīq al-Jinā'ī, p. 27. Ministry of Interior, Murshid al-Ijrā'āt al-Jinā'iyyah, p. 43.

[45] Article 165, from the Legal System of the Public Security Administration in Saudi Arabia. Also: Sirāj al-Dīn, al-Qawā'id al-'Āmmah li al-Taḥqīq al-Jinā'ī, p. 27. Ministry of Interior, Murshid al-Ijrā'āt al-Jinā'iyyah, p. 42. Badr al-Dīn, al-Taḥqīq al-Jinā'ī, pp. 119-120.

[46] Promulgation of the Ministry of the Interior, No. 333\S dated 22-8-1388 AH. Also: Ministry of Interior, Murshid al-Ijrā'āt al-Jinā'iyyah, p. 42. Badr al-Dīn, al-Taḥqīq al-Jinā'ī, p. 124.

[47] al-Mimān, 'Ahmmiyyat Mu'āyanat Masraḥ al-Garīmah, pp. 29-30

[48] Id, p. 31.

[49] Promulgation of the Ministry of the Interior, No. 333\S dated 22-8-1388 AH. Also: Ministry of Interior, Murshid al-Ijrā'āt al-Jinā'iyyah, p. 42.

[50] al-Mimān, 'Ahmmiyyat Mu'āyanat Masraḥ al-Garīmah, pp. 31-32.

[51] Promulgation of the Ministry of the Interior, No. 333\S dated 22-8-1388 AH. Also: Ministry of Interior, Murshid al-Ijrā'āt al-Jinā'iyyah, p. 42.

[52] al-Mimān, 'Ahmmiyyat Mu'āyanat Masraḥ al-Garīmah, pp. 34-35.

[53] Article 133, from the Legal System of the Public Security Administration in Saudi Arabia. Also: Ministry of Interior, Murshid al-Ijrā'āt al-Jinā'iyyah, p. 65.

[54] Badr al-Dīn, al-Taḥqīq al-Jinā'ī, p. 41.

[55] Ministry of Interior, Murshid al-Ijrā'āt al-Jinā'iyyah, p. 65.

[56] al-Mimān, 'Ahmmiyyat Mu'āyanat Masraḥ al-Garīmah, pp. 35-36.

[57] Promulgation of the Ministry of the Interior, No. 333\S dated 22-8-1388 AH.

[58] Traditional dress often worn by women to cover their bodies when they go outside into the street or any other public places.

[59] al-Mimān, 'Ahmmiyyat Mu'āyanat Masraḥ al-Garīmah, p. 46.

[60] Id, p. 66.

[61] Badr al-Dīn, al-Taḥqīq al-Jinā'ī, pp. 344-346.

[62] Id, p. 365.

[63] Id, pp. 360-361.

[64] al-Mimān, 'Ahmmiyyat Mu'āyanat Masraḥ al-Garīmah, p. 79-80.

[65] Id, p. 90.

[66] Id, p. 82-84.

[67] See, chapter two, section I.

[68] Badr al-Dīn, al-Taḥqīq al-Jinā'ī, pp. 282-283.

[69] Id, p. 258.

[70] al-Mimān, 'Ahmmiyyat Mu'āyanat Masraḥ al-Garīmah, p. 88.

[71] Id, p. 89.

[72] al-Sadḥān, Ijrā'āt Niẓām al-Sijillāt, p. 9.

[73] Artical 86, from the Traffic Legal System (niẓām al-murūr) in Saudi Arabia No. 49\M dated 6\11\1391 A.H. Also: Resolution of the Ministry of the Interior, No. 1 dated 20-7-1395 A.H.

[74] Artical 175, from the Traffic Legal System in Saudi Arabia No. 49\M dated 6\11\1391 A.H. Also: Resolution of the Ministry of the Interior, No. 1 dated 20-7-1395 A.H. Ministry of Interior, Murshid al-Ijrā'āt al-Jinā'iyyah, p. 195.

[75] al-Sadḥān, Ijrā'āt Niẓām al-Sijillāt, p.11.

[76] Resolution of the Ministry of the Interior, No. 1 dated 20-7-1395 A.H.

[77] Article 110, from the Legal System of the Public Security Administration in Saudi Arabia. Also: Ministry of Interior, Murshid al-Ijrā'āt al-Jinā'iyyah, p. 42.

[78] Promulgation of the Ministry of the Interior, No. 333\S dated 12-8-1388 A.H. Also: Ministry of Interior, Murshid al-Ijrā'āt al-Jinā'iyyah, p. 42.

[79] Promulgation of the Ministry of the Interior, No. 5\4\656 dated 25-11-1399 A.H. Also: Ministry of Interior, Murshid al-Ijrā'āt al-Jinā'iyyah, p. 43.

[80] Promulgation of the Ministry of the Interior, No. 17748 dated 7-6-1398 A.H. Also: Ministry of Interior, Murshid al-Ijrā'āt al-Jinā'iyyah, p. 43.

[81] Resolution of the Council of the Ministres, No. 1253 dated 12-11-1392 A.H., sanctioned by royal decree No. 16\300 dated 3-1-1393 A.H. Also: Ministry of Interior, Murshid al-Ijrā'āt al-Jinā'iyyah, p. 44.

[82] Badr al-Dīn, al-Taḥqīq al-Jinā'ī, pp. 313-320.

[83] Id, p. 323.

[84] Articles 40-47, from the Legal System of the Committee of Investigation and Public Prosecution in Saudi Arabia. Also: Department of Islamic Law, al-Ijrā'āt al-Jinā'iyyah, pp. 81-83.

[85] Article 49, from the Legal System of the Committee of Investigation and Public Prosecution in Saudi Arabia. Also: Department of Islamic Law, al-Ijrā'āt al-Jinā'iyyah, p. 84.

[86] Badr al-Dīn, al-Taḥqīq al-Jinā'ī, pp. 238-242.

[87] Id, pp. 242-245.

[88] Resolution of the Ministry of the Interior, No. 1288 dated 23-4-1395 AH. Also: Ministry of Interior, Murshid al-Ijrā'āt al-Jinā'iyyah, p. 26.

[89] Ministry of Interior, Murshid al-Ijrā'āt al-Jinā'iyyah, p. 196

[90] Department of Islamic Law, al-Ijrā'āt al-Jinā'iyyah, p. 178.

[91] Ibn al-Qayyim, al-Ṭuruq al-Ḥakamiyyah, pp. 78.

[92] al-Tirmidhī, 'Īsā M. Sunn al-Tirmidhī, vol. 4, p. 311.

[93] al-Ṣan'ānī, al-Muṣannaf, vol. 10, p. 217.

[94] Article 3, from the resolution of the Council of the Ministres, No. 725 dated 23-12-1380 A.H. Also: Ministry of Interior, Murshid al-Ijrā'āt al-Jinā'iyyah, p. 50.

[95] See the previous section

[96] Articles 5, 7, 8, from the Legal System of the Imprisonment and Detention in Saudi Arabia. Also: Department of Islamic Law, al-Ijrā'āt al-Jinā'iyyah, pp. 164-166.

[97] Articles 11, 12, 13, from the Legal System of the Imprisonment and Detention in Saudi Arabia. Also: Department of Islamic Law, al-Ijrā'āt al-Jinā'iyyah, pp. 181-182.

[98] Promulgation of the Ministry of the Interior, No. 1\1598 dated 22-9-1399 AH. Also: Ministry of Interior, Murshid al-Ijrā'āt al-Jinā'iyyah, p. 81.

[99] Article 8, from the Legal System of the Imprisonment and Detention in Saudi Arabia. Also: Department of Islamic Law, al-Ijrā'āt al-Jinā'iyyah, pp. 173.

[100] al-Sadḥān, Ijrā'āt Niẓām al-Sijillāt, p. 38.

[101] Article 10, from the Legal System of the Imprisonment and Detention in Saudi Arabia. Also: Department of Islamic Law, al-Ijrā'āt al-Jinā'iyyah, pp. 174. See also: Article 3, from the Resolution of the Council of the Ministres, No. 725 dated 23-12-1380 A.H. Ministry of Interior, Murshid al-Ijrā'āt al-Jinā'iyyah, p. 50.

[102] Department of Islamic Law, al-Ijrā'āt al-Jinā'iyyah, p. 175.

[103] Article 9, from the Legal System of the Imprisonment and Detention in Saudi Arabia. Also: Department of Islamic Law, al-Ijrā'āt al-Jinā'iyyah, p. 175.

[104] al-Sadḥān, Ijrā'āt Niẓām al-Sijillāt, p. 16.

[105] Id, p. 18.

[106] Department of Islamic Law, al-Ijrā'āt al-Jinā'iyyah, p. 177.

[107] Article 11, from the Legal System of the Imprisonment and Detention in Saudi Arabia. Also: Department of Islamic Law, al-Ijrā'āt al-Jinā'iyyah, p. 178.

[108] Article 11, from the Legal System of the Imprisonment and Detention in Saudi Arabia. Also: Department of Islamic Law, al-Ijrā'āt al-Jinā'iyyah, p. 179-180.

[109] Articles 12 and 13, from the Legal System of the Imprisonment and Detention in Saudi Arabia. Also: Department of Islamic Law, al-Ijrā'āt al-Jinā'iyyah, p. 180.

[110] Ibn al-Qayyim, al-Ṭuruq al-Hakamiyyah, p. 103 Also: Sa'īd, al-Muttaham, p. 34. al-Saleh, Osman A. "The Right of the Individual to Personal Security in Islam" (in: Bassioni, The Islamic Criminal Justice System, pp. 76-78.

[111] Articles 12, 13, from the Legal System of the Imprisonment and Detention in Saudi Arabia. Also: Department of Islamic Law, al-Ijrā'āt al-Jinā'iyyah, p. 181.

[112] Department of Islamic Law, al-Ijrā'āt al-Jinā'iyyah, p. 183.

[113] Article 17, from the Legal System of the Imprisonment and Detention in Saudi Arabia. Also: Department of Islamic Law, al-Ijrā'āt al-Jinā'iyyah, p. 186.

[114] Article 16, from the Legal System of the Imprisonment and Detention in Saudi Arabia. Also: Department of Islamic Law, al-Ijrā'āt al-Jinā'iyyah, p. 185.

[115] Articles 19, 20, 21 and 22, from the Legal System of the Imprisonment and Detention in Saudi Arabia. Also: Department of Islamic Law, al-Ijrā'āt al-Jinā'iyyah, p. 187.

[116] Resolution of the Ministry of the Interior, No. 474\J dated 18-3-1401 A.H. Ministry of Interior, Murshid al-Ijrā'āt al-Jinā'iyyah, pp. 85-86.

[117] Ministry of Interior, Murshid al-Ijrā'āt al-Jinā'iyyah, pp. 74-87.

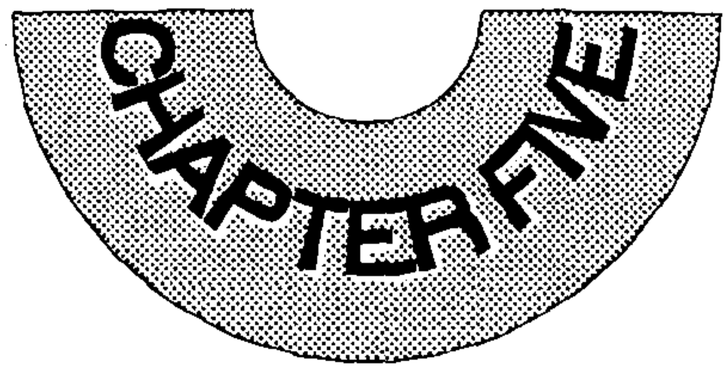
[118] Artical 3, from the Resolution of the Ministry of the Interior, No. 3919 dated 22-9-1398 AH. Also: Ministry of Interior, Murshid al-Ijrā'āt al-Jinā'iyyah, p. 81.

[119] Article 18, from the Legal System of the Imprisonment and Detention in Saudi Arabia. Also: Artical 3, from the Resolution of the Ministry of the Interior, No. 3919 dated 22-9-1398 AH. Also: Ministry of Interior, Murshid al-Ijrā'āt al-Jinā'iyyah, p. 81.

[120] Resolution of the Ministry of the Interior, No. 4092 dated 22-10-1398 A.H. Also: Ministry of Interior, Murshid al-Ijrā'āt al-Jinā'iyyah, p. 81.

[121] Articles 13, 14, 15 and 17, from the Legal System of the Imprisonment and Detention in Saudi Arabia. Also: Ministry of Interior, Murshid al-Ijrā'āt al-Jinā'iyyah, p. 81.

[122] Article 231, from the Legal System of the Public Security Administration in Saudi Arabia. Also: Ministry of Interior, Murshid al-Ijrā'āt al-Jinā'iyyah, p. 77.



TRIAL PROCEDURE ACCORDING TO THE LEGAL SYSTEM IN SAUDI ARABIA.

Introduction:

In the previous chapter it was stated that an investigator's findings, in every case of crimes of killing, must be summarised in an official final report, countersigned by the Director General of the Police, and approved by the Ministry of the Interior. These procedures must be carried out before referring the case to the General Court. This final report should be referred to the General Court by the competent authority in order to be read at the trial.

There are various trial criminal procedures legislated by the government of Saudi Arabia which should be followed by the judge when executing his duty. The discussion in this chapter will describe the judicial system of courts, the rules of evidence, the procedures to be followed when hearing the case, and the rights of the accused during the hearing and after conviction. These points will be discussed in detail in the following sections.

SECTION I: THE SYSTEM OF COURTS.

Part 1: Historical Background.

The formal judicial system in Saudi Arabia was established on 4-2-1346 A.H. when king 'Abd al-'Aziz issued a royal decree which organised the courts and delimited their jurisdictions.[1] This first step in formalising the system classified the courts into three divisions. These are:[2]

1- Summary Courts (al-maḥakim al-musta'jalah).

2- General Courts (al-maḥākim al-kubrā).

3- The Committee of Judicial Supervision (hay'at al-murāqabah al-qadā'iyyah).

The criminal jurisdiction (sulṭah qadā'iyyah) of the Summary Courts was primarily concerned with misdemeanours (junaḥ) and the penalties for which were less severe than mutilation or death. The civil jurisdiction of such courts was limited to dealing with cases costing three hundred riyāls or less.[3]

More serious crimes and those involving cases costing more than three hundred riyals were dealt with by the General Courts.[4]

The Committee of Judicial Supervision was located in Makkah. As a result of its status, Makkah had a General Court and two Summary Courts instead of the usual one. These two Summary Courts were called: "The First Summary Court" and "The Second Summary Court". They had the same jurisdiction except that the latter was set aside for looking into matters related to nomadic people.[5]

In the General Courts of Jiddah and al-Madīnah al-Munawwarah there was only one judge and a deputy. In contrast, in Makkah there was one chief judge and two additional judges.[6]

Initially, cases would be heard by one of the judges who would then make a presentation to the other judges, who constituted the General Court Committee. The final decision concerning the case would be the majority view of the judges.

Minor punishments of ḥudūd and ta'zīr crimes were dealt with by the General Court Committee. In contrast, sever punishments, such as the death penalty, amputation, and lapidation i.e. stoning (al-rajm), required sanctioning by the chairman and the other majority of the members of the Committee of Judicial Supervision.[7] This committee comprised a chairman, a deputy, and three judges. These members were chosen from superior scholars (kibār al-'ulamā') by the king. Two of the main functions of this committee were to supervise and inspect courts and monitor (i.e. confirm or reverse) the judgements issued by judges in the General Courts.[8]

Since the initiation of this judicial system, many amendments and elaborations have been made. The most important elaboration was introduced by the Committee of Judicial Supervision through a decision (No. 3 dated 7-1-1347 A.H.) approved by the king on 24-3-1347 A.H.[9] This elaboration concerned the production of a list of judicial reference sources required to be followed by judges when giving their decisions. These sources were chosen from the Ḥanbalī Madhhab, since it was easily accessible, and because the authors depended almost entirely on the Qur'ān and the Sunnah, to support their opinions.[10]

In addition, this new regulation stipulated that it was also possible to issue judgements based upon the other Madhhabs. However, this only applied to cases in which the application of the Ḥanbalī Madhhab would be problematic (mashaqqah) contrary to the public interest.[11]

Two years later, a royal decree was issued stating that it was no longer necessary for the Committee of the General Court to meet when determining sentences. The decree states: "The legal opinion of the Ḥanbalī Madhhab is to be applied without recourse to a meeting of the Committee of the Court. Such a meeting is required only in cases where a legal opinion has not been cited from the Ḥanbalī Madhhab, and such a meeting is required for ijtihād".[12]

The royal decree defined the process of seeking a legal fatwā or judgement in matters not specified in the Ḥanbalī Madhhab by recourse via ijtihād to the legal opinions specified in the other Madhhabs. However, the royal decree did not restrict

the process of seeking additional legal opinion to the other three Madhhabs only. Accordingly, legal opinion might be taken from any other Suunī schools, as long as it did not conflict with the public interest.[13]

The main reference sources in the Ḥanbalī Madhhab in Saudi Arabia were determined and listed by the Committee of Judicial Supervision on the previous decision that was approved by the king on 24-3-1347 A.H. The judges would initially refer to these sources when seeking a legal opinion. These are:

1- al-Fatūhī (died 972 A.H.), Muntahā al-irādat.

2- al-Bahūtī, Manṣūr (died 1051 A.H.), Sharḥ Muntahā al-Irādat.

3- al-Hajāwī, Musā. (died 948 A.H.) al-Iqnā'.

4- al-Bahūtī, Kshaf al-Qinā' 'an matn al-Iqnā'.

If the above sources are not available in the court, the judgement is sought from the following sources:

5- al-Hajāwī, Zād al-Mustaqni'.

6- al-BahūtJ, al-Rawḍ al-Murbi'.

7- al-Maqdisī, Mura'ī b. Yūsuf.(died 1032 A.H) Dalīl al-Ṭalib ila Asnā al-Maṭālib.

8- al-Ḍuwiyan, Ibrāhīm M. (died 1353 A.H.) Manār al-Sabīl.

If these sources are also not available to the court, a judgement is sought from the other sources in the Ḥanbalī Madhhab. Some of these other sources are:

9- Ibn Qudāmah, Muwaffaq al-Dīn (died 620 A.H.) al-Mughnī.

10- Ibn Qudāmah, 'Abd al-Raḥmān (died 682 A.H.) al-Sharḥ al-Kabīr.[14]

It should be noted that the Ḥanbalī Madhhab was at first commonly applied principally to matters concerning mu'āmalāt (transactions). Later (1353 A.H.), some exceptions to this application were introduced.[15] These exceptions stipulated that some cases should be excluded from the previous rule and dealt with by the law of the prevailing local Madhhab instead. Examples of such exclusion are the irrigation of crops (al-musāqāt wa al-ijārah) such as palm trees, inheritance and legacy (waṣāya) matters, and mortmain acts (waqf), i.e. estates mortified for charitable purposes.

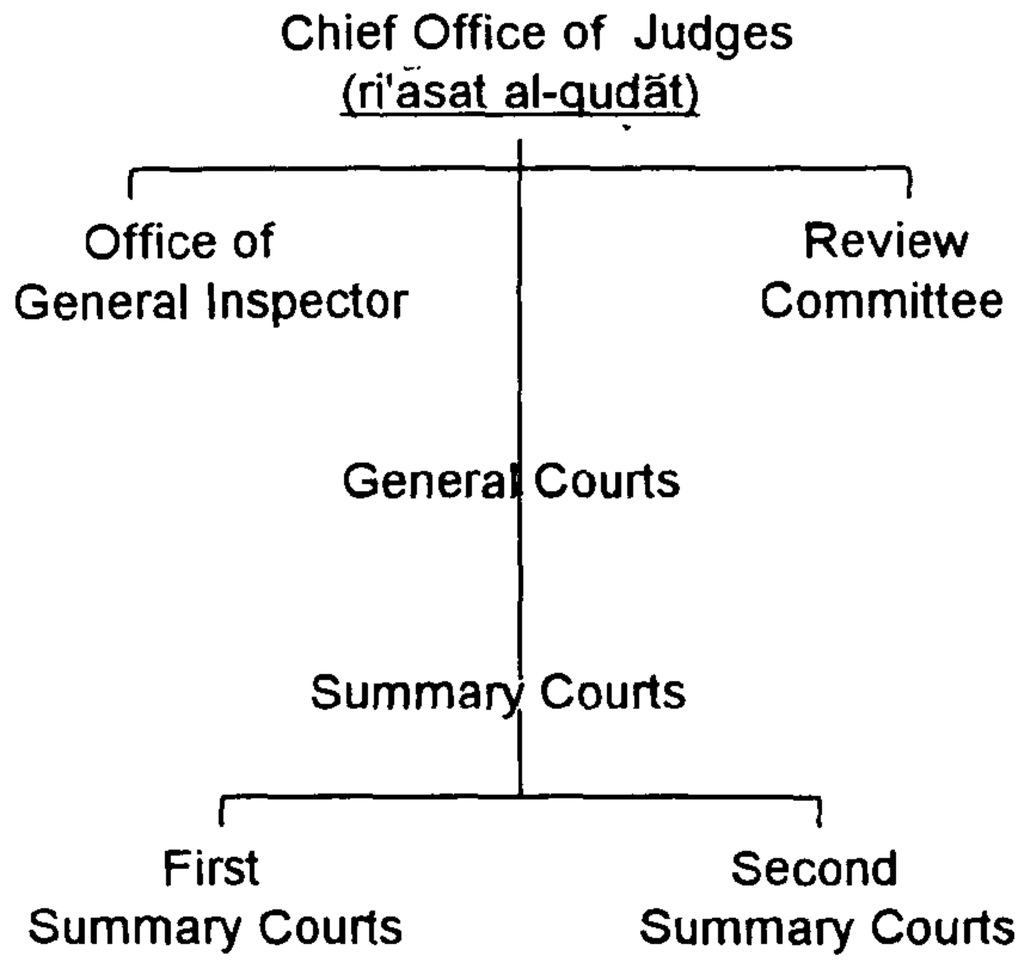
Thus, the prevailing Madhhab would be considered in such matters, irrespective of whether or not it was the Ḥanbalī Madhhab .[16]

From the above, it should be clear that matters of a spiritual nature (ʻibadāt) are not completely restricted to the Ḥanbalī Madhhab. In contrast, the public interest was always taken into account in matters where the application of the opinion of the Ḥanbalī Madhhab was problematic, i.e. introduced a difficult (mashaqqah).[17] This means that the Ḥanbalī Madhhab not the only Madhhab applied in Saudi Arabia. Any preponderant legal opinion from whatever Madhhab should be applied.

