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CRIMINAL PROCEDURE

IN SAUDI ARABIAN JUDICIAL INSTITUTIONS

by

MUHAMMAD SA'AD AL-RASHEED

Thesis Submitted for the Degree

of Doctor of Philosophy, University of Durham

April, 1973

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ABSTRACT

It is hoped that this thesis will achieve two objectives. The first and more important one is to make a contribution to the study of legal development in the sphere of criminal procedural law and practice in Saudi Arabia, which is at the present time going through a process of evolution. As far as the author has been able to ascertain, no full study has been made in this field. The fact that the author was given access to important material pertaining to judicial proceedings, and that he had the opportunity to make valuable personal contacts with officials, has been a great help in trying to obtain a comprehensive and constructive picture of the subject-matter.

The second objective is the hope that this thesis may also contribute to a wider comparative study of the legal systems of other Arab and Islamic countries. There has been a conscious effort in recent years towards a greater degree of harmony in legislation, and it is felt that a research in this field may facilitate this process.

Chapter One deals with the Saudi Arabian Constitution. Why and how did King 'Abdul 'Azīz choose this constitution? What are the constitutional institutions? What is the relation between the different powers of the state? Is the judiciary independent?

Chapter Two is dedicated to the study of the institutions which run the machinery of justice.

Chapter Three deals with the proceedings which take place after the preliminary investigation by the police has been completed and before the hearing begins; in other words it deals

with the way in which a case is brought to court and the receivability, or the non-receivability, of such a case.

Chapter Four examines the conduct of the trial and the general principles according to which it is conducted.

Chapter Five deals with evidence: standard of proof, the categories of evidence, the admissibility and non-admissibility of evidence, and examination of witnesses.

Chapter Six is devoted to the judicial proceedings arising after the trial has closed; that is to say appeal.

The study is concluded in Chapter Seven, which gives an appreciation of the system of judicial proceedings, with some suggestions regarding the solution of procedural matters, and an assessment of possible future developments.

Acknowledgement

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TRANSLITERATION

Arabic Letters	Transliteration	Arabic Letters	Transliteration
ا	a	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	ه	h
ش	sh	و	w
ص	ṣ	ي	y

’ = (hamza). ā = prolonged a (alif mamdūda).

ī = prolonged i (yā’ mamdūda). ū = prolonged u (wāw mamdūda).

a = (tā’ marbūṭa).

ABBREVIATIONS

A.C.C.	=	Appellate Customs Committee.
A.G.	=	administrative governor.
b.	=	ibn.
B.C.	=	Bribery Committee.
C.	=	circular.
C.C.	=	Consultative Council.
C.C. (J).	=	Commercial Council of Jeddah.
C.C. (M).	=	Court of Cassation in Mecca.
C.C. (R).	=	Court of Cassation in Riyadh.
C.D.	=	Council of Deputies.
C.E.C.D.	=	Committee for Ending Commercial Disputes.
C.L.	=	Commercial Law.
C.M.	=	Council of Ministers.
C.R.	=	Customs Regulations.
C.S.	=	Committee for Securities.
C.S.C.D.	=	Committee for the Settlement of Commercial Disputes.
Cust. C.	=	Customs Committee.
Cust. L.	=	Customs Law.
D.	=	decision.
(D)	=	Dammām.
D.M.C.I.	=	Deputy Minister of Commerce and Industry.
D.M.I.	=	Deputy Minister of the Interior.
D.M.J.	=	Deputy Minister of Justice.
D.P.C.M.	=	Deputy President of Council of Ministers.
D.P.J.	=	Deputy President of the Judiciary.
F.C.	=	Forgery Committee.
F.M.	=	Foreign Ministry.
F.M.C.	=	First Magistrate's Court.
G.B.	=	Grievances Board.

G.C.D. = General Customs Directorate.

G.S.C. = Grand Sharī'a Court.

H.J.C. = High Judicial Committee.

H.O. = high order.

H.W. = high will.

(J) = Jeddah.

K.O. = King's Office (al-Dīwān al-Malakī).

L. = letter.

M. = Memorandum.

(M) = Mecca.

Maj. = Majmū'a al-Nuẓum.

M.C. = Magistrate's Court.

M.C.I. = Minister (or Ministry) of Commerce and Industry.

M.F. = Minister (or Ministry) of Finance.

M.I. = Minister (or Ministry) of the Interior.

M.J. = Minister (or Ministry) of Justice.

O. = Order.

P.C.D. = President of Council of Deputies.

P.C.M. = President of Council of Ministers.

P.J. = President (or Presidency) of the Judiciary.

P.K.O. = President of the King's Office (Dīwān).

P.O.P.C.M. = President of the Office (Dīwān) of the President of Council of Ministers.

P.P. = Public Prosecutor

R. = record.

(R) = Riyadh.

R.C.C. = Reviewing Commercial Committee.

R.D. = royal decree.

R.O. = royal order.

R.W. = royal will.

Ṣ.	=	ṣakk.
S.C.	=	Sharī'a Court.
S.M.C.	=	Second Magistrate's Court.
(Ṭ)	=	Ṭāiyf.
Vic.	=	the Viceroy.

Preface

The general purpose of this work is to deal chiefly with the practice of judicial institutions in Saudi Arabia in the field of criminal procedure. It concentrates on applied principles rather than on a pursuit of purely theoretical ones. Yet, we may sometimes refer briefly to some theoretical principles for the purpose of introduction or comparison, or where the practice and law in Saudi Arabia has departed from substantial legal norms of the Sharī'a (the law of Islam). Here we may allude to the fact that the Sharī'a, on the whole has no precise principles and rules covering every aspect of criminal procedure. However, the most important of these principles are: the innocence of the accused until proven guilty, his full right to defend himself by all legitimate means, and the right of both parties to be treated equally. Another important consideration in this respect is that the Sharī'a embraces important principles regarding the burden of proof, the conditions thereof, and the mode in which evidence is produced. These principles and rules will, besides being consulted in documentary sources, be referred to in the recognized legal authorities, which will be mentioned in the first chapter.

In 1927, King 'Abdul 'Azīz laid the foundations of the legal system of Saudi Arabia. By the expression "legal system" or "judiciary" in Saudi Arabia is meant the Sharī'a courts system. This judicial system is long established; it is well-organized, and greatly respected by all. Above all, its substantive laws are considered to be God-given laws. Moreover, the Sharī'a judiciary covers most of the judicial field. Therefore, there is no alternative for this study, but to be devoted to the Sharī'a

system. Nevertheless, the study will also consider some semi-judicial institutions, namely those of a criminal character, and will compare their procedure with that of the Sharī'a courts, when it seems fit. Here, it may be mentioned that, sometimes, the laws and regulations governing the semi-judicial institutions and their practice are relatively too brief or vague to give a clear picture of their procedure. Therefore, the only alternative open to us was to rely on the general judicial principles in Saudi Arabia and on personal interviews with the respective authorities.

Limitations. It is important to note that this thesis is not intended to deal with all the semi-judicial institutions for the following reasons:-

(a) Some of these institutions follow an administrative rather than a judicial procedure such as the General Directorate of Passports and Nationality, the Department of Taxes, and the Committees of Combatting Adulterations.

(b) Others, such as the "Trial of Ministers", have no detailed procedure or practice and if, on the assumption that there is a minister to be tried, this trial will be held in camera.

(c) Others, such as the "Martial Tribunal", do not fall within the general judiciary. Moreover, its law is too brief to give a clear picture of its procedure. Also it holds its sessions in camera and there is no access to its records.

Since the subject of this study is concerned with criminal procedure, the punishment itself will not be dealt with for the reason that punishments are covered by another branch of criminal law. Sentencing will also not be examined in this study on the grounds that the mode in which a judge passes a sentence is not complicated enough to deserve special attention.

According to the Sharī'a, crimes are classified into three categories: (i) hudūd (sing. hadd) i.e. crimes with fixed punishments, (ii) qiṣāṣ i.e. retaliation, and (iii) ta'zīr i.e. crimes whose punishments are left to the discretion of the appropriate authority to determine. Besides using these terms for crimes themselves, they are also used to designate their punishments. The crimes of hudūd are six types: illegal sex relations (zinā), defamation (qadhf), wine-drinking (sukr or shurb), theft (sariqa), highway robbery (Ḥirāba or qaṭ'al-ṭarīq), and apostasy from Islam (ridda). The crimes of retaliation (qiṣāṣ) are two kinds: murder, and the intentional cutting off of the limb of a human being. The vast majority of crimes comes under ta'zīr. Sometimes, the terms misdemeanour, felony and offence may be used, but there is no exact definition for these terms in the laws either governing Sharī'a courts or semi-judicial tribunals. However, misdemeanour, felony, and offence fall within the category of ta'zīr. Hence, we have to follow the classification of the Sharī'a in this respect.

Material and sources. The data and information consulted in this study are the following:-

(1) Unpublished and confidential material consisting of:-

(a) Records and registers of cases and judicial decisions, which are the principal sources.

(b) Decisions, instructions, and circulars issued by the High Judicial Authority.

(c) Royal and high edicts.

(d) Decisions taken by legislative and chief administrative institutions, i.e. the Consultative Council, the Council of Deputies, and the Council of Ministers.

(e) Ministerial decisions.

(f) Instructions circulated by authoritative institutions.

(g) Official correspondence.

(h) Memoranda.

(i) A few draft laws.

(j) Reports.

The above-mentioned data were obtained in four periods of fieldwork totalling some fourteen months.

(2) Published laws, some of which are booklets, and others which are published in the official gazette of Saudi Arabia, Umm al-Qurā.

(3) Documents obtained from the Documents Section of the Library of Institution of Public Administration in Riyadh.

(4) Personal observations and notes made by the author at court hearings, to which he was given access.

(5) Correspondence between the author and some authorities, appended together with useful information.

(6) Interviews conducted by the author with senior judges, legal officials and statesmen. However, this kind of material is used to a limited extent, namely where the law and the practice do not cover the subject of the interview. Equally, it is used where it is impossible, for any reason, to have access to the source of the subject.

(7) Published theses, whose consultation is confined to the Library of the Faculty of Law at the University of al-Azhar and to the Library of the Faculty of Law at Cairo University. These theses were consulted in two visits, totalling six weeks. Although the theses do not deal with the law in Saudi Arabia, they were useful to the theme of this study.

(8) Legal and general literature available in articles, theses and books among which are the Ḥanbalī legal books,

recognized as authorities on judicial laws. These texts are consulted particularly when dealing with evidence.

Although it is commonly believed that data and information in developing countries, such as Saudi Arabia, are rare and unreliable, it may be claimed that the data utilized in this study is quite ample and highly reliable. This fact is for the following reasons:-

(1) The interest which some officials referred to in the acknowledgments have shown in the accomplishment of this study. Their co-operation helped the author in having access to the material needed for this thesis.

(2) The permission of the Minister of the Interior accorded to the author to consult confidential documents relevant to this study.

(3) Personal contact with some officials, through whose advice the author was guided to important documents.

Finally, the question to be considered in this preface is whether the subject of this thesis has been dealt with before. In Saudi Arabia, it does not appear that an important study of criminal proceedings before courts has been made. The Advanced Legal Institute (Ma'had al-Qaḍā' al-'Ālī), was set up in the 1960's for the express purpose of providing the country with highly-educated judges. But not one of the students of the institute has made a specific study of any aspect of the judicial system of Saudi Arabia, in spite of the fact that most of the students are judges. This shows that the time for a legal study of the Saudi Arabian judicial system, from inside Saudi Arabia, has yet to come. Nevertheless, it may come shortly. Studies written abroad have no direct connection with the main theme of this work; in actual fact, no extensive study of the judicial

system in Saudi Arabia has been produced. It is true that few theses have made reference to the judiciary, but only as a prelude to another and probably related subject.

Although this work is a modest attempt, it is hoped that it will be a first step towards a comprehensive study not only of criminal proceedings at courts and preliminary criminal procedure but also of the judicial system of Saudi Arabia as a whole.

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Chapter One

THE CONSTITUTION OF SAUDI ARABIA

I. HISTORICAL BACKGROUND

After the conquest of Ḥijāz by King ʻAbdul ʻAzīz in 1926, the people of Ḥijāz and Najd were anxious to see real Muslim rule in the country. As King ʻAbdul ʻAzīz was the formal religious leader of the country (imām), the organization of this rule was within his discretion. His Wahhābī upbringing was, to a certain degree, to influence his political ideas and consequently to shape the framework of the constitution of his country.

The 'Ulamā' (the doctors of Islam), who kept constant observation on matters concerning the Sharīʻa (the Law of Islam), provided the King with the legal advice he needed. The adoption of the Sharīʻa was also the primary concern of the Ikhwān (Brethren), who were at one time the most efficient fighting force in Najd. The Muslim world was also concerned with Ḥijāz, and wanted the Sharīʻa to be applied there. Before examining how far, and how much of the Sharīʻa was to be applied it is necessary to consider briefly certain aspects of the historical background of the Wahhābī Movement, King ʻAbdul ʻAzīz, the 'Ulamā', the Ikhwān, the people of Najd and Ḥijāz, and the opinion of the Muslim world.

A. The Wahhābī Movement

At the beginning of the 18th century the inhabitants of Najd, the desert country in central Arabia, were in a state of ignorance, having forgotten even the fundamental principles of their religion, Islam. Ibn Ghannam, a Najdī historian, when describing the Najdis at that time, recorded: "They were at this time sunk deep in the abyss of paganism, steeped in shame and defiled by the taint of corruption."[1] The only exception to this was an extremely small minority, including the few 'ulamā', who had very little influence in the country. In the 18th century, there lived a man named Muḥammad Ibn ʻAbdul Wahhāb (1703-1792 A.D.)

(1115-1206 A.H.) who was to revive Islam. He was born in 'Uyayna, a town situated near Riyadh. His father gave him a preliminary education in Islamic studies. Afterwards, he went to Aḥsā', Ḥijāz, and Baṣra (in Iraq) to continue his education. At the same time he studied the religious convictions held by the people of these countries. He reached the conclusion that they had adopted some superstitious and heretical beliefs. He observed that the 'ulamā' had collaborated with the rulers who betrayed Islam.[2] Ibn 'Abdul Wahhāb decided to devote himself to his beliefs. He returned to his home-town ('Uyayna) and started to preach that people should return to the principles of Islam as they were practised in the early days of the faith. He wanted to see the Arabians become devout Muslims, welded into one people serving the cause of the faith of Islam. His opponents put pressure upon the ruler of "'Uyayna", Ibn Mu'ammar, in order to put an end to Ibn 'Abdul Wahhāb's teaching. In 1741 (1157) he left for the town of "Dir'iyya" which was ruled by the House of Sa'ūd. There he met the Sa'ūdī ruler, Muḥammad b. Sa'ūd (d. 1766), who was a typical Arabian ruler (amīr) who was ambitious to acquire power over other Arabian rulers. Ibn 'Abdul Wahhāb promoted this ambition when he assured Ibn Sa'ūd that if he served the Islamic belief, his dynasty would become much stronger than it was before. Ibn Sa'ūd offered Ibn 'Abdul Wahhāb the asylum and proctection which he needed.[3] The two men agreed to devote themselves to the cause and to serve this movement of religious revival by practical means. The former became the spiritual and the latter the political and military leader of the movement.

Ibn 'Abdul Wahhāb's ambition was partially fulfilled when Najd and some other parts of the Arabian Peninsula were annexed. The new state became known to the outside world as the Wahhābī

State (Al-Dawla al-Wahhābiyya).

In the 20th century this state was revived by 'Abdul 'Aziz Ibn 'Abdul Raḥmān Al-Sa'ūd, and on September 22, 1932 (21/5/1351) was named the Kingdom of Saudi Arabia (al-Mamlaka al-'Arabiyya al-Sa'ūdiyya). The question now to be considered is the reaction of the Muslim world to what came to be known as the Wahhābī Movement.

The Wahhābis called themselves unitarians (muwaḥḥidīn). The outside world looked upon the Movement in different ways.

(a) As an independant sect of Islam. This was the opinion of some doctors of Islam such as 'Abdul Bāsiṭ al-Fākhūrī, the Muftī of Lebanon, who was appointed by the Ottoman Sultan 'Abdul Ḥamīd.[4]

(b) Not as a new sect, but as a movement following the Ḥanbalī school. This view was held by many scholars of Islam, such as Muḥammad Rashīd Riḍa of Egypt.

(c) Not only as a doctrine at variance with the Sunna (the Prophet's Tradition), but as an innovation in Islam. This judgement was made by some opponents either for political reasons, or because of a difference in the interpretation of the principles of Islam. The Ottoman Empire, The Egyptians,[5] and the Hashimites[6] fought for the destruction of the Wahhābi State. The Shī'a sect in a special conference in Karbalā' announced that the Wahhabis were nothing but heretics.[7] Some 'ulamā' in Beirut and Damascus, who collaborated with the politicians, accused Ibn 'Abdul Wahhāb of hating the Prophet Muhammad and of claiming that he himself was a prophet.[8]

However, the Wahhabis had neither called themselves Wahhābis, nor did they call their movement Wahhābism, but rejected this designation.[9] They believed that they were not competent of ijtihād[10] (individual legal opinion) but they followed the

traditional teaching of the Sunnī schools (ahl al-Sunna wa al-Jamā'a); and in subsidary issues (al-furū') they generally followed the Ḥanbalī school, formed by Aḥmad Ibn Ḥanbal. (780-855) (164-241).[11]

If we study the WahhabĪ Movement carefully, we will see that it is not a new Islamic doctrine, but has its roots in the Sunnī concept of Islam. In its theological aspect, it is an echo of the teachings of Ibn Taymiyya [1262-1328 (661-728)]. It is also influenced by the teaching of Ibn al-Qaiyym al-Jawziyya [1291-1350 (691-751)], who was a pupil of Ibn Taymiyya. Both of them called, and so did Ibn 'Abdul Wahhāb, for the purification of Islam from innovations and from the cult of prophets and saints. They believed in the Qur'ān, the Suunna, and the conduct and teachings of the Prophets Companions (Ṣaḥaba) and Pious Followers (Tābi'īn). In matters of law and jurisprudence (fiqh), the movement generally followed the Ḥanbalī School,[12] whose founder categorized the sources from which he derived his opinion in the following order;-

(a) The Qur'ān.

(b) The authentic Ḥadīth (tradition of the Prophet).

(c) The consensus (ijmā') of the Prophet's Companions (Ṣaḥāba).

(d) In controversial issues, the opinion nearest to the first two sources.

(e) The weak tradition (ḥadīth ḍa'Īf); in other words that which is not as reliable as the authentic (ṣaḥīḥ) tradition, but which is not falsified.

(f) Qiyās (legal analogy).[13]

Clearly then, Wahhabism is an Islamic revivalistic movement, which called for puritanism and religious revival.

B. King 'Abdul 'Azīz (1882-1953)

'Abdul 'Azīz was born on 21st October 1882, while his father al-Imām 'Abdul Raḥmān was engaged in a battle to restore the rule of his family in Najd. Al-Imām 'Abdul Raḥmān made many attempts to revive the rule of the House of Sa'ūd, but without success. Therefore, he decided to look for a refuge, and he found it in Kuwait. His son 'Abdul 'Azīz, who was about ten years of age, heard of the glory of his grandfather Faisal (d. 1866), but at the same time he witnessed the unenviable fate of his father and the misery in which the family then lived. In these circumstances 'Abdul 'Azīz could scarcely have been expected to receive a good education. His education was limited to the extent of learning the Qur'ān and the basic principles of Islam. In the meantime he "showed no inclination for book-reading."[14] However, he remained in the company of his father, who was well-informed in the history of the Arabs. As his father was accustomed to have reading-sessions quite frequently,[15] 'Abdul 'Azīz's education would no doubt have been thereby improved.

Al-Imām 'Abdul Raḥmān had but one purpose in life, that he, or his sons after him, should restore the Empire of the House of Sa'ūd, and re-unite the Arabs into one nation and convert them into devout Wahhabis.

'Abdul 'Azīz could not accept or endure his life in exile and the misery of his family. In 1902 (1319) he left Kuwait for Riyadh, the capital of his grandfather Faisal, in an attempt to restore the rule of his family. On January 15, 1902 he succeeded in retaking Riyadh. Within about a quarter of a century most of the Arabian Peninsula was indisputably under his rule. In 1913 (1331) he captured al-Aḥsā'. In 1921 (1341) he conquered Ḥāyil, which was the capital of his rivals, the family of Āl-Rashīd.

In 1926 (1344) he was in full control of the whole of Ḥijāz.[16]

The tide of 'Abdul 'Azīz's influence reached its height on September 22, 1932 (21/5/1351) when he became the King of the Kingdom of Saudi Arabia[17] (al-Mamlaka al-'Arabiyya al-Sa'ūdiyya).

We may now refer to King 'Abdul 'Azīz's religious convictions and their influence on his personal life and on the constitution of his country. Since King 'Abdul 'Azīz, as mentioned before, was brought up in a Wahhābī environment, some have assumed that he was an extremely strict Wahhābī. One of his trusted advisers, Ḥāfiz Wahba, wrote that King 'Abdul 'Azīz had established his state on the basic principles of the Wahhābī Movement.[18] However, it seems that King 'Abdul 'Azīz was, in matters of personal religious duties and conduct, a fairly typical Wahhābī, who would readily listen to what his 'Ulama' said. This may be understood from the following event. When the 'Ulama' of Riyadh objected to his will to celebrate the anniversary of his accession to the throne in 1930 (1349) [19] he obeyed the 'Ulamā''s instructions. On matters relating to the state, he would do what suited him provided that it was in harmony with general Islamic principles. His political ambitions and realistic international outlook had, in this respect, modified his religious convictions and his thought. He had to satisfy his subjects, who ranged from the extreme Muslim Wahhābis in Najd to the comparatively open-minded people of Ḥijāz. He also had to satisfy the Muslim World. He had to adopt Islam as revealed in the Qur'ān, and to follow the Sunna (the Tradition of the Prophet), the Conduct of the Companions of the Prophet and their Pious Followers.[20]

C. The 'Ulamā'

The word 'ālim means in this context a learned and well-informed religious man of Islam, the plural is 'ulamā'. The

'Ulamā' in the Wahhābī Movement were in fact the spiritual leaders. Ibn 'Abdul Wahhāb himself, the founder of the Movement, was classified as an 'ālim, and since then the leadership of the 'Ulamā' has been, with very few exceptions, left to one of his descents. The opinion of the 'Ulamā' was so important that it was usually decisive in questions relating to the Sharī'a, which governed every aspect of life.

Their power was great in the reign of 'Abdul 'Azīz, when they succeeded in converting the non-religious Beduins of Najd into devout Muslims; these were later called "al-Ikhwān" (brethren). The 'Ulamā' were the only force which could control and modify the emotional beliefs of the Ikhwān, and the only persons through whom King 'Abdul 'Azīz could rule. A typical example of their importance is evident in their Fatwa (legal opinion) issued on February 11, 1926 (8/8/1345) which resulted from the conference held on January 29, 1926 (25/7/1345). This conference was called by King 'Abdul 'Azīz to look into the serious dispute between him and the Ikhwān. The Fatwa, however, demanded the abolition of anything which was contrary to the Sharī'a. The power of the 'Ulamā' is also obvious in their Fatwa issued on November 2, 1964 (26/6/1364). This Fatwa demanded the deposition of Sa'ūd, the former King of Saudi Arabia, and the setting up of his brother, Faisal, as King in his place. This Fatwa was soon carried out.[21]

Thus, the 'Ulamā' practically formed a religious hierarchy from which the leading religious figures were chosen. The 'Ulamā', to whom all religious questions were usually referred were responsible for carrying out the religious duties, including the laws.

D. The Ikhwān

The word Ikhwān (brethren) became a designation of the Beduins

who deserted the nomadic life to live in hermit settlements, called "hijar" in order to become devout Muslims. They were inspired by Wahhābī idealism, through religious teachers who were sent to them by King 'Abdul 'Azīz,[22] his intention being to achieve a religious reformation, and thereby to transform them into reliable soldiers who would help him in building his Kingdom.

The first settlement (hijra) was established in 1911 (1330), and it soon set the pattern for other settlements. It was named "al-Artāwiyya". Some sixty settlements, inhabited by about 40,000 Ikhwān were established in rapid succession all over the country.[23] The Ikhwān became enthusiastic and powerful. They were so zealous in their faith that they were prepared to fight and die for it. A false handling of these militants could have developed into a national catastrophe. On one occasion they told King 'Abdul 'Azīz categorically "that unless he would lead them out to Ḥijāz they would themselves declare war on Hussain [Ḥusayn] and march to capture Makkah [Mecca] without him."[24] However, King 'Abdul 'Azīz succeeded in keeping them under control when he assured them that he would fight for the faith. The Ikhwān defeated King Ḥusayn's army and practically captured Ḥijāz in 1924-1925 (1343).[25] Their zeal to fight for their faith thereafter was increased. Their energy and capability grew to such an extent that they became out of the King's control. They accused him of working only for his own ambitions and of betraying the faith. They told him that they fought not to set him up for his own glory, but for the glory of God. They wanted him to enforce Wahhābī rule in Ḥijāz and to declare holy war (jihād) against the people of Iraq, whom they considered to be heretics.[26]

In response to this accusation King 'Abdul 'Azīz called for a conference in Riyadh, in 1926, to put the case before the 'Ulamā'. The 'Ulamā' produced a fatwa which partly supported the

Ikhwān. The King saw no alternative but to order the implementation of some of the items of the fatwa.[27] Nevertheless, the Ikhwān went their own way to fight neighbouring countries which they believed were heretical.[28]

After having unsuccessfully tried peaceful methods, King 'Abdul 'Azīz had no choice but to put an end to the activities of the Ikhwān by force. The year 1929 witnessed their end as an important fighting force.[29]

E. The General Attitude of the King's subjects

Saudi Arabia consists of four provinces: Najd, Ḥijāz, al-Aḥsā' and 'Asīr. Only two of them, however, are relevant to our discussion, Najd and Ḥijāz, and it is to the attitudes of the people in these two provinces that we now turn.

Najd was almost entirely isolated from the influence of the outside world. It was exclusivly inhabited by Wahhābis, among whom were the 'Ulamā' and the Ikhwān. The Najdis wanted a strong leader who was able to restore peace in their country and end their tribal disputes. The leader whom they needed was 'Abdul 'Azīz b. Sa'ūd, and the law which was to be respected by both parties involved in any dispute was the Sharī'a, since it was the law of Islam.

The people of Ḥijāz wished and, indeed, demanded to see in their country a better system of administration than had been in force before the conquest by King 'Abdul 'Azīz: a system guaranteed by a modern constitution. This attitude was to be expected since in the past the people of Ḥijāz had been in touch with the outside world. Two main external influences affected the people of Ḥijāz: firstly, the Ottoman administration,[30] with its judiciary;[31] and secondly, the contact with Muslims of many different cultures, pilgrims and visitors and immigrants who came

freely to Ḥijāz. Life here was far more complex than in Najd.

Thus, the people of Ḥijāz, the inhabitants of the Holy Land of Islam, wanted a modern constitution, but at the same time they wished to be ruled in accordance with the Sharī'a, the law of Islam. King 'Abdul 'Azīz was able to satisfy the Ḥijāzis and the Najdis by drawing upon the Sharī'a as the basic source of his legislation.

As soon as Mecca was occupied, the King declared that the Sharī'a was to be the basis of legislation in Ḥijāz.[32] After his entry to Mecca, King 'Abdul 'Azīz confirmed what he had already proclaimed concerning the role of the Sharī'a in the country, adding that the source of legislation was to be the principles of Islam. This was received by the people of Ḥijāz with great satisfaction.[33]

F. The Opinion of the Muslim World

Being the Holy Land of Islam, Ḥijāz had been very much sanctified and respected by the Islamic peoples. King 'Abdul 'Azīz had to exercise special care and tact in dealing with matters affecting its status and the welfare of its inhabitants. Evidence shows that he was careful not to provoke the sentiments of the Muslim world, which was so much concerned with the administration of Ḥijāz. He tried to introduce his legislation when the right moment came. The weight of Muslim world opinion on this issue had a clear effect from the time when King 'Abdul 'Azīz decided to invade Ḥijāz and put an end to the rule of the Hashemites. After the conquest of Mecca, he had to prove to the whole Muslim world that the Holy Land was safe and in true Islamic keeping. In his statement of November 11, 1924 (13/7/1343) King 'Abdul 'Azīz, due to leave Riyadh for Mecca for the first time said:-

"I will leave for Mecca not as overlord, but to remove the grievances and the taxes which have weighed upon the people, and to grant them the rule of the Sharī'a. Now there shall be no rule in Mecca except the rule of the Sharī'a. All the people must respect it. Mecca belongs to all Muslims. The issue of the administration must be decided in conformity with the wishes of the Muslim World. We will meet the Muslim delegates and consult with them with a view to keeping Mecca free of any political ambitions, and to preserve the safety and comfort of the pilgrims to the Holy Land."[34]

On December 7, 1924 (12/5/1343) King 'Abdul 'Azīz issued a proclamation putting forward his programme regarding Ḥijāz. He made it clear that he would leave matters concerning Ḥijāz to a conference to be attended by delegations representing all Muslim countries, which would decide which kind of government Ḥijāz should have, in order to implement the laws of God. The proclamation had a drastic effect not only on the Ḥijāzis but also on the whole of the Muslim world, which had been almost entirely hostile to Wahhābis ever since the beginning of their movement.

The King tried to keep good relations with the outside world, especially with other Muslim countries, in order to give a good impression of himself and his government.

The question now is whether King 'Abdul 'Azīz was sincere in his promises. It seems that the King was playing for time until events should turn his way, when he would not hesitate to annex Ḥijāz. That this was his policy could be seen from his proclamation of November 7, 1926, when he decided to abandon the idea of calling the Islamic conference to decide the future of

Ḥijāz. However, he had later to yield to the pressure put upon him by the Muslim world and to agree to hold the conference, although he continued to bargain over the issue of the government of Ḥijāz, with the intention of preventing the conference from discussing this matter, until he finally succeeded.[35]

This was the time for him to go on with his schemes, when he thought that the Muslim world was prepared to accept, or at least not to repudiate, his plan to rule Ḥijāz, so long as he would rule it according to the principles of the Sharī'a.

Thus, King 'Abdul 'Azīz was in a position where he was able to embark on establishing the constitutional and administrative machinery, after having settled matters both with his own subjects and with the Muslim world.

Having referred to the factors which played an important role in shaping the constitutional organization of Saudi Arabia, we proceed to discuss the Saudi constitution on the provincial and national level.

II. THE CONSTITUTION ON THE PROVINCIAL LEVEL

Saudi Arabia, as a twentieth century state, was to have a modern constitution, but it was not very easy to produce one because the country had no experience in this field. Until 1923 Najd was isolated from the world. Life there was very simple; the problems of modern life were little known. On the whole, Najd was inspired by the Wahhābī Movement which put an end to, or modified, some of the Arab traditions which had been prevalent there before. As to al-Aḥsā', the Eastern Province, although it had been under Turkish control for forty years, its life was fundamentally similar to that of Najd.[36]

The situation in Ḥijāz differed from that in Najd and al-Aḥsā'

because Ḥijāz was relatively modern.[37] Having entered Mecca, King 'Abdul 'Azīz was confronted with the problems of a more complex region.

King 'Abdul 'Azīz, with his Najdī background, his limited experience in administration, and his great enthusiasm to annex Ḥijāz and build a vast kingdom, had to go through a long process. He had to take measures which were to be agreed upon by both Ḥijāzis and Najdis. This was not an easy task because the Najdis disliked innovation, while at the same time the Ḥijāzis were anxious to see modern institutions in their country. As a man who knew well the nature of the contradiction between the Najdis and Ḥijāzis, King 'Abdul 'Azīz had to be careful and patient when establishing new institutions, in order to meet the Ḥijāzis demands on the one hand and avoid provoking the Najdis on the other. Thus, the King had to deal first with Ḥijāz. Gradually he established a provincial administration in the country. But the way in which he went on with his plans to establish a modern state was controlled by his wish to avoid any radical change and to concentrate on Ḥijāz till the situation in the other parts of his kingdom was such as to favour further change.

Dealing with Ḥijāz we shall now consider the institutions which the King introduced. The most important of these was the Fundamental Instructions of the Kingdom of Ḥijāz of 1926. Later we shall refer to the "Consultative Council", "The Council of Deputies", and the "Viceroy in Ḥijāz".

A. The Fundamental Instructions of 1926

On August 30, 1926 (21/2/1345), the Fundamental Instructions of the Kingdom of Ḥijāz (al-T'alīmāt al-Asāsiyya li al-Mamlaka al-Ḥijāziyya) were introduced. They consisted of nine sections containing seventy-nine articles.

The first section deals with the unity of the Kingdom of Ḥijāz and stated that the Arab Ḥijāzī State is an independent Islamic consultative monarchy.[38]

In the second section, it is stated that the administration of the Kingdom of Ḥijāz is left to King 'Abdul 'Azīz, who is bound by the provisions of the Sharī'a.[39] In Article (6) it is stated that legislation in the Kingdom of Ḥijāz shall always conform to the Book of God, the Sunna of His Prophet, and the conduct of the Prophet's Companions and their Pious Followers. The second section deals also with the establishment of the post of the King's Viceroy in Ḥijāz.[40]

The third section divides the affairs of the kingdom into six categories; Sharī'a, internal, external, fiscal, public educational, and military.[41]

The fourth section deals with the Consultative Council of Mecca, the Administrative Council of Madīna, the Administrative Council of Jeddah, the District Councils and the Village and Tribal Councils.[42]

The other sections deal with the establishment of the Department of Audit, the General Inspectorate, Government Employees, Municipal Councils and Administrative Committees.

The Instructions have been subjected to some amendments; the title of the king, for example, was changed to "the King of Ḥijāz and Najd and its Dependencies." This event took place in 1927 (1345). In 1932 (1351) the whole country was named "The Kingdom of Saudi Arabia."[43]

An amendment dated December 29, 1930 (19/8/1350) created the Council of Deputies.[44]

Since the Consultative Council of Mecca is the most important of all the councils determined in the fourth section, we shall

refer to it now.

B. The Consultative Council

The term 'Consultative Council' is the equivalent of Majlis al-Shūrā in Arabic; Shūrā means consultation. Shūrā has a significant appeal to Muslims as this political doctrine is attached to the Islamic heritage. If Shūrā could be put into effect by King 'Abdul 'AzIz, both his subject peoples, the Najdis and the Ḥijāzis, and the Muslim world too, would be satisfied. Indeed, as this principle of Shūrā was very important, King 'Abdul 'Azīz adopted it when he established the Consultative Council in 1926 (1345).

The primary purpose of establishing this council was to provide the Viceroy with consultation, when needed. But in 1927 (9/1/1346) a basic law concerning the Consultative Council was promulgated to replace the fourth section of the Fundamental Instructions.[45]

The new law gave wider responsibilities to the Council, such as the enactment of laws and regulations.[46] But it could not initiate projects de Loi; it only studied them, when it was instructed to do so by the supreme authority, the King or his Viceroy. The decision taken by the Council had to be ratified by the Viceroy or by the King himself, and if the King, who possessed the ultimate authority, was not satisfied with any decision of the Council, he was not bound by it. Nevertheless, the Council enjoyed the power to discuss and prepare the draft of the laws and regulations of the country before the Council of Ministers was established in 1953.[47] Thus, one can say that the Consultative Council left its mark on the laws of Saudi Arabia, as a whole, despite its provincial character.

If a student of constitutional law examines the limitations

to which the council had been subject, he may well appreciate its achievements - particularly when he bears in mind that the King had the power to dissolve the Council, or to dismiss or change its members,[48] and that he was the ultimate authority in all legislative matters[49] (so long as these did not conflict with the Sharī'a).