In 1357 A.H. another promulgation was issued in order to meet the needs of the Kingdom of Saudi Arabia for modern administration, to refine the judicial system of courts, including judges and their classification, and to specify the jurisdiction of the judiciary.[18] The title of this promulgation was "The Delimitations of the Jurisdiction of the Judicial System" (tarkīz mas'ūliyyat al-qaḍā' al-Shar'ī). Although this new regulation fell into 282 articles, and the former regulation issued by the royal decree of 1346 A.H. was less than twenty articles, the organisational structure remained essentially the same.[19]

The regulation of 1357 did not change the previous classification of courts, but it did rename "the Committee of Judicial Supervision" "the Chief Office of Judges" (ri'āsat al-quḍāt). The main responsibilities of this office were to supervise the inspection of courts and judicial review.[20]

In 1372 A.H., with the same title this regulation was amended further, resulting in 258 articles instead of 282.[21] The organisation of the courts according to this amendment was as follows:



The regulation of 1372 A.H. comprised eight parts, as follows:

1- Chief Office of Judges (ri'āsat al-quḍāt).

2- Office of Inspection of Courts (taftīsh al-maḥākim).

3- Judges of Courts (quḍāt al-maḥākim).

4- Clerks of Courts (kuttāb al-maḥākim).

5- Summoning Officers (al-muḥadirūn).

6- Notaries Public (kuttāb al-'adil).

7- Public Treasury Departments (dawā'ir bayt al-māl).

8- General Articles (mawādd 'ūmūmiyyah).[22]

The new Chief Office of Judges consisted of seven members instead of five members, as in the former regulation. These members are:

1- The chief judge.

2- A first assistant.

3- A second assistant.

4- Four members from the office's judges.

This regulation defined the classification of judges as follows:

1- Chairman of Court. This title is given to the head judge in a court which has two or more deputy judges.

2- In court where there is one judge and a deputy, both are known as qāḍī.

3- Deputy (mu'āwin or wakīl) is the title given to the first deputy if the court has two assistants.

4- Assistant Judge (nā'ib qāḍī) is the title given to the second or third judge in a court that has two or more judges.

5- Judge of the First Summary Court is the title given to judges who deal with misdemeanours and ta'zīr penalties that do not result in amputation or the death penalty.

6- Judge of the Second Summary Court is the title given to a judge dealing with matters concerning nomadic people.

7- Judge of Summary Court is the title given to a judge in a town which has only one Summary Court.[23]

In 1387 A.H., King Faysal b. 'Abd al-'Azīz issued a royal decree, No. M\1 dated 12-1-1387 A.H., which contained further amendments.[24] This was called Kādir al-quḍāt. It presented, for example, the classification of judges and rules for the nomination, retirement, promotion ('alāwah), transfer (naql), punishment, and secondment (i'ārah) of judges.[25]

The procedures for the nomination, retirement, promotion, transfer, punishment, and secondment of judges, were to be carried out by a committee consisting of six members. These members were the Chief of Justice (ra'īs al-quḍāt), the Chief of Committee of Review (ra'īs hay'at al-tamyīz) and one of its judges, and three Senior Head judges from the General Courts of the following cities: Makkah, Riyadh, Joddah, Dammām, and al-Madīnah al-Munawwarah.[26]

According to the regulation of this royal decree, the decisions of this committee were to be made on the basis of a majority vote. However, if the vote was spilt 50/50, the opinion held by the party in which the Chief Justice was would be adopted.[27]

Part 2: The Present Judicial System of Courts.

In 1390 A.H. there was a major development in the judicial system through the establishment of the Ministry of Justice, which was in the former system the Chief Office of Judges (ri'āsat al-quḍāt).[28] This ministry had the power of enforcing the regulation of the judicial system in the Kingdom.[29] This included all administrative and commercial matters.[30] During the five years following the establishment of this ministry, the number of courts increased from 207 to 241 and the number of judges from 321 to 464.[31]

The responsibilities of the Ministry of Justice included, for example, the disciplinary actions against judges which must be under the supervision of the minister of justice.[32] The minister also had the power to authorise the General and the Partial Courts to hear cases which were not within their jurisdiction.[33]

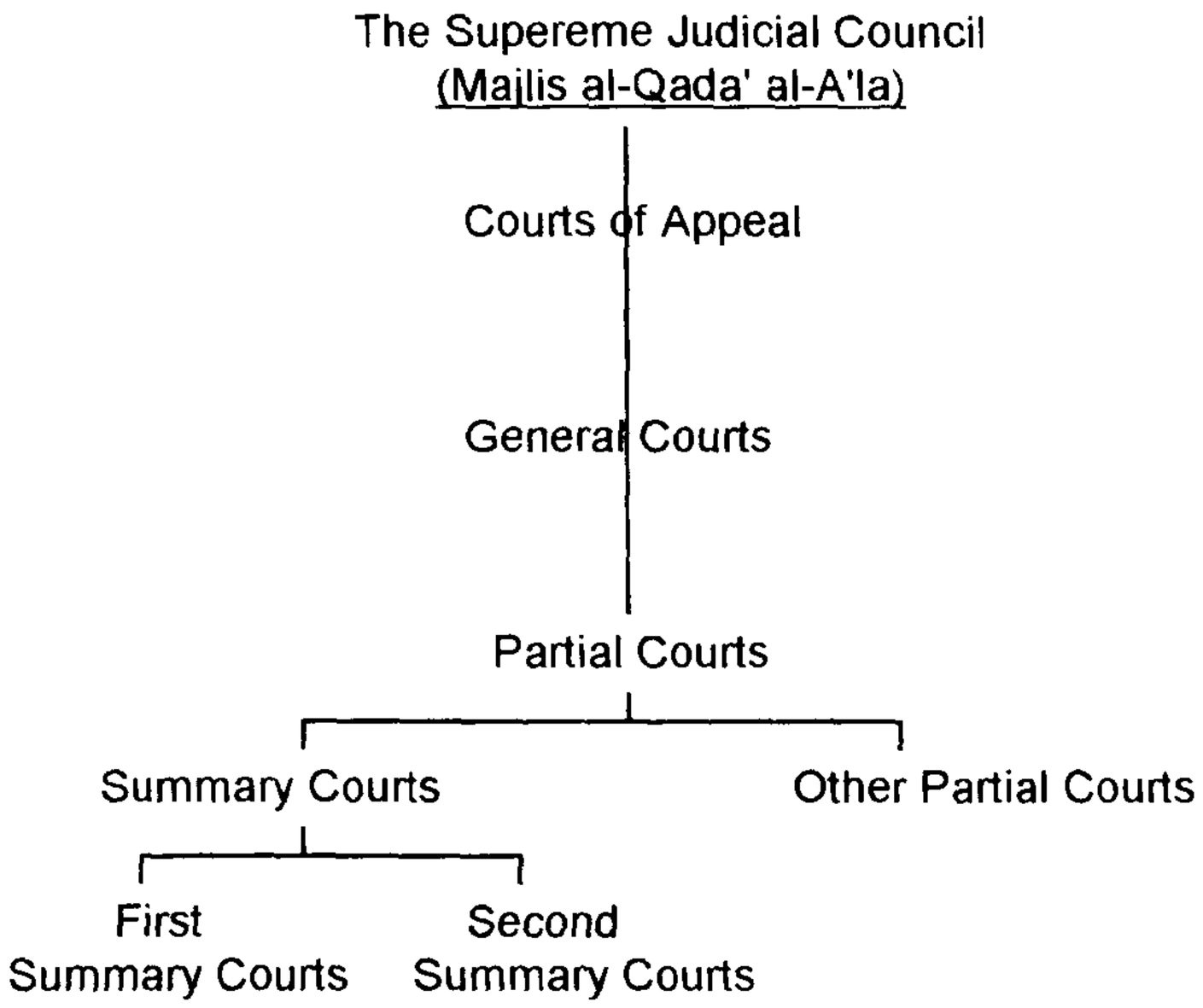
However, the power of this ministry over the judicial system was limited, as it was not permitted for any person to interfere in the decision of the trial or to attempt to influence judges in their judgement. This meant that the principles of judicial independence in Islamic law are observed in Saudi Arabia.[34]

In this context, the regulations of the judicial system stipulated: "Judges shall be independent and not subject to any superior authority when executing their judicial functions except in cases where Islamic law and the applied rules [al-anẓimah al-mar'iyyah] state otherwise. No person shall interfere in the judgement".[35] This rule is still applied at the present time in Saudi Arabia.

In 1395 A.H. King Khālid b. 'Abd al-'Azīz issued a royal decree which presented the new judicial system that is applied nowadays.[36] The important change which has

occurred in this system is the creation of the Supreme Judicial Council which has the responsibility of supervising the courts throughout the country.[37]

Similar to the previous classification of courts, the present system divides courts into four levels which are organised in a pyramid structure as follows[38]:



The Supreme Judicial Council.

The judicial system stipulates that the Supreme Judicial Council consists of eleven members as follows:

1- Five members who work full-time as members of the Supreme Judicial Council and who have held a specific position as chief of the Appeal Court. The presiding judge among these members is appointed by the King. The attendance of all these members is necessary to confirm sentences of death, amputation or lapidation.[39]

2- Five members who work part-time in the council. The first must be a chief of Appeal Court or his deputy, the second is the deputy of the minister of justice, and the other three members are judges chosen according to seniority from the chiefs of the

General Courts in Makkah, al-Madīnah al-Munawwarah, Riyadh, Jiddah, al-Dammām, and Jizān.

3- These ten members most be presided over by the Chairman of the Supreme Judicial Council (his grade is equal to ministerial rank).[40]

Among the duties of the Supreme Judicial Council are:

(a) Studying matters referred to it by the King;

(b) stating general principles of Islamic law in response to questions directed from the Minister of Justice;

(c) reviewing all death penalties, amputation, or lapidation;

(d) as the highest authority in judicial matters, supervising and inspecting the courts throughout the Kingdom.[41]

Decisions of this council must be taken by absolute majority vote.[42]

Courts of Appeal.

Such courts consist of a chief and additional judges. The deputy and the assistant of the chief judge are chosen according to seniority from these additional judges.[43]

In Saudi Arabia, there are two Courts of Appeal, located in Makkah and Riyadh. The court in Makkah hears appeals from the Western Region, and the court in Riyadh hears appeals from the Central and Eastern Regions.[44] One of various duties of such courts is to review all decisions or judgements rendered by the judges of the inferior courts.[45] It takes, in fact, the form of revision rather than the rehearing of a case.[46]

Cases which are within the jurisdiction of the Appeal Courts are divided into three: criminal cases, personal status cases, and cases which are beyond the jurisdiction of the General Courts and the other Partial Courts (al-maḥākim al-juz'iyyah).[47] In such cases, the Courts of Appeal have the power either to approve the judgement given by the inferior courts, or to disapprove such judgement and remit the case to the court either for a retrial or specific amendments.[48]

The judgement of the inferior courts can be appealed during a limited period that should not exceed fifteen days.[49] The right of appeal does not include judgements which have been issued before fifteen days, except under certain circumstances. In addition, the regulations stipulate that the right of appeal does not include the following[50]:

1- Any judgement that has been previously reviewed by the court of Appeal.

2- Any judgement that has been agreed by the convicted person.

3- Any judgement involving a sum which does not exceed five hundred riyals or its equivalent.

4- Any judgement involving either ta'zīr punishments of less than forty lashes, or imprisonment penalties of ten days or less.

5- Any judgement issued as a consequence of reconciliation (ṣulḥ).

Appeals in ordinary cases must be deliberated or reviewed by a three-judge panel. In contrast, serious cases involving possible death sentence, amputation, or lapidation must be reviewed and approved by a five-judge panel.[51] The decision of such panels must be taken by majority vote. Finally, it is important to note that the age of the judges of the Court of Appeal should be at least forty years.[52]

General Courts.

The General Court, according to the judicial system in Saudi Arabia, consists of one judge or more. The location and the jurisdiction of such a court should be appointed by the Minister of Justice pursuant to a suggestion from the Supreme Judicial Council.[53] The jurisdiction of the General Courts comprehends all civil and criminal cases not within the jurisdiction of the Partial Courts.[54]

In ordinary cases, judgements in the General Courts may be made by one judge. In serious cases, which of course include murder, decisions must be made by three judges.[55] Finally, the age of judges working in the General Courts must be twenty-two years or over.[56]

Partial Courts.

These courts are located throughout the kingdom. Partial Courts include the Summary Courts which are limited to cases of minor misdemeanour and civil actions involving sums less than eight thousand riyals, or one-fifth of the fixed amount for diyah.[57]

As a with the General Courts, Summary Courts consist of one judge or more who are aged twenty-two years or over.[58] The decisions of these courts may also be made by one judge.[59]

Juvenile Courts are a part of the Partial Courts. The jurisdiction of these courts is limited to criminal cases committed by persons under eighteen, or under fifteen for sentences of death, amputation, or lapidation.[60] According to the legal system in Saudi Arabia, the age in such cases is to be considered from the time when the crime was committed.[61]

Finally, it is worth noting that the Council of Ministers, which is presided over by the King, is at the top of the pyramid structure of courts when serious cases are concerned.[62] In serious cases, including murder, the decision of both the General Court, The Court of Appeal, and the Supreme Judicial Council must be sanctioned, as a final proceeding, by a royal decree issued by the Council of Ministers.[63]

Part 4: Conditions and Qualifications for Appointing Judges.

According to the judicial system in Saudi Arabia, there are conditions and qualifications that must be observed when appointing judges. The most important

conditions are that the judge must be a Saudi, of good conduct, and a graduate of the Sharī'ah college in Saudi Arabia, or its equivalent (but in such case he should pass an exam prepared by the Ministry of Justice).[65]

The rules of examining candidate persons and appointing judges in Saudi Arabia are based on the principles of Islamic law. For Instance:

The Prophet examined Mu'ādh b. Jabal, when he was nominated to be a judge in al-Yemen, and appointed him judge after the examination.[66]

It is stated in the Sunnah, that the Prophet asked Mu'ādh b. Jabal when he appointed him as a judge in Yemen: "On what basis will you judge?' Mu'ādh b. Jabal replied: 'On the basis of the Qur'ān'. Then the prophet again asked him: 'But if you do not find your answer there what will you do?' Mu'ādh replied: 'I will judge according to the Sunnah; if I do not find it there (the judgement), then I will interpret (ajtahidū) according to my opinion based on the teaching of Islam". Thereupon, the Prophet approved that.[67]

However, there is some flexibility within the system when such an examination is believed no longer necessary, as when a candidate is known qualified to be a judge. This was also the practice of the Prophet when he appointed, without examination, 'Alī b. Abī Ṭālib to be a judge, since he knew that the conduct and personality of 'Alī demonstrated his qualification to be a judge.[68]

In addition, it is essential, as mentioned previously, that in order to appoint a judge the minimum age of a candidate should be twenty-two years, and for the appeal judges forty years. Also, a judge should not have been convicted of criminal activity, or dismissed from any job as a result of disciplinary proceedings.[69] Following his initial appointment as a judge, he remains under probation for one year. At the end of this year the Supreme Judicial Council has the authority either to confirm his qualification as a judge or to discharge him from that position.[70]

The following table illustrates the conditions and qualifications for appointing judges at the present time in Saudi Arabia.[71]

Table: 13

The Judicial Corps (Judges)		
Name of Post	Qualifications and Conditions	
	Level of Education	Experience
Judge's Apprentice. (mulāzim qāḍī) [art. 38].	Bachelor from Sharī'ah College. [art. 39]	Under probation during the first year. [art. 50]
Judge C. [art. 38]	Bachelor from Sharī'ah College. [art. 39]	Three years service as a judge's apprentice. [art. 40]
Judge B. [art. 38]	Bachelor from Sharī'ah College. [art. 39]	One year service as Judge C., or four years of either judicial experience or Islamic jurisprudence teaching in Sharī'ah College in Saudi Arabia. [art. 41].
	Master the High Institute of the Judiciary System in Saudi Arabia. [art. 41]	**NB**. This Master's degree is equal to four years of judicial experience and is applicable to the following positions. [art. 48].
Judge A. [art. 38]	Bachelor from Sharī'ah College. [art. 39]	Four years service as Judge B., or six years of either judicial experience or Islamic jurisprudence teaching in Sharī'ah College in Saudi Arabia. [art. 42].
Deputy of Court B. (wakīl maḥkamah B.). [art. 38]	Bachelor from Sharī'ah College. [art. 39]	Three years service as Judge A., or ten years of either judicial experience or Islamic jurisprudence teaching in Sharī'ah College in Saudi Arabia. [art. 43].
Deputy of Court A. (wakīl maḥkamah A.). [art. 38]	Bachelor from Sharī'ah College. [art. 39]	Two years service as Deputy of Court B., or twelve years of either judicial experience or Islamic jurisprudence teaching in Sharī'ah College in Saudi Arabia. [art. 44].

Chairman of Court B. (ra'īs maḥkamah B.). [art. 38]	Bachelor from Sharī'ah College. [art. 39]	Two years service as Deputy of Court A., or fourteen years of either judicial experience or Islamic jurisprudence teaching in Sharī'ah College in Saudi Arabia. [art. 45].
Chairman of Court A. (ra'īs maḥkamah A.). [art. 38]	Bachelor from Sharī'ah College. [art. 39]	Two years service as a Chairman of Court B., or sixteen years of either judicial experience or Islamic jurisprudence teaching in Sharī'ah College in Saudi Arabia. [art. 46].
Appeal Judge (qāḍī tamyīz). [art. 38]	Bachelor from Sharī'ah College. [art. 39]	Two years service as a Chairman of Court A., or eighteen years of either judicial experience or Islamic jurisprudence teaching in Sharī'ah College in Saudi Arabia. [art. 47].
Chairman of Appeal Court (ra'īs maḥkamah tamyīz). [art. 38]	Bachelor from Sharī'ah College. [art. 39]	The same condition as for Appeal Judge; to be chosen from amongst them by absolute seniority. [art. 49 A.]
Chairman of the Supreme Judicial Council (ra'īs al-majlis al-a'lā li al-qadā'). [art. 38 and 49]	Bachelor from Shari'ah College. [art. 39]	The same condition as for Appeal Judge; to be Appointed by royal decree. [art. 49 B.] **NB**. This position is equal to ministerial rank. It was established by royal decree No. M\76 dated 14-10-1395 A.H., and added to article No. 49 of the judicial system.

The act of appointing judges in Saudi Arabia is usually to be conducted as the result of a decision from the Supreme Judicial Council and then a royal decree.[72]

It can be concluded from the above discussion that in order to serve as a judge in Saudi Arabia, a person must initially became a scholar who has knowledge of the Qur'ān, the Sunnah, and the other sources of Islamic law. In addition, his conduct and communication or interaction with others should be exemplary.

Nowadays, these requirements of conduct and quality should be observed during the period of the candidate study at the Sharī'ah Colleges or the High Institute of the Judiciary. Accordingly, if such a student meets the requirements, the Sharī'ah College or the High Institute of the Judiciary may recommend him to either the Ministry of Justice or the Supreme Judicial Council who may, in some circumstances, interview and examine him. If the result of this interview concludes that the candidate is acceptable, he will initially be appointed as a judge's apprentice i.e. apprentice to an experienced judge (mulāzim qāḍī), and will be under probation for the first year.[73] After being accepted as a judge at the end of the first year, he will remain as mulāzim qāḍī for another two years in which time he will be experienced in judicial procedures. During his career, he should be an exemplary follower of Islamic teaching.[74]

A judge, according to the judicial system in Saudi Arabia, must be a male Muslim. A female is absolutely not allowed to be a judge. This is the opinion of the majority of the jurists (Mālik, al-Shāfi'ī, and Ibn Ḥanbal).[75]

The Ḥanafī Madhhab however states that a woman may be allowed to serve as a judge in certain circumstances, which do not include qiṣāṣ or ḥudūd cases.[76] This means that there is unanimous agreement between the four Madhhabs on the disqualification of a female from being a judge in crimes of killing.

As a rule, it is prohibited for judges to become involved in trade or any other work not within the duties of their career.[77]

These conditions and qualifications for nominating a candidate and appointing a judge are generally included in the principles of Islamic law. For instance, there are certain conditions that should be observed when appointing a judge. These conditions include: wisdom (ḥikmah), religious piety ('adālah), adulthood (bulūgh), and sanity ('aqil).[78]

'Alī b. Abī Talib believes that no person can become a judge, unless he is pious, wise and dignified (razīn), has some knowledge (muṭṭali' i.e. educated) and fears Allah.[79]

To sum up, according to the Ḥanbalī Madhhab, there are many qualities which a judge should posses. He should be strong without harshness yet lenient without weakness. He must be dignified, thoughtful, serious, wakeful and attentive. He must be intelligent and have the ability to understand dialects. He should demonstrate piety (ʻadālah or tuqā) and abstinence (aʻtidāl), and be neat and stylish in appearance (ḥasan al-maẓhar). When speaking, he must be honest and gentle; when threatening, solemn; when promising, decisive; and when dealing, productive (nashīṭ or muntij) and selfless. In addition, he must be humble and avoid acting in a tyrannical manner.[80]

[1] Āl al-shaykh, Hasan ʿAbd Allah. al-Tanẓīm al-Qadā'ī fi al-Mamlakah al-ʿArabiyyah al-Saʿūdiyyah, (Tuhāmah li al-Nashir, Jiddah, ed. 1, 1403 A.H.) p. 34. Also: al-Zuḥaylī, Muḥammad Muṣtafā. al-Tanẓīm al-Qadā'ī fi al-Fiqh al-Islāmī wa Tatbiquhū fi al-Mamlakah al-ʿArabiyyah al-Saʿūdiyyah, (Dār al-Fikr, Damascus, 1402 A.H.) p. 114.

[2] al-Durīb, Saʿūd Saʿad. al-Tanẓīm al-Qaḍā'ī fi al-Mamlakah al-ʿArabiyyah al-Sa'ūdiyyah fi Ḍawʿ al-Sharīʿah al-Islāmiyyah wa Niẓām al-Sulṭah al-Qaḍā'iyyah. (Dār al-Hilāl, Riyadh, ed. 2, 1405 A.H.) p. 22. Also: Āl al-shaykh, al-Tanẓīm al-Qaḍā'ī, p. 35. al-Zuḥaylī, al-Tanẓīm al-Qaḍā'ī fi al-Fiqh, p. 114. Seaman, Bryant W. "Islamic Law and Modern Government: Saudi Arabia Supplements the Shari'a to Regulate Development", Columbia Journal of Transnational Law, 1979, vol. 18, p. 441.

[3] al-Durīb, al-Tanẓīm al-Qaḍā'ī fi al-Mamlakah, p. 22. Also: al-Zuḥaylī, al-Tanẓīm al-Qaḍā'ī fi al-Fiqh, p. 114. Ministry of Justice, Majmūʿat al-Nuẓum wa al-Lawā'iḥ, (1400 A.H.) p. 13.

[4] Ministry of Justice, Majmūʿat al-Nuẓum wa al-Lawā'iḥ, p. 13.

[5] Āl al-shaykh, al-Tanẓīm al-Qaḍā'ī, p. 37. Also: al-Durīb, al-Tanẓīm al-Qaḍā'ī fi al-Mamlakah, p. 23. Solaim, Soliman A. Constitutional and Judicial Organization in Saudi Arabia, (The Johns Hopkins University, Ph.D., 1970, Law) p. 93.

[6] Solaim, Constitutional and Judicial Organization, p. 93. Also: al-Durīb, al-Tanẓīm al-Qaḍā'ī fi al-Mamlakah, p. 23.

[7] al-Durīb, al-Tanẓīm al-Qaḍā'ī fi al-Mamlakah, p. 22. Also: Solaim, Constitutional and Judicial Organization, p. 93.

[8] al-Durīb, al-Tanẓīm al-Qaḍā'ī fi al-Mamlakah, P. 24. Also: Solaim, Constitutional and Judicial Organization, p. 94. Basha, The Significant Influences of Islamic Law, p. 19.

[9] Ministry of Justice, Majmūʿat al-Nuẓum wa al-Lawā'iḥ, p. 11. Also: Hāshim, Maḥmūd M. al-Qaḍā' wa Niẓām al-Ithbāt fi al-Figh al-Islāmī wa al-Anẓimah al-Waḍʿiyyah, (University of King Saʿūd, Riyadh, 1408 A.H.) p. 40.

[10] Hāshim, al-Qaḍā' wa Niẓām al-Ithbāt, p. 40. Also: Solaim, Constitutional and Judicial Organization, p. 95.

[11] Ministry of Justice, Majmū'at al-Nuẓum wa al-Lawā'iḥ, p. 11. Also: Hāshim, al-Qaḍā' wa Niẓām al-Ithbāt, p. 40. Solaim, Constitutional and Judicial Organization, p. 96.

[12] Ministry of Justice, Majmū'at al-Nuẓum wa al-Lawā'iḥ, pp. 15-16.

[13] al-Durīb, al-Tanẓīm al-Qaḍā'ī fi al-Mamlakah, p. 27. Also: Solaim, Constitutional and Judicial Organization, p. 97.

[14] al-Durīb, al-Tanẓīm al-Qaḍā'ī fi al-Mamlakah, pp. 27-28.

[15] Id, pp. 28-29.

[16] Ministry of Justice, Majmū'at al-Nuẓum wa al-Lawā'iḥ, p. 39. Also: al-Durīb, al-Tanẓīm al-Qaḍā'ī fi al-Mamlakah, P. 27. Solaim, Constitutional and Judicial Organization, p. 98.

[17] Solaim, Constitutional and Judicial Organization, pp. 98-99. Also: al-Durīb, al-Tanẓīm al-Qaḍā'ī fi al-Mamlakah, p. 29.

[18] Royal decree No 32\1\3 dated 4-1-1357 A.H. Also:Ministry of Justice, Majmū'at al-Nuẓum wa al-Lawā'ih, pp. 73-112. Āl al-shaykh, al-Tanẓīm al-Qaḍā'ī, p. 38.

[19] al-Durīb, al-Tanẓīm al-Qaḍā'ī fi al-Mamlakah, p. 60. Also: Hāshim, al-Qaḍā' wa Niẓām al-Ithbāt, p. 41. al-Zuḥaylī, al-Durīb, al-Tanẓīm al-Qaḍā'ī fi al-Fiqh, p. 115.

[20] al-Durīb, al-Tanẓīm al-Qaḍā'ī fi al- Mamlakah, p. 60. Also: Solaim, Constitutional and Judicial Organization, p. 99.

[21] Royal decree No. 109 dated 24-1-1372 A.H. Also: Āl al-shaykh, al-Tanẓīm al-Qaḍā'ī, p. 38. al-Zuḥaylī, al-Tanẓīm al-Qaḍā'ī fi al-Fiqh, p. 141. al-Durīb, al-Tanẓīm al-Qaḍā'ī fi al-Mamlakah, p. 60.

[22] Āl al-shaykh, al-Tanẓīm al-Qaḍā'ī, p. 38. Also: al-Durīb, al-Tanẓīm al-Qaḍā'ī fi al-Mamlakah, p. 61. al-Zuḥaylī, al-Tanẓīm al-Qaḍā'ī fi al-Fiqh, p. 141.

[23] al-Durīb, al-Tanẓīm al-Qaḍā'ī fi al-Mamlakah, p. 61. Also: al-Zuḥaylī, al-Tanẓīm al-Qaḍā'ī fi al-Fiqh, p. 146. Solaim, Constitutional and Judicial Organization, pp. 102-103.

[24] al-Durīb, al-Tanẓīm al-Qaḍā'ī fi al-Mamlakah, p. 65.

[25] al-Durīb, al-Tanẓīm al-Qaḍā'ī fi al-Mamlakah, p. 65. Also: Solaim, Constitutional and Judicial Organization, p. 104.

[26] al-Durīb, al-Tanẓīm al-Qaḍā'ī fi al-Mamlakah, p. 65. Also: Solaim, Constitutional and Judicial Organization, p. 105.

[27] al-Durīb, al-Tanẓīm al-Qaḍā'ī fi al-Mamlakah, p. 65. Also: Solaim, Constitutional and Judicial Organization, p. 105.

[28] al-Durīb, al-Tanẓīm al-Qaḍā'ī fi al-Mamlakah, p. 161. Also: Seaman, "Islamic Law and Modern Government", Columbia Journal of Transnational Law, 1979, vol. 18, p. 441.

[29] Basha, The Significant Influences of Islamic Law, p. 20. Also: Moor, JR. Richter H. "Court, Law, Justice, and Criminal Trials in Saudi Arabia", International Journal of Comparative and Applied Criminal Justice, Spring 1987) vol. 11, p. 62.

[30] Articles 71, and 87, from the Judicial System issued by royal decree No. M\64 dated 14-7-1395 A.H.

[31] Basha, The Significant Influences of Islamic Law, p. 20.

[32] Article 74, from the Judicial System.

[33] Article 27, from the Judicial System. Also: Leerrick, A. and Main, Q.J. Saudi Business and Labour Law, (U.K., Graham and Trotman, 1982.) pp. 219-220.

[34] Leerrick and Main, Saudi Business and Labour Law, p. 219.

[35]Article 1, from the Judicial System. Also: Leerrick and Main, Saudi Business and Labour Law, p. 219.

[36] Royal decree No. M\64 dated 14-7-1395 A.H.

[37] Article 49, from the Judicial System. This article was amended by royal decree No. M\76 dated 14-10-1395 A.H. Also: al-Durīb, al-Tanẓīm al-Qaḍā'ī fi al-Mamlakah, p. 328. Seaman, "Islamic Law and Modern Government", Columbia Journal of Transnational Law, 1979, vol. 18, p. 441. Karl, D.J. "Islamic Law in Saudi Arabia: What Foreign Attorneys Should Know", George Washington Journal of International Law, 1991, vol. 25, part: 1, p. 145.

[38] Article 5, from the Judicial System.

[39] Article 6, from the Judicial System. This article was amended by royal decree No. M\4 dated 1-3-1401 A.H., as it was: "The presiding judge will be chosen by seniorty among these members." Also: al-Durīb, al-Tanẓīm al-Qaḍā'ī fi al-Mamlakah, p. 328.

[40] Article 6, from the Judicial System. This article was amended by royal decree No. M\4 dated 1-3-1401 A.H., as it was: "This Committee must be presided over by the Minister of Justice." Also: al-Durīb, al-Tanẓīm al-Qaḍā'ī fi al-Mamlakah, p. 328.

[41] Articles 7, 8, 9, from the Judicial System.

[42] Article 9, from the Judicial System. Also: Amin, Middle East Legal Systems, p. 320. Karl, "Islamic Law in Saudi Arabia", George Washington Journal of International Law, 1991, vol. 25, part: 1, p. 146. Leerrick and Main, Saudi Business and Labour Law, p. 204.

[43] Article 10, from the Judicial System. Also: Āl al-shaykh, al-Tanẓīm al-Qaḍā'ī, p. 51.

[44] Karl, "Islamic Law in Saudi Arabia" vol. 25, part: 1, p. 146. Also: al-Durīb, al-Tanẓīm al-Qaḍā'ī fi al-Mamlakah, p. 164.

[45] Royal decree No. 24836 dated 29-10-1386 A.H. Also: al-Durīb, al-Tanẓīm al-Qaḍā'ī fi al-Mamlakah, p. 166.

[46] Shamma, Samir. "Law and Lawers in Saudi Arabia" International and Comparative Law Quarterly, 1965. vol. 14, p. 1036.

[47] Article 10, from the Judicial System.

[48] Shamma, "Law and Lawers in Saudi Arabia" vol. 14, p. 1036.

[49] Karl, "Islamic Law in Saudi Arabia", George Washington Journal of International Law, 1991, vol. 25, part: 1, p. 146. Also: al-Durīb, al-Tanẓīm al-Qaḍā'ī fi al-Mamlakah, p. 166.

[50] Royal decree No. 24836 dated 29-10-1386 A.H. Also: al-Durīb, al-Tanẓīm al-Qaḍā'ī fi al-Mamlakah, pp. 166-167.

[51] Articles 12, 13, from the Judicial. Also: al-Durīb, al-Tanẓīm al-Qaḍā'ī fi al-Mamlakah, p. 164. Hāshim, al-Qaḍā' wa Niẓām al-Ithbāt, p. 44. Karl, "Islamic Law in Saudi Arabia", George Washington Journal of International Law, 1991, vol. 25, part: 1, p. 146. Amin, Middle East Legal Systems, p. 320. Moor, "Court, Law, Justice, and Criminal Trials in Saudi Arabia", International Journal of Comparative and Applied Criminal Justice, 1987, vol. 11, p. 62.

[52] Article 37, from the Judicial System. Also: al-Zuḥaylī, al-Tanẓīm al-Qaḍā'ī fi al-Fiqh, p. 161. Āl al-shaykh, al-Tanẓīm al-Qaḍā'ī, p. 61. Hāshim, al-Qaḍā' wa Niẓām al-Ithbāt, p. 60. Leerrick and Main, Saudi Business and Labour Law, p. 220. Karl, "Islamic Law in Saudi Arabia", George Washington Journal of International Law, 1991, vol. 25, part: 1, p. 144.

[53] Article 22, from the Judicial System. Also: al-Durīb, al-Tanẓīm al-Qaḍā'ī fi al-Mamlakah, p. 169. al-Zuḥaylī, al-Durīb, al-Tanẓīm al-Qaḍā'ī fi al-Fiqh, p. 156. Hāshim, al-Qaḍā' wa Niẓām al-Ithbāt, p. 44.

[54] Article 23, from the Judicial System. Also: al-Durīb, al-Tanẓīm al-Qaḍā'ī fi al-Mamlakah, p. 169. al-Zuḥaylī, al-Tanẓīm al-Qaḍā'ī fi al-Fiqh, p. 156. Leerrick and Main, Saudi Business and Labour Law, p. 223. Karl, "Islamic Law in Saudi Arabia", George Washington Journal of International Law, 1991, vol. 25, part: 1, p. 145.

[55] Article 37, from the Judicial System. Also: al-Durīb, al-Tanẓīm al-Qaḍā'ī fi al-Mamlakah, p. 170. al-Zuḥaylī, al-Tanẓīm al-Qaḍā'ī fi al-Fiqh, p. 157. Āl al-shaykh, al-Tanẓīm al-Qaḍā'ī, p. 55. Hāshim, al-Qaḍā' wa Niẓām al-Ithbāt, p. 44. Leerrick and Main, Saudi Business and Labour Law, p. 223. Karl, "Islamic Law in Saudi Arabia", George Washington Journal of International Law, 1991, vol. 25, part: 1, p. 144.

[56] Article 37, from the Judicial System. Also: al-Zuḥaylī, al-Tanẓīm al-Qaḍā'ī fi al-Fiqh, p. 161. Āl al-shaykh, al-Tanẓīm al-Qaḍā'ī, p. 61. Hāshim, al-Qaḍā' wa Niẓām al-Ithbāt, p. 60. Leerrick and Main, Saudi Business and Labour Law, p. 220. Karl, "Islamic Law in Saudi Arabia", George Washington Journal of International Law, 1991, vol. 25, part: 1, p. 144.

[57] Royal decree No. 14\Z\384 dated 6-1-1397 A.H. Also: al-Durīb, al-Tanẓīm al-Qaḍā'ī fi al-Mamlakah, p. 170. Leerrick and Main, Saudi Business and Labour Law, p. 223. Karl, "Islamic Law in Saudi Arabia", George Washington Journal of International Law, 1991, vol. 25, part: 1, p. 145.

[58] Article 24, from the Judicial System. Also: al-Durīb, al-Tanẓīm al-Qaḍā'ī fi al-Mamlakah, p. 170. al-Zuḥaylī, al-Tanẓīm al-Qaḍā'ī fi al-Fiqh, p. 157. Āl al-shaykh, al-Tanẓīm al-Qaḍā'ī, p. 55. Hāshim, al-Qaḍā' wa Niẓām al-Ithbāt, p. 44. Leerrick and Main, Saudi Business and Labour Law, P. 203. Karl, "Islamic Law in Saudi Arabia", George Washington Journal of International Law, 1991, vol. 25, part: 1, p. 145.

[59] Article 25, from the Judicial System. Also: al-Durīb, al-Tanẓīm al-Qaḍā'ī fi al-Mamlakah, p. 171. al-Zuḥaylī, al-Tanẓīm al-Qaḍā'ī fi al-Fiqh, p. 157. Āl al-shaykh, al-Tanẓīm al-Qaḍā'ī, p. 55. Hāshim, al-Qaḍā' wa Niẓām al-Ithbāt, p. 44. Leerrick and Main, Saudi Business and Labour Law, p. 223. Karl, "Islamic Law in Saudi Arabia", George Washington Journal of International Law, 1991, vol. 25, part: 1, p. 145.

[60] See chapter three, section two. Also: al-Durīb, al-Tanẓīm al-Qaḍā'ī fi al-Mamlakah, p. 172.

[61] al-Durīb, al-Tanẓīm al-Qaḍā'ī fi al-Mamlakah, p. 173.

[62] Basha, The Significant Influences of Islamic Law, p. 22. Also: Moor, "Court, Law, Justice, and Criminal Trials in Saudi Arabia", International Journal of Comparative and Applied Criminal Justice, 1987, vol. 11, p. 62.

[63] Basha, The Significant Influences of Islamic Law, p. 22.

[64] Article 37, from the Judicial System. Also: Leerrick and Main, Saudi Business and Labour Law, p. 220.

[65] Ibn Ḥayyān, Wakī` b. khalaf. 'Akhbār alquḍāṭ, (Maṭba`at al-Istiqāmah, Cairo, ed. 1, 1366 A.H.) vol. 1, p. 275. Also: al-Durīb, al-Tanẓīm al-Qaḍā'ī fi al-Mamlakah, p. 87.

[66] al-'Āmidi, al-Aḥkām, vol. 3, p. 77. Also: 'Awdah, al-Tashrī` al-Jinā'ī fi al-Islām, vol. 1, p. 183.

[67] Ibn Ḥayyān, 'Akhbār alquḍāṭ, vol. 1, p. 275. Also: al-Durīb, al-Tanẓīm al-Qaḍā'ī fi al-Mamlakah, p. 87.

[68] Article 37, from the Judicial System. Also: Leerrick and Main, Saudi Business and Labour Law, p. 220.

[69] Article 50, from the Judicial System. Also: al-Durīb, al-Tanẓīm al-Qaḍā'ī fi al-Mamlakah, pp. 124-126. Leerrick and Main, Saudi Business and Labour Law, pp. 220-221. Majalat Ma`had al-Idārah al-'Āmmah, "al-Ta'yīn Taḥt al-Ikhtibār fi Ḍaw' Niẓām al-Muwaẓafīn al-'Āmm" (1393 A.H., rabī` al-awwal) p. 19.

[70] Judicial System issued by royal decree No. M\64 dated 14-7-1395 A.H.

[71] Article 53, from the Judicial System.

[72] Article 50, from the Judicial. Also: al-Durīb, al-Tanẓīm al-Qaḍā'ī fi al-Mamlakah, pp. 124-126. Leerrick and Main, Saudi Business and Labour Law, pp. 220-221. Majalat Ma'had al-Idārah al-'Āmmah, "al-Ta'yīn Taḥt al-Ikhtibār ", pp. 19-20.

[73] Article 40, from the Judicial System. Also: al-Durīb, al-Tanẓīm al-Qaḍā'ī fi al-Mamlakah, pp. 124-126. Walker, "The Rights of the Accused in Saudi Criminal Procedure", Loyola of Los Angeles International and Comparative Law, 1993, vol. 5, part: 4, p. 869.

[74] University of Imām Muḥammad b. Sa'ūd, Nẓām al-Qaḍā' fi al-Islām, (Idārt al-Thaqāfah wa al-Nashir fi al-Jāmi'ah, 1404 A.H.), p.24. Also: al-Najdī, Ḥāshiyat al-Rawḍ al-Murbi', vol. 7, p. 517. al-Mawārdī, al-Aḥkām al-Sulṭāniyyah, p. 65.

[75] University of Imām Muḥammad b. Sa'ūd, Nẓām al-Qaḍā' fi al-Islām, p. 25. Also: al-Mawārdī. al-Aḥkām al-Sulṭāniyyah, p. 65.

[76] Article 58, from the Judicial System. Also: al-Durīb, al-Tanẓīm al-Qaḍā'ī fi al-Mamlakah, p. 133. al-Ashaykh, al-Tanẓīm al-Qaḍā'ī, p. 76.

[77] University of Imām Muḥammad b. Sa'ūd, Nẓām al-Qaḍā' fi al-Islām, p. 182. Also: al-Najdī, Ḥāshiyat al-Rawḍ al-Murbi', vol. 7, p. 520. al-Mawārdī, al-Aḥkām al-Sulṭāniyyah, pp. 65-66. al-Munifi, Abdullah Abd al-Aziz. The Islamic Constutional Theory, (Ph.D, School of Law, University of Virginia, 1973) p. 459. Azad, Ghulam Murtaza. "Conduct and Qualities of Qadi", Islamic Studies, Spring, 1985, vol. 24., p. 59.

[78] al-Najdī, Ḥāshiyat al-Rawḍ al-Murbi', vol. 7, p. 524. Also: Azad, "Conduct and Qualities of Qadi", Islamic Studies, 1985, vol. 24., p. 59.

[79] al-Najdī, Ḥāshiyat al-Rawḍ al-Murbi', vol. 7, pp. 522-536. Also: University of Imām Muḥammad b. Sa'ūd, Nẓām al-Qaḍā' fi al-Islām, pp. 183-185. Azad, "Conduct and Qualities of Qadi", Islamic Studies, 1985, vol. 24., p. 59. al-Munifi, The Islamic Constutional Theory, p. 460.

SECTION II: THE RULES OF EVIDENCE IN CRIMINAL CASES.

Introduction.

Evidence is the most common means of proving a fact in a case. The rules of evidence indicate what is properly admissible to be introduced by a party, and what standard of proof is required in any particular case. In sum, the rules of evidence regulate the means and methods in which a party may prove his own case or challenge that of his adversary .[1]

In Islamic law evidence is known as bayyinah which means: "A decisive proof."[2] In the legal sense, it is considered as: "A clear and definite proof given for the purpose of ascertaining whether the accused is innocent or guilty". It primarily comprises the confession of the accused, the testimony of witnesses under oath, and written documentary evidence.[3]

Jurists in Islamic law hold various views regarding the definition of bayyinah. The opinion of Ibn al-Qayyim, which defines bayyinah as a name given to anything producing clear evidence of the truth, conforms most with modern approaches to the theory of proof. According to his definition, there may be two or four witnesses, or even one witness. These witnesses may be male or female. Bayyinah may also be used as an oath in situations where there is no positive evidence and the accused denies the charge. In addition, it may be used as a confession or merely circumstantial evidence.[4]

The rules of criminal evidence aim not only to prove the guilt of the accused but also to prove the innocence of the not guilty. In Islamic law, it is considered better for the Judge to acquit a criminal than convict an innocent person.[5] El-Ewa states: "The aim of the law of evidence in Islamic legal theory in general was rightly described as the establishment of the truth of claims with a high degree of certainty".[6]

It is stated in the Qur'ān: **"O ye who believe! If a sinner comes to you with any news, ascertain the truth, lest ye harm people unwittingly, and afterward become full of repentance for what ye have done!"**[7]

The Prophet says: "If the people believed only according to their allegations, some persons would claim the blood of other persons and their properties, but the accuser is bound to present positive proof".[8]

He also says: "The accuser is bound to produce positive evidence, and an oath is required of one who denies".[9]

In criminal cases (including crimes of killing) the link between the evidence and the conviction of the accused is naturally taken into account when rendering the judgement. Accordingly, the punishment cannot be executed unless there is unambiguous evidence on which the judgement was based.