Finally, one may ask about the fate of the Consultative Council now. It is, in fact, still functioning and has three committees: legislative, financial, and administrative; but it is subservient to the Council of Ministers.[50]

C. The Council of Deputies

The administrative organs functioned according to the Fundamental Instructions until 1931; that is to say the Viceroy possessed all executive powers. After the Saudi Arabian administration had passed the experimental stage and had become more complicated, the government felt that the time had come to create some form of a cabinet, which would be more suited to the needs of the country, and more efficient in assisting the Viceroy to run the administration. The "Commission on the Administrative Reform" (of 1927) recommended that an organ called the "Council of Deputies" should be established. The King approved the recommendation in 1927,[51] but it was put into practice only in 1931, when the Constitution of the Council of Deputies[52] was promulgated.

The Council consisted of a president, who was the Viceroy, (Faisal), and three other members: the deputies for Foreign Affairs, and Finance, and the Vice President of the Consultative Council.[53] These members were appointed by the King from whom they derived their authority and before whom they were responsible. The Council took its decisions by majority vote.

For a decision to be carried out, the vote of the deputy whose department was concerned had to be cast with the majority.[54] In the event of his objection to the decision of the majority, the President, acting as Viceroy, could in urgent cases order the implementation of the decision. But if the matter in question was not urgent, the King had to be referred to for his opinion thereon.[55] Although the Council was intended to operate the administrative machinery of Ḥijāz, it used to administer the foreign and financial policy of Saudi Arabia as a whole. The Council functioned for twenty-three years; it ceased to exist when the Council of Ministers was created in 1953.

D. <u>The Viceroy (al-Nā'ib)</u>

In January 1926, after he had established himself in Ḥijāz, King 'Abdul 'Azīz appointed his son, Faisal, as His Viceroy there.[56] From this date, Prince Faisal took charge of running the administration in Ḥijāz. By the <u>Fundamental Instructions of 1926</u>, the affairs of the Kingdom of Ḥijāz were assigned to him except for military[57] affairs and some foreign[58] affairs, which were reserved for the King himself. The Viceroy was also accorded the Presidency of the Consultative Council.[59] By the <u>Constitution of the Council of Deputies</u> (1931), the Viceroy was granted the Presidency of this Council, which was the highest administrative institution in the country. In practice the Viceroy directed the whole of the affairs of Ḥijāz.[60] By the above mentioned Constitution he became the Minister for Internal, Foreign, and Military Affairs.[61] However, in the presence of the King in Ḥijāz, Prince Faisal was only to act as the President of the Council of Deputies.[62] The position of the Viceroy was abolished in 1953 when the Council of Ministers was established.

Finally, it is important to note that the <u>Fundamental</u>

Instructions of 1926 served as the constitution of Ḥijāz until its unification with Najd on September 21, 1932.[63] After this date it became clear that these Instructions had to be replaced by new ones in order to deal successfully with the new situation in Saudi Arabia. Hence, the Royal Order of September 18, 1932 (17/5/1351) indicated that new Instructions were to be promulgated,[64] but nothing of this sort has in fact come into existence.

However, the Constitution of Ḥijāz, namely the Fundamental Instructions of 1926 and the amendments thereof may be criticized by some as being undemocratic. But if one considers the circumstances in which this constitution existed and to which we have referred earlier, one may more readily appreciate the stability in the country resulting from its implementation. It may be unwarranted for a student of constitutional law to criticize King 'Abdul 'Azīz for having adopted such a constitution, since the situation in Arabia was at that time not ripe for a more modern one. Perhaps, it is to the credit of King 'Abdul 'Azīz that he succeeded in unifying the country and ruling it according to the system which he had laid down. This was by no means an easy task to accomplish. He had, for example, to avoid even using the word Dustūr (constitution) for fear that it might anger the Najdis. Instead he used the word t'alīmāt (instructions). This shows how cautious the King was and, in fact, he had to be.

Umm al-Qurā, the official newspaper of Saudi Arabia, in reply to the criticism of the Instructions by the Egyptian press, commented as follows: "Any student of constitutionalism in a certain country must take into account the nature and mentality of its environment."[65] On the other hand while the constitutional institutions of the country were not settled, and not well-defined, "the Judicial system has been based on solid institutions ever

since King 'Abdul 'AzIz was able to lay down its foundation in 1927."[66] This we shall examine in detail later, as it is an important concern of this work.

III. THE CONSTITUTION ON THE NATIONAL LEVEL

King 'Abdul 'AzIz spent most of his life in laying down the foundations of the kingdom over which he ruled. He established the administration with himself at its head, but he delegated some powers to his Viceroy in Ḥijāz, a post to which he appointed his son Faisal, as mentioned above. In Ḥijāz, where life was relatively complex, the Fundamental Instructions of 1926 were implemented to meet the demands of the Ḥijāzis, while in the other provinces life had not greatly changed until the discovery of oil in the Eastern Province in 1938 (1357). After this date, and especially after the end of the Second World War, the national income started to grow very rapidly. Revenue obtained from the annual pilgrimage to Ḥijāz became less important to the national income. In virtue of this new financial development, Ḥijāz tended to become less important than it had been in the administrative field.

In this way, new economic, administrative and social changes took place in the whole country. By this time, in 1953, King 'Abdul 'AzIz had become old and ill, and he authorised the Crown Prince, his eldest son Sa'ūd, to whom he had gradually been delegating some powers, to direct the new administration, which began to take on a centralized character. This fact brought about a transfer of the administrative centre from Ḥijāz to Riyadh which from this time became the new administrative capital of Saudi Arabia as it had been the home of the Royal Family, and the heart of the country in the physical sense. On October 9, 1953 (1/1/1373) a royal decree[67] was issued setting up a new administrative

institution called "Majlis al-Wuzarā'", the Council of Ministers. It was presided over by Crown Prince Sa'ūd who then took charge of executive as well as administrative authority over the whole country, since the Council of Ministers was created to be a binding force over Saudi Arabia as a whole.

On November 11, 1953 (2/3/1373), one month after the establishment of the Council of Ministers, King 'Abdul 'Azīz died. He was succeeded by his son Sa'ūd, who, in turn, issued a royal decree on March 17, 1954 (12/7/1373) organizing a new constitution for the Council of Ministers.[68] In this Constitution, the King was to be President of the Council. Later, on August 16, 1954 (16/12/1373) Crown Prince Faisal presided over the Council.[69] The Constitution accorded the Council extensive executive powers in internal and external affairs, (Art. 7). The President of the Council had the authority to supervise all the ministries and administrative departments. But the King, besides being the head of the state, had the power to direct the executive machine and the authority of sanctioning legislation.[70]

As the country had passed the experimental stage in its administration, King Sa'ūd issued a royal decree[71] in 1958 (1377) entrusting the President of the Council, Prince Faisal, with complete authority to lay down and supervise the executive policy of the government in internal and external affairs. The decree called for a revision of the Constitution of the Council of Ministers. This revision came about in the same year by another royal decree.[72] The new constitution grants the Council of Ministers complete authority to lay down the policy of the country in legislative, administrative and executive spheres.[73] But it is to be noted that the legislative issues have to be introduced by royal decree[74] in order to be enforceable. Another limitation of

the authority of the Council is that the President has to conduct the general policy of the country according to the instructions of the King.[75] Thus, the King possesses authority over the whole constitutional machinery of the country. It may be said that the authority of the King has been modified by Art. (23) of the Constitution of the Council, which reads as follows:

> "If His Majesty the King does not approve any proposed legislation submitted to His Majesty by the Council, the proposal has to be returned to the Council, together with the reasons for which the legislation is to be discussed again by the Council; but if no royal decree or order has been issued within thirty days after the proposal has been submitted to His Majesty, the President of the Council will take appropriate action and will notify the Council of it."

However, this action has never yet been taken. The Constitution is not explicit enough as to the delimitation of the authority of the King and that of the President of the Council. As the King himself is now the President of the Council, the distinction between the powers invested in these two positions cannot be ascertained in practice. Despite this, the Council of Ministers has been playing an increasingly important role in legislative, executive and administrative matters.

It would be useful, at this point, after having considered the Constitution of the Council of Ministers of 1958, to mention a serious attempt made in 1960 to lay down a Constitution for the country. It was divided into eight parts:-

(1) The State and the System of Government.

(2) The Basis of Society.

(3) Public Rights and Public Duties.

(4) The King.

(5) The Legislative Power, (al-Sulṭāt al-Niẓāmiyya).

(6) The Executive Power.

(7) The Judicial Power.

(8) General and Provisional Rules.

The primary purpose of this Constitution was conceived as connecting "what has been disconnected between us and our Islamic heritage of consultation and justice."[76] The Constitution did not go beyond the proposal stage. Nevertheless, it defined the powers of the state and the rights of citizens more precisely than any other constitutional document in the history of the country.

Before we end this discussion of constitutional development in Saudi Arabia, it is important to refer to the "Ten Point Programme" announced by Crown Prince Faisal,[77] after he formed a new government on October 31, 1962.[78] This programme was read before the new cabinet on November 6, 1962 (9/6/1382). It states that the time had come for the promulgation of a basic law for the country to be drawn up from the Qu'rān and the Traditions of the Prophet and the acts of his Caliphs, and for the organization of the various powers of the state and their relationships.[79] It also[80] stresses the need for the judiciary to have immunity and a high standing, and for the creation of a supreme judicial Council, and of a ministry of justice to which the office of the States Public Prosecutor would be attached.[81]

Quite a long time has passed since this programme was announced, but its most important point, the promulgation of a basic law, has not yet been fulfilled. Nevertheless, we shall refer to the basic law of Saudi Arabia as it stands.

Some scholars interested in the study of the Sharī'a believe that Saudi Arabian law is basically Ḥanbalī law. Professor

Schacht, for instance, writes "Islamic Ḥanbalī Law is not only the basic law of Saudi Arabia, it is not only valid without restriction, it is even its only law in the full meaning of the term."[82] A close examination of the sources of the Saudi Arabian basic law will show that Professor Schacht's view of the matter is to a great extent inaccurate. King 'Abdul 'Azīz made it clear in The Fundamental Instructions of the Kingdom of Ḥijāz of 1926 that the source of legislation was the Qur'ān, the Sunna, and the Conduct of the Prophet's Companions and their Pious Followers.[83] Without specifying a certain school, the draft constitution of 1960, in King Sa'ūd's era laid down that the Sharī'a was to be the source of legislation. In his "Ten Point Programme of 1962", Faisal, the present King, promised that a basic law drawn up from the Sharī'a would be promulgated.[84] In his speech after acceeding to the throne, King Faisal stated that the Sharī'a was the source of the laws.[85] On many occasions he stated that the Sharī'a is the constitution of the country without reference to any particular school.[86] Moreover, some of the Ottoman laws which do not contradict the Sharī'a, and which were prevailing in Ḥijāz before its annexation by King 'Abdul 'Azīz are still enforceable in Saudi Arabia.[87] The laws introducing reforms, which have been promulgated by edicts are based on the principle of the so-called al-maṣāliḥ al-mursala, the general welfare. (The principle of al-maṣāliḥ al-mursala is probably the most suitable means to meet the constellation of new problems). This principle is applied more frequently by other schools, such as the Malikī, than by the Ḥanbalī. Therefore, it may be said that the laws enforcing various reforms in Saudi Arabia are closer to the Malikī than to the Ḥanbalī Law.

It is true that the substantive law[89] applied by the Sharī'a

courts has in theory been limited to the Ḥanbalī Law since it was enforced in 1928 (1347).[90] Yet its limitation to the Ḥanbalī law is not absolute.[91] The other Sunnī laws are to be referred to when the application of the Ḥanbalī law is liable to cause hardship or contravention of the public interest. Matters concerning endowment (waqf), bequest (waṣiyya),[92] crop sharing (musāqāa), and the lease (ijāra) of palm trees[93] are not necessarily governed by Ḥanbalī law.

It is clear then that the basic law of Saudi Arabia is not limited to the Ḥanbalī law but is drawn up from the general principles of the Sharī'a as interpreted by the Sunnī Schools, supplemented by royal edicts and decisions of the Council of Ministers.

IV. THE DIFFERENT POWERS OF THE STATE

We have now to consider the different powers of the state in Saudi Arabia. We must admit that it is not easy to distinguish between these powers with the exception of the judiciary. The judicial power will be given special attention since it is closely attached to the theme of this study.

A. The Legislative Power

King 'Abdul 'Azīz had total authority over the legislative machine but he delegated some power mainly to the Consultative Council (Majlis al-Shūrā). Nevertheless, this council was not the only authority to enact laws. Some laws and regulations were promulgated without the Consultative Council being even notified.[94] Experience showed that there were other institutions carrying the burden of legislation. The Council of Deputies,[95] for instance, was in 1932 instructed to draw up a constitution for the Kingdom of Saudi Arabia, a law for the succession to the throne, and laws for organizing the system of government.[96] King Sa'ūd and King

Faisal invested the legislative power in the Council of Ministers, which was created in 1953. This Council has a legislative committee composed of six ministers and a legal staff of ten experts.[97] The committee studies and recommends the new legislation which the Council is to introduce. Thus, the Council of Ministers is officially the only legislative institution in the country at present. But there is another institution which has in practice played an important role in the legislative as well as in the judicial sphere; it is the High Judicial Authority (the Presidency of the Judiciary and later the Ministry of Justice). The former carried greater weight than the latter in this respect. As this institution is very important to this study, we shall now examine its legislative capacity.

The Sharī'a entitles the head of state "walī al-'amr" or persons or institutions representing him to draw up the new legislation which the country needs. This method of producing law is called "siyāsa shar'iyya".* This power, however, must be exercised in such a way that the new legislation is not contrary to the Sharī'a, but according to its general principles and its spirit. A person who takes responsibility for drawing up such legislation must be a scholar of the Sharī'a, who is thoroughly informed of its principles. The persons who are best qualified for this position are the 'ulamā', who have staffed the High Judicial Authority. Indeed, this authority has usually been consulted, especially when judicial legislation was to be promulgated.[98] The High Judicial Authority usually opposes any legislation which it believes to be contrary to the Sharī'a.[99] But, if the legislation opposed by the High Judicial Authority does not contradict the Sharī'a, the King or the President of the Council of Ministers may enforce it.[100]

* The principle of legislation within the spirit of the Sharī'a.

However, it seems that the Presidency of the Judiciary has not been willing to encourage the enactment of laws, especially those which concern judicial issues.[101] In 1969, the King, acting as the president of the Council of Ministers, commanded the formation of a commission in which the Presidency of the Judiciary, the Ministry of Interior, and the Ministry of Labour and Social Affairs were represented. The commission was to draw up a new law regarding the treatment of criminal juveniles, before and after they were prosecuted at courts.[102] After the commission had drawn up its decision, the President of the Judiciary made his own decision and circulated it to the courts.[103] That decision has since become the applied law. This kind of attitude of the High Judicial Authority may explain why the government is cautious when introducing legislation, and careful when formulating it. It is sometimes specified in the new legislation that the Sharī'a shall never be violated.[104] It may be introduced by a quotation from the Qur'ān or Ḥadīth (Tradition) or from both, or by stating that the Sharī'a has stressed the importance of the matter which the new legislation is dealing with.[105]

Next to be mentioned is the Office of the Muftī, "Dār al-Iftā'", which is also important in producing legislation in matters relating to the Sharī'a. A typical example is the fatwa issued after the increase in the death-rate caused by traffic accidents in 1959. This fatwa deals with the responsibility of drivers of vehicles involved in accidents.[106] The Office of the Muftī, however, had beem attached to the Presidency of the Judiciary during the tenure of office of Shaykh Muḥammad b. Ibrahim,[107] who died in 1969. However, the office of the Muftī has been transformed into an institution called "idāra al-Buḥūth al-'Ilmiyya wa al-Iftā' wa al-Da'wa wa al-Irshād" (the Office of

*The gist of this fatwa was: That a qualified driver who was able to prove that he maintained his vehicle under reasonable mechanical check, and who was not driving recklessly, could not be held responsible for the accident.

Religious Researches, the Issuing of Fatāwa, Preaching, and Religious Guidance). Parts of the jurisdiction of the Office of the Muftī have also been given to another new body called "Hay'a Kibār al-'Ulamā' (Board of the Grand 'Ulamā'). Nevertheless, both of these two new institutions will probably be as important in the legislative sphere as the Muftī Shaykh Muḥammad b. Ibrāhīm - the strongest 'ālim which Saudi Arabia has ever had.

B. The Administrative and Executive Powers

King 'Abdul 'Azīz, as we have seen, had full power over the administrative and executive fields, but he delegated authority to some statesmen and some institutions such as the Viceroy of Ḥijāz (Faisal), the Crown Prince (Sa'ūd), and the Ruler (Amīr) of the Eastern Province (Ibn Jalawī),[108] and the Council of Deputies and the Council of Ministers of 1953.

A new era of administration began in 1953 (1373) when the Council of Ministers was established. Crown Prince Sa'ūd, who presided over the council, took full responsibility for directing the administrative machinery of the whole country.[109] Centralization took place then for the first time in Saudi Arabia. Since then the Council of Ministers, in particular that of 1958, has been accorded all the administrative and executive powers.[110] These powers have become stronger since Art. (7) and Art. (8) in the Constitution of 1958 were replaced by new articles,[111] which gave the King the Presidency of the Council.

It may, then, be said that the Council of Ministers is now, in practice, the sole institution that possesses administrative power and that supervises the executive organisation, but it must also be borne in mind that the King, at least in theory, has the authority to instruct and direct the Council.[112]

C. The Judicial Power

Generally speaking, the judiciary of Saudi Arabia means the

Sharī'a judiciary because it covers most of the judicial sphere, whereas the semi-judicial tribunals cover only a very small part of the judiciary. While the Sharī'a judiciary is a stable and well-organized system,[113] the semi-judicial tribunals are disparate and unstable, probably with the exception of the Grievances Board (Dīwān al-Maẓālim). The Sharī'a courts were intended to be the only judicial tribunals in the country, but the Sharī'a judges, who were 'ulamā', were reluctant to apply statutes which were promulgated to meet the problems of modern life. The reasons behind their reluctance either to the promulgation, or the application, of statutes may be summarised as follows:-

(a) The promulgation of new laws could, in one way or another, not be in conformity with the Sharī'a, and the enforcement of these laws would therefore violate the Sharī'a. Furthermore, these laws would become substitutes for the Qur'ān and the Sunna, and they would prevent the judges from using their talent in arriving at the appropriate judgements through the application of the principle of al-ijtihād.

(b) The desire of the 'ulamā' to minimize, if they were to allow in the first place, the creation of codified laws. They feared that an expansion in codification could ultimately lead to the adoption of foreign legal principles which were alien to the Sharī'a as had happened in other Muslim countries. The 'ulamā' always bore in mind that the Ottoman codification which began with "tanẓīmāt" had opened the door wide for the adoption of western laws.

(c) Some of the 'ulamā' maintained that a new law or ruling could only be initiated by mujtahidīn, i.e. 'ulamā' who are qualified to make ijtihād (individual legal opinion); that the 'ulamā' so qualified were, if any, very few; that even if they did

not believe in principle in the closing of the gate of ijtihād, they had no alternative but to refer to the work of their predecessors since they themselves were not competent in ijtihād.

This negative response of the 'ulamā' to the needs of the twentieth century necessitated the establishment of some semi-judicial tribunals, and probably resulted in the absence of 'ulamā' from the Legislative Committee of the Council of Ministers.

At an early stage of the history of the Saudi Arabian judiciary, namely in King 'Abdul 'Azīz's reign, there existed the following semi-judicial tribunals:-

(a) The Commercial Council of Jeddah.

(b) The Administrative Council of Yanbu', which was in miniature, a model of the former.[114] However, each of these coumcils had a Sharī'a judge among its members.

(c) The Consultative Council, which was vested with the power to review the decisions of the Commercial Council of Jeddah.[115]

(d) Some tribunals set up to look into cases which the Sharī'a courts were not prepared to examine, such as the customs cases and cases involving tobacco.

The growth of the country's wealth, particularly in the era of King Sa'ūd and King Faisal, made life much more complicated than it had been before. Problems grew simultaneously with the national wealth. Consequently, the body of royal edicts introducing new statutes had to be increased. The attitude of the 'ulamā' in general, and the Sharī'a judges in particular, towards the application of the statutes did not change. As a result of the increasing statutes and this attitude of the 'ulamā', who dominated the Sharī'a judiciary, the necessity of establishing more semi-judicial tribunals was felt. The tribunals took the

form of boards, committees, commissions, or councils. They were, in one way or another, linked with the administrative authorities. However, the Sharī'a courts still have a general jurisdiction over the judicial matters in the country.[116] The Presidency of the Judiciary[117] instructed the Sharī'a courts that they had to decide on any case brought before them because the Sharī'a had a binding jurisdiction over any issue. Indeed, a Sharī'a court may hear a case which, according to statute, lies within the jurisdiction of a semi-judicial tribunal. But the latter cannot decide on an issue which falls within the jurisdiction of the former.[118]

Now we may examine the relationship of the judicial authority to the executive authority or, to be exact, the question of how independent is the judiciary in Saudi Arabia.[119]

Dealing with the independence of the judiciary from the executive does not mean at all that we are talking in terms of the principle of "the separation of powers" as formulated by Montesquieu.[120] Although the doctrine of the separation of powers has been subject to criticism for not being practical in many respects, its value "lies in the emphasis placed upon those checks and balances which are essential to prevent an abuse of the enormous powers which are in the hands of rulers".[121] The importance of this doctrine with regard to Saudi Arabia is that it caused the authorities to elucidate the principles relating to the independence of the judiciary from the executive in Islamic judicial theory and practice. As they have, in determining this, found the concept of this independence, they have also emphasized its importance. This fact is apparent in the wording of the First Chapter of the prospective judicial law, the Law of the Judicial Authority. However, we shall only examine the independence of the judiciary in the context of the non-interference of the

executive officials with the machinary of justice.

According to the Sharī'a both in theory and practice, the head of state is entitled to act as a judge in his realm or to delegate the judicial authority to some of his subjects. The Prophet acted as the judge of the locality of Madīna and authorized some of his companions to take charge of the judicial authority in distant parts of his realm. His Caliphs sometimes deputized persons to decide criminal, as well as civil, cases in Madīna itself.[122]

Since the law of Saudi Arabia was based on the principles of the Sharī'a, King 'Abdul 'Azīz could have set himself up as a judge if he wanted to, provided that he had the necessary scholarly qualifications. In actual fact, he did not exercise any judicial function, probably for the following reasons:-

(a) He was not qualified scholarly to be a judge. (See what has been mentioned earlier about his education).

(b) His great respect for the 'ulamā', who usually have staffed the judiciary, his confidence in their impartiality,[123] and his satisfaction that they were the most qualified persons for the judiciary.

(c) The power of the 'ulamā', who believed that judges had to be from among their own class.

(d) The unwillingness of the King to participate in any judicial activities, since he was more interested in the political and the internal affairs of his realm. Indeed, he gave no indication that he wanted to exercise any judicial functions. One of his most urgent and important schemes was to curb the activities of thieves by the harshest means the law would permit.[124] If he had any desire to exercise a judicial function he would have tried cases relating to theft.

(e) The long history of the independence of the judiciary in Islam.[125]

Although judges were sometimes appointed in the past by the King, and are still appointed by royal edict, the judiciary is absolutely independent.[126] The Saudi Arabian judiciary is probably not less independent than that in the country which most clearly demonstrates the adoption of the theory of the separation of powers - namely the U.S.A. Foreign legal experts who had contact with the Saudi Arabian judiciary admire its independence. For example, Hart, a former U.S. Consul in Dhahran (the centre of Aramco), states that the first factor which caused the Saudi Arabian judicial system to function efficiently "is the absolute incorruptibility and independence of the Sharī'a courts . . . . " [127] Shamma writes that the judges exercise their judicial functions "without interference from the Government ".[128] On the other hand Professor Gershenson quoted in a certain case brought before the federal court in New York that when a lawyer, who had to prove the Saudi Arabian law, failed to do so, he "could only argue that there was no legal system there; that parties there had to go to a dictatorial monarch who decided according to his whim whether such a claim should be redressed."[129] This accoumt of the Saudi Arabian judiciary is not accurate. The King, for instance, is amenable to the appropriate court of his kingdom, even an ordinary one, irrespective of the fact that judges are considered to be his deputies. Indeed, the theory that "the Sovereign can do no wrong"[130] is completely foreign to the Sharī'a which is the Saudi Arabian law.[131] This fact is an important proof of the independence of the Saudi Arabian judiciary.

However, no constitutional document[132] states explicitly that the judiciary must be independent.[133] Its independence has been

achieved and maintained by the absolute supremacy of the Sharī'a, and through the constant practice of the judges in enforcing its rules. Nevertheless, it may not be premature to refer to the fact that the Draft Law of the Judicial Authority[134] states in its First Article: "Judges shall be independent, and there shall be no power over them in exercising their judicial functions except the power of the Sharī'a and the prevailing laws, and no one shall interfere with the judiciary." This draft law is pending the assent of King Faisal, who has already stated in his government's programme in 1962: "We have determined to ... promulgate a law concerning the independence of the judiciary."[135] We may conclude that this draft law will provide for this principle.

Besides the separation of the judiciary from other powers there are certain important measures which help to maintain the independence of the judiciary. These are:- (i) the selection and appointment of judges according to specific standards of conduct, qualification, and experience; (ii) immunity against arbitrary removal and transfer; (iii) immunity against disrespect; (iv) other measures for securing the impartiality of judges.

1. Selection and appointment of judges

The judges in King 'Abdul 'AzIz's era were mostly chosen for their experience, seniority, and religious belief. At present, as the country has academic legal institutes, the judges have to be graduates from one of these institutes. They have to demonstrate a fair intelligence during the period of their study [136] and to have judicial training for one year at least.[137] In addition they must be of highly religious and moral standard. (During their study they are under continuous observation with regard to their conduct, piety, and general attitude towards religion.)

Having fulfilled these requirements, they are then qualified

to be junior judges. The appointment or promotion of any judge is nowadays by royal order issued on the recommendation of the Judicial Council (al-Majlis),[138] which consists of six members. These members are chosen from amongst the judiciaries. They are a president, who is the High Judicial Authority, one member of each of the two Courts of Cassation, and three members of the most senior presiding judges of Grand Sharī'a Courts.[139]

Judges are given financial privileges including high salaries which are not usually granted to administrative functionaries.[140]

Before 1967, judges were appointed by the King or by the President of the Judiciary. However, Shaykh Muḥammad b. Ibrāhīm,[141] the last President of the Judiciary, usually selected his judges without referring to the King. Now they have to be appointed by royal order on the recommendation of the Judicial Council.[142]

2. Immunity against arbitrary removal and transfer

This principle means that a judge must not be removed or transferred by the executive authority on its own initiative, but by a judicial authority independent of the executive.[143] Although the commission of a judge holds less danger to his independence than his removal, it is possible that commission, if abused, could be used to influence him. Thus, modern laws try to immunize a judge against the abuse of commission mainly by vesting the power of making the commission in a judicial authority. In Saudi Arabia, the law of the Judges' Cadre determines that a judge is irremovable. But he shall be pensioned off at seventy years of age; that is to say he stays in office ten years longer than a civil servant. Nevertheless, a judge may be removed for misbehaviour or misconduct,[144] or for a criminal offence of some gravity[145] on the decision of the Judicial Council, passed by a majority of five out of six votes; provided that the decision is given assent by royal

order.[146] A judge may likewise be subject to removal if he shows inability on three successive occasions. Yet, he may appeal to the Judicial Council against the decision determining his inability, within fifteen days of being informed of this decision.[147]

A judge is not subject to transfer or commission, except to a judicial office, and unless decided by the Judicial Council. If he is to be transferred or commissioned to an office outside the judiciary, the Judicial Council must decide this in the above mentioned manner, and the decision must be approved by royal order. It remains to be said that the High Judicial Authority may, in exceptional cases (not specified), commission temporarily a judge to occupy a vacant judicial office, or an office of an absent judge. But it is stipulated that the commission must be (i) to a post which is not lower in rank to the original post of the commissioned judge; and (ii) for a period not exceeding three months per year.[148]

3. Immunity against disrespect

Since judges are the persons who operate the machinery of justice, they must enjoy the maximum respect from individuals as well as from officials. Certain measures are adopted to guarantee their integrity. It is true that there are no well-defined rules relating to their immunity against disrespect, but they may be traced in judicial laws and practice. This will be seen when we refer to contempt of court, and their protection from malicious actions.

(a) Contempt of Court. Contempt of Court may consist of words or actions directed against the judge or the court[149] whether they occur inside[150] or outside[151] the court. They may also be directed against a person inside the court[152] whether, or not, he is involved in the proceedings. Causing noise or disturbance

inside the court is also contempt of court.[153] Contempt may take the form of interference with the proceedings[154] other than by a prerogative order, which will be examined at a later stage. Attempt to delay the proceedings of court[155] is regarded equally as contempt of court. Such a delay may take one of the following forms:-

(i) False[156] or biased[157] allegation.

(ii) Putting a case before a court after it has been finally decided.[158]

(iii) The refusal to appear before court after being summoned.[159]

(b) Protection from Malicious Actions. It is a general proposition of modern law that a judge who is appointed to administer the law should do so under its protection, both independently and freely, without fear of the consequences of his decision. It is for the benefit of the public that a judge must be free to exercise his function. Immunity attaches only to a judicial act. Thus, a judge is liable for an unlawful refusal to hear a case, but not for erroneous judgement. A judge who exceeds, without malice, his jurisdiction is not liable for this act, unless he neglects the order of the High Judicial Authority to restrain his proceedings. No action lies against a judge in respect of his ordinary defamatory words when exercising judicial duties. Nevertheless, a judge is liable for any act of malice, whether made inside or outside his judicial functions. Indeed, immunity is not granted for a malicious or corrupt judge.[160] The law punishes corruption and malice, misconduct and misbehaviour, and neglect of judicial duty, as well as other public crimes. However, any criminal or disciplinary charge or complaint against a judge has to be investigated and decided by the High Judicial Authority.[161]

4. Security of impartiality

The law of Saudi Arabia imposes certain restrictions on a

judge regarding both his judicial function and his private life in an attempt to guarantee his impartiality. A judge, or a member of a court, must not adjudicate a case to which he is a party, or a case concerning his ascendants, descendants, or spouse. Equally, it is generally accepted that he cannot sit to hear a matter to which he would not be permitted to testify, if he were not the judge. As a witness is not permitted to give evidence from which he may benefit in any way, or evidence against his enemy, a judge cannot decide on a matter in which he has some interest, or a matter concerning his enemy. Where an appellate judge has given a decision in a lower court, he must not participate in its review.[162] Judges are not permitted to take out of court any document relating to the case in question.[163] It is forbidden for judges or officials of courts to have private contacts outside the courts with either party, or their representatives.[164] Furthermore, judges are not permitted to take part in any activity which may affect their independence such as assuming a non-judicial office or engaging in business.[165]

Finally, it may be important to mention that, with the exception of the Sharī'a Examining Magistrates of the Grievances Board,[166] the members of the semi-judicial tribunals do not enjoy the kind of immunity granted to the judges of the Sharī'a courts, although some of the former may be of much higher rank. For example, the President of the Grievances Board, who ranks as a minister, does not have the immunity enjoyed by a Sharī'a magistrate. Nevertheless, the members of the semi-judicial tribunals are independent in exercising their judicial functions. (This will be illustrated in the Chapter on "Appeal".)

References and Comments

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3. Ibid, pp. 320-321.
4. Al-Manār, Cairo, Part 5, Vol. XXI, August 26, 1919, p. 235.
5. Al-Manār, part 1, Vol.XXVII, April 13, 1926, p. 4.
6. Al-Qibla, Mecca, July 17, 1918 (Shawwāl 9, 1336).
7. Al-Manār, part 1, Vol. XXVII, April 13, 1926, p. 14.
8. Al-Manār, part 7, Vol. XXIV, July 14, 1923, p. 584.
9. Al-Rāf'I, A. "Sā'a ma' al Malik 'Abdul 'Azīz", see al-Manār, part 3, Vol. XXVII, June 11, 1926, p. 273; See, an interview with the President of the Judiciary, Ibid, p. 276.
10. Ijtihād means independence in forming a legal opinion based on the original sources of the Sharī'a.
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12. Comcerning the development of the Ḥanbālī School, see (in English), 'Abū Sulaiman, 'A.I., The Role of Ibn Qudāma in Hanbalī Jurisprudence, (thesis), 1970, pp. 207-215; 'Alī, M.I.A, Social Responsibilities of the Individual and the State in Saudi Arabian Law, (thesis), 1971, pp. 31-37.
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17. Ḥamza, p. 28.
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20. The Fundamental Instructions of the Kingdom of Ḥijāz (1926), art. 6.
21. See the Fatwa in 'Ajlānī, M., Tārīkh Mamlaka fi Sīra Za'īm: Faisal, 1968, p. 211.
22. The letter sent to the author from Shaykh Ḥasan Āl-al-Shaykh (Minister of Education) concerning his father Shaykh 'Abdulla b. Ḥasan, dated May 24, 1971, appended together with a biography of Shaykh 'Abdulla, (the first imām of the Settlement of "al-Arṭāwiyya", written by Shaykh 'Abdul Raḥmān b. 'Abdul Laṭīf Āl-al-Shaykh.
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24. Armstrong, p. 165.
25. Ḥamza, p. 27.
26. Armstrong, pp. 265-266.

27. See the Fatwa in, Wahbah, pp. 296-297.
28. Armstrong, pp. 198-199.
29. Wahba, pp. 300-302.
30. Ibid, p. 146.
31. Ibid., p. 152.
32. Ibid., p. 269.
33. Ibid., p. 271.
34. Ibid., p. 269.
35. See, Ibid, pp. 270-276.
36. Ṣādiq, pp. 24-25.
37. Ḥamza, p. 86.
38. Art. 2.
39. Art. 5.
40. Arts. 7-8.
41. Art. 9.
42. Arts. 28-42.
43. Ṣādiq, p. 23.
44. Maḥmasānī, Ṣ., al-Awḍā' al-Tashrī'iyya wa al-Qaḍā'iyya fi al-Bilād al-'Arabiyya, Beirut, 1962, p. 349.
45. Ibid., p. 349.
46. Ḥamza, p. 103.
47. Yamānī, A.Z., "Nizām al-Ḥukm fi al-Mamlaka al-'Arabiyya al-Sa'ūdiyya", Majalla al-Jāmi'a, Riyadh University, 1960, Vol. 3, p. 122.
48. The Law of the Consultative Council of 1927, art. 14, quoted in Ḥamza, p. 105; the Law of the Consultative Council of 1928 (1347), Art. 12, quoted in Ḥamza, p. 107.
49. Yamānī; p. 121.
50. Solaim, S. 'A., Constitutional and Judicial Organization in Saudi Arabia (thesis), 1970, p. 35.
51. Umm al-Qurā, August 12, 1927 (14/2/1346).
52. About its text, see, Umm al-Qurā, January 1, 1932 (7/9/1350).
53. Constitution of the Council of Deputies, art. 1.
54. Ibid., art. 6.
55. Ibid., art. 7.
56. 'Ajlanī, p. 133.
57. Fundamental Instructions (1926), art. 27.
58. The Department of Foreign Affairs was divided into four Sections: Political, administrative, legal and consular. This department was directly connected with the Royal Court, but it carried out the orders of the Viceroy in connection with the administrative and consular sections. (The Fundamental Instructions, arts., 17-19).