According to the applied legal system in Saudi Arabia, there are some alternative methods of proof in criminal cases. These methods may be the testimony of the witnesses (shuhūd), the criminal's confession (iqrār), oath, or the circumstantial evidence (qarā'in). These types of evidence will be discussed in detail in the following parts.

Part 1: Testimony (shahādah).

Legal testimony is the statement of witness made under oath in court and is offered as proof of what has been asserted. In legal usage, shahādah is testimony relating to facts of which the witness has had personal experience. This kind of testimony is called "direct evidence" (shahādah mubāshirah), such as eyewitness testimony. al-shahādah mubāshirah is a term commonly used and contrasts with shahādah ghayr al-mubāshirah, such as hearsay evidence.

Testimony basically means: to tell, to inform, i.e. to witness.[10] In the legal sense, it commonly means: The oral testimony of one or, in most criminal cases, two adult Muslims, who must have a certain degree of moral and religious piety.[11] For example:

Allah says:**"... And take for witness two persons from among you, endued with justice, and establish the evidence for the sake of Allah..."**[12]

The required number of witnesses in criminal cases, according to the Sharī'ah law, is as follows:

1- Testimony of four witnesses.

Jurists agree that this number of witnesses is only required in cases of unlawful sexual intercourse (zinā). This agreement is based on the Qur'ānic verse: **"And those who launch a charge against chaste women, and produce not four witnesses (to support their allegation), flog them with eighty stripes..."**.[13]

Ibn Ḥanbal, al-Shāfi'ī, Mālik, and Abū Ḥanīfah agree that the witnesses to such a crime should be male, as they believe that the testimony of females in crimes of zinā is not acceptable. However, some jurists (such as 'Aṭā b. Rajab and Ḥamad b. Salāmah) believe that the testimony of three men and two women in such crimes may be accepted.[14] In contrast, Ibn Ḥazm maintains that the testimony of two women equals that of one man in all civil and criminal cases, and, hence, he accepts the testimony of eight women in zinā crimes.[15]

2- Testimony of two witnesses.

This number of witnesses is required in most criminal and civil cases. Allah says:

"... And get two witnesses out of your own men..."[16]

It is also the required number of witnesses in crimes of killing.[17] Thus, the testimony of two male eyewitnesses is sufficient to prove such crimes in Saudi Arabia, as long as these witnesses are legally competent to bear the duty of testimony. The testimony of two eyewitnesses is believed to be one of the most powerful and pervasive types of evidence routinely introduced into courts and one of the most important sources of evidence leading to conviction in crimes of killing.

The testimony of a female is unacceptable in proving cases deserving the death penalty[18] except according to some minority jurists such as ʻAṭā, Ibn Salāmah, and Ibn Ḥazm.[19] This minority opinion however is not a common acceptable method of proof in such cases in Saudi Arabia. The testimony of two male Muslim eyewitnesses, is effectively the only method of testimony accepted as sufficient ground for the death penalty as qiṣāṣ.[20]

3- Testimony of one man and two women.

Ibn Ḥanbal, al-Shāfiʻī, Mālik, and Abū Ḥanīfah agree that the testimony of one man and two women is acceptable in civil cases involving property and financial matters. Abū Ḥanīfah adds that such testimony is accepted in all civil matters, regardless of whether these matters are related to property or finance, or others such as matters of marriage and divorce.[21] However, Ibn Ḥazm believes that such testimony is equal to the testimony of two men.[22] Al-Shawkānī states that al-Zuhrī and al-Awzāʻī believe that some criminal cases, including crimes of killing, can be proven by one man and two women. He comments that he does not agree with the opinions of the majority of jurists, and would accept the testimony of one man and two women in those crimes which normally required that of two men.[23]

4- Testimony of one man and oath.

According to Ibn Ḥanbal, al-Shāfi'ī, Mālik, and Abū Ḥanīfah such testimony is not acceptable as sufficient proof in criminal cases. However, Ibn Ḥazm believes that judgement in cases related to cases of unintentional killing may be based on such a testimony.[24]

5- Testimony of one man.

This testimony, according to Ibn Ḥanbal, al-Shāfi'ī, Mālik, and Abū Ḥanīfah, is absolutely not sufficient proof in most civil and all criminal cases. By contrast, Ibn al-Qayyim holds that the criminal and civil cases may be proven by one witness, provided that the judge is satisfied by other circumstances that the witness is telling the truth. However, the ḥudūd crimes are not covered by this view, since they must be proven by either four male witnesses in crimes of zinā , or two male witnesses in the other ḥudūd cases.[25]

In Saudi Arabia, the method of testimony which is most common and considered the most powerful in proving crimes of killing (specifically murder) in court, is that given by at least two male Muslim eyewitnesses. However, in cases where such eyewitnesses are not available, the case may be proven by other types of testimony. If so, such types, in fact, do not call for the death penalty as qiṣāṣ but only for diyah, and a ta'zīr penalty, which is left to the discretion of the judges depending on the circumstances surrounding each case.[26]

Condition of witnesses.

Jurists are in unanimous agreement that shahādah is one of the main methods of proof as long as the witnesses are legally capable. The capability of witnesses means: that the following conditions should be met in order to provide acceptable testimony.

1- A witness, according to Mālik, al-Shāfi'ī, Ibn Ḥazm and most Hanbalis, must be a Muslim at the time of the testimony having the ability to give the testimony in an

acceptable legal form.[27] Thus, the testimony of a non-Muslim is not acceptable against that of a Muslim. Hanafis and minor Hanbalis believe that such a testimony is accepted only in a case when the crime is totally related to non-Muslims. However, Ibn al-Qayyim and Ibn Taymiyyah allow the testimony of non-Muslims against Muslims only in cases when it is necessary.[28] They support this opinion with their interpretation of the Qur'ānic verse : **"O ye who believe! When death approaches any of you, (take) witnesses among yourselves when making bequest, two just men of your own (brotherhood, or others from outside...".**[29]

Ibn al-Qayyim and Ibn Taymiyyah insist that the last statement in the above verse refers to non-Muslims.[30] The Mālikī, the Ḥanafī, and the Shāfi'ī Madhhabs disagree with this interpretation of the verse. They believe that the meaning of the last statement refers to another Muslim tribe but not a non-Muslim.[31] Al-Shawkānī comments that such a rule refers only to non-Muslims who are ahl al-dhimmah, and, therefore, testimony of non-Muslims who are not from ahl al-dhimmah is inadmissible, by ijmā'.[32]

In Saudi Arabia, the testimony of non-Muslims in crimes of killing may be considered as circumstantial evidence .[33]

2- A witness must be of sound mind. Thus, any person suffering from a mental illness is not legally considered competent to bear the duty of testimony.[34] Mental illness according to Islamic law falls into two types: Firstly, prolonged illness which permanently blocks or damages a person's mental capacity to understand. Secondly, sporadic illness which renders a person incapable only occasionally. According to the legal system of Saudi Arabia, a person having a prolonged mental illness is totally incompetent to testify. A person suffering from sporadic mental illness is considered incompetent to testify during the temporary bout of the illness only.[35] In order to provide acceptable testimony, such a witness must be in possession of his mental faculties both when he observes the commission of the crime and when he testifies in court.[36]

3- A witness must be an adult who has become a mature person (rāshid). Hence, a child who has not reached the age of distinction (al-tamyīz) is considered incompetent to bear the duty of testimony. This opinion has been unanimously agreed by the jurists. However their opinions differ concerning children who have reached the age of distinction but have not yet reached the age of puberty. For instance, Abū Ḥanīfah, al-Shāfi'ī, and some jurists of the Ḥanbalī the Madhhab (the preponderant view in this Madhhab) believe that the testimony of a person who has not yet reached the age of puberty is completely unacceptable. In contrast, Mālik accepts the testimony of adolescents (subyān) against each other in crimes of killing. The other jurists of the Ḥanbalī Madhhab accept the testimony of such adolescents only in cases of injury (jirāḥ) provided that the adolescents testify before leaving the scene of the crime.[37]

In Saudi Arabia, a witness in criminal cases (including crimes of killing), must be an adult who is a mature. In order to ease the duty of examining such a maturity, the age of a witness has been specified as eighteen or over.[38]

4- A witness should be known as a person of good character and dignity ('adl). Mālik and al-Shāfi'ī believe that an 'adl is a person who always avoids committing both grave and small sins (kabā'ir and saghā'ir).[39] Abū Ḥanīfah and Ibn Ḥanbal state that 'adālah means that a person's good deeds outweigh his evil deeds, and that his appearance shows a sense of honour (al-murū'ah), i.e. that he persistently eludes any shameful deeds and always fulfils his religious duties.[40] Ibn Ḥazm however believes that a person is considered 'adl when he is unknown to have been involved in any serious crimes or grave sins, and has not committed any small sins in public.[41]

In order to prove whether or not a person is 'adl, there are two different theories in Islamic law. Abū Ḥanīfah and Ibn Ḥazm maintain that a person is initially presumed to be of good character and dignity until the contrary is proven. If this is not the case, the judge is not obliged to check such condition.[42] This view is supported by the Qur'ānic verse: **"If ye (but) eschew the most heinous of the things which ye are**

forbidden to do, we shall remit your evil deeds, and admit you to a gate of great honour."[43] In contrast, Mālik, Abū Ḥanīfah, and Ibn Ḥanbal maintain that the person should not be considered ʻadl until his good character and dignity is proven. So, a judge should verify the ʻadālah of a witness even if the defendant does not challenge the ʻadālah of the witness against whom he is testifying.[44] This view is adopted in Saudi Arabia, and, thus, a judge is obliged to verify the ʻadālah of each witness.

Nowadays, as a result of the increased number of population, a judge is not expected to know the character of every witness and, therefore, he may not know whether or not a witness is really ʻadl. In light of this, the judicial system in Saudi Arabia stipulates that in order to ascertain whether or not a witness is verily ʻadl, a judge must call for the appearance of other persons who are called al-muzakkīn. The function of such persons is to testify that the witnesses are of good character (ʻudūl). Accordingly, the ʻadālah of every witness must be confirm by another person in the judge's presence. The person who verifies the ʻadālah of the witness is called muzakkī, who must be familiar with the witness whom he is going to report on. At the present time, there are certain points that need to be considered when verifying the ʻadālah of a witness in Saudi Arabia. For instance:

The first concerns the behaviour and the conduct of a witness; the witness should be well-known as a trustworthy and honest person, who has not engaged in sinful deeds. The second point concerns the religiosity of the witness; the witness, especially when a male, should have been seen several times in the mosque of the quarter where he lives. Specifically, he should usually have been seen by the muzakkī himself, going through the daily prayer with the group of the mosque (jamāʻat al-masjid), of the place where he lives or works.[45] Such a rule is based on the statement of the Prophet: "If you see a man frequenting the mosques, then testify that he has faith." [46]

5- A witness must be sure of what he is testifying, since authenticity is required in order for the testimony to be accepted. Thus, in criminal cases, the witness must have

seen the crime to which he is testifying, with his own eyes. This means that any hearsay testimony is unacceptable as it will contain a degree of doubt.[47] It is stated in the Qur'ān: **"... we bear witness only to what we know, and we could not well guard against the unseen!"**[48]

It is essential also in Saudi Arabia that a witness knows exactly the subject matter of the testimony. If he has seen a criminal activity but cannot completely recall it at the time of the testimony, he will be considered incompetent. The witness, hence, must possess an adequate memory in order to recall what he has seen. This is confirmed by a judge's observation when examining the witness.[49]

In addition to the above, a witness in criminal cases should be able to speak clearly or otherwise be capable of writing perfectly what he has observed. This rule is adopted from the opinion of the Ḥanbalī and the Mālkī Madhhabs.[50] If a witness is blind, his testimony would not be accepted in crimes of killing.[51]

A witness may meet the above conditions but his testimony may not actually qualify because of one or other of the following:

First: The testimony is not accepted if the case concerns one of the witness's family. Accordingly, the Hanafis, the Malikis, the Hanbalis and some Shafi'is maintain that affinity (ṣilah or qarābah) to the party disqualifies a witness, because the witness may benefit from the trial outcome. The term affinity mainly includes: parents and ascendants, and children and descendants. These jurists, except the Shafi'is, also disqualify the testimony of spouses against each other.[52] However, Ibn Ḥazm totally disagrees with the above opinion and accepts such a testimony as long as the witness is 'adl and competent to bear the duty of testimony.[53]

Second: if a witness holds a negative feeling toward the accused (for example, hostility or anger), his testimony, according to the opinion of the majority (Mālik, al-Shāfi'ī, and Ibn Ḥanbal), is unacceptable.[54]

In conclusion, the testimony of witnesses in criminal cases is unacceptable if any animosity exists between him and the accused. Neither it is acceptable where there is any possible benefit or avoidance of loss, such as in situations where there are blood relationships, or business relationships. For instance, the testimony of a father in favour of his son or vice versa is not admissible, but it may be accepted if the testimony of the one is against the other. Similarly, the testimony of one spouse against the other is acceptable, but this does not hold for evidence in favour of a spouse.[55]

Part 2: Confession (Iqrār).

Iqrār, as defined in the Islamic law, includes an admission of particular facts as well as a full admission of guilt. It is one of the major forms of evidence in Islamic law.[56] In general, the iqrār means: to admit or to confess to something.[57] It is stated in the Qur'ān:

"Others (there are who) have a acknowledged their wrong-doings..."[58] Also: **"they will then confess their sins..."**[59]

In legal usage, it is defined as: "Information given by word of mouth or in writing which establishes the confessor's guilt."[60] Salama states: "confession is the admission by the accused of having committed the act that incurs punishment".[61]

Jurists unanimously agree that confession is a proper method of proof which a judge can depend on for establishing a criminal conviction. In Islamic law, confession by the defendant is considered the strongest proof for the establishment of the plaintiff's claim. This was applied by the Prophet and the Caliphs. For instance: Abu Bakr convicted a man who confessed to his guilt. 'Umar b. al-Khaṭṭāb also convicted a woman for adultery dependent on her own free confession.[62]

In Saudi Arabia, the formal admission in criminal cases refers to the statement which is given by an accused to a person in authority, and is known as a confession. In criminal proceedings, a confession given in the pre-trial stage may include: any

statement made by the accused, whether wholly or partly incriminate him, whether made in words or otherwise, and whether made to the person on authority or not. Such statements are only accepted in the court if the judge is satisfied that these statements are legally valid. Accordingly, in crimes of killing, the judge's panel always ask the confessor to re-confess when hearing the case in order to validate such a confession.

Conditions of iqrār.

There are certain conditions which must be met in order to validate the confession. These are:

1- Iqrār must be given by a mature and sane adult who has the ability to understand the nature and legal consequences of such an iqrār. Thus, the confession of minors or those with a mental illness is unacceptable. The same rule is also applied to a person confessing to deeds done while having a reduced level of consciousness or understanding. This may be as a result of consuming any intoxicating drugs. This is the opinion of the majority jurists (Ibn Ḥanbal, al-Shāfi'ī, Mālik).[63] The reason for not accepting such a confession is that these circumstances may weaken the legal capacity or interfere with the state of mind of the accused.[64] This opinion is based on the statement of the Prophet which explains that: "The pen is withdrawn regarding three (persons) from the minor until he reaches majority; from the lunatic until he recovers sanity; and from the sleeper until he awakes".[65] It is also the practice of the Prophet, for example, when there was a man who came to the Prophet while he was in the Mosque and called him: "Allah's messenger. I have committed adultery'. The Prophet turned him away until the man said it four times. [On two occasions the man was asked whether he was drunk and of sound mind] Then, as the man testified four times against him own self, the Prophet asked him: 'Are you married?'. He said: 'yes'. Thereupon, the Prophet said: 'Take him and stone him".[66]

In addition to the above, a confessor should be capable of verbal communication at the time of confession. Hence, Abū Ḥanīfah insists that a confession should be given

verbally.[67] However, the jurists of the other three Madhhabs accept the confession regardless of whether it was given verbally, in writing, or in sign language which can be clearly understood.[68]

2- Confession must be given voluntarily by the accused. This means that the accused must confess of his own free will, and he must be in a complete consciousness. Hence, confession is not acceptable if it has been obtained as a result of oppressive (ẓulm) conduct which is likely to render it unreliable. Confession is also unacceptable if it has been obtained through any threat, pressure, deception, or coercion, or deal proposed by a police investigator.

The above rules apply now in Saudi Arabia. Thus, for example, if the accused, when referred to the court from a police station, plead that he confessed while he was under any of the above circumstances, the judge will consider it an unacceptable iqrār.

3- Confession must be made in unequivocal, clear language, and provides an explicit description of what happened.[69] In this regard El- Ewa states: "Confession should be made in detail, showing that the confessor is aware of what he has done and proving that his action was in fact the crime for which a punishment is prescribed. If a summarised confession was acceptable, someone might confess that he had, for example, committed zina while he actually had not, resulting in his being punished unjustly. Accordingly, a detailed confession is required and it is the judge's duty to ask the confessor about the minute details of his offence. Associated with his principle is the rule that confession must be made in clear and explicit words since an indirect confession, i.e., by way of kinaya, is not accepted as a proof in criminal cases...".[70]

In Saudi Arabia, a confession is required to be clear and explicit regardless of whether it is presented orally, in writing, or sign language.[71]

4- Confession must be presented in court (i.e. in the presence of the judge) during the period of hearing. This is the opinion of Abū Ḥanīfah who believes that a

confession given outside the court is no longer valid when the case is heard in court. However, Mālik, al-Shāfi'ī, and Ibn Ḥanbal accept such a confession if it was witnessed by competent persons.[72]

In Saudi Arabia, if a confession is made by an accused, for example, at a police station, the judge when hearing the case will ask the accused to re-confess, even if the accused has not challenged the legality of his iqrār. This applies in all criminal cases, even if the confession was witnessed by competent persons. In cases relevant to crimes of killing, a single confession presented in court may be sufficient to prove guilt.

Limitations on the effectiveness of iqrār.

According to the majority opinion (the Ḥanbalī, the Mālikī, and the Shāfi'ī Madhhabs), applicable in Saudi Arabia, iqrār only incriminates the confessor and not the other accomplices in the crime. This was the practice of the Prophet, for instance, when a man came to him and confessed that he had committed adultery, and named the woman involved. The woman rejected the allegation, and therefore the Prophet decided that the punishment should be inflicted on the man only.[73]

Finally, iqrār may meet all the above conditions of validity and the judge still has the power to evaluate and determine whether or not it is sufficient basis on which to render the judgement. Consequently, in crimes of killing, confession may meet all the conditions set forth, but the judge may not always be convinced, for example when he realises that the confession is contradicted by other circumstances in the case.[74]

Part 3: Circumstantial Evidence (qarā'in).

It is a truism that nothing happens without a cause, and that every event has its natural consequence. Also, every crime has some surrounding facts which may be almost inevitable parts of the crime. For example, if a gun is found, which is warm and smells of burnt powder, these circumstances imply that it has recently been fired.

The part played by al-qarā'in in proving cases is important in Islamic law. Qarā'in means: "to connect or to link between things".[75] In legal usage, it is considered as a series of circumstances by which the judge can infer the connection or the relationship between the accused and the crime when direct evidence (i.e. shahādah or iqrār) is not available.[76]

Ibn al-Qayyim defines al-qarā'in as: "a logical inference drawn from statements, deeds, or particular circumstances". He maintains that al-qarā'in may be strong or weak evidence and therefore might be considered as either conclusive or irrelevant evidence.[77]

An example for circumstantial evidence in Islamic law is as follows: A man is found in his house with a slit throat. Shortly before, another man was seen leaving the house, carrying a blood-stained knife, and visibly very anxious. These circumstances suggest that the second man is the killer of the first. The judge in such would not necessarily reach a decision solely on the basis of this evidence. [78]

In criminal cases, jurists disagree over whether or not al-qarā'in are sufficient in order to render the judgement. According to the opinion of the majority (the Hanafis, the Shafi'is, and the Hanbalis), circumstantial evidence is not sufficient in ḥudūd and qiṣāṣ cases, since by definition it has an element of uncertainty. They maintain that the criminal conviction in such crimes must be based upon legal testimony or confession.[79] This view is based on the statement of the Prophet: "If I intended to stone anyone without evidence I would stone X as her speech, appearance, and the appearance of those entering and leaving her house indicate her guilt".[80]

However, Mālik believes that certain types of al-qarā'in can be used in proving ḥudūd crimes. For example, the smell of alcohol on someone's breath is considered conclusive circumstantial evidence that the person had consumed some alcohol. Likewise, the pregnancy of a woman who is not married is conclusive circumstantial evidence that the woman is illegally pregnant. 'Umar b. al-Khaṭṭāb believes that punishment of zinā should be rendered on such a pregnancy if a reasonable excuse such as rape is not provided.[81]

Ibn al-Qayyim disagrees with the majority opinion and holds a different view. He believes that a judge can base his decision upon any evidence with which he is satisfied. Correspondingly, it is allowed that a judge might render his decision on the grounds of circumstantial evidence alone, if he is convinced that such evidence is legally sufficient to convict the accused. Ibn al-Qayyim justifies his opinion by the fact that the method of proving criminal cases on the basis of circumstantial evidence is supported by Islamic precedents.[82] For example, such evidence was accepted in the case of the Prophet Joseph and Zulaykhah, mentioned in the Qur'ānic verses, where Allah says:

"So they both raced each other to the door, and she tore his shirt from the back; they both found her lord near the door, she said: 'What is the fitting punishment for one who formed an evil design against thy wife, but prison or grievous chastisement?"[83] "He said: 'It was she that sought to seduce me from my (true) self.' And one of her household saw (this) and bore witness, (thus): 'If it be that his shirt is rent from the front, then it is her tale true, and he is a liar !"[84] "But if it be that his shirt is torn from the back, then is she the liar, and he is telling the truth !"[85] "So when he saw his shirt, that it was torn at the back, (her husband) said: 'Behold ! it is a snare of you women !Truly, mighty is your snare !..."[86]

These verses emphasise the legality of accepting circumstantial evidence as a basis to make the judgement, as there was no eyewitness to what took place between them. 'Abd Allah states: "If Joseph's shirt was torn at the back, he must obviously have been retreating, and the wife of the 'Aziz must have been tugging from behind. No one could doubt who was the guilty party. Every body saw it, and the 'Aziz was convinced."[87]

Ibn al-Qayyim hence believes that this example supports his opinion, as it implies that circumstantial evidence is accepted as an independent form of evidence. Concerning cases of killing, he adds that such evidence is approved by the Prophet when he accepted al-qasāmah (compurgation) as sufficient proof in crimes of killing.