59. Ibid, arts. 28, 31.
60. Constitution of the Council of Deputies, 1931, arts. 16-17.
61. Ibid, art. 3.
62. Ibid, arts. 2, 21.
63. Ḥamza, p. 86.
64. Art. 6, quoted in Ḥamza, p. 95.
65. Umm al-Qurā, October 15, 1926.
66. See, Solaim, p.p. 6, 25.
67. R.D. No. 5/19/1/4288 of 1/2/1373 (1953).
68. Ṣādiq, p. 55.
69. R.D. No. 5/20/1/6498.
70. Yamānī, p. 121.
71. No. 37 of May 22, 1958 (2/2/1377).
72. No. 38 of 22/10/1377 (1958).
73. Constitution of the Council of Ministers of 1958, art. 18.
74. Ibid, art. 19.
75. Ibid, art. 44.
76. Ṭalāl b. 'Abdul 'Azīz, Risāla ilā Muwāṭin, p. 9, Quoted in Solaim, p. 71.
77. He is now the King of Saudi Arabia.
78. Gaury, Gerald de, (Appendix), p. 147.
79. Quoted in Gaury, (Appendix), p. 148.
80. Ibid, pp. 148-149.
81. The Council will be set up when the "Law of the Judicial Authority" is enforced.
The Ministry of Justice was established in 1970, The Supreme Judicial Council and the Office of the Public Prosecutor will be established when the Law of the Judicial Authority, which is in a final stage of study by the Council of Ministers, is approved by the King.
82. Schacht J. "Islamic Law in Contemporary States." The American Journal of Comparative Law, Vol. VIII, 1959, p. 136.
83. Art. 6.
84. See the programme, in Gaury, (Appendix 1), pp. 147-151.
85. 'Assa, A., Mu'jiza fawq al-Rimāl, Beirut, 1966, p. 148. For further information, see, Sa'Id, p. 162.
86. King Faisal's speech at the ceremony made in his honour in 1967 by the King of Belgium, quoted in Umm al-Qurā, June 2, 1967 (24/2/1387).
87. See, R.W. No. 1166 of 27/12/1345 (1927).

88. Where there is a problem which is not determined by the Qur'ān or the Sunna, not agreed upon by the consensus (ijmā') of the authorities, ijtihād (individual legal oponion) is then to be referred to. The principle of ijtihād may easily be achieved by applying the principle of al-maṣālih al-mursala.

89. Since most aspects of the adjective law and administrative rules are not strictly definde by the Sharī'a, King 'Abdul 'Azīz and his judiciaries were able to incorporate, to a certain degree, from the Ottoman system which existed in the cities of Ḥijāz.

90. The Decision of the Judicial Commission, No. 3 of 7/1/1347 (1928), determined that judges had to refer to two Ḥanbalī commentary books when deciding upon a matter. These were: (i) Sharḥ Muntahā al-Irādāt, by al-Bahūtī and (ii) Kashshāf al-Qinā' 'an Matn al-Iqnā', by al-Bahūtī. Another two Ḥanbalī commentaries were substituted for the former; they were: al-Rawḍ al-Murbi' bi Sharḥ Zād al-Mustaqna' of al-Bahūtī, and Manār al-Sabīl fi Sharḥ al-Dalīl of Ibn Ḍuwayyān. The more extensive Ḥanbalī books were to be consulted if the case pending examination had no adequate ruling in the former ones. There were four more books which were generally recognized as authoritative. These were: (i) al-Iqnā', by al-Ḥajjāwī, (ii) Muntahā al-Irādāt, by al-Futūḥī, (iii) al-Mughnī, by Ibn Qudāma, M., and (iv) al-Sharḥ al-Kabīr of Ibn Qudāma, S. (See, Ḥamza, p. 197).

91. Indeed, in practice, the judges do not rigidly confine their rulings to the Ḥanbalī opinion, but they may occasionally exercise their own discretion. By doing so they are applying the principle of ijtihad. (See, Abū Sulaiman, pp. 249-251; 'ALI, pp. 54-55). Yet, the Ḥanbalī law is officially and, to a great extent in practice, still the law applied by Sharī'a courts. Moreover, in controversial or serious cases, the judges usually refer to Sharḥ Muntahā al-Irādāt, and to Kashshāf al-Qinā'.

92. The Decision of the Judicial Commission, sanctioned by the King on 30/12/1348 (1930).

93. H.W. No. 5/9/2 of 13/7/1353 (1934).

94. Yamānī, p. 121.

95. R.O. No. 2716 of 17/5/1351 (1932), quoted in Ḥamza, p. 95.

96. None of these laws came into being, except the last.

97. Nafisa, M.A., Law and Social Changes in Saudi Arabia: Directive Legal Rules, (thesis), 1972, p. 16.

98. See, e.g., R. D. of 4/2/1346 (1927).

99. A typical example of this was the objection of the Presidency of the Judiciary to the Law of the Guardianship Court (al-Majlis al-Ḥisbī) [C.D., D. No. 35 of 16/5/1336 (1937)] Furthermore, an American life insurance company in Saudi Arabia was abolished on the order of the President of the Judiciary. [L. of C.M. to M.C.I. No. 2190 of 27/10/1389 (1969)]

100. L. of P.K.O. to P.C.D. No. 99/2/2 of 20/1/1355 (1936).

101. See, L. of P.J. to M.I. No. 1290/1 of 7/7/1389 (1969).

102. L. of P.C.M. to M.I. No. 12812 of 26/7/1387 (1967).

103. L. of P.J. to M.I. No. 526/1 of 16/3/1389 (1969).

104. See, e.g., Law of Companies, the Memorandum introducing the Law, R.D. No. M/6 of 22/3/1385 (1965).

105. See, e.g. Law of the Co-operative Society, the Code, p. 13.

106. Fatwa No. 383 of 7/3/1379 (1959). The text of the Fatwa is enclosed in L. of the Mufti to the King No. 1725 of 24/12/1380 (1961).

107. H.O. No. 19746 of 22/9/1379 (1959).

108. Lipsky, G.A., Saudi Arabia, New Haven, 1959, p. 126.

109. The Constitution of the Council of Ministers of 1953, arts. 7-8.

110. The Constitution of the Council of Ministers of 1958, art. 18.

111. 'Ajlānī, (footnotes) p. 265.

112. The Constitution of the Council of Ministers of 1958, art. 44.

113. Lipsky, p. 120.

114. Maḥmaṣānī, p. 360.

115. L. of P.K.O. to Vic. No. 2620/1366 of 22/10/1351 (1933).

116. H.O. to M.C.I. No. 21900 of 27/10/1379 (1960); H.O. to M.I. No. 3829 of 24/2/1388 (1968). See also, al'AmūdI, "al-Tanẓim al-Qadā'I fi al-Mamlaka al-'Arabiyya al-Sa'ūdiyya", a lecture at King 'Abdul 'AzIz University (Jeddah) on 8/7/1388 (1968).

117. C. No. 1849/3/M of 14/6/1385 (1965).

118. See, "Governmental Proclamation", Umm al-Qurā, 29/2/1344 (September 17, 1925); Law of Administrative Council [C.C.D. of 19/7/1352 (1933)], Chap. II, art. 2; C.M., D. No. 1 of 30/12/1391 (1972).

119. It may be worth mentioning that there has been no capitulation in Saudi Arabia. (Hart,T.B., "Application of Hanbalite and Decree Law to Foreigners in Saudi Arabia", George Washington Law Review, xxii, December 1953, p.p. 165, 169; Shāwī, M.T., Muḥaḍarāt fi al-Tashrī' al-Jinā'I fi al-Duwal al-'Arabiyya, Cairo, 1954, pp. 37-38; 'Assa, pp. 112-113.) It is true that Saudi Arabia has some legal treaties and conventions with other countries (see, Solaim pp. 131-132), but this is inevitable for a country of this century. For further information see, (C.C., D. No. 60 of 17/3/1358 (1939); L. of the British Commissioner in Saudi Arabia to F.M. No. 39 (829/1283/10) of April 8, 1939 (30/2/1359); M. of F.M. to Vic. No. 153/2/19 of 13/3/1359 (1940); L. of P.C.M. to G.B. No. 1612 of 19/1/1383 (1963); L. of F.M. to M.I. No. 31/10/12995/3 of 23/11/1383 (1964); L. of F.M. to M.I. No. 22/5/30/11158 of 2/9/1389 (1969).

120. Some writers maintain that the Islamic judiciary had known the independence of the judiciary one thousand years before Montesquieu formulated his theory. (Arsilān, M.S., al-Qaḍā'

wa al-Quḍāt, Beirut, 1969, p. 39).

121. Wade, E.C.S. and Bradley, A.W., Constitutional Law, London, 1965, p. 22.

122. Ḥasan, I.H., Tārīkh al-Islām al-Siyāsī, Cairo, 1948, Vol. I, p. 378.

123. L. of King 'Abdul 'Azīz to his son Faisal (the Viceroy in Ḥijāz) of 3/4/1349 (1930).

124. Lipsky, p. 124; Mutwallī, 'A., Mabādī' Nizām al-Ḥukum fi al-Islām, Cairo, 1966, pp. 403-404.

125. Ḥasan, vol. I, p.p. 377, 379, 380; Ḥasan, I.H., and Ḥasan, al-Nuẓum al-Islāmiyya, Cairo, 1962, p.p. 275, 276, 279.

126. In this respect, the Saudi Arabian judiciary is, to a large extent, similar to the English judiciary.

127. p. 172.

128. Shamma, S., "Law and Lawyers in Saudi Arabia", International and Comparative Law Quarterly, XIV, July 1965, p. 1035.

129. Gershenson, Milton, M., "Fasten Your Seat Belt and Know Your Travel Law", Worldwide P. and I. Planning, March/April, 1969, p. 35.

130. In this matter the Saudi Arabian judiciary differs fundamentally from its English counterpart.

131. Shamma, ibid, pp. 1034-1035.

132. The "Ten Point Programme of 1962" of Faisal stresses the necessity for the independence of the judiciary.

133. The Law of Administrative Governors and Councils (Art. 15) states: "It is prohibited that the governor may interfere in judicial affairs ..." The Law of Regional Governments (Art. 10) determines that governors or their assistants must not interfere with the judicial functions of judges or try to influence them in any way.

134. Niẓām al-Sulṭa al-Qaḍā'iyya.

135. The Third Point of the Programme.

136. See The Judges' Cadre, R.D. No. M/1 of 12/1/1387 (1967) art. 2.

137. Ibid, art. 3.

138. Ibid, art. 18.

139. The function of the Judicial Council is determined by the "Judges Cadre", arts. 15-16.

140. Durayb, S., "brief report on the judiciary", 1972. As to the amount of judges' salaries, see the "Judges' Cadre", Appendices.

141. Baroudi, George, "Sharī'a Law of Islam", Aramco World, November/December 1966, p. 30.

142. Judges' Cadre, art. 18.

143. Shāwī, M.T., Muhādarāt fi al-Mabādi' al-Asāsiyya li al-Tanẓīm al-Qaḍā'ī fi al-Bilād al-'Arabiyya, Cairo, 1957, p. 37.
144. Judges' Cadre, art. 12.
145. See, ibid, art. 26; Law of Civil Servant (Niẓām al-Muwaẓẓafīn al-Āmm) (1958/1377), art. 85.
146. Judges' Cadre, art. 12.
147. Ibid, art. 19.
148. Ibid, art. 20.
149. See, P.P. v. al-'Azīb, M.C., (al-Ḥasā'), D. of 1388 (1969).
150. C.C., D. No. 252 of 22/4/1350 (1931).
151. C.C., D. No. 40 of 9/2/1352 (1933).
152. Gharīb v. Bāḍī, F.M.C. (R), D. No. 191 of 1385 (1965).
153. Law of 1936, art. 114; Law of 1952,(A), art.74.
154. Law of 1938, art. 280; Law of 1952 (B), art. 256.
155. L. of King 'Abdul 'Azīz to Vic. No. 67/2/6 of 14/2/1355 (1936).
156. Ibid.
157. L. of P.C.M. to M.I. No. 17993 of 11/7/1383 (1963).
158. P.J., C. No. 82/M/T of 2/7/1389 (1969).
159. L. of P.K.O. to CCC. No. 8/15/842 of 19/8/1368 (1949); R.O. to A.G. (Shaqrā) No. 15841 of 16/5/1375 (1955).
160. See, P.J., D. No. 81 of 26/2/1359 (1940); L. of P.K.O. to Vic. No. 33/1/6 of 12/4/1359 (1940); L. of P.C.M. to P.J. No. 11951 of 13/5/1384 (1964).
161. See, e.g. Law of 1931, art. 36; Law of 1952 (B), art.21; M.J., D. No. 1008 of 8/9/1390 (1970).
162. See, e.g. Law of 1952 (B), art. 31; Regulations for the High Judicial Committee, art. 6.
163. See, e.g. Instructions of 1967, art. 29.
164. Law of 1938, art. 280; Law of 1952 (B), art. 256.
165. A.G. of Najrān v. Judge al-Janūbī, G.B. Registry, 1375 (1955-56), vol. I, p. 1. For further information, see the "Draft Law of the Judicial Authority", art. 58.
166. C.M., D. No. 91 of 4/4/1390 (1970).

Chapter Two

CRIMINAL JUDICIAL INSTITUTIONS

I. THE SHARĪ'A COURTS

The judicial reforms undertaken by the late Ottomans did not apply to Ḥijāz because of its special religious position.[1] During the period of Ottoman rule in Ḥijāz there was a chief judge, who was a Ḥanafī, and three deputy judges representing the other Sunnī schools.[2] The fact that the judiciary in Ḥijāz was Islamic made it easy for the Hashemite King, Ḥusayn, as well as for King 'Abdul 'Azīz who came to power after him to adopt a similar judicial system. Indeed, the judiciary then existing in Ḥijāz, which was Ottoman in character, was not changed by King 'Abdul 'Azīz until he was in full control of Ḥijāz in 1926. In that year he established in Mecca the Presidency of the Judiciary (Ri'āsa al-Qadā') and the Sharī'a Court (al-Maḥkama al-Shar'iyya). The former was the High Judicial Authority, and the latter was an interim court, which was replaced in 1927 by three courts, as we shall see below. The Presidency of the Judiciary at that time was headed by a Wahhābī jurist ('Ālim) called 'Abdullah b. Bulayhid. The Sharī'a Court was composed of:-

(a) A chief judge, who was a Ḥanafī.

(b) Two first deputy judges, a Mālakī and a Shaf'ī.

(c) A second deputy judge, who was a Ḥanbalī.[3]

Thus, all the Sunnī schools were represented in the court in order to cover cases involving the followers of the four Sunnī schools, who constituted the vast majority of the inhabitants of Mecca. The Ottoman influence is seen in its composition.

The establishment of the judicial institutions in this manner did not last for very long. The judiciary was re-constituted by the Law of 1927 concerning the organisation of the Sharī'a courts.[4] By this law, King 'Abdul 'Azīz laid down solid foundations for the

judiciary, not only in Mecca, but in Ḥijāz as a whole. Subsequently, this judicial system proved itself to be the most suitable judicial system for the whole of Saudi Arabia. The laws which followed the Law of 1927 did not bring any drastic changes, but created additional institutions, and altered or added some procedural rules in response to the normal evolution in the economic, social, administrative, and educational circumstances of the country. All types of courts of first instance were created by this law, except the Third Magistrate's Courts, which were established in 1952,[5] and later abolished in 1971.[6]

In the system of Sharī'a Courts, there are no purely criminal courts. All the courts, which are empowered to hear criminal cases, also settle civil disputes. Thus, we shall refer briefly to the civil jurisdiction of these courts, in order to form a clear picture of the Courts with which we are dealing. These courts are the First Magistrate's Courts, the Second Magistrate's Courts, the Magistrate's Courts, the Grand Sharī'a Courts, the Sharī'a Courts, the Committee of Review, the Courts of Cassation, and the Supreme Appellate Authority.

A. The First Magistrate's Courts

The first First Magistrate's Court (Maḥkama Musta'jala Ulā) in Saudi Arabia was established in Mecca in accordance with the Law of 1927. It set the pattern for the rest of the First Magistrate's Courts, which were instituted only in the important cities of Saudi Arabia.

A First Magistrate's Court is empowered to hear all crimes which fall within the Sharī'a judiciary, except the following:-

(a) The ḥadd of illegal sex relations (zinā).[7]

(b) The ḥadd of theft (sariqa).

(c) Highway robbery (qaṭ' al-ṭarīq, or ḥirāba)

(d) Apostasy from Islam (ridda).

(e) Crimes of retaliation (qiṣāṣ).

Thus, this type of court deals with all crimes of ta'zīr, and crimes of the ḥadd of intoxication (sukr) and defamation (qadhf).[8] It decides also some minor civil disputes, not involving a sum of more than approximately £30.[9] In addition, it settles cases concerning the compensation for corporal injury (arsh) which does not amount to more than one tenth of the whole blood-money.[10]

These First Magistrate's Courts are competent to hear cases involving urban dwellers only.[11]

B. The Second Magistrate's Courts

The first Second Magistrate's Court (Maḥkama Musta'jala Thāniya) was established in Mecca in 1927, like the first First Magistrate's Court.[12] It was a pioneer for the other Second Magistrate's Courts, which were set up side by side with the First Magistrate's Courts in the important cities.

A Second Magistrate's Court decides the same type of cases lying within the jurisdiction of the First Magistrate's Courts,[13] provided that both parties are Bedouins. In addition, it settles some civil cases among Bedouins, which concern non-serious personal, commercial, and agricultural disputes on bequests, guardianship and inheritance.[14]

The jurisdiction of this type of court may extend to include an urban dweller who is a party in a minor dispute with a Bedouin.[15]

C. The Magistrate's Courts

These courts were created by the Law of 1927. Two Magistrate's Courts, one in Jeddah and the other in Madīna, were established. Subsequently, Magistrate's Courts were established in towns which had no other type of magistrate's courts to deal with cases falling within the jurisdiction of the magistrates. Thus,

a Magistrate's Court is empowered to hear cases, criminal or civil, involving both urban dwellers and Bedouins.[16] But, it is to be noted here that the Magistrate's Court of Madīna was disqualified in 1936 by a royal will[17] of hearing criminal cases pertaining to the inhabitants of Madīna. However, the detailed Law of 1938 did not reaffirm this disqualification. Therefore, it may be concluded that the Magistrate's Court of Madīna has regained its full competence as a Magistrate's Court.

Comparison between the magistrate's courts

All three types of magistrate's courts have only one judge.[18] These courts hear cases which need a speedy handling because they are not so serious as to be dealt with by a Grand Sharī'a Court, or a Sharī'a Court.

Of the three types, the First Magistrate's Courts have the smallest jurisdiction. Next come the Second Magistrate's Courts. The Magistrate's Courts have the greatest jurisdiction, since they are competent to hear all kinds of cases decided by the First and Second Magistrate's Courts. As to the number of cases heard, the First Magistrate's Courts have the largest number. This may be due to the fact that the First Magistrate's Courts are constituted in the most heavily populated cities, which have a higher proportion of crimes. The jurisdiction of these magistrate's courts has been slightly reduced, since some cases which used to be tried by them have been allocated to semi-judicial tribunals. However, they still hear the vast majority of crimes.

In 1927, the judgements of the Magistrate's courts were made liable to appeal. But if an appellant failed to establish that the judgement was contrary to the Sharī'a, the court had the option of refusing to commit the case for appeal.[19] This rule was abolished by Article 33 of the Law of 1931, which determined that a

criminal judgement of a lower court was to be automatically committed for review. The Law of 1936 basically followed this Article, but it determined that a conviction of a crime of ta'zīr[20] based on an express confession was not appealable.[21] Nevertheless, the Law of 1952(A) does not distinguish between a judgement based on an express confession and a judgement based on any other kind of evidence. In other words, all decisions decreed by a magistrate's court are appealable. In 1954, a royal order[22] repealed the right of appeal, but this order was not applied by all courts until 1957.[23] Hence, a judgement of a magistrate's court was officially inappealable. This fact was confirmed by Article 5 of the Instructions of 1962.[24] But when The Instructions of 1967[25] were promulgated, appeal against the judgements of the magistrate was practically restored. The exceptions to this were:-

(a) When the sentence was of no more than forty lashes or ten days imprisonment.

(b) When the judgement concerned a sum of no more than SR500 (£50), or its equivalent.[26]

D. The Grand Sharī'a Courts

The first Grand Sharī'a Court (Maḥkama Shar'iyya Kubrā) was established in Mecca in accordance with the Law of 1927,[27] and was to set the pattern for the remainder of the Grand Sharī'a Courts, which have since been constituted in the important cities in Saudi Arabia.

The judges of the Grand Sharī'a Court of Mecca were at this time three in number.[28] By 1971, they numbered seven.[29] With the exception of the Law of 1927, the Judicial Laws do not determine the number of judges of a Grand Sharī'a Court. It is usually determined according to need. For instance, the Grand Sharī'a Court of Riyadh, the capital, has eleven judges, while that of al-Dawādmī, a small

city, has only three.[30] This shows the great difference in the number of judges.

A Grand Sharī'a Court has competence to hear all cases which do not fall within the jurisdiction of magistrate's courts, and which are tried by the Sharī'a judiciary. As a magistrate's court hears a comparatively small proportion of civil and a large proportion of criminal cases, so a Grand Sharī'a Court hears a large proportion of civil cases and a small proportion of criminal cases. It settles most of the civil disputes, but it tries very few crimes. These crimes are:-

(a) The crimes of the ḥadd of zinā,[31] highway robbery, and apostasy from Islam.

(b) The crimes of retaliation.[32]

Besides that, Grand Sharī'a Courts were entitled, in 1931 (1350), to review criminal judgements passed by magistrate's courts sitting in the same venue as the former.[33] But the Grand Sharī'a Court of Mecca was not accorded such appellate power before 1954.[34] However, the Grand Sharī'a Courts had ceased to act as appellate authorities by the end of 1957.[35]

Here, the question may arise as to whether the judgements of a Grand Sharī'a Court itself have been appealable. In answering this question, we have to distinguish between civil and criminal cases as follows:-

(a) Most of the civil cases which were within the competence of Grand Sharī'a Courts were appealable from the time these courts were established in 1927[36] until 1954.[37] Still, appeal against the judgements passed by Grand Sharī'a Courts was restored in 1962,[38] but in 1967, such an appeal against civil judgements of minor cases was annulled.[39]

(b) As to criminal cases, although original judgements were

made final in 1954 and in 1957, criminal judgements by SharI'a Courts continued to need approval by the President of the Judiciary, as they had prior to this date. This measure, however, may be classified as a kind of appeal, especially since the President was to study thoroughly the cases and approve, or reverse, the sentences.

In 1962, the Courts of Cassation were set up, and the criminal judgements of Grand SharI'a Courts were made liable to appeal.[40]

Thus, all criminal judgements by the Grand SharI'a Courts have been appealable, in one way or another, since the establishment of the SharI'a judiciary in 1927.

From all that has been said, a Grand SharI'a Court used to have both jurisdiction of first instance (as some of its judgements were appealable, particularly the criminal ones) and appellate jurisdiction (since it reviewed, at one time, the criminal judgements passed by a magistrate's court). Now, it has only an original jurisdiction - that means it is a court of first instance.

E. The SharI'a Courts

According to the Law of 1927, two SharI'a Courts[41] were to be established, one in Jeddah, and the other in MadIna.[42] Subsequently, this kind of court began to spread in Saudi Arabia, so much so that their number is now greater than that of any other kind of court.

The number of the judges of each SharI'a Court has never been determined by law but has been fixed according to need. The only exception was the Law of 1927 which determined that SharI'a Courts of Jeddah and MadIna were to consist of two judges, a first (chief) judge, and a second (deputy) judge.[43]

Before the establishment of modern administrative systems in Saudi Arabia, the SharI'a Courts were classified into two kinds:-

(a) Organized courts which occupied a permanent building and worked according to fixed office hours, such as the courts of

Jeddah and Madīna.

(b) Courts in towns outside Ḥijāz, and in villages in all provinces. These usually consisted of one judge, who heard cases in any convenient place, even in his home or in the market or in the building of the office of the governor, and at any convenient time, whether during the day or night.[44] At the present time, every court, even if it is in a village, occupies a building called "the Court" (al-Maḥkama), and cases are decided during set office hours.

A Sharī'a Court is empowered to hear:-

(a) All cases decided by a Grand Sharī'a Court,[45] since a Sharī'a Court is constituted in an area where no Grand Sharī'a Court exists.

(b) All cases adjudged by a magistrate's court in an area where no magistrate's court exists.[46] There has been only one exception to this rule in the history of the Saudi Arabian Judiciary. From 1936 to 1938, the Sharī'a Court of Madīna was entitled to try the criminal cases of the towns people which were allocated, originally, to the Magistrate's Court.[47]

(c) All functions falling within the competence of the Public Notary (Kātib al-'Adl),[48] where no office of Public Notary in the jurisdiction of the Sharī'a Court exists.[49]

(d) The jurisdiction of "Bayt al-Māl",[50] where no such office exists within the Sharī'a Courts venue.[51]

It is to be concluded that a Sharī'a Court may have a large criminal jurisdiction if there is no magistrate's court situated in its venue, but if there is a magistrate's court, the criminal jurisdiction of the Sharī'a Court will be very limited. Thus, a Sharī'a Court with a single judge in a village, which does not have a magistrate's court, exercises much greater jurisdiction than a

Sharī'a Court in a big city, where a magistrate's court exists.

F. The Committee of Review

The words "tamyīz" and "tadqiq" mean the same thing. They have been used in the judicial laws and regulations, to mean reviewing a judgement of a court of first instance, by an appellate authority, in order to ensure:-

(a) That the judgement conforms to the rules of the Sharī'a, and if not, the court is to be informed of the right judgement as to the case in issue, and instructed to avoid the error in future.

(b) That the sentence, if left to the discretion of the court, is consistent with the general spirit of the Sharī'a.[52]

The power of review (tamyīz or tadqīq) was first invested in the Presidency of the Judiciary in 1927.[53] But in 1931, a special committee attached to the Presidency was accorded the power of review. It was called "The Committee of Review".[54] This committee comprised a president, who was to be the President of the Judiciary,[55] and four members who were, incidentally, the same members of the Presidency of the Judiciary.[56] Although the President of the Judiciary was the President of the Committee, he was only to give his opinion on judicial questions like any other member.[57] The Committee had only one president throughout its existence - he was Shaykh 'Abdullah b. Ḥasan Al-al-Shaykh (1870-1959).[58]

The judgements which had to be reviewed were those concerning civil cases, provided that these were not minor ones.[59] The criminal judgements were not to be reviewed unless they concerned crimes of retaliation (qiṣāṣ),[60] and ḥudūd, excluding the judgements of the ḥadd of intoxication and defamation.[61] However, all criminal cases tried in Mecca were liable to be reviewed by the Committee.[62]

The Committee ceased to exist in 1954, when the original judgements were made final. The reason why these judgements were

made final was to shorten the procedure so that cases would be dealt with in the speediest way possible. Yet, it appears that this measure was not successful in shortening the procedure, as planned, since some parties began to complain to the King or to the High Judicial Authority, who usually considered their complaints. This resulted in inconvenience and waste of time to the administrative and judicial authorities. Consequently, the execution of the judgements was delayed. In order to avoid this inconvenience and delay, the authority executing the judgements, the Ministry of the Interior, proposed to the King in 1961 the establishment of some independent institutions to deal with the review of the judgements, and whose decisions were to be final.[63] The King and the President of the Judiciary approved this proposal and put it into practice by creating appellate institutions in 1962. They were called the Courts of Cassation (Maḥākim al-Tamyīz) or (Hay'āt al-Tamyīz).

G. The Courts of Cassation

There are two Courts of Cassation, one in Riyadh, and the other in Mecca. The first deals with cases decided by the courts of the Central Province and the Eastern Province. The second deals with cases decided by the courts in the Western Province. The number of judges is not fixed by their laws or regulations, but is decided according to need. However, in the Court of Cassation in Riyadh, there were four judges (including the Chief Judge) before 1971, but after that their number rose to six. In the court of Mecca, the number rose from three to six in 1971.[64]

According to Article 5 of the Instructions of 1962, only the judgements of the Grand Sharī'a Courts, and the judgements of the magistrate's courts concerning a trustee of endowment (waqf), a guardian, or an absent person, were appealable to the Courts of

Cassation.[65] This means that the vast majority of criminal judgements were not appealable. Nevertheless, the criminal jurisdiction of these courts was enlarged by the Instructions of 1967, which are now in force. According to these instructions, a decision by a lower court, whether criminal or civil, is appealable, except when:-

(a) It does not involve more than SR500 (£50), or its equivalemt.

(b) It does not inflict a punishment of more than forty lashes or ten days imprisonment.

However, certain decisions are to be committed to the Court of Cassation under all circumstances. These are:-

(a) Sentences imposing mutilation[66] or death.[67]

(b) Convictions against trustees of endowment (waqf), guardians, or "Bayt al-Mal",[68] except if the convicted persons are foreign pilgrims, where decisions of lower courts are to be carried out[69] on account of the fact that the said persons are due to leave the country quickly, so that their cases have to be dealt with expeditiously.

(c) Decisions concerning real estate.[70]

(d) Decisions awarded by default.[71]

(e) Decisions referred by the Judicial Authority, even if originally they were not liable to appeal.[72]

(f) Decisions against juveniles.[73]

Thus, most criminal cases triable by lower Sharī'a courts are liable to appeal.

A comparison between the Committee of Review and the Courts of Cassation shows the following facts:-

(a) Both have the function of affirming or reversing the decisions of courts of first instance.

(b) The Committee of Review was the final judicial authority, except when the sentence imposed death or mutilation, and the fact that the President of the Judiciary was its Chief Judge assured it of this kind of authority. Moreover, King 'Abdul 'AzIz informed the Council of Deputies that if the Committee of Review and the Presidency of the Judiciary differed in their decisions upon a judicial issue, the decision of the Committee was to be considered valid.[74] Although this difference was unlikely to happen, since both the Presidency and the Committee consisted of the same members, it indicated how final were the decisions of the Committee. As to the Courts of Cassation, the matter is not quite the same. The High Judicial Authority (represented at present by the High Judicial Committee) may reverse the decision of the Court of Cassation if its decision is liable to review, such as that concerning death or mutilation. Thus, it may be concluded that the Committee of Review used to have greater power over the judgements of original courts than the Court of Cassation.

H. The Supreme Appellate Authority

1. The President of the Judiciary.

Having examined the appellate institutions in Saudi Arabia, it is necessary to deal with the supreme appellate authorities which the judiciary has known. This means that we have to refer now to the Presidents of the Judiciary. The first President was Shaykh 'Abdullah b. Bulayhid,who took office[75] soon after King 'Abdul 'AzIz occupied Ḥijāz in 1926. He retired in 1927. In virtue of what has been mentioned at the beginning of this chapter about the judicial situation at that time, one cannot draw a clear picture of the power of the President of the Judiciary during the office of the Shaykh b. Bulayhid.

In 1927, Shaykh 'Abdullah b. Ḥasan succeeded to the Presidency

of the Judiciary.[76] In 1931, he was invested with an appellate jurisdiction to review sentences imposing punishments of a hadd or retaliation (qiṣāṣ) in Ḥijāz and its dependencies, and any criminal judgement decreed in Mecca, no matter how lenient it was.[77] Since 1936, he was empowered only to review sentences of mutilation and death, but he continued to have the power to review any criminal decision given in Mecca.[78] However, the King occasionally referred this type of sentence to the MuftI Shaykh Muḥammad b. Ibrāhīm Al-al-Shaykh, (the most important 'ālim in Najd and the Head of its Judiciary).[79] But after 1950, when Shaykh 'Abdullah was in his eighties and still in office, the King referred cases more frequently to Shaykh Muḥammad b. Ibrāhīm as a final appellate authority.[80] This became apparent after the review of the judgements was repealed in 1954. In 1959, Shaykh 'Abdullah died, and Shaykh Muḥammad b. Ibrāhīm presided over the whole judiciary of Saudi Arabia.[81] In addition to reviewing the sentences of mutilation and death, Shaykh Muḥammad had the power to give the casting opinion, when the members of the Court of Cassation were equally divided on an issue.[82] In November 1969, Shaykh Muḥammad died leaving behind him serious cases pending a final review.

2. The Judicial Commission of 1970.

In January 1970, King Faisal issued a royal order allocating the appellate authority of Shaykh Muḥammad to a Commission situated in Riyadh, and composed of five members. It made its decisions by majority. Its decisions were final - exactly as the decisions of Shaykh Muḥammad.[83] In September 1970, the Presidency of the Judiciary was converted into a ministry, which was called the "Ministry of Justice".[84] Its Minister[85] was in theory accorded the same power which had been allocated to the President of the Judiciary.[86] Yet, in practice, the Minister of Justice has no

appellate power such as that enjoyed by the President of the Judiciary. This fact made the Commission the ultimate appellate authority. However, this Commission lasted only for about one year and in 1971 it was replaced by the new High Judicial Committee (al-Hay'a al-Qaḍā'iyya al-'Ulyā).

3. The High Judicial Committee.

This Committee was set up in January 1971 in Riyadh.[87] It consisted of a chairman and four members. The Chairman is a judge of the Court of Cassation in Riyadh. Two of its members are members of the former Commission, and the other two experts in judicial problems. The High Judicial Committee[88] decides the cases which were pending review by its predecessor, and those which are to be reviewed since it came into existence. Its decisions are taken by majority. Although it is administratively linked with the Ministry of Justice, the Committee is absolutely independent in taking its decisions, which are final. This Committee will continue to function until it is replaced by a new institution called the "High Judicial Council" (Majlis al-Qadā' al-A'Lā).[89] The latest indication is that this Council will probably start functioning in 1973 (1393).

Finally, to complete the picture of the Sharī'a Judicial institutions, one should look at the ad hoc commissions. Such commissions handle only single cases and are then automatically dissolved. The cases which they try are serious and complicated. Their members are selected from the judiciary. They are formed on the order of the King[90] or the President of the Council of Ministers[91] or by the High Judicial Authority.[92] These commissions may act as a court of first instance, whose decisions are appealable,[93] or as an appellate authority.[94] Their procedure is exactly the same as applied by the Sharī'a courts. However, this kind of commission is

formed only rarely.

II. THE SEMI-JUDICIAL TRIBUNALS

A. The Commercial Tribunals

1. The Commercial Council of Jeddah

Although the Commercial Council of Jeddah (al-Majlis al-Tijārī be Jeddah) does not function now, it may be useful to refer to it here. It was set up in 1926 (1345).[95] According to the Commercial Law,[96] the Council was given the following powers:-

(a) To settle disputes among merchants and money changers, and disputes over bills of exchange, trade marks, business partnerships or companies, contracts, and marine questions.[97]

(b) To decide cases referred to it by the King.[98]

(c) To try offences violating the Commercial Law.[99]

(d) To review the decisions of the Administrative Council of Yanbu', when acting as a commercial tribunal.[100]

The Commercial Council of Jeddah consisted of a chairman and seven members, three of whom were honorary members, and the seventh was a Sharī'a judge. They were all chosen for their experience and good religious and moral standing. They had to be at least thirty years old.[101] All of them had to be appointed by the King for a period of two years, but they could be appointed for a further two years.[102]

The decisions of the Council had to be agreed upon by a majority of the members.[103] The decisions were at first appealable to the Administrative Council of Jeddah together with the Chief Judge there as it was determined by Article 556 of the Commercial Law, But after 1933, appeal against them lay to the Consultative Council.[104]

The Commercial Council ceased to exist in 1955, when its

jurisdiction was transferred to the Sharī'a courts.[105] However, the Sharī'a judges were not acquainted with some commercial matters, such as marine disputes over commercial business between Saudis and non-Saudis. The government realized this when a case involving a marine dispute occurred. As a remedy for this problem and for prospective ones, the government set up, in 1957, two commercial committees situated in Jeddah and Dammām. They were to settle disputes between merchants and traders, and marine disputes concerning goods on wrecked ships, or goods transferred from one ship to another, and similar disputes.[106] In 1960, the Ministry of Commerce and Industry was invested with the power to decide commercial questions.[107] Accordingly, committees were set up in this Ministry to hear commercial cases. The operative committees at the present time are the Committees for the Settlement of Commercial Disputes and the Committees for Securities.