Ibn al-Qayyim also adds that circumstantial evidence was also the ancient practice of 'Umar b. al-Khaṭṭāb, for example, when he punished a person for drinking wine solely on the grounds of the smell of alcohol on the accused's breath; he also imposed the punishment for theft upon a person, based solely on the discovery of the stolen property in the accused's possession.

Finally, Ibn al-Qayyim suggests that al-qarā'in may be stronger (aqwā) in proving a crime than that of testimony or confession. He illustrates this by saying: "Does any person who sees a dead person drowned in his blood and sees at the same moment another person carrying a blood-stained knife in his hand bending over the dead person's head doubt that the person with the stained knife is the killer?" [88]

The application of al-qarā'in in crimes of killing in Saudi Arabia.

The power of al-qarā'in as sufficient evidence in proving criminal cases in Saudi Arabia is left to the discretion of the judge and his conscience. Consequently, al-qarā'in may be considered as an acceptable means of proof to convict the accused. This, of course, applies in the absence of other conclusive evidence (i.e., legal confession or testimony), and only when the judges are sufficiently satisfied that such circumstantial evidence is adequate as legal grounds to prove guilt, and thus convict the accused.[89]

Circumstantial evidence ranges from being very weak to almost conclusive, depending upon the circumstances and corresponding facts. Accordingly, al-qarā'in may be discounted or, on the other hand, it may be used as an absolute proof, as when the facts are judged to be overwhelming (i.e. they are the natural cause or consequence of the act to be proved). The significance of al-qarā'in lies in its potential to prove a variety of different facts, all of which are relevant, and which all lead to the same conclusion. An example would be to establish by al-qarā'in that an accused committed murder by looking at evidence of preparation, motive and opportunity for its commission, together with evidence of the discovery of a weapon

which could have caused the fatal injury amongst in the accused's property and bearing his fingerprints.

According to contemporary legal practice in Saudi Arabia, there are various methods of proof which may be considered as circumstantial evidence in crimes of killing. This will be discussed in the following points:

Compurgation (qasāmah).

Qasāmah is known as an ancient procedure of proof which had been applied according to the institution of pre-Islamic Arabian law, and has since been adopted by Islamic law.[90]

In legal usage qasāmah means: A method of proof in crimes of killing particularly in cases where a killed person is found and no evidence is discovered, but instead the inhabitants of the neighbourhood where the body was found are required to swear by Allah fifty oaths, stating both that they did not kill the victim and do not know the killer. These fifty confirmatory oaths may be given by fifty individuals, or may be a total of fifty oaths given by less than fifty people.[91] In Saudi Arabia, compensation (i.e. diyah) in such cases may be paid from the public treasury but not by the persons who have sworn such an oath.

In considering the significance of al-qarā'in as a method of proof in crimes of killing, it is worth illustrating that the procedure of al-qasāmah is a good example where al-qarā'in are considered a justification request oath-swearing, and, if this is accepted, as sufficient proof, to impose the punishment [92]

Although al-qasāmah is very rare in contemporary Saudi Arabia legal system, it can still be considered an acceptable method of proof in crimes of killing, whether for acquittal or conviction.

In Saudi Arabia, crimes of killing cannot however be proved only on the ground that the accused, for example, was seen coming out from a house with a blood-stained knife, and that the victim's body was subsequently found in the house. Circumstantial evidence in this case would not be considered conclusive. However, such evidence

would be taken into account, as it may help the judges obtain the accused's confession, when he confronts the accused with this evidence.

If the judges conclude that the homicide is committed by an unknown person, he may, as a last resort and only if appropriate, recourse to the method of al-qasāmah.[93]

The judge's personal knowledge ('ilm al-qāḍī).

Jurists in Islamic law generally have different views regarding the judge's personal knowledge as grounds for making a judgement. One view does not permit the judge to make his decision on the basis of his own personal knowledge. A second view opposes this, and accepts such evidence in all cases. A third view however distinguishes between ḥudūd and other crimes. This view accepts that such evidence may be sufficient grounds for rendering judgement except in ḥudūd cases.[94]

In summary, regarding crimes of killing, the majority of jurists disallow the judge from rendering his judgement only on the basis of his pre-trial extra-judicial knowledge and, therefore, this is insufficient proof to sustain a criminal conviction. This was the practice of 'Umar b. al-Khaṭṭāb, when he refused to act as a judge in those cases of which he had pre-trial judicial knowledge, saying: "If you wish, I can testify but not judge, or if you wish, I can judge but not testify." This is also the opinion of Abū Bakr, 'Alī b. Abī Ṭālib, and the majority of jurists.[95] Such an opinion is considered the most convincing and it has subsequently been adopted by the Saudi legal system in crimes of killing.[96] Hence, the judge in such a situation is allowed to stand only as a witness. The Saudi judicial system states that a judgement must be made solely on competent evidence. A judge may not reach a decision for a case based on the grounds of his personal knowledge.[97]

Finally, it must be concluded from the above, that a judge's personal knowledge can not alone be considered as sufficient proof in Saudi Arabia. The judge correspondingly must disqualify himself of acting within a judicial capacity if he has extra-judicial knowledge concerning a case he was to judge, and where there is no other competent evidence.

Other circumstantial evidence.

The other circumstantial evidence includes any evidence that has been found before the trial, or evidence derived by the court from an inspection of documentary evidence, or observations made during the course of a case.

According to the legal practice in Saudi Arabia, circumstantial evidence in criminal cases is allowed, but it must always be carefully examined, since such evidence may be deliberately fabricated to falsely implicate someone. It is also important before establishing the accused's guilt from such evidence to be absolutely sure that there are no other circumstances which would weaken or destroy the inference of guilt drawn from circumstantial evidence.

Circumstantial evidence in cases related to the crimes of killing may include the following:

1- Motive (al-bā'ith).

The motive may be established by certain facts, which may suggest that the accused is most likely to have committed the crime. For instance: during a murder trial, previous actions or words of the accused may be used to indicate that he was hostile towards the victim. It may also be suggested that the accused made preparations to commit the crime. In addition, circumstantial evidence of the mental state of the accused (e.g., when a mental illness is confirmed by experts) has an obvious relevance to the question whether the accused in fact had intentionally performed the act.

2- Identification.

The identity of the person who committed a crime may be obtained from evidence found at the place where the crime was committed. Circumstantial evidence to identity the accused often takes the form of expert testimony that, for example, the fingerprints of the accused match those discovered on a material object found at the

scene of the crime. Identity may also be established by the circumstantial evidence which suggests that the accused and the killer shared the same style of handwriting, or a matching physical identification had been given by the dying victim or by any other witness.

3- The defence of alibi.

Circumstantial evidence may also be used for acquittal. For example, the accused might be able to provide a satisfactory alibi for the time the crime took place. This would be accepted as proof of his innocence, and he would be acquitted of the crime as a result.[98]

4- Other circumstantial evidence

Documentary evidence is one of the various types of circumstantial evidence. It is now not limited purely to paper documents. The contemporary meaning of documents extends to include anything on which information is recorded in a manner capable of being made clearly understood, for example, the medium of photography, audio tapes, video tapes, or information technology (computing).[99] Such documentation is admissible in Saudi Arabia provided that proof of execution by the accused is made.[100]

Documentary evidence also includes the testimony of expert witnesses written on official forms. In Saudi Arabia, there is no rule stating that the experts must be present in court to testify, their duty at the trial stage is to furnish the court with the necessary scientific opinion.[101] In criminal cases, experts' opinion, if intelligible and convincing, becomes an important factor to be considered along with other evidence relating to the case, but the final decision is for the judge.[102]

In conclusion, all kinds of evidence mentioned previously in Chapter Four (including the testimony of witnesses and the confession) that have been obtained at the pre-trial stage, are considered circumstantial evidence.[103] At the trial stage, the

testimony of witnesses, or the confession obtained from the accused at the pre-trial stage, has to be re-introduced in court, in the presence of the judges' panel, in order to make a judgement.[104]

To sum up, circumstantial evidence, in crimes of killing, is considered as a presumption in Saudi Arabia. Although admissible, this type of evidence should be proved by legal testimony or confession.[105] However, as mentioned previously, there is a flexibility on this rule in certain cases when the judges' panel in the General Court are satisfied that such evidence is absolutely conclusive, and can be sufficient grounds on its own to make a judgement. When this occurs, the judges must summarise the case in an official report in order to be reviewed by the other judges' panel in the Court of Appeal. The three judges' panel in the General Court must mention in the report (referred to the Court of Appeal) their justification for considering such evidence conclusive and sufficient grounds to reach a conviction. In particular, they must explain why the evidence was considered conclusive. When reviewing this judgement, the judges' panel in the Court of Appeal may approve the judgement and as a result may remit the case to the Supreme Judicial Council. This will be discussed in detail in the following section.

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[2] Thomas Patrick Hughes, Dictionary of Islam, p. 64.

[3] al-Ṭurayfī, Nāṣir ʿAqīl. al-Murāfaʿāt al-Sharʿiyyah, Riyadh, ed: 1, 1405 A.H., p. 92. Also: Omer, A. Ibrahim Proof in Islamic Law with Special reference to the Sudan, Ph.D., School of Oriental and African Studies, University of London, 1986, p. 291.

[4] Ibn al-Qayyim, al-Ṭuruq al-Ḥakamiyyah, p. 8.

[5] Naqati, The Theory of Crime and Criminal responsibility in Islamic Law, p. 99.

[6] El-Ewa, Punishment in Islamic Law, p. 124.

[7] Qur'ān, 49 verse 6.

[8] Transmitted from: Ibn `Abbās, see: Muslim, Sahih Muslim, (English translation) vol. 3, p. 927.

[9] al-Bayhaqī, Kitāb al- Sunan al-Kubrā, p. 26.

[10] al-Rāṣī, Mukhtār al-Ṣiḥāḥ, p. 349.

[11] El-Ewa, Punishment in Islamic Law, p. 124. Also: Mahmasani, Falsafat al-Tashri` fi al-Islam, p. 178.

[12] Qur'ān, 65 verse 2.

[13] Qur'ān, 24 verse 4.

[14] Ibn Qudāmah, al-Mughnī, vol. 8, p. 198. Also: al-Najdī, Ḥāshiyat al-Rawḍ al-Murbi`, vol. 7, p. 606. Mahmasani, Falsafat al-Tashri` fi al-Islam, pp. 177-178.

[15] Ibn Ḥazm, al-Muḥallā, vol. 9, p. 395. Also: Mahmasani, Falsafat al-Tashri` fi al-Islam, pp. 177-178.

[16] Qur'ān, 2 verse 282.

[17] Ibn Qudāmah, al-Mughnī, vol. 8, p. 98. Also: al-Najdī, Ḥāshiyat al-Rawḍ al-Murbi`, vol. 7, p. 608. El-Ewa, Punishment in Islamic Law, p. 125.

[18] Ibn Qudāmah, al-Mughnī, vol. 8, p. 198. Also: al-Najdī, Ḥāshiyat al-Rawḍ al-Murbi`, vol. 7, p. 608.

[19] Mahmasani, Falsafat al-Tashri' fi al-Islam, p. 178. Also: Ibn Ḥazm, al-Muḥallā, vol. 9, p. 395.

[20] Personal interview with al-qāḍī A. S. 1414 A.H.

[21] Ibn Qudāmah, al-Mughnī, vol. 8, p. 99. Also: al-Najdī, Ḥāshiyat al-Rawḍ al-Murbi', vol. 7, pp. 608-611. 'Awdah, al-Tashrī' al-Jinā'ī fi al-Islām, vol. 2, p. 315. Mahmasani, Falsafat al-Tashri' fi al-Islam, p. 178.

[22] Ibn Ḥazm, al-Muḥallā, vol. 9, p. 395.

[23] al-Shawkānī, Nayl al-Awtār, vol. 6, p. 311. Also: 'Awdah, al-Tashrī' al-Jinā'ī fi al-Islām, vol. 2, p. 315.

[24] Mahmasani, Falsafat al-Tashri' fi al-Islam, p. 179. Also: Naqati, The Theory of Crime and Criminal responsibility in Islamic Law, p. 100. Salamah, Ma'moun General Principles of Criminal Evidence in Islamic Jurisprudence (In: Bassioni, The Islamic Criminal Justice System) p. 116.

[25] Ibn al-Qayyim, al-Ṭuruq al-Ḥakamiyyah, pp. 66-78. Also: Bik, Aḥmad Ibrāhīm Ṭuruq al-Ithbāt al-Shar'iyyah ,Maṭba'at al-'ulūm, ed. 1, p. 181. 'Awdah, al-Tashrī' al-Jinā'ī fi al-Islām, vol. 2, p. 316. El-Ewa, Punishment in Islamic Law, p. 126.

[26] Personal interview with al-qāḍī A. S. in 1414 A.H. Also: Ministry of Interior, The Effect of Islamic Legislation on Crime Prevention in Saudi Arabia, p. 176.

[27] al-Najdī, Ḥāshiyat al-Rawḍ al-Murbi', vol. 7, p. 592. Also: 'Awdah, al-Tashrī' al-Jinā'ī fi al-Islām, vol. 2, p. 405.

[28] Ibn al-Qayyim, al-Ṭuruq al-Ḥakamiyyah, pp. 171-172. Also: 'Awdah, al-Tashrī' al-Jinā'ī fi al-Islām, vol. 2, p. 407.

[29] Qur'ān, 5 verse 106.

[30] Ibn al-Qayyim, al-Ṭuruq al-Ḥakamiyyah, p. 173. Also: 'Awdah, al-Tashrī' al-Jinā'ī fi al-Islām, vol. 2, p. 407.

[31] Ibn al-Qayyim, al-Ṭuruq al-Ḥakamiyyah, p. 173.

[32] al-Shawkānī, Nayl al-Awtār, vol. 9, pp. 207-208. Also: Omer, Proof in Islamic Law, p. 304.

[33] Personal interview with al-qāḍī A. S. in 1414 A.H.

[34] Ibn al-Qayyim, al-Ṭuruq al-Ḥakamiyyah, pp. 175-177. Also: al-Najdī, Ḥāshiyat al-Rawḍ al-Najdī, Ḥāshiyat al-Rawḍ al-Najdī, Ḥāshiyat al-Rawḍ al-Murbi', vol. 7, p. 591. Omer, Proof in Islamic Law, p. 306. Naqati, The Theory of Crime and Criminal responsibility in Islamic Law, p. 100.

[35] See Chapter Three. Also: Omer, Proof in Islamic Law, p. 306.

[36] Salamah, "General Principles of Criminal Evidence", (in: Bassioni, The Islamic Criminal Justice System) p. 116.

[37] Ibn al-Qayyim, al-Ṭuruq al-Ḥakamiyyah, p. 177. Also: al-Najdī, Ḥāshiyat al-Rawḍ al-Murbi', vol. 7, p. 590. Omer, Proof in Islamic Law, p. 305. Salamah, "General Principles of Criminal Evidence", (in: Bassioni, The Islamic Criminal Justice System) p. 116. 'Awdah, al-Tashrī' al-Jinā'ī fi al-Islām, vol. 2, p. 397. Naqati, The Theory of Crime and Criminal responsibility in Islamic Law, p 100.

[38] See: chapter Three.

[39] al-Shīrāzī, al-Muhadhab, vol. 2, p. 343. Also: Salamah, "General Principles of Criminal Evidence", (in: Bassioni, The Islamic Criminal Justice System) p. 116. 'Awdah, al-Tashrī' al-Jinā'ī fi al-Islām, vol. 2, p. 402.

[40] Ibn Qudāmah, al-Mughnī, vol. 8, p. 98. Also: al-Najdī, Ḥāshiyat al-Rawḍ al-Murbi', vol. 7, p. 594. Salamah, "General Principles of Criminal Evidence", (in: Bassioni, The Islamic Criminal Justice System) p. 117. 'Awdah, al-Tashrī' al-Jinā'ī fi al-Islām, vol. 2, pp. 402-413. Omer, Proof in Islamic Law, P. 309. Naqati, The Theory of Crime and Criminal responsibility in Islamic Law, p. 100. El-Ewa, Punishment in Islamic Law, p. 125.

[41] Ibn Ḥazm, al-Muḥallā, vol. 9, p. 393. Also: 'Awdah, al-Tashrī' al-Jinā'ī fi al-Islām, vol. 2, p. 404. El-Ewa, Punishment in Islamic Law, P. 125. Omer, Proof in Islamic Law, p. 322.

[42] Ibn Ḥazm, al-Muḥallā, vol. 9, p. 393. Also: 'Awdah, al-Tashrī' al-Jinā'ī fi al-Islām, vol. 2, p. 404. El-Ewa, Punishment in Islamic Law, p. 125. Omer, Proof in Islamic Law, p. 322.

[43] Qur'ān, 4 verse 31.

[44] al-Najdī, Ḥāshiyat al-Rawḍ al-Murbi', vol. 7, p. 594. Also: 'Awdah, al-Tashrī' al-Jinā'ī fi al-Islām, vol. 2, p. 405. El-Ewa, Punishment in Islamic Law, p. 125. Omer, Proof in Islamic Law, p. 322. Salamah, "General Principles of Criminal Evidence", (in: Bassioni, The Islamic Criminal Justice System) p. 117.

[45] al-Najdī, Ḥāshiyat al-Rawḍ al-Murbi', vol. 7, p. 598. Also: al-Ṭurayfī, al-Murāfa'āt al-Shar'iyyah, p. 97.

[46] al-Bayhaqī, al-Sunn al-Kubrā, vol. 10, p. 125. Also: al-Sayyd Sābiq, Fiqh al-Sunnah, vol. 2, p. 69.

[47] 'Awdah, al-Tashrī' al-Jinā'ī fi al-Islām, vol. 2, p. 398. Salamah, "General Principles of Criminal Evidence", (in: Bassioni, The Islamic Criminal Justice System) p. 117. Naqati, The Theory of Crime and Criminal responsibility in Islamic Law, p. 101.

[48] Qur'ān, 12 verse 81.

[49] Personal interview with al-qāḍī A. S. in 1414 A.H.

[50] al-Najdī, Ḥāshiyat al-Rawḍ al-Murbi', vol. 7, p. 591. Also: al-Shīrāzī, al-Muhadhab, vol. 2, p. 342. 'Awdah, al-Tashrī' al-Jinā'ī fi al-Islām, vol. 2, p. 399. Salamah, "General Principles of Criminal Evidence", (in: Bassioni, The Islamic Criminal Justice System) p. 116. Naqati, The Theory of Crime and Criminal responsibility in Islamic Law, p. 100.

[51] 'Awdah, al-Tashrī' al-Jinā'ī fi al-Islām, vol. 2, p. 399.

[52] al-Najdī, Ḥāshiyat al-Rawḍ al-Murbi', vol. 7, pp. 601-602. Also: al-Shīrāzī, al-Muhadhab, vol. 2, p. 347. 'Awdah, al-Tashrī' al-Jinā'ī fi al-Islām, vol. 2, p. 407. Salamah, "General Principles of Criminal Evidence", (in: Bassioni, The Islamic Criminal Justice System) p. 118. Naqati, The Theory of Crime and Criminal responsibility in Islamic Law, p. 100.

[53] Ibn Ḥazm, al-Muḥallā, vol. 9, p. 415. Also: 'Awdah, al-Tashrī' al-Jinā'ī fi al-Islām, vol. 2, p. 408.

[54] al-Najdī, Ḥāshiyat al-Rawḍ al-Murbi', vol. 7, p. 604. Also: al-Shīrāzī, al-Muhadhab, vol. 2, p. 348. 'Awdah, al-Tashrī' al-Jinā'ī fi al-Islām, vol. 2, p. 407. Mahmasani, Falsafat al-Tashri' fi al-Islam, p. 184. Salamah, "General Principles of Criminal Evidence", (in: Bassioni, The Islamic Criminal Justice System) p. 118. Naqati, The Theory of Crime and Criminal responsibility in Islamic Law, p. 100.

[55] Mahmasani, Falsafat al-Tashri' fi al-Islam, p. 184.

[56] 'Awdah, al-Tashrī' al-Jinā'ī fi al-Islām, vol. 2, p. 303.

[57] al-Rāẓī, Mukhtār al-Ṣiḥāḥ, p. 529.

[58] Qur'ān, 9 verse 102.

[59] Qur'ān, 11 verse 67.

[60]al-Najdī, Ḥāshiyat al-Rawḍ al-Murbi', vol. 7, p. 630. Also: Omer, Proof in Islamic Law, p. 344.

[61] Salamah, "General Principles of Criminal Evidence", (in: Bassioni, M. The Islamic Criminal Justice System) p. 119.

[62] al-Najdī, Ḥāshiyat al-Rawḍ al-Murbi', vol. 7, p. 630. Also: 'Awdah, al-Tashrī' al-Jinā'ī fi al-Islām, vol. 2, p. 304. Mahmasani, Falsafat al-Tashri' fi al-Islam, p. 173. Salamah, "General Principles of Criminal Evidence", (in: Bassioni, The Islamic Criminal Justice System) p. 119. Naqati, The Theory of Crime and Criminal responsibility in Islamic Law, p. 102. Omer, Proof in Islamic Law, p. 344. al-'Awwā, Fi Uṣūl al-Niẓām al-Jinā'ī, p. 291.

[63] al-Najdī, Ḥāshiyat al-Rawḍ al-Murbi', vol. 7, p. 630. Also: 'Awdah, al-Tashrī' al-Jinā'ī fi al-Islām, vol. 2, p. 312. Ibn Duyan, Manar al-Sabil, vol. 2, p. 163. Salamah, "General Principles of Criminal Evidence", (in: Bassioni, The Islamic Criminal Justice System) p. 119. Naqati, The Theory of Crime and Criminal responsibility in Islamic Law, p. 102.

[64] Omer, Proof in Islamic Law, p. 345.

[65] Kahn, The Translation of the Meaning of Sahih al-Bukhari, vol. 2, p. 527.

[66] Muslim, Sahih Muslim, (English translation) vol. 4, p. 913.

[67] Salamah, General Principles of Criminal Evidence (In: Bassioni, The Islamic Criminal Justice System) p. 119.

[68] al-Najdī, Ḥāshiyat al-Rawḍ al-Murbi', vol. 7, p. 631. Also: 'Awdah, al-Tashrī' al-Jinā'ī fi al-Islām, vol. 2, p. 293. Salamah, "General Principles of Criminal Evidence", (in: Bassioni, The Islamic Criminal Justice System) p. 119.

[69] al-Najdī, Ḥāshiyat al-Rawḍ al-Murbi', vol. 7, p. 647. Also: 'Awdah, al-Tashrī' al-Jinā'ī fi al-Islām, vol. 2, p. 304. al-'Awwā, Fi Uṣūl al-Niẓām al-Jinā'ī, p. 292.

[70] El-Ewa, Punishment in Islamic Law, p. 128.

[71] Personal interview with al-qāḍī A. S. in 1414 A.H.

[72] Ibn al-Qayyim, al-Ṭuruq al-Ḥakamiyyah, p. 210. Also: Naqati, The Theory of Crime and Criminal responsibility in Islamic Law, p. 103. Omer, Proof in Islamic Law, p. 346-347.

[73] ʿAwdah, al-Tashrīʿ al-Jināʾī fi al-Islām, vol. 2, p. 304. Also: al-Ṭurayfī, al-Murāfaʿāt al-Sharʿiyyah, pp. 94-95.

[74] ʿAwdah, al-Tashrīʿ al-Jināʾī fi al-Islām, vol. 2, p. 304. Also: al-Ṭurayfī, al-Murāfaʿāt al-Sharʿiyyah, p. 96.

[75] al-Rāẓī, Mukhtār al-Ṣiḥāḥ, P. 533.

[76] Bik, Aḥmad Ṭuruq al-Ithbāt al-Shar ʿiyyah, p. 438.

[77] Ibn al-Qayyim, al-Ṭuruq al-Ḥakamiyyah, p. 5-6.

[78] ʿAwdah, al-Tashrīʿ al-Jināʾī fi al-Islām, vol. 2, p. 339. Also: Sharif, Crime and Punishment in Islam, pp. 23-24.

[79] al-Ṭurayfī, al-Murāfaʿāt al-Sharʿiyyah, pp. 139-140. Also: Salamah, "General Principles of Criminal Evidence", (in: Bassioni, The Islamic Criminal Justice System) p. 121.

[80] Ibn Mājah, Sunn Ibn Mājah, vol. 2, p. 855. Also: al-Ṭurayfī, al-Murāfaʿāt al-Sharʿiyyah, p. 178.

[81] Ibn al-Qayyim, al-Ṭuruq al-Ḥakamiyyah, p. 7. Also: al-Ṭurayfī, al-Murāfaʿāt al-Sharʿiyyah, p. 140. Salamah, General Principles of Criminal Evidence (In: Bassioni, The Islamic Criminal Justice System) p. 121.

[82] Ibn al-Qayyim, al-Ṭuruq al-Ḥakamiyyah, p. 6-7.

[83] Qur'ān, 12 verse 25.

[84] Qur'ān, 12 verse 26.

[85] Qur'ān, 12 verse 27.

[86] Qur'ān, 12 verse 28.

[87] ʿAbd Allah, Translation of the Holy Qur'an, p. 637.

[88] Ibn al-Qayyim, al-Ṭuruq al-Ḥakamiyyah, pp. 7-8. Also: al-Ṭurayfī, al-Murāfaʿāt al-Sharʿiyyah, p. 141. Omer, Proof in Islamic Law, p. 371-373.

[89] Personal interview with al-qāḍī A. S. in 1414 A.H.

[90] al-Ṭurayfī, al-Murāfaʿāt al-Sharʿiyyah, p. 142. Also: Omer, Proof in Islamic Law, p. 385.

[91] al-Ṭurayfī, al-Murāfaʿāt al-Sharʿiyyah, p. 142.

[92] El-Ewa, Punishment in Islamic Law, p. 131.

[93] Personal interview with al-qāḍī A. S. in 1414 A.H.

[94] al-'Awwā, Fi Uṣūl al-Niẓām al-Jinā'ī, p. 395. Also: al-Ṭurayfī, al-Murāfa'āt al-Shar'iyyah, p. 169. Omer, Proof in Islamic Law, p. 357.

[95] al-Ṭurayfī, al-Murāfa'āt al-Shar'iyyah, p. 181. Also: al-'Awwā, Fi Uṣūl al-Niẓām al-Jinā'ī, p. 395.

[96] Personal interview with al-qāḍī A. S. in 1414 A.H.

[97] Lerrick,. and Main, Saudi Business and Labour Law, p. 235.

[98] Keane, The Modern Law of Evidence, pp. 13-14.

[99] Id, pp. 10 and 166.

[100] Lerrick, and Main,. Saudi Business and Labour Law, p. 233.

[101] Id, p. 233.

[102] Personal interview with al-qāḍī A. S. in 1414 A.H.

[103] See: Ch 4 S 2.

[104] Personal interview with al-qāḍī A. S. in 1414 A.H.

[105] Lerrick, and Main, Saudi Business and Labour Law, p. 233.

SECTION III: TRIAL PROCEDURE IN CRIMES OF KILLING AND THE ENSUING PROCEEDINGS.

Introduction.

In crimes of killing, the court trial is of course pivotal to decide guilt or innocence. The legal system in Saudi Arabia accordingly has regulated the legal procedure of trial as well as all procedures which follow this process. Trial procedures in Saudi Arabian courts were initially regulated in the third section of the judicial system issued by the royal decree of 1346 A.H. This section was divided into ten articles which dealt mainly with the judge's duty to question the parties, and other procedures in hearing a case.[1] Further amendments were issued in 1350 A.H. containing 38 articles which introduced more regulations.[2]

The most comprehensive regulation for trial procedures was issued in 1357 A.H. These procedures were extended into 142 articles under the title: "Regulations for Sharī'ah Pleadings".[3] These articles remained essentially the same when an amendment for the judicial system was issued by the order of King Sa'ūd b. 'Abd al-'Azīz in 1372 A.H.[4] However, the title of these articles was changed to : "The organisation of administrative functions in the Sharī'ah courts system" (tanẓīm al-a'māl al-idāriyyah fi al-dawā'ir al-shar'iyyah). These procedures were condensed into 96 articles,[5] and are still applied today in Saudi Arabia, together with other instructions later issued by the competent authorities.[6]

Present legal procedures comprise the due process following the referral of a case to court (i.e. the preparation procedures prior to the hearing), the trial procedure, the rights of parties during the trial, and the procedures implemented after the judgement is reached. These procedures will be discussed in detail in the follwing sections.

Part 1: The Legal Procedures of Trial.

The legal procedures of preparation.

As has been stated previously in section one of this chapter, all cases relevant to crimes of killing must firstly be referred to the General Court, in which the panel would comprise three judges. Once the final report of the police has been prepared, it must be referred to such a court. In cases of murder or quasi-murder, such a referral should be made as soon as possible either by the police or by the emir of the region. The reason referral to the general court must be swift is because the accused in such crimes of killing would be detained in pre-trial custody, and the judicial system insists that every person thus detained should be given priority for trial.[7]

After the case has been received by the General Court, the responsible person should direct it initially to the office of the chief judge, who would then refer it to the three judges' panel assigned to hear the case.

In some cases, an accusation of a crime of killing may be brought directly by the victim's heirs or family to the local General Court.[8] If so, the court should notify the police in order to carry out the initial investigation procedures and prepare a final report of the findings. The reason the court notifies the police is that crimes of killing are relevant to both public and private interest, and such cases must be presented in the court by both the "use plaintiff" (i.e. the victim's heirs) and the public prosecutor.[9]

Once the assigned judges receive the case, they should on the same day, determine the earliest possible date for trial,[10] as the serious crimes of killing must always take priority[11] Consequently, the notary of the judge's office where the case is to be heard should order a summons notice, and make sure that the "use plaintiff", the public prosecutor, and the defendant have been notified of the appointed time in person.[12] This notice may be brought by the summons officer, or through the police station where the case was initially investigated and where the defendant might be detained.[13] The signature of the defendant must be written on an official form in order to confirm

the receipt and acknowledgement of such a summons.[14] The defendant should understand that he must appear in the General Court at the appointed time.[15] The summons officer must then submit the official form, signed by the defendant, to the General Court.[16]

In cases where the option of bail or surety has been accepted, and the defendant hence is released, if the defendant for some reasons does not appear in court at the appointed time, a second notice of summons shall be sent to the defendant. The date of the second session should be within three days from the original date.[17] If the defendant has no reasonable excuse and still fails to appear, an arrest warrant will be issued, and the defendant will be brought by force to the court by the police.[18] If the defendant cannot be found, a judgement *in absentia* (ḥukum ghiyābī) might be issued.[19] Such a judgement would be subject to an affirmation issued by the appellate committee. A decision *in absentia* however, will not annul the right of defence, which would be considered if the defendant later came forward.[20] Since serious crimes, which carry the death sentence require a high degree of certainty of conviction, judgement *in absentia* is both profoundly inappropriate and unlikely, as such a level of certainty could only be equivocal without the testimony (i.e. attendance) of the defendant. Therefore, judgement *in absentia* may only be executed in less culpable or serious crimes of killing, which do not carry the death penalty.[21]

Thus, it can be concluded that cases of murder, in general, should not initially be dealt with by the judges' panel unless the case is instituted by the "use plaintiff" and the public prosecutor. In addition, unless the defendant was present in such cases trial might not be held, nor sentence passed by the judges' panel.

In cases where the "use plaintiff" is unable to be present at the trial, an agent must be appointed. This must be done as soon as possible, specifically in cases when the defendant has been kept in pre-trial custody. This, of course, is in order to prevent any unavoidable pre-trial detention. If the appointment of an agent is delayed, the public prosecutor may present the case, and judgement might be passed, even in the

absence of the "use plaintiff". This would apply according to circumstance and necessity, and is left to the discretion of the judges.[22]

Appointment as an agent for the "use plaintiff" in a specific trial is subject to the judges' permission and, it will be supported by a legal document signed by the chief judge of the court where the trial is to be held.[23]

The judges' panel must study the case prior to the session.[24] In this context, the judicial system states that a judge's notary shall prepare a file for the case on an official form,[25] and enter it in the judge's list of cases a day before the time fixed for the trial, in order to enable the judge to understand it and prepare accordingly for the prosecution.

This file should comprise the following:

A- A concise summary of the natural of the case.

B- Documents and other evidence relevant to the case.

C- Any written statement presented and signed by the plaintiff.[26]

The legal procedures to hear the case.

At the appointed date for trial, the "use plaintiff" or the agent, the public prosecutor, and the defendant are expected to be present in the General Court. The judges will firstly hear from the plaintiff, while the notary takes notes. The notary then reads the written statements and asks the plaintiff to sign it.[27] Following this, the defendant's answer is required, which may admit or deny the allegation. This must also be recorded by the notary, and signed by the defendant.[28]

The "use plaintiff" or the agent, the public prosecutor, and the defendant, may challenge each other's arguments and, therefore, the judge would ask the notary to record the salient points of the argument. However, if the defendant were to voluntarily admit to the charge, the judges must confirm that this confession is legally acceptable. If so, the judgement will be passed on the grounds of the defendant's confession. On the other hand, if the defendant denies the allegation, the plaintiff is obliged to present legal evidence which may prove the allegation.[29] This evidence may

comprise either legal testimony (i.e. a competent eyewitnesses), or other circumstantial evidence.

In cases where legal testimony is available, the witnesses will be summoned to give their testimony under oath in front of both the judges and the parties. Before hearing the witnesses, the ʻadālah of these witnesses must be confirmed, in the presence of the judge, by two other competent persons (muzakkīn),. The testimony is not worthy of credit unless it is introduced by an oath in the name of Allah, which pronounce that a witness is going to tell the truth. This is based on the teaching of Islam, for example: the Prophet says: "He who has to take an oath, he must not take oath but by Allah..."[30] It is stated in Ṣaḥīḥ Muslim that 'Uqail narrated: "I did not take an oath by any one else accept Allah, since I heard Allah's messenger forbidding it..."[31]

Following the swearing of the oath, the testimony should begin with the word "ashhadū" (I testify), meaning that the testimony consists of what has directly been seen by the witnesses, and that they are absolutely sure of the truth of the evidence which they give.

In trials of crimes of killing, it is essential that the witnesses have seen the act of killing, and that there are no discrepancies in the testimony regarding time, place, identification, or circumstances.[32]

Following the presentation of the testimonial evidence, the notary shall record each testimony and ask the witnesses to sign their own statement. The defendant may refute the testimony, if he can provide evidence which negates it. Thus, the defendant must be given sufficient time in order to present evidence which would strengthen his own case.[33] If the defendant cannot refute the testimonial evidence of the prosecution, a conviction will be issued on the grounds of the legal testimony provided by the witnesses.[34]

It is worth noting that jurists maintain that if witnesses deliberately give false evidence in their testimony, they will suffer the same punishment which was received by the accused. An example would be if the defendant is beheaded on the grounds of

testimony, but later it is found that this testimony was is false, the witnesses shall themselves be beheaded.[35]

In cases where the defendant denies the allegation, and no competent witnesses can be produced, the only evidence being circumstantial, the decision is left to the discretion of the judges. The judges in such cases should confront the defendant with the circumstantial evidence against him which may help obtain the defendant's confession. However, it must always be realised that coercion, pressure, or deception would immediately nullify any confession.[36]

The judges, if appropriate and only in very isolated cases, may recourse to al-qasāmah in trials where the killer is unknown. They may also, as a final resort, request an exculpatory oath to be given by the defendant in cases where satisfactory evidence has not been produced.[37] The value of such an oath is, however, procedural rather than evidentiary, the sole purpose of such an oath would be to attest to the innocence of the defendant.[38]

Finally, it should always be understood that the main function of the judges in crimes of killing is usually to determine guilt or innocence. If guilt is established the punishment would then be determined by the victim's heirs. In crimes which carry the death penalty as a qiṣāṣ, if the victim's heirs waive the death penalty into diyah or even freely, the public prosecutor still has the right to ask for a ta'zīr penalty for the public right, on the grounds of the public interest.[39] This procedure only applies in cases of murder or quasi-murder in which the public prosecutor is not allowed to waive the right of ta'zīr.[40]

Part 2: General Conditions and Rights.

The fundamental concept of all trials is that the defendant is presumed to be innocent until it can be proved to the contrary. The onus of proof rests with the prosecution. Thus, once the parties have come to court, certain rights and conditions must be observed. The most basic right is that the trial must be held with absolute and impartial justice.

Justice is a fundamental right which Islamic law has given to all human beings.[41] It is stated in the Qur'ān:

"Allah doth command you to render back your trust to those to whom they are due; and when ye judge between people that ye judge with justice..."[42]

Also: **"...And let not the hatred of others to you make you swerve to wrong and depart from justice. Be just: that is next to piety: and fear Allah..."[43]**

The right to justice, as mentioned in the above verse, must be given even to enemies.

The Prophet says: "Avoid injustice because it is a darkness in the judgement day..."[44]

It is important that in all crimes of killing the trial proceedings must be held in public, There is some flexibility in this rule when the judges believe that in the public interest a closed trial would be preferable. However, regardless of the circumstances of the trial, the decision of the judges must be read aloud in a public session.[45] It should be noted that the concept of public trial in Saudi Arabia does not have the same connotation as it does in the West.[46]

The judges themselves have a number of duties which must be upheld. During the trial the judges shall be even tempered, as Islamic law believes no case should be heard if a judge was, for example, unwell, tired, sad or angry.[47] The judges must treat all parties equitably, and with no sense of bias. Equal and fair treatment is a basic right, regardless of position or social status.[48]

When hearing the case, the judges should either face or have their back to the Ka'bah (the direction in which one prays) in order to emphasise the connection between the court and the Sharī'ah. The parties should be positioned in the front of the judges.[49]

The defendant shall not be compelled to confess, and must be given sufficient time to answer questions put to him by the judges, and to refute the allegation. Time must be given for the preparation and presentation of the defence which may prove his innocence. Thus, the defendant may leave the court to obtain such evidence. In

addition, the defendant should have the opportunity to examine the prosecution (or evidence presented by the other party) .[50]

The right to defence is essential during the trial. This means that before a case is heard, the defendant must be informed of the charge and of the evidence against him. The defendant must have the capacity to defend himself or else assistance on his behalf shall be retained.

In cases of intentional killing, it is essential that the judges should consider the possibility of conciliation with the victim's heirs, so as to waive the death penalty, i.e. the judges may try to persuade the victim's heirs to waive the right of qiṣāṣ and accept diyah.[51]

Finally, affinity or kinship disqualifies a judge from hearing a case. Al-Mawārdī, however, accepts the decision of the judge if it was against the judge's relative. He also believes that the term "relative" includes parents, children, brothers, sisters, uncles, aunts and other close relatives.[52] This opinion is applied in Saudi Arabia.[53]

Power of attorney in crimes of killing.

Although the number of practising lawyers in Saudi Arabia is few, power of attorney in criminal cases is tolerated. Both parties have the right to appoint or retain an attorney in crimes of killing. The judicial system stipulates that in general every person shall, without restriction, have the right to appoint an attorney.[54] The possibility of practising such a rule nowadays in crimes of killing has been confirmed by the present chairman of the Supreme Judicial Council in Saudi Arabia.[55]

According to the legal system, there are certain conditions to which practising lawyer in Saudi Arabia may adhere. An attorney must not have more than three cases at any one time. If so, his power of attorney is not acceptable.[56] Government employees are not allowed to act as an agent, unless for close relatives.[57]

The licence to act as a professional lawyer is issued only to those people who have Saudi nationality, and are aged twenty-one or over. These persons must be of good character and conduct, and graduated from a Sharī'ah College.[58] However,

individuals who do not have a degree from Sharī'ah College may also be given such a licence, subject to an interview and an exam held by the competent authority [59]

Language.

The judicial system states that all litigation should be heard in Arabic [60] However, in cases where a person has difficulty in understanding Arabic, an interpreter must be present. The interpreter must initially be informed that it is his responsibility to give the exact meaning of the statements he is interpreting. He must write down the original statement given by the person in the language in which it is made. This statement must be signed by the person, and the interpreter must then write down his interpretation and sign the form.[61]

Part 3: The Legal Procedures Following Judgement in Crimes of Killing.

After a decision has been rendered, the notary will be ordered by the judges to record the judgement. The record must be concise and must contain a brief summary of the case, including evidence and the decision of the judges, together with the legal basis for the judgement. If appropriate, the signed statement of the losing party, which may imply either acceptance or dissatisfaction, must be included in the record. The record will be signed by both the notary and the judges, and registered in the General Court.[62] A copy of this record must be kept in the registrar's office.[63] The record should be completed and signed within ten days of the date of the judgement, excluding weekends or holidays.[64]

In cases relevant to crimes of killing, the judgement must be reviewed regardless of whether or not the losing party requested an appeal, since such crimes have automatic right of appeal. Thus, the record in such cases will be referred to the Court of Appeal in order to be reviewed by either three judges, in cases where the punishment is less than the death penalty, or by five judges in those cases when the punishment is the death penalty.[65] The decision in both cases must be taken by majority vote.[66] These

judges should also keep in mind that priority should be given to crimes of killing, specifically when the defendant is detained.[67]

The judges in the Court of Appeal may either approve, or reject the judgement If it is rejected the case is remitted to the General Court, either for retrial or with specific directions.[68] In this instance, the three judges' panel in the General Court will again study or review the case. If they do not agree with the decision of the Court of Appeal, they have the right not to re-try the case. In a such instance, another panel would re-hear the case.[69]

If, however, the judgement is approved by the Court of Appeal, this will be considered a final decision, provided that the punishment is less than the death penalty.[70] This final decision should be confirmed by the Minister of the Justice [71]

An extraordinary appeal to superior authorities may be made by the losing party in certain cases.

In cases where the death sentence is imposed, the approval of the Court of Appeal must be referred to the Supreme Judicial Council. The case will then be discussed by a panel of five judges presided over by the chairman of this council The decision of this panel must be set by majority vote.[72] If these judges approve the decision of the Court of Appeal, the judgement must finally be sanctioned by royal decree.[73]

Part 4: Execution of the Judgement.