2. The Committees for the Settlement of Commercial Disputes.[109]

These Committees were set up in 1967 in Riyadh, Jeddah and Dammām[109] to replace the following committees:-

(a) The Committees for the Ending of Commercial Disputes (Hay'āt Faḍḍ al-Munāza'āt al-Tijāriyya) which were established in 1965, and were empowered to settle commercial disputes and to try offences of violating the Law of Trade Marks,[110] of 1939.[111]

(b) The Committees for the Settlement of Disputes among Companies[112] of 1965, (which were also to try the offences of violating the Law of Companies).[113] The Committees for the Settlement of Commercial Disputes are additionally invested with the power to liquidate companies if they deem fit.[114] Before 1969, the Committees used to try offences of fraud in Securities.

The Committees of the Settlement of Commercial Disputes at first consisted of three members[115] who were legal experts.[116] In

1968, each Committee was composed of two members, who were experts in the Sharī'a, and two members from among the legal experts of the Ministry of Commerce and Industry,[117] but since 1969 it has been composed of only two Sharī'a experts.[118]

The Committees sit only in the evening because their members have a full-time professional occupation. The decisions of the Committees were appealable to the Reviewing Commercial Committee (Hay'a al-Tamyīz al-Tijāriyya), which was composed of the Deputy Minister of Commerce as chairman, and two legal advisors as members. The decision of the Reviewing Committee was final.[119] Nevertheless, this Reviewing Committee was abolished in 1968, and since then, the decisions of the Committees for the Settlement of Commercial Disputes have been final.[120]

The procedural rules applied by these committees are in theory those determined by the Commercial Law of 1931.[121] In practice, the committees also apply, to some extent, the procedural rules followed by the Sharī'a courts,[122] and do not confine their procedure to this Law. This may be due to the following reasons. First, all the members of the Committees are now Sharī'a or former Sharī'a judges, or at least qualified in the Sharī'a.

Secondly, the procedural rules determined by the Commercial Law are fairly similar to those of the Sharī'a.[123]

Thirdly, there are no detailed procedural rules in the Commercial Law. A good example here is that this Law does not specify any measure to be taken if the parties concerned fail to appear, whereas the Law of 1952(A), which is operative in the Sharī'a courts, deals with this matter by dropping the case.[124] Indeed, the Committee for the Settlement of Commercial Disputes of Riyadh has met this particular question, and it applies the Law of 1952(A), exactly in the same way as it is applied in the Sharī'a

courts.[125]

3. The Committees for Securities

In 1968, the jurisdiction over cases concerning fraud in securities was removed from the Committees for the Settlement of Commercial Disputes and was allocated to independent committees, named the Committees for Securities (lijān al-Awrāq al-Tijāriyya). These Committees are three in number, one in Riyadh, one in Jeddah, and the third in Dammām. Each Committee consists of a president and two members, who are chosen from among the legal experts of the Ministry of Commerce and Industry.[126]

In addition to the hearing of cases of fraud in securities, these Committees are empowered to hear cases concerning the violation of the Law of Commercial Agencies (al-Wakālāt al-Tijāriyya) and the Law of Weights and Measures (al-Mu'āyara wa al-Maqāyīs).[127]

The decisions of these Committees are appealed against to the Minister of Commerce and Industry.[128]

Having examined the various commercial tribunals it is clear that the Commercial Council has the widest jurisdiction. Next come the Committee for the Settlement of Commercial Disputes, and last the Committees for Securities. However, it should be pointed out here that none of these three commercial tribunals cover the whole area of commercial disputes. The Sharī'a courts have always been invested with very considerable commercial jurisdiction. If we examine the competence of the Commercial Council, while it was in existence, and that of the Sharī'a courts, we shall find that the Council dealt only with special commercial problems in Jeddah and to some extent in Mecca, whereas the commercial problems in the rest of the country were dealt with by the Sharī'a courts. Moreover, the Sharī'a Court of Jeddah, like other Sharī'a courts, was empowered to hear important commercial questions,[129] and since the

Sharī'a courts had general jurisdiction over all matters the Sharī'a Court of Jeddah could deal with commercial issues brought before it which were also within the competence of the Council. At present the Committees for the Settlement of Commercial Disputes and the Committees for Securities are in no stronger position than that of the Commercial Council when compared with the Sharī'a courts. The Sharī'a courts hear cases which fall within the jurisdiction of these committees, when such cases are referred to them.[130] Although the government intends to make these Committees the only tribunals to decide the questions allocated to them, the Sharī'a courts are too strong to be deprived of their general jurisdiction.[131] However, there is no delimitation between the competence of the Sharī'a courts and between that of these Committees in commercial cases. On the whole, the Committees usually decide cases which are technically rather complicated, whilst most of the cases brought before the Sharī'a courts are not technically complicated.

B. The Grievances Board.

The jurisdiction of maẓālim (grievances) was defined by Muslim jurists as forcing the parties involved in a grievance to yield to justice. Therefore, the person who had this authority, wālī al-maẓālim, was to have the power of a ruler and the education of a judge.[132] He looked into grievances and corruption committed by officials in any position, or even by private individuals. He also had power to expedite the execution of the judgements of judges, and look into the matters falling within the jurisdiction of muḥtasibīn (persons who looked after the public interest) if the execution of their decisions was delayed. Additionally, he decided cases involving personal quarrels or disputes, but by the same procedure followed by judges.[133]

The first Muslim ruler to fix a specific day for looking into his people's grievances was the Umyyad Caliph 'Abdul Malik b. Marwān (646-715). He referred these grievances to his judge, when they were so complicated that they had to be settled by judicial decision. 'Umar b. 'Abdul 'Azīz, another Umayyad Caliph (682-720), was the first Muslim ruler to invest the jurisdiction of mazālim in himself. In this way, he set the pattern for the Muslim caliphs, who dealt personally with their people's grievances. The jurisdiction of mazālim came to an end with the death of the Abbasid Caliph al-Muhtadī (869-870).[134]

The concept of mazālim was adopted by King 'Abdul 'Azīz after his conquest of Ḥijāz. In 1926 he made himself available for hearing grievances against anyone, irrespective of his position. A box for complaints was set up and its key was kept by the King.[135] In 1930 he dedicated two hours every day to look into complaints made by aggrieved persons. These complaints were to reach him, according to their importance,by a visit to the Royal Palace, by telegram, or by mail.[136]

After modern administration had found its way to Saudi Arabia, the mazālim was, in turn, modernized. By the Constitution of the Council of Ministers of 1954,[137] a public institution, called the Grievances Board (Dīwān al-Mazālim), was established and attached to this Council. Prince Musā'ad b. 'Abdul Raḥmān, an uncle of the King, was appointed to be president of the Board. Its being presided over by this important prince gave the Board considerable prestige. This fact was demonstrated in 1955, when a royal decree was issued re-organizing the Board. Since then, it has been an independant institution, presided over by a president with the rank of minister. Its President was directly responsible to the King, who was the highest authority for the Board.[138] However, the power

of the King concerning the Board was transferred to the President of the Council of Ministers, when the Constitution of the Council of Ministers of 1958[139] was promulgated. Since King Faisal succeeded to the throne in 1965, and did not relinquish the post of the Presidency of the Council, he is now the final authority of the Board.

The Board sits in Riyadh and it has a branch in Jeddah. The Board comprises:-

(a) A president.

(b) A deputy president.

(c) A general director.

(d) Legal advisors on Sharī'a, and other legal matters.

Their number was not determined by the Law or by the Internal Regulations of the Board. However, in practice, there has been only one advisor on Sharī'a and on other legal matters.

(e) An unspecified number of examining magistrates, specialized in the matters with which the Board deals, whose number is to be determined according to need.

(f) Clerical staff.[140]

The structure of the Board is now constituted as follows:-

(a) The reviewing Committee, which is in theory composed of the Vice-President of the Board as chairman, (but in practice, the President himself acts as chairman for the Committee); the legal advisors of the Board; some examining magistrates, who may be called in if necessary to take part in the proceedings of the Committee; and a secretary to deal with clerical matters.[141]

(b) The Consultative Committee, which is composed of the legal advisors.

(c) The Sharī'a section.

(d) The section of other legal matters.

(e) The Fiscal section.

Each of these sections consists of competent examining magistrates, who investigate matters related to their own area of specialization.[142]

(f) Some administrative departments.[143]

The Law and the Internal Regulations of the Grievances Board do not explicitly set out the types of cases into which it looks. They only state that it looks into complaints against governmental officials,[144] indicating that the Board is set up to deal only with administrative cases.[145] Besides this, the Board may, in theory, look into a complaint against the judgement of a Sharī'a court on two grounds - first, when the impartiality of the judge is challenged, and second, if the procedure followed by him is alleged to be illegal.[146]

While it is evident that the Board was not intended to be concerned with complaints against individuals, in actual practice it has dealt largely with such complaints.[147] A study of the Board's General Records for the 1950's showed that it dealt with all kinds of complaints, except those against judgements of Sharī'a courts, where the Board decided that it was not an authority to review such judgements.[148] Where a complaint presented to the Board fell within the jurisdiction of a Sharī'a court, but it had not yet been adjudged by it, the former usually referred it to the latter in the form of a suggestion.[149]

The first indication of the limiting of the Board's wide jurisdiction came in 1958, when it was informed by a high order that it should not accept any further complaint involving labour disputes, which were to be decided by a committee attached to the Ministry of Labour and Social Affairs.[150] However, the wide jurisdiction of the Board did not begin to contract considerably

until Prince Musā'ad b. 'Abdul Raḥmān resigned from its presidency in 1960 (1380).[151]

At the present time the Board is the authority which decides on the following matters:-

(a) An application for executing a judgement issued in an Arab country, which is a member of the Arab League, according to the Arab League Agreement Concerning the Execution of Judgements.[152]

(b) Cases concerning government officials or employees, who fail to claim refunds for the expense of their official transportation within the determined period, and claim later that they have a legal excuse for their delay.[153]

(c) Disputes between ministers and business companies in Saudi Arabia.[154]

(d) An appeal by a foreign business establishment operating in Saudi Arabia against a decision withdrawing its licence or liquidating it.[155]

Moreover, the Board is represented at tribunals and on committees, which deal with the following crimes and offences:-

(1) Bribery.

(2) Violations of the Law Concerning the Boycott of Israel.[156]

(3) Illegal wealth of government officials and their dependants.[157]

(4) Military disciplinary offences involving officers of the rank of general amd lieutenant general.[158]

(5) Forgery.[159]

(6) Immoral offences committed by members of the education staff.[160]

(7) Disciplinary offences of civil servants.[161]

A comparison between the period of Prince Musā'ad and the present day shows the following facts:-

(a) In the first period, the Board looked into complaints, whether determined in its Law and Internal Regulations or not, and whether they were concerned with public or private parties. This large jurisdiction was due to the vagueness and brevity of its Law and Regulations, which allowed it power to deal with almost any kind of case except when the case fell within the jurisdiction of the Shar‘I‘a courts. Equally, it is attributed to the fact that it was presided over by Prince Musa‘ad, who was one "of the most intelligent administrators in the kingdom."[162] At the present the jurisdiction of the Board has been greatly limited.

(b) While it formerly examined cases independently, at present other authorities participate with it in the trial of the majority of the cases.

(c) While previously it dealt with cases as an appellate authority as well as an authority of first instance, now it decides cases as an authority of first instance, except when it reviews decisions against foreign business establishments.

(d) In the first period its decisions were more like recommendations. Now they are definitive judgements.[163] However, they have to be approved by the President of the Council of Ministers,[164] except when it acts as an appellate authority, where its decisions are final.[165]

Some writers consider that the Board has been functioning as the council of state does in other countries.[166] Others believe that the Board has a wider jurisdiction than that of the council of state, or even of the high court in other countries.[167]

This view may be an overestimation of the Board, since (i) neither does it possess power to study the legal problems facing the country and suggest new laws concerning such problems, (ii) nor does it have power to review judgements, except those against

foreign business establishments, or have authority over courts. However, the Board has a relatively important role to play in the judicial sphere for two reasons. Firstly, it consists of legal experts in the Sharī'a affairs and in other legal affairs, and this enables it to be a connecting link between the Sharī'a courts and the semi-judicial tribunals. Secondly, it has a comparatively long experience in dealing with legal questions.

Finally, we may here consider briefly the Bribery Committee, which has some attachment to the Grievances Board. This Committee was set up in accordance with Article 17 of the Law of Combating Bribery[168] of (1962). The Committee consists of:-

(a) A president, who is the President or the Vice-President of the Grievances Board.

(b) Two members, one from the Board, and the other is appointed from outside it.

The examining magistrates of the Board deal with cases involving bribes in much the same way as they deal with the cases examined by the Board. The Bribery Committee holds its hearing in the Board Office. Its decision must be ratified by the President of the Council of Ministers.

C. The Customs Committees[169]

According to the Customs Law[170] of 1952, there are eight committees of first instance jurisdiction. The number of their members varies - while some consist of a chairman and four members, others are composed of only a chairman and three members. Each committee has a secretary to undertake the clerical functions. Most members are administrative officials from among the personnel of the customs office, with which each committee is linked.[171] A Customs committee of first instance is entitled to investigate and decide on crimes of smuggling taking place within its area.[172]

Its decisions are appealable to the Appellate Customs Committee.[173]

According to the Customs Regulations,[174] an appellate tribunal, called the Appellate Customs Committee (al-Lajna al-Jumrukiyya al-Isti'nāfiyya), was established. It consisted of:-

(a) A president, appointed from among the officials of the Ministry of Finance, ranking as a general director of ministry.

(b) Two members - one was the General Director of the Public Department of the Ministry of Finance, and the other was a legal adviser from this Ministry.

The President and the Members of the Appellate Customs Committee were appointed by the Minister of Finance. The usual seat of the Committee was in the Ministry of Finance in Riyadh. The Committee was set up to review the decisions of the Customs committees of the first instance. The Committee functioned from 1952 till 1971 when it was replaced by two new appellate committees, one in Riyadh and the other in Jeddah.

The Appellate Customs Committee of Riyadh is empowered to review the decisions of the original committees in the locality of Riyadh, the Eastern Province, and the Northern Borders.

The Appellate Customs Committee of Jeddah has the power to review the original decisions made by the Customs committees in Jeddah, the South, and Tabūk.[175] The members of the Appellate Customs Committee work only part-time.

The decisions of the Appellate Customs Committee must be approved by the Minister of Finance.[176]

D. The Forgery Committee

In 1960, a royal decree[177] set out the penalties for crimes for the forgery of money, and in 1961, another royal decree[178] introduced the Law for Combatting Forgery (Nizām Mukāfaḥa al-Tazwīr). This Law was partly amended by a third royal decree in 1963.[179]

Up till then, however, no single authority was designated to try cases involving forgery; this matter had been left to the President of the Ministers, the Minister of Finance and National Economy, and the Minister of the Interior, who were to enforce these Laws, each within his own jurisdiction.[180] Nevertheless, in 1966, the Council of Ministers decided that a special committee for trying crimes of forgery was to be set up. This Committee is composed of the Minister of the Interior as chairman (who may depute another official to preside over it), two members from the Grievances Board, one member from the Ministry of the Interior and one member from among the legal advisers of the Council of Ministers.[181]

The decisions of the Committee must be approved by the President of the Council of Ministers before they are carried out.

References and Comments

1. Ḥamza, p. 196.
2. Al-'Amūdī, M. 'U.S., "al-Tanẓīm al-Qaḍā'ī fi al-Mamlaka al-'Arabiyya al-Sa'ūdiyya", Qāfila al-zayt, August 1970, p. 33
3. Niẓām Tashkīlāt al-Qaḍā' (Regulations on the Judiciary) of 18/8/1344 (March 2, 1926).
4. Niẓām Awḍā' al-Maḥākim al-Shar'iyya wa Tashkīlātihā, R.D. of 4/2/1346 (August 2, 1927).
5. L. of Crown Prince Sa'ūd to Vic. No. 707 of 8/4/1371 (1952).
6. Judicial Council, D. No. 181 of 23/8/1391 (1971). As to the jurisdiction of the Third Magistrate's Court, see, L. of P.J. to G.S.C. (R) No. 2617/3 of 16/6/1383 (1963).
7. The ḥadd of zinā is divided into two kimds. One of them is that commited by a legally competent person who has been married (muḥṣan). The other is that committed by a legally competent person who has never been married (ghayr muḥṣan). The magistrate's courts had the jurisdiction to hear the latter till 1963. In 1963 (1383) the Presidency of the judiciary withdrew this jurisdiction. (L. of P.J. to G.S.C. (R) No. 2617/3 of 16/6/1383 (1963).)
8. Law of 1927, art. 1; C.C., D. No. 32 of 29/5/1357 (1927); Law of 1938, art. 101; Law of 1952 (B), art. 82.
9. Ibid.
10. L. of C.M. to P.J. No. 4044/2 of 4/10/1374 (1955); L. of P.J. to G.S.C. (R) No. 2617/3 of 16/6/1383 (1963); M.J., C. No. 92/3/T of 18/5/1391 (1971).
11. Neither the Law of 1927 nor the other main Judicial Laws state that a First Magistrate's Court is only to hear cases concerning urban dwellers, but they all determine that a Second Magistrate's Court is to handle cases involving Bedouins. Nevertheless, the Royal Will (of which G.S.C. (M) was informed by L. of Vic. No. 784 of 27/2/1350 (1931)) determined that a Second Magistrates Court must not hear cases concerning urban dwellers. The Royal Will No. 39 of 21/1/1351 (1932) stated that all cases pertaining to Bedouins, which were within the jurisdiction of the magistrate's courts had to be handled only by a Second Magistrate's Court. Thus, a First Magistrate's Court may only decide the cases of urban dwellers. But if a Bedouin resides in a town and maintains the way of life of a Bedouin, a First Magistrate's Court will not hear his case. (See L. of F.M.C.(R) to the Chief Detective in Riyadh No. 2101 of 12/11/1384 [1965]).
12. Law of 1927, art. 1.
13. Ibid; Law of 1938, art. 102; Law of 1952 (B), art. 83; L. of P.J. to G.S.C.(R) No. 2617/3 of 16/6/1383 (1963).
14. C.C., D. No. 303 of 2/7/1349 (1930), sanctioned by R.W. No. 2417/190 of 26/7/1349 (1930).
15. R.W. of which G.S.C.(M) was informed by L. of Vic. No. 784 of 27/2/1350 (1931).
16. Law of 1927, art. 2; Law of 1938, art. 103; Law of 1952(B) art. 84.