Judgement of the court would establish either innocence, in which case an acquittal would take place, or guilt, which would result in either the death penalty, paying diyah, or imprisonment. An accused person must be informed of the judgement, after all the stages in the legal process have been duly held, in a public session held in court.[74] There are certain legal procedures which should be carried out in order to implement the judgement. These procedures differ according to the type of judgement.

Once the judgement has been officially established, the executive authority shall be informed in order that the judgement be legally carried out It is illegal to implement

the court's decision in crimes of killing, if it has been given only by telephone or orally.[75] Therefore, an official written document must be sent to the executive authority. Once the executive authority receives a written statement of the judgement, various functions should be done. The judgement shall initially be recorded on official forms.

One form should contain the name of the court in which the judgement was passed, the date and the grounds on which the judgement was made, and any other relevant information. For example:

1- The name of the superior authority (al-sulṭah al-'ulyā) which ordered the execution, and the number and date of the order document.

2- The detention number, date, and the police station which supervised the detention, and the type of the crime.

3- The defendant's name, date of birth, and the number of his identification card. [76]

The other record form should include the decision of the court, whether it established guilt or innocence. If guilt has been established, a fully detailed description of the punishments should be recorded. For example: if the punishment includes imprisonment, the length of the sentence and, if the diyah is part of the punishment, the amount.[77]

Following the above procedures of recording the judgement, different functions to implement the judgement are now available. Determining which of these is appropriate is dependent upon the type of punishment imposed by the judgement.

Legal procedures to execute the death penalty.

Death penalty as a qiṣāṣ may be established on the grounds of either the testimony of competent witnesses (i.e. two adult male Muslims), or the defendant's confession. This, of course, applies when the judges fail to persuade the victim's heirs to waive the death sentence, and accept diyah. The death penalty may also be imposed, even when the above evidences are not available, but the judges are satisfied that other evidences are sufficient grounds to impose or utilise the death penalty. These

evidences, for example, might be the testimony of one man and two women, one man and one woman, along with other circumstantial evidence. However, the death penalty in such cases is considered as a ta'zīr penalty but not a qiṣāṣ.

In order to execute the death penalty, the convicted person will temporarily be kept in a prison until the date fixed for the execution. In cases where the death penalty is requested by the victim's heirs, but some of them are minors or the victim's wife is pregnant, the convicted person will be kept in the prison until the minors or the said foetus attain competency. The reason for allowing such an extended imprisonment to take place concerns the defendant's hope that the death penalty would be waived, as the rule in Saudi Arabia maintains that the death penalty as a qisas must not be executed if one of the heirs has waived this right.[78]

In cases where the convicted person is a pregnant woman, the execution shall be delayed until delivery. Similarly, when the convicted person is a nursing mother, the execution of the death penalty may be delayed until she has weaned her child.[79]

The convicted person shall be given adequate time to write a will and to give any other important instructions to be considered after execution. Those instructions ought to be witnessed by two competent individuals, in the presence of a judge who has been appointed to visit the convicted person during the time of imprisonment, before the day of the execution.[80]

The execution of the death penalty should be held in public. Hence, such a punishment is usually carried out in squares, outside the central mosques of the cities, on Fridays after jum'ah prayer. According to the legal practice in Saudi Arabia, the execution is usually carried out by an official executioner, appointed by the government. Such an act is supervised by the competent authorities. The instrument by which the death penalty is carried out is most commonly by sword or occasionally by gun. Once the person is executed, an ambulance is ordered to carry out the corpse.[81] The act of exhibiting the corpse after execution is not allowed, except in cases when the executed person had been dangerous and had previously been convicted of several crimes, when the judges might believe that such an act is

necessary. Finally, if appropriate, the corpse will be buried in a public Saudi graveyard.[82]

Legal procedures to execute punishments less than the death penalty.

Diyah is a penalty for quasi-murder and killing by mistake. It may also be the punishment for murder when the victim's heirs or one of them have commuted the death penalty to diyah. The convicted person whose penalty is the diyah, may be imprisoned until the diyah is paid in full. The criminal who has been convicted of murder or quasi-murder is liable to an additional ta'zīr penalty, on the grounds of public interest.[83] Such punishment would usually be claimed by the public prosecutor.[84]

The fixed ta'zīr penalty in cases of murder is imprisonment for five years.[85] This penalty is inflicted together with the demand for diyah, in cases where the victim's heirs chose blood-money rather than the death penalty. In such a case, the period of imprisonment may extend to a life sentence depending on the choice of the heirs.[86]

In cases of quasi-murder, the fixed ta'zīr penalty is imprisonment for thirty months.[87] Such a penalty may also be imposed together with the diyah.

In cases of killing by mistake, the penalty due is the diyah alone.[88] In cases where the victim dies as a result of motor accident, where careless driving is proven, the driver in addition to the diyah is liable to a ta'zīr penalty of imprisonment for a period ranging between six to twenty-four months. If the driver is involved in another such accident within five years from the first accident, the period of such a penalty would range from twelve months to twenty-four months.[89]

In cases where judgement includes an imprisonment penalty, the convicted person will be kept in a public prison (sijin 'āmm); or if the criminal is under eighteen in a girls' care house (dār ri'āyat al-fatayāt) or juvenile home (dār al-aḥdāth).[90] Once the convicted person has been taken to prison, the prison officer will firstly prepare the official forms of the imprisonment record. These forms should include the following points[91]:

1- The reason for imprisonment, as follows:

A- Infringement of the public rights (ʾiʿtidāʾ ʿalā al-ḥuqūq al-ʿāmmah).

B- Infringement of the private rights (ʾiʿtidāʾ ʿalā al-ḥuqūq al-khāṣṣah).

C- Temporary imprisonment.

2- Prisoner's number, his full name and date of birth, and the number, date, place of his identification card.

3- Prisoner's sex, nationality, marital status, occupation, and the level of his education.

4- Date and period of imprisonment.

5- Name of the executive authority which supervise the imprisonment (al-sulṭah al-mubāshirah li al-ḥabs).

Legal procedures for releasing the convicted person.

The imprisoned shall be released on the morning of the last day of the period fixed for imprisonment.[92] The period of imprisonment starts from the first day of the pre-trial detention, at the time when the convicted person was first arrested by the police.[93] In cases where imprisonment was imposed as a result of murder, the order for release would not be valid unless it has been sanctioned by a royal decree.[94]

After obtaining authority to release the prisoner, the prison officer will record the prisoner's number, name, date of release, and other relevant information such as the released authorised (sulṭat al-ifrāj), and number and date of the release order document.[95]

Finally, if the crime is considered a precedent, the prison officer must record on official precedent forms, the full name, date of birth, and nationality of the convict. In addition, he must record the name of the court which issued the judgement, the date and the grounds of the judgement, and other relevant information including:

1- Prisoner's number, date and the lengt of sentenceperiod, and place of the imprisonment.

2- Prisoner's sex, marital status, occupation, and the level of education.

3- Colour of eyes, hair, and skin.

4- Number, date, and the issuing place of the identification card.

5- Distinguishing features (ramz al-'alāmh al-mumiyyzah), and fingerprints

6- Name of the superior authority ordered the execution of the judgement, and number and date of the order document.

7- Type and description of the punishments.

8- Any other previous precedents or convictions.[96]

[1] Solaim, Constitutional and Judicial Organization, pp. 111-112.

[2] Resolution of al-Shūrā council, No. 671\3 dated 6-1-1350 A.H. Also: Āl al-shaykh, al-Tanẓīm al-Qaḍā'ī, p. 37. Solaim, Constitutional and Judicial Organization, p. 112.

[3] Royal decree No. 32\1\3 dated 14-1-1357 A.H. Also: Āl al-shaykh, al-Tanẓīm al-Qaḍā'ī, p. 38. Solaim, Constitutional and Judicial Organization, p. 113.

[4] Royal decree No. 109 dated 24-1-1372 A.H.Also: Also: Āl al-shaykh, al-Tanẓīm al-Qaḍā'ī, p. 38. Solaim, Constitutional and Judicial Organization, p. 113. Also: al-Ṭurayfī, al-Murāfa`āt al-Shar`iyyah, p. 249.

[5] Solaim, Constitutional and Judicial Organization, p. 114. Also: al-Ṭurayfī, al-Murāfa`āt al-Shar`iyyah, p. 249.

[6] Ministry of Interior, Murshid al-Ijrā'āt al-Jinā'iyyah, p. 219.

[7] Artical 75, from the Organisation of Administrative Functions in the Sharī`ah Courts System in Saudi Arabia (tanẓīm al-A`māl al-idāriyyah fi al-dawā'ir al-Shar`iyyah) issued by royal decree No. 109 dated 24-1-1372 A.H.

[8] Walker. "The Rights of the Accused in Saudi Criminal Procedure". Loyola of Los Angeles International and Comparative Law, 1993, vol. 5, part: 4. p. 872.

[9] Promulgation of the Ministry of the Interior, No. 41 dated 21-11-1395 AH. Also: Ministry of Interior, Murshid al-Ijrā'āt al-Jinā'iyyah, p. 209. "Majallat al-Yamāmah", Issue No. 1282 on 11-6-1414 A.H., p. 12. The job of public prosecutor has been established in Saudi Arabia by royal decree No. 1310\813 dated 6-4-1353 A.H.

[10] Artical 75, from the Organisation of Administrative Functions in the Sharī`ah Courts System in Saudi Arabia.

[11] Artical 1, from Id.

[12] Articals 2-3, from from Id.

[13] Articals 7-9, from Id.

[14] Artical 7, from Id.

[15] Artical 3, from Id.

[16] Artical 8, from Id.

[17] Artical 26, from Id.

[18] Articals 24-25,from Id.

[19] Artical 29, from Id.

[20] Artical 37, from Id.

[21] Ministry of Interior, Murshid al-Ijrā'āt al-Jinā'iyyah, p. 222.

[22] Id.

[23] Artical 14, from the Organisation of Administrative Functions in the Sharī`ah Courts System in Saudi Arabia.

[24] Āl al-shaykh, al-Tanẓīm al-Qaḍā'ī, p. 97. Also: al-Ṭurayfī, al-Murāfa`āt al-Shar`iyyah, p. 257.

[25] Artical 15, from the Organisation of Administrative Functions in the Sharī`ah Courts System in Saudi Arabia.

[26] Artical 41, from Id. Also: Āl al-shaykh, al-Tanẓīm al-Qaḍā'ī, p. 97.

[27] Artical 18, from the Organisation of Administrative Functions in the Sharī`ah Courts System in Saudi Arabia.

[28] Artical 19, from Id.

[29] Solaim, Constitutional and Judicial Organization, pp. 115-116. Also: Moor, "Court, Law, Justice, and Criminal Trials in Saudi Arabia", International Journal of Comparative and Applied Criminal Justice, 1987, vol. 11, p. 65.

[30] Muslim, Sahih Muslim, (English Translation) vol. 3, p. 875.

[31] Id.

[32] `Awdah, al-Tashrī` al-Jinā'ī fi al-Islām, vol. 2, p. 407. Also: Lippman, Islamic Criminal Law and Procedure, p. 70.

[33] Artical 34, from the Organisation of Administrative Functions in the Sharī`ah Courts System in Saudi Arabia.

[34] al-Ṭurayfī, al-Murāfa`āt al-Shar`iyyah, p. 82.

[35] Ministry of Interior, The Effect of Islamic Legislation on Crime Prevention in Saudi Arabia, p. 188.

[36] See: chapter 5 section 2.

[37] al-Ṭurayfī, al-Murāfa'āt al-Shar'iyyah, pp. 82-83.

[38] Lerrick, Saudi Business and Labour Law, p. 234.

[39] See: chapter 2 section 1.

[40] Promulgation of the Ministry of the Interior, No. 16\2299 dated 14-8-1395 AH. Also: Ministry of Interior, Murshid al-Ijrā'āt al-Jinā'iyyah, p. 209.

[41] al-Mawdudi, A. Human Rights in Islam, (1977), p. 19.

[42] Qur'ān, 4 verse 58.

[43] Qur'ān, 5 verse 8.

[44] Muslim, Sahih Muslim, (English Translation) vol. 2, p. 578. Als: al-Nawawī, Abū Yḥyā b. Sharaf. Riyāḍ al-Ṣālḥīn, (Mu'ssasat al-Risālh, Beirut, ed: 16, 1408 A.H) p. 136.

[45] Article 33, from the Judicial System in Saudi Arabia.

[46] Moor, "Court, Law, Justice, and Criminal Trials in Saudi Arabia", International Journal of Comparative and Applied Criminal Justice, 1987, vol. 11, p. 66.

[47] al-Najdī, Ḥāshiyat al-Rawḍ al-Murbi', vol. 7, p. 528.

[48] Id, p. 526.

[49] Id, p. 537. Also: Lippman, Islamic Criminal Law and Procedure, p. 67. Azad, "Conduct and Qualities of Qadi", Islamic Studies, Spring, 1985, vol. 24., p. 53.

[50] Walker, "The Rights of the Accused in Saudi Criminal Procedure". Loyola of Los Angeles International and Comparative Law, 1993, vol. 5, part: 4, p. 877. Also: Moor, "Court, Law, Justice, and Criminal Trials in Saudi Arabia", International Journal of Comparative and Applied Criminal Justice, 1987, vol. 11, p. 66.

[51] al-Hewesh, "Shari'ah Penalties and Ways of their Implementation in the Kingdom of Saudi Arabia" (In: The Effect of Islamic Legislation) p. 377.

[52] al-Mawārdī, al-Aḥkām al-Sulṭāniyyah, p. 414.

[53] Ministry of Interior, Murshid al-Ijrā'āt al-Jinā'iyyah, p. 230.

[54] Artical 58, from the Organisation of Administrative Functions in the Sharī'ah Courts System in Saudi Arabia.

[55] An interview with the Chairman of the Supreme Judicial Council in Saudi Arabia (al-shaykh, Ṣāliḥ al-Luḥaydān), in 1414 A.H. This interview was held by "Majallat al-Yamāmah", Issue No. 1282 on 11-6-1414 A.H, p. 12.

[56] Artical 60, from the Organisation of Administrative Functions in the Sharī'ah Courts System in Saudi Arabia..

[57] Artical 61, Id.

[58] Artical 63, from Id.

[59] Artical 64, from Id.

[60] Article 36, from the Judicial System in Saudi Arabia.

[61] Personal interview with al-qāḍī A. S. in 1414 A.H.

[62] Article 35, from Id. Also: Artical 42, from the Organisation of Administrative Functions in the Sharī'ah Courts System in Saudi Arabia. Artical 5, from the Legal Instructions for Reviewing Judgements in Saudi Arabia. (ta'līmāt tamyīz al-aḥkām al-shar'iyyah) , issued by royal decree No. 24836 dated 29-10-1386 A.H.

[63] Solaim, Constitutional and Judicial Organization, p. 117.

[64] Artical 42, from the Organisation of Administrative Functions in the Sharī'ah Courts System in Saudi Arabia. Also: Artical 5, from the Legal Instructions for Reviewing Judgements in Saudi Arabia..

[65] Articles 12-13, from the Judicial System in Saudi Arabia.

[66] Article 16, from Id.

[67] Artical 20, from the Legal Instructions for Reviewing Judgements in Saudi Arabia..

[68] Article 27, from the Judicial System in Saudi Arabia. Also: Artical 47, from the Organisation of Administrative Functions in the Sharī'ah Courts System in Saudi Arabia.

[69] Articals 15-16-17, from the Legal Instructions for Reviewing Judgements in Saudi Arabia. Also: Ministry of Interior, Murshid al-Ijrā'āt al-Jinā'iyyah, p. 234. Solaim, Constitutional and Judicial Organization, p. 121.

[70] Artical 50, from the Organisation of Administrative Functions in the Sharī'ah Courts System in Saudi Arabia. Also: Ministry of Interior, Murshid al-Ijrā'āt al-Jinā'iyyah, p. 235.

[71] Article 20, from the Judicial System in Saudi Arabia.

[72] Article 9, from Id.

[73] See, chapter 5, section 1.

[74] Article 33, from the Judicial System in Saudi Arabia. Also: Ministry of Interior, Murshid al-Ijrā'āt al-Jinā'iyyah, p. 239

[75] Article 70, from the Legal Instructions for Reviewing Judgements in Saudi Arabia. Also: Ministry of Interior, Murshid al-Ijrā'āt al-Jinā'iyyah, p. 241.

[76] al-Sadḥān, Ijrā'āt Niẓām al-Sijillāt, p. 20.

[77] Id, p. 21.

[78] See: chapter 2, section I.

[79] Id.

[80] Personal interview with al-qāḍī A. S. in 1414 A.H.

[81] See: chapter 2, section I.

[82] al-Hewesh, "Shari'ah Penalties and Ways of their Implementation in the Kingdom of Saudi Arabia" (In: The Effect of Islamic Legislation) p. 376.

[83] See: chapter 2, section I.

[84] Promulgation of the Ministry of the Interior, No. 16\2299 dated 14-8-1395 AH. Also: Ministry of Interior. Murshid al-Ijrā'āt al-Jinā'iyyah, p. 209.

[85] Royal decree No. 17155 dated 17-7-1393 A.H. Also: Ministry of Interior. Murshid al-Ijrā'āt al-Jinā'iyyah, p. 267.

[86] Ministry of Interior. Murshid al-Ijrā'āt al-Jinā'iyyah, p. 266.

[87] Royal decree No. 17155 dated 17-7-1393 A.H. Also: Ministry of Interior. Murshid al-Ijrā'āt al-Jinā'iyyah, p. 267.

[88] Royal decree No. 25470 dated 23-10-1396 A.H. Also: Ministry of Interior. Murshid al-Ijrā'āt al-Jinā'iyyah, p. 267.

[89] Artical 199, from the Traffic Legal System in Saudi Arabia. Also: Ministry of Interior. Murshid al-Ijrā'āt al-Jinā'iyyah, p. 198.

[90] Articles 1, 2, from the Legal System of the Imprisonment and Detention in Saudi Arabia. Also: Ministry of Interior, Murshid al-Ijrā'āt al-Jinā'iyyah, p. 248. Department of Islamic Law, al-Ijrā'āt al-Jinā'iyyah, p. 187. This is also stated in the Resolution of the Ministry of the Interior, No. 233 dated 17-1-1404 A.H.

[91] al-Sadḥān, Ijrā'āt Niẓām al-Sijillāt, pp. 27 and 30.

[92] Article 24, from the Legal System of the Imprisonment and Detention in Saudi Arabia. Also: Ministry of Interior, Murshid al-Ijrā'āt al-Jinā'iyyah, p. 252.

[93] Article 26, from the Legal System of the Imprisonment and Detention in Saudi Arabia. Also: Ministry of Interior, Murshid al-Ijrā'āt al-Jinā'iyyah, p. 251.

[94] Resolution of the Ministry of the Interior, No. 70\B dated 17-4-1390 A.H. Also: Ministry of Interior, Murshid al-Ijrā'āt al-Jinā'iyyah, p. 253.

[95] al-Sadḥān, Ijrā'āt Niẓām al-Sijillāt, p. 38.

[96] Id, pp 35-36.

SUMMARY AND CONCLUSION

Crimes according to the gravity of the punishment are divided into three categories: ḥudūd, qisas, and ta'zīr. For each of these fundamental concepts of Islamic criminal law, there exists a different criminal procedures. For Example: Once guilt in ḥudūd crimes is established, the punishment cannot be commuted to a lesser penalty, since the ḥudūd punishments are fixed by the Qur'ān or the Sunnah. Therefore, no one can intercede to reduce the penalty, regardless of social status of the criminal. As for qiṣāṣ or ta'zīr crimes, the victim or his heirs, or even the competent authorities, can intercede under certain conditions. In ḥudūd crimes, any competent individual can bring charges against the defendant in court, whilst in qiṣāṣ and ta'zīr crimes, legal action must be initiated by the aggrieved party or by an agent acting on their behalf. The minimum legal number of witnesses normally required for ḥudūd and qiṣāṣ crimes are two adult sane Muslims, but ta'zīr crimes can be proved by a single witness.

Crimes of killing fall into two categories: intentional crimes and unintentional crimes:

Intentional crimes compose any act that has been deliberately performed with the express purpose of taking a human life, in whatever circumstances. In order to judge whether or not an act is one of murder, the following three elements must be considered: the link between the act and the death of the victim; the instrument used; and the absolute desire for the consequence of the act by the perpetrator.

No person may be subject to the death penalty who is not legally competent. The law regarding the death penalty is applicable to all the residents in Saudi Arabia, including those Non-Muslims who have a protective covenant.

The punishment can be determined by the victim's heirs rather than by a fixed immutable code of sentencing. The heirs could opt to be paid diyah as an alternative.

This choice is left to the victim's heirs, although for the purpose of preventing blood-shed, the authorities in Saudi Arabia are encouraged to intercede with the heirs in cases where the death penalty has been chosen. Diyah for intentional killing nowadays is to be paid in specie, whether it is the government's fixed price or more. In cases where the heirs waived the death penalty, the criminal is liable to an additional ta'zīr penalty, on the ground of public interest.

If the victim has no heirs, or his heirs are unknown, the judge in such cases has the discretion to act on their behalf in the choice of qiṣāṣ or diyah. In such cases diyah is paid in to the public treasury of the government.

In cases where the death penalty is commuted into diyah, a killer is also liable to a kaffārah penalty. Originally, this meant freeing a slave, but as slavery in Saudi Arabia was abolished in 1962, the convicted must fast two consecutive months as an alternative penalty. If for medical reasons the criminal is unable to fast, he must provide food for sixty poor people. In addition, regardless of whether execution or diyah is imposed, the convicted murderer would be disinherited if the victim is one of his legators.

Unintentional crimes of killing comprise those which result in death but were not premeditated, i.e. quasi-murder or killing by mistake.

Quasi-murder is a homicide committed with a normally non-lethal instrument. This crime is comparable with manslaughter, in that an illegal act occurred which was deliberate by the perpetrator but was not intended to kill. The distinction between quasi-murder and murder rests upon a consideration of the means of killing and upon the intention of the criminal.

On the other hand, killing by mistake includes any act which inadvertently results in death, for example: striking a person with a door while he is opening it, and causing a fatal injury. There may be error in the act or in the intention. The difference between quasi-murder and killing by mistake lies in the legality of the committed act. The usual penalties for unintentional killing are diyah and kaffārah. However, as in the case of

murder, a person convicted of quasi-murder is liable to an additional ta'zīr penalty. He might also be disinherited if the victim is one of his legators.

The current (1996) fixed amount of the diyah is 100,000 Saudi riyals for mistaken killing, and 110,000 Saudi riyals for murder and quasi-murder. The amount of diyah required for a female is half the payment for a male. The amount of diyah if claimed is set at its fixed value at the time of judgement. In cases of murder, the principle of the fixed diyah may not apply in certain circumstances. In cases of unintentional killing, diyah may be paid by either the criminal himself and his 'āqilah, or the public treasury. The Saudi public treasury would be responsible for paying diyah if both the criminal was poor and had no 'āqilah able to pay on his behalf. The public treasury is not responsible in those cases where the criminal is not of Saudi nationality, nor where the crime was committed with intentional negligence or recklessness, nor if it was the result of an illegal act.

Abortion of an unborn child is only permitted in extreme cases in which the mother's life is at risk, or when a failure to abort the baby would cause severe harm to the mother. An agent of an illegal abortion is criminally liable. The type of punishment imposed depends on the outcome of such an act.

Crimes of killing may be committed by more than one individual acting either as direct or indirect accomplices. Should a group of people conspire to kill someone, and thus share in the physical act itself of murder, their action will be considered as a premeditated direct complicity. Responsibility in this instance will be based upon the *mens rea* of the criminals in such an attack, who will then all be liable to an identical punishment, regardless of the extent of their involvement. If the complicity were to occur accidentally, and each accomplice did whatever he felt and thought necessary at the time, this will be considered as an incidental complicity. In the latter case, each accomplice would be held responsible only for his *actus reus*, and his individual involvement in the crime.

Indirect complicity could occur where the killing is planned by more than one person but not all those involved in its premeditation are physically present at the event. If the crime were to be carried out by a fully competent accomplice, the indirect accomplice may be considered to have a partial responsibility. However, an indirect accomplice would be held to be fully responsible, even if he has not participated physically in the commission of the crime, in certain cases such as when he hands a gun to incompetent person.

However, in the cases where an incompetent person act kills another, but not as an accomplice to a competent, the death penalty would be withheld, but would nevertheless compensate the victim's heirs, unless they chose to remit the crime freely. In cases of killing committed by individuals acting under the influence of alcohol or drugs, there is no defence for mitigation unless it could be judged that these intoxicating substance had been taken for medicinal purposes or under duress. Otherwise, he would be held to be fully responsible for his action. Similarly, a defence that the criminal had not yet attained legal maturity would also annul criminal responsibility, although not the civil accountability.

Immunity from criminal responsibility on the grounds of medical treatment is subject to certain conditions. A doctor may not be held responsible if a patient dies during an operation, or a course of treatment, as long as he acted in accordance with the laws of his profession. His responsibility would be judged by the Saudi Legal Medical Committee, prior to any criminal proceedings.

There are some sports which are intrinsically violent. Cases of killing which occur in such sports (for example: boxing) are considered to have extenuating circumstances. Therefore, the killer would not be held criminally responsible, provided he did not transgress the principles of the sport.

The plea of self-defence, the defence of honour, or the defence of property, if proven and certain conditions are met, are considered as reasons to annul both criminal and civil responsibility.

Finally, no capital punishment as a qiṣāṣ would be imposed if the criminal is a parent of the victim, the punishment may only be a ta'zīr penalty, imposed on the grounds of public interest.

The contemporary legal procedure in Saudi Arabia, following the knowledge of a crime, can be seen as two separate processes, the pre-trial procedures and the trial itself.

At the level of crime prevention, official bodies are responsible for protecting the state and society from crime before its occurrence. They are, therefore, empowered with certain preventative rights in order to maintain public security. However, there are certain safeguards in place to protect the right of the suspect, to avoid arbitrary arrest or detainment without reasonable charge. A suspect should never be exposed to threatening behaviour from officials involved in the case. If the executing officer finds no firm evidence of criminal activity at the initial stages of investigation, the suspect must be released immediately. The executing officer will be held responsible for any arbitrary or abusive practices.

A suspect would be interviewed in the presence of an interpreter if the he has difficulty in understanding Arabic. Similarly, if a suspect has a hearing disability, he would be interviewed in the presence of a sign-language practitioner.

Crime prevention may require a search of private premises. The searching of these premises is governed by strict conditions, in general favourable to the interest of the suspect. For example, no search or seizure may take place except pursuant to a warrant; to be valid, a warrant must be predicated upon probable cause. Concerning diplomatic premises, no search would be carried out, unless a warrant has been issued by a royal decree.

Experience in Saudi Arabia has shown that it is important for the investigator to observe certain procedures during the investigative stage of crimes of killing. The services provided by laboratory specialists, and other experts are very essential to the investigation and thus would be utilised in every case. From the discussion in chapter

four, it can be concluded that the investigation procedures, in Saudi Arabia, begins from the moment the police are first notified of a crime or as soon as a crime has been discovered by police officers. The investigator assigned to the case immediately sets in motion the initial stages of the investigation, calling upon experts who are specially trained to search for and collect evidence. These experts take photographs, draw sketches, and carry out the technical part of the investigation, whilst the police gather information from witnesses, search for suspects, and prepare official reports.

It is self-evident that there are two possible outcomes to an investigation regarding a suspect's involvement in a crime of killing: If there is no evidence of guilt, or by contrast he can satisfactorily demonstrate his innocence, the suspect must be released immediately; however, if there is sufficient evidence to link him to the crime, further actions must be implemented. The accused will be charged with a crime relevant to the evidence, and in cases of serious crimes, i.e. murder or quasi-murder, bail or surety will not be permitted. All cases will be referred to a General Court. Referrals would vary according to the nature of the crime.

Police detention may be an essential factor during the investigation. A police investigator has the right to take any person suspected of a crime of killing into custody in order to enable further investigation to be made. A suspect must not be kept in police detention for more than twenty-four hours without reasonable grounds. The length of police detention should not exceed thirty-six hours. In order to keep a person in custody for the extended period, the police investigator must obtain, in advance, the consent of the Commander of the Police Station where the investigation is being carried out.

Similar to the police detention for an investigation, pre-trial custody is a form of preventive detention. Normally, pre-trial detention will not last longer than fifty-one days. Should a further extension period be required, the approval of either the Emir of the Region or his assistant, or that of the judges, must be obtained. Appeal against the extension of the period of pre-trial detention is considered in the legal system of Saudi

Arabia. The period of studying such an appeal should take no longer than ten days. However, children under ten years old are not detained under any circumstances. Children over the age of ten and under eighteen may only be detained by a court order, if the judges are satisfied that detention would be the best course of action.

Certain conditions must be observed when detaining the accused. As well as basic human rights, there must be facilities for quiet prayer. In order to safeguard individual rights the legal system stipulates that if there is insufficient ground for detention, the officer in charge of the case will himself be liable to the same amount of detention, and responsible for any harm which the accused suffered as a consequence of his false detention.

Once the case has been referred to the General Court, a panel of three judges would be appointed to preside over the trial, regardless of the degree of the crime. In order to enable the judges to understand the case and prepare accordingly for the prosecution, the case would be studied by the judges' panel on the day before the day of the trial. The case would normally be presented by the victim's heirs or their agent, and the public prosecutor. The defendant is allowed all means possible to prove his innocence. If required, an interpreter would be present. Judgement *in absentia* might be executed under strict conditions, and only in less serious crimes of killing, which do not carry the death penalty.

The trial in all cases of crimes of killing would be held in public. Occasionally, the judges may rule that the case is to be heard in a closed trial. However, regardless of the circumstances of the hearing, the decision will be pronounced in a public session. The concept of "public" here does not have the same implication as it does in Western legal proceedings: there would generally be insufficient room for more than twenty members of the public to be present.

Proof normally rests upon either a legal testimony of at least two male Muslim eyewitnesses or a legal confession. Coercion, pressure, or deception, would immediately nullify any confession. The legal testimony or confession in court, are

considered the most powerful evidence in proving crimes of killing. Other types of evidence will be taken into account, but will not be regarded on their own sufficient for the death penalty as qiṣāṣ, but only for a ta'zīr penalty.

Judgement issued by the judges of the General Court would automatically be reviewed, in every crime of killing, regardless of whether or not the losing party had requested the appeal. The nature of appeal procedure varies according to the sentence passed. In order to protect the right of the individual, the death penalty would not be executed unless it was deliberated bythirteen judges, three from the General Court, five from the Court of Appeal, and five from the Supreme Judicial Council. Such punishment must be agreed and approved by the majority of these judges and then by the king. On the other hand, punishments less than the death penalty would be deliberated by six judges, three from the General Court, and three from the Court of Appeal.

The judgement of court would establish either innocence, or guilt which would result in either the death penalty, paying diyah, or imprisonment. If the punishment is the death penalty, the convicted person will be kept in a prison until the date fixed for the execution. No death penalty as a qiṣāṣ would be executed if one of the heirs had waived this right; nor would it be executed against a pregnant woman or nursing mother, unless they had weaned the child.

The execution of the death penalty would be carried out in public by an official executioner, appointed by the government, under the supervision of the competent authorities. At the time of the execution, there would not be any form of sedative given to the convicted person. The corpse would be exhibited if the judges believed that such an act was necessary. The case is reported in the local newspapers the day following the execution.

If the punishment is diyah, the convicted person of murder, or quasi-murder would be liable to an additional imprisonment ta'zīr penalty, claimed by the public prosecutor. The length of such imprisonment is five years for the murderer; or it might be a life sentence if this was the choice of the victim's heirs. In cases of quasi-

murder, the convicted person would be imprisoned for a period of thirty months. If death occurred as a result of careless driving, the driver would also be liable to an additional imprisonment, as a ta'zīr penalty, for a period ranging between six to twenty-four months. At the end of the imprisonment, an order of release would be issued and the prisoner is freed on the morning of the last day of the period fixed for imprisonment. A release order, in cases where imprisonment was imposed as a result of murder, would only be issued by a royal decree.

The discussion in this thesis has demonstrated that some of the criminal procedures that still apply nowadays in Saudi Arabia were established from the beginning in Islamic criminal law. Although the specific procedural safeguards, regulated by the government in Saudi Arabia, are not prescribed in detail in the primarily sources of Islamic law, the contemporary criminal procedures are considered to be based on the principles of the Sharī'ah. These procedures are derived from various sources: the Qur'ān, the Sunnah, Ijmā', Qiyās, and other secondary sources that are consistent with the teaching of Islam. These are also legislated as methods to be followed by the competent authorities for pre-trial procedure and the trial itself in order to implement justice and maintain human rights.

Application of Islamic criminal law maintains a significant influence on decreasing crime rate in Saudi Arabia. However, other factors are at work: it can be argued that Islamic social structure, the rule of a spiritual community based on piety and good conduct, the present scarcity of unemployment and demographic factors, are all contributory in maintaining this low level of criminality. In order to foster this responsible attitude (i.e. the low level of criminality), the government has encouraged the citizens to notify competent authorities of a crime and co-operate in protecting society by offering a reward for any notification of criminal activity.

SUMMARY & CONCLUSION

The regulation that the priority for trial and reviewing of judgement should be given to all cases relevant to crimes of killing, particularly in those cases where the defendant is detained, suggests that Saudi law is adequate as a preserver of human rights. As a further example, the period of imprisonment, in all crimes of killing would be considered from first day of the pre-trial detention, specifically, at the time when the convicted person was initially arrested by the police.

The rule that the age of the majority of the judges, dealing with crimes of killing, must be at least forty years, is evidence that the Saudi legal system observes the importance of such crimes, and thus ensures that the execution of its judgements is restricted to approval issued by a requisite number of experienced judges. Moreover, the fact that the aggrieved party plays significant role in the determination of the sentence, tends to confirm that the system is concerned with the sufferings of the victim.

As to incorporates present developments and need within the kingdom, the Saudi legal system is taken an advantage of the advances of modern technology and sciences.

However, concerning the small numbers of public admissions allowed within court hearings, it would be beneficial if the courts could allow access to a greater number of observers.

At present in Saudi Arabia the Appeal Court consider reviews of former proceedings rather than rehearing of cases. This procedure restricts the possibility that might be requested by either party of rehearing the case. There are ground than for a review of such procedure.

Finally and overall, the thesis concludes that the contemporary criminal procedures relevant to crimes of killing, regulated by the Saudi government, are substantially accord with the public interest consistent with the teachings of Islam.

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APPENDIX

LIST OF LEGAL SYSTEMS AND ROYAL DECREES

- Judicial System in Saudi Arabia issued by royal decree No. M\64 dated 14-7-1395 A.H.
- Legal Instructions for Reviewing Judgements (ta'līmāt tamyīz al-aḥkām al-shar'iyyah), issued by royal decree No. 24836 dated 29-10-1386 A.H.
- Legal system of the Administration of the Public Security in Saudi Arabia (niẓām mudīriyat al-amn al-'āmm), issued by royal decree No. 3594 dated 29-3-1369 A.H.
- Legal system of the Committee of Investigation and Public Prosecution in Saudi Arabia (niẓām hay'at al-taḥqīq wa al-'iddi'ā al-'āmm).
- Legal system of the Imprisonment and Detention in Saudi Arabia (niẓām al-sijin wa al-tawqīf), issued by royal decree No. 31\M dated 12-6-1398 A.H.
- Ministry of Justice, Majmū'at al-Nuẓum wa al-Lawā'iḥ, 1400 A.H.
- Organisation of Administrative Functions in the Shari'ah Courts System (tanẓīm al-a'māl al-idāriyyah fi al-dawā'ir al-Shar'iyyah) issued by royal decree No. 109 dated 24-1-1372 A.H.
- Traffic Legal System (niẓām al-murūr) in Saudi Arabia No. 49\M dated 6\11\1391 A.H.
- Royal decree No 32\1\3 dated 4-1-1357 A.H.
- Royal decree No. 109 dated 24-1-1372 A.H.
- Royal decree No. 1293 dated 29-3-1382 A.H.

- Royal decree No. 1310\813 dated 6-4-1353 A.H.
- Royal decree No. 14\Z\384 dated 6-1-1397 A.H.
- Royal decree No. 17155 dated 17-7-1393 A.H.
- Royal decree No. 17155 dated 17-7-1393 A.H.
- Royal decree No. 24836 dated 29-10-1386 A.H.
- Royal decree No. 25470 dated 23-10-1396 A.H.
- Royal decree No. 3\SH\11112 dated 6-5-1396 A.H.
- Royal decree No. 32\1\3 dated 14-1-1357 A.H.
- Royal decree No. 38 on 21/3/1409 A.H.
- Royal decree No. 4\13201 dated 13-6-1399 A.H.
- Royal decree No. 7\D\ 8776 dated 9-4-1400 A.H.
- Royal decree No. 7153 dated 23-4-1382 A.H.
- Royal decree No. M\4 dated 1-3-1401 A.H.
- Royal decree No. M\64 dated 14-7-1395 A.H.
- Royal decree No. M\76 dated 14-10-1395 A.H.

LIST OF FATĀWĀ AND PROMULGATIONS

- Fatāwā of the chief justice (ra'īs al-quḍāt) in Saudi Arabia, first: No. 692 dated 24-7-1380 A.H.; second: No. 1025 dated 3-11-1380 A.H.; third: No. 829 dated on 3-8-1381 A.H.
- Fatwā of the chief justice in Saudi Arabia, No. 2372 dated 21-6-1389 A.H., sanctioned by royal decree No. 17016 dated 26-8-1389 A.H.
- Fatwā of the chief justice in Saudi Arabia, No.1124 dated 7-4-1378 A.H.

- Fatwā the Committee of Superior Scholars (hay'at kibār al-'ulamā') in Saudi Arabia No. 47 dated 20-8-1396 A.H., sanctioned by royal decree No.1030 dated 13-1-1397 A.H.
- Promulgation (ta'mīm) of the Chief Director of the Public Security in Saudi Arabia, No. 261 dated 4-1-1399 A.H.
- Promulgation of the Ministry of the Interior, No. 2\S\4682 dated 22-4-1395 A.H.
- Promulgation of the Ministry of the Interior No. 1\1598 dated 22-9-1399 A.H.
- Promulgation of the Ministry of the Interior No. 10\117491 dated 29-4-1400 A.H.
- Promulgation of the Ministry of the Interior No. 154 dated 2-1-1398 A.H.
- Promulgation of the Ministry of the Interior No. 16\2299 dated 14-8-1395 A.H.
- Promulgation of the Ministry of the Interior No. 16\2955 dated 1-8-1399 A.H.
- Promulgation of the Ministry of the Interior No. 17748 dated 7-6-1398 A.H.
- Promulgation of the Ministry of the Interior No. 2\S\5614 dated 2-6-1399 A.H.
- Promulgation of the Ministry of the Interior No. 28562 dated 11-7-1395 A.H.
- Promulgation of the Ministry of the Interior No. 3156 dated 24-6-1390 A.H.
- Promulgation of the Ministry of the Interior No. 333\S dated 22-8-1388 A.H.
- Promulgation of the Ministry of the Interior No. 3735\S dated 2-9-1390 A.H.

- Promulgation of the Ministry of the Interior No. 41 dated 21-11-1395 A.H.
- Promulgation of the Ministry of the Interior No. 5\4\656 dated 25-11-1399 A.H.
- Promulgation of the Ministry of the Interior No. 5381 dated 21-11-1390 A.H.

LIST OF RESOLUTIONS

- Resolution (qarār) of the Supreme Judicial Council, No. 214 dated on 23-8-1392 A.H., sanctioned by royal decree No. 2071 dated 12-11-1392 A.H.
- Resolution of the Counsel Council (majlis al-Shūrā), No. 671\3 dated 6-1-1350 A.H.
- Resolution of the Council of the Ministers No. 611 dated 13-5- 1395 A.H.
- Resolution of the Supreme Judicial Council No. 133 dated 3-9-1401 A.H
- Resolution of the Supreme Judicial Council No. 46\3\T dated 29-4-1389 A.H.
- Resolution of the Supreme Judicial Council No. 65 dated 25-4-1397 A.H.
- Resolution of the Council of the Ministers Majlis al-Wuzarā' No. 725 dated 23-12-1380 A.H.
- Resolution of the Council of the Ministers No. 734 dated 5-5-1396 A.H.

- Resolution of the Council of the Ministers No. 83 dated 1-2-1395 A.H.
- Resolution of the Council of the Ministers No. 1253 dated 12-11-1392 A.H., sanctioned by royal decree No. 16\300 dated 3-1-1393 A.H.
- Resolution of the Council of the Ministers No. 4099 dated 5-2-1395 A.H.
- Resolution of the Ministry of Justice No. 119\1\89 dated 13-2-1400 A.H.
- Resolution of the Ministry of the Interior No. 2\S\6302 dated 26-8 1392 A.H.
- Resolution of the Ministry of the Interior No. 2104 dated 26-8 1389 *A.H.*
- Resolution of the Ministry *of the Interior,* No. 1 dated 20-7-1395 A.H.
- Resolution of the Ministry of the Interior, No. 1288 dated 23-4-1395 A.H.
- Resolution of the Ministry of the Interior, No. 2440 dated 28-11-1396 A.H.
- Resolution of the Ministry of the Interior, No. 3919 dated 22-9-1398 A.H.
- Resolution of the Ministry of the Interior, No. 4092 dated 22-10-1398 A.H.
- Resolution of the Ministry of the Interior, No. 70\B dated 17-4-1390 A.H.
- Resolution of the Ministry of the Interior No. 105462 dated 21-7-1385 A.H.
- Resolution of the Ministry of the Interior No. 16\S\4382 dated 8-11-1400 A.H.

- Resolution of the Ministry of the Interior No. 22525 dated 28-5-1395 A.H.
- Resolution of the Ministry of the Interior No. 233 dated 17-1-1404 A.H.
- Resolution of the Superior Judicial Committee (qarār al-hay'ah al-qaḍā'iyyah al-'aulyā), No. 21 dated 8-3-1391 A.H.
- Resolution of the Superior Judicial Committee, No. 88 dated 29-3-1396 A.H., sanctioned by royal decree No. 9264\M dated 18-4-1396 A.H.
- Resolution of the Superior Judicial Committee No. 153 dated 25-8-1397 A.H.
- Resolution of the Superior Judicial Committee No. 18 dated 6-1-1396 A.H., sanctioned by royal decree No. 4\Z\12752 dated 27-5-1397 A.H.
- Resolution of the Superior Judicial Committee No. 214 dated 23-8-1392 A.H., sanctioned by royal decree No. 2071 dated 12-11-1392 A.H.
- Resolution of the Superior Judicial Committee No. 50 dated 25-8-1396 A.H., sanctioned by royal decree No. 4\4\2021 dated 18-10-1396 A.H.
- Resolution of the superior judicial committee No. 79 dated on 10-3-1393 A.H., sanctioned by royal Decree No. 8972 dated on 10-5-1393 A.H.
- Resolution of the Superior Judicial Committee No. 82 dated on 14-3-1392 A.H., sanctioned by royal decree No. 7192\M dated 25-2-1393 A.H.
- Resolution of the Supreme Judicial Council, No. 100 dated 6-11-1390 A.H. , sanctioned by royal decree No. 21347 dated 24-11-1390 A.H.

- Resolution of the Supreme Judicial Council, No. 214 dated 23-8-1392 A.H., sanctioned by royal decree No. 2071 dated 12-11-1392 A.H.
- Resolution of the Supreme Judicial Council, No. 88 dated on 29-3-1396 A.H., sanctioned by royal decree No. 9264 dated 18-4-1396.