17. The Presidency of the Judiciary was informed of this Royal Will on 8/1/1356 (1936), quoted in Maj. pp. 63-64.

18. Law of 1927, art. 4; Law of 1938, art. 70; Law of 1952(B) arts. 82-84.

19. It was unfair to demand from the appellant that he should establish to the court of first instance that its judgement was contrary to the Sharī'a before it committed the case for appeal. This unfairness was due to the fact that there were not, in the country at that time, proper professional legal consultants to help appellants in this respect.

20. A crime of ta'zīr is tried by a magistrate's court as mentioned before.

21. Law of 1936, art. 69.

22. L. of D.P.J. to Mr. Samir Shamma, a lawyer, No. 407/3 of 19/1/1382 (1962), (in the author's possession).

23. M. of M.I. to P.C.M. No. 875 of 2/6/1377 (1957).

24. Al-Ta'līmāt al-Qaḍā'iyya wa al-Idāriyya li Maḥākim al-Tamyīz, issued by P.J. (M. of P.K.O. to P.C.M. No. 16/3/1336 of 20/10/1381 (1962), quoted in, L. of P.O.P.C.M. to D.M.I. No. 20327 of 23/10/1381 (1962).

25. Ta'līmāt Tamyīz al-Aḥkām al-Shar'iyya, approved by P.C.M. in his L. to P.J. No. 24836 of 29/10/1386 (1968), quoted in P.J.,C. No. 2681/3/M of 25/11/1386 (1967).

26. Art. 3.

27. Art. 1.

28. Law of 1927, art. 4.

29. Written information sent to the author in 1971 by Shaykh 'Abdul Malik b. Duhaysh (a senior judge of G.S.C.(M) through Dr. 'Abdul Wahhāb Abū Sulaimān (Dean of Faculty of the Sharī'a and Islamic Studies in Mecca).

30. These figures are based on a personal observation by the author in July of 1970.

31. The crime of zinā committed by a competent person, who has never been married was not within the competence of a Grand Sharī'a Court until 1963 (1383). [L. of P.J. to G.S.C.(R) No. 2617/3 of 16/6/1383 (1963); also see, G.S.C.(R), Ṣ. No. 41/1 of 21/3/1388 (1968); C.C.(R), D. No. 189/1 of 13/4/1388 (1968)].

32. Law of 1927, art. 1; C.C., D. No. 32 of 29/5/1346 (1927); C.C.,D. No. 303 of 2/7/1349 (1930), sanctioned by R.W. No. 2417/190 of 26/7/1349 (1930); Law of 1938, art. 71; Law of 1952(A), art. 52.

33. Law of 1931, art. 33; Law of 1936, arts. 82-84; Supplement of Law of 1936, quoted in Maj., p. 65; Law of 1952(A), arts.51-53.

34. M. of M.I. to P.C.M. No. 4181 of 5/4/1374 (1954); L. of P.C.M. to G.S.C.(M) No. 199 of 20/1/1377 (1957); H.O. No. 2725 of 19/3/1377 (1957).

35. L. of P.J. to G.S.C.(J) No. 228 of 23/2/1377 (1957).

36. Law of 1927, art. 7.

37. L. of D.P.J. to Mr. Samir Shamma, supra.
38. Instructions of 1962, art. 5.
39. Instructions of 1967, art. 3.
40. Instructions of 1962, art. 5; Instructions of 1967, art. 3.
41. A Sharī'a Court is designated Al-Maḥkama al-Shar'iyya.
42. Art. 2.
43. Art. 4.
44. Report by the Inspector of the Sharī'a courts, Muḥammad Shaṭa, on his circuit of 1355 (1936), the section concerning the Court of al-'Ulā; Durayb, supra.
45. Law of 1927, art. 2; Law of 1938, art. 97; Law of 1952(B) art. 78.
46. Law of 1927, art. 3; Law of 1938, art. 104; Law of 1952(B), art. 85.
47. R.W. of 8/1/1356 (1936), quoted in Maj., pp. 63-64.
48. Briefly, Kātib al-'Adl (pl. Kuttāb al-'Adl) is empowered to record, issue, and endorse legal documents pertaining to private or public interests. (Law Concerning Public Notaries, art. 2, sanctioned by H.O. No. 11083 of 19/8/1364 (1945)).
49. Law of 1938, art. 276; Law Concerning Public Notaries, art. 5; Law of 1952(B), art. 252.
50. Bayt alMāl is an authority which looks after the rights of people who are abroad and those who have no guardians, relatives, agents, or heirs (in case of death). (See, R.D. of 4/2/1346 (1927), quoted im Maj., p. 107).
51. R.D. of 4/2/1346 (1927).
52. Maj., p. 29.
53. Law of 1927, art. 5.
54. Law of 1931, art. 32.
55. Law of 1938, art. II.
56. Solaim, p. 102.
57. Law of 1938, art. 8.
58. Personal letter in the author's possession from Shaykh 'Abdullah's son, Shaykh Ḥasan Āl al-Shaykh, Minister of Eductation, supra.
59. Law of 1927, art. 7; Law of 1936, art. 88; Law of 1952(A), art. 55.
60. Ibid; Law of 1936, arts. 69, 82, 83, 85; Law of 1952(A) arts. 51,52, 54; See also, L. of Vic. to M.I. No. 2413 of 28/9/1350 (1932).
61. Law of 1927, art. 7; Law of 1952,(A), arts. 51-54.
62. Law of 1936, art. 82; Law of 1952(A), art. 51.
63. M. of M.I. to the King (and the P.C.M.) No. 2491 of 14/8/1380 (1961).
64. Written information supplied by Shaykh 'Abdul Malik b. Duhaysh, supra.

65. Art. 28.
66. M. of P.J. to G.S.C. (T) No. 1176/3/W of 1/4/1388 (1968).
67. M. of P.J. to G.S.C. (T) No. 1569/3/I of 19/5/1388 (1968).
68. Instructions of 1967, art. 8.
69. Law of 1952(A), art. 48.
70. Instructions of 1967, art. 3.
71. Ibid, art. 8; M.J., C. No. 13/1/T of 12/1/1391 (1971).
72. Instructions of 1967, art. 4.
73. Instructions on the trial of juveniles, issued by P.J. in 1389 (1969).
74. L. of the King to V.C.D. No. 11984 of 4/11/1361 (1942).
75. Niẓām Tashkīlāt al-Qaḍā', Regulations on the Organization of the Judiciary, of 14/8/1344 (1926).
76. Letter from Shaykh Ḥasan Al-al-Shaykh, supra.
77. Law of 1931, art. 33.
78. Law of 1936, arts. 82, 83, 85; Law of 1952(A) arts. 51-54.
79. L. of P.K.O. to Vic. No. 35/3/6 of 19/4/1359 (1940); L. of P.K.O. to Vic. No. 7/7/169 of 15/8/1360 (1941).
80. L. of Muḥammad b. Ibrāhīm to P.K.O. No. 38 of 16/9/1374 (1955).
81. H.O. No. 19746 of 22/9/1379 (1959).
82. Instructions of 1967, art. 21.
83. R.O. of 28/11/1389 (1970), quoted in L. of P.O.C.M. to D.P.J. No.22482 of 1/12/1389 (1970).
84. R.O. No. A/105 of 21/7/1390 (1970).
85. He is Shaykh Muḥammad b. 'Alī al-Ḥarkān, a former Chief judge of the Grand Sharī'a Court of Jeddah.
86. R.O. No. A/126 of 13/8/1390 (1970).
87. R.O.No. 21244 of 18/11/1390 (1971).
88. Regulations for the High Judicial Committee (al-Lā'iḥa al-Tanfīdhiyya li 'Amāl al-Hay'a al-Qāḍā'iyya al-'Uliyā), approved by the High Authority. L. of P.C.M. to M.J. No. 22721 of 18/12/1390 (1971).
89. "Interview with the Minister of Justice", Al-Ḥayah, Beirut March 5, 1971.
90. A royal order, n.d., quoted in Umm Al-Qurā, March 4, 1932.
91. Order of P.C.M. No. 21916 of 20/11/1389 (1970).
92. Order of P.J. No. 35/3/1 of 14/11/1385 (1966).
93. L. of P.J. to C.C.(R) No. 1292/2/1 of 5/2/1386 (1966).
94. A royal order, n.d., quoted in Umm Al-Qurā, supra.
95. Ḥamza, p. 203.
96. H.O. No. 32 of 15/1/1350 (1931).
97. Art. 443.

98. Art. 444.
99. Arts. 136-147.
100. Art. 560.
101. Art. 432.
102. Art. 433.
103. Art. 437.
104. C.C., D. No. 121 of 1/8/1351 (1932), approved by the King; L. of P.K.O. to Vic. No. 2620/1366 of 22/10/1351 (1933).
105. Shamma, "Law and Lawyers in Saudi Arabia" International And Comparative Law Quarterly, XIV July, 1965, p. 1036.
106. C.M., D. No. 62 of 5/3/1377 (1957).
107. C.M., D. No. 228 of 2/6/1380 (1960); L. of C.M., to M.C.I. No. 21776 of 24/8/1383 (1964).
108. Hay'āt Ḥasm al-Munāz'āt al-Tijāriyya.
109. C.M., D. No. 186 of 5/2/1387 (1967), quoted in L. of P.O.C.M. to M.C.I. No. 3429 of 9/2/1387 (1967).
110. M.C.I., D. No. 262 of 26/11/1384 (1965).
111. Niẓām Tasjīl al-'Alāmāt al-Fāriqa, H.O. No. 7762 of 28/7/1358 (1939).
112. Hay'a Ḥasm Munāza 'āt al-Sharikāt al-Tijāriyya.
113. Niẓām al-Sharikāt al-Tijāriyya, art. 232., R.D. No. M/6 of 22/3/1385 (1965).
114. M.C.I., C. No. 724/M of 15/11/1387 (1968).
115. Law of Companies, art. 232.
116. C.M., D. No. 186 of 5/2/1387 (1967).
117. C.M., D. No. 1221 of 7/9/1388 (1968).
118. C.M., D. No. 1394 of 25/10/1388 (1969).
119. C.M., D. No. 186 of 5/2/1387 (1967).
120. C.M., D. No. 1221 of 7/9/1388 (1968); L. of P.C.M. to M.I. No. 1018 of 18/1/1390 (1970; L. of P.C.M. to M.C.I. No. 24753 of 16/12/1388 (1969).
121. M.C.I., D. No. 262 of 26/11/1384 (1965).
122. C.S.C.D.(R), D. 1/90 of 1/1/1390 (1970), and D. No. 24/90 of 7/3/1390 (1970).
123. See, C.L. arts. 432-560.
124. Art. 32.
125. C.S.C.D., D. No. 1/90 of 1/1/1390 (1970), and D. No. 21/90 of 5/3/1390 (1970).
126. M.C.I., D. No. 353,and D. No. 354 of 11/5/1388 (1969), and D. No. 961 of 18/3/1389 (1969), and D. No. 1186 of 28/6/1389 (1969).
127. See, e.g., M.C.I., D. No. 1185 of 28/6/1389 (1969).
128. M.C.I., D. No. 729 of 7/11/1388 (1969).
129. Law of 1927, art. 8; C.C., D. No.303 of 1349 (1930), supra.

130. 'Ahmad v. Sharika Rafīq al-Quṭb, C.S.C.D., D. No. 7/90 of 15/2/1390 (1970); Kāblī v. Sunbul, C.S., D. No. 22/90 of 21/3/1390 (1970).

131. The following example is a good illustration of the position and power of the Sharī'a courts. The Minister of the Interior asked the President of the Council of Ministers for a ruling on whether the decision of the Committee for the Settlement of Commercial Disputes was final, and whether any measures could be taken against a party who referred his case to a Sharī'a court after he had brought it before this Committee. The President of the Council of Ministers stated that the decision of this Committee was final, but abstained from answering the other part of the question. [L. of P.C.M. to M.I. No. 1018 of 18/1/1390 (1970)]. This abstention may be interpreted as an intention not to provoke the Sharī'a judges, or to give the slightest indication that any part of their jurisdiction was being withdrawn.

132. Abū Ya'lā,M.b.H., al-Aḥkām al-Sulṭāniyya, Cairo, 1938, p. 58.

133. See, al-Māwardī A.b.H., al-Aḥkām al-Sulṭāniyya, Cairo, 1909, pp. 76-79; Abū Ya'lā, pp. 61-63.

134. Abū Ya'lā, p. 59.

135. Umm al-Qurā, June 7, 1926.

136. Umm al-Qurā, September 5, 1930.

137. Article 19.

138. Law of Grievances Board, art. 1, R.D. No. 7/13/8759 of 17/9/1374 (1955).

139. Art. 46.

140. Internal Regulations of G.B., art. 2.

141. Ibid, art. 4.

142. The Board used to have a doctor and an engineer who acted as examining magistrates, each in his own field, but when the jurisdiction of the Board contracted these posts were abolished.

143. Unpublished report, in the author's possession, written by the Head of the Board in Jeddah, Shaykh Muḥammad 'Umrān.

144. Law of the Board, art. 2; Internal Regulations of the Board, art. 5.

145. Law of the Board, art. 5.

146. Internal Regulations of the Board, art. 6.

147. See e.g., Salūh v. Ghāzī, G.B., D. No. 340 of 1375 (1956); Shawlān v. Jamīl.,D. No. 376 of 1375 (1956).

148. Baraka v. Fālih, D. No. 237 of 8/7/1375 (1956); Jamlā v. Judge 'Alī al-Hindī, D. No. 276 of 1375 (1956).

149. The case of al-Ḥamdān, D. No. 147 of 1375 (1955-1956); the case of al-Ḥamdān,D. No. 229 of 1375 (1956).

150. H.O. No. 5745 of 17/4/1378 (1958).

151. Ṣādiq, pp. 145-146.

152. C.M., D. No. 251 of 28/12/1379 (1960).

153. C.M., D. No. 16 of 9/1/1383 (1963).

154. C.M., D. No. 58 of 17/1/1383 (1963).

155. Law Concerning Foreign Capital Investment, art. 12, R.D. No. 35 of 11/10/1383 (1964).

156. Law Concerning Boycott of Israel, art. 12, R.D. No. 28 of 25/6/1382 (1962).

157. R.D. No. 16 of 7/3/1383 (1963).

158. Law Governing the Police, art. 133, R.D. No. 30 of 4/12/1384 (1965).

159. C.M., D. No. 214 of 10/3/1386 (1966).

160. C.M., D. No. 332 of 25/5/1387 (1967).

161. Law Concerning Civil Servants, arts. 88-89, R.D. No. 42 of 29/11/1377 (1958).

162. Solaim, p. 141.

163. Interview with Shaykh 'Abdullah al-Mas'arī, the present President of G.B., June 1, 1970.

164. L. of M.I. to A.G.(M), No. 7697 of 6/11/1387 (1968).

165. Law Concerning Foreign Capital Investment, art. 12.

166. See, Soulie, Jean-Louis, and Champenois, Lucien, Le Royaume D'Arabia Saoudite Face A L'Islam, Paris, 1966, p. 78.

167. Shamma, Samīr, "Dīwān al-Maẓālim", Majalla Ma'had al-Idāra al-'Amm (Riyadh), December 1966, p. 21.

168. Niẓām Mukāfaḥa al-Rishwa, R.D. No. 15 of 7/3/1382 (1962).

169. Al-Lijān (sing, Lajna) al-Jumrukiyya.

170. Niẓām al-Jamārik wa al-Lā'iḥa al-Tanfīdhiyya (1952). It consists of two parts, the Customs Law and the Customs Regulations.

171. Cust. R., art. 257.

172. C.. L., art. 52.

173. Cust. R., arts. 257, 264.

174. Art. 257.

175. M.F., D. No. 4/1907 of 30/7/1391 (1971).

176. Ibid.

177. No. 12 of 20/7/1379 (1960).

178. No. 114 of 26/11/1380 (1961).

179. No. 53 of 5/11/1382 (1963).

180. R.D. No. 12 of 20/7/1379 (1960); art. 14; R.D. No. 53 of 1963

181. C.M., D. No. 214 of 10/3/1386 (1966), quoted in L. of P.O.P.C.M. to M.I. No. 6334 of 17/3/1386 (1966).

Chapter Three

PROCEEDINGS PRIOR TO TRIAL

Introduction

Generally speaking, it is difficult to distinguish in Saudi Arabian criminal procedure between interrogation or the inquiry for establishing the suspicion, and preliminary investigation or the inquiry for establishing the accusation. Both are conducted by the police and are not subject to any form of judicial restraint, as it is the case in some countries.[1] The authority in charge of any inquiry made before the trial is neither judicial nor even semi-judicial, but administrative. Therefore, any process prior to the trial is solely an administrative process. It is true that cases triable by the Grievances Board, the Bribery Committee, and the Forgery Committee are examined by the examining magistrates of the Grievances Board, whose function is semi-judicial. However, these cases are negligible in volume compared with those triable by the Sharī'a courts and other tribunals. The mode in which the police conduct the preliminary investigation and the right of parties at this stage will not be dealt with in this thesis, since its theme is concerned with judicial proceedings. Moreover, evidence mentioned in the minutes of the police in their inquiry will not be examined, but the evidenciary value of these minutes will be briefly referred to when evidence is discussed. In the light of what has been said, we shall mention the police only when we refer to their power to bring a criminal action against an accused person.

Since proceedings before the trial in the Commercial tribunals are similar to those in Sharī'a courts, and since proceedings in other semi-judicial tribunals are purely administrative, with the exception of investigation by the examining magistrates of the Grievances Board which, for convenience, will be examined later under "Trial", we shall refer only to the process

before the trial in Sharī'a courts.

A. WHO MAY BRING CRIMINAL ACTION OF A PRIVATE RIGHT?

Crimes are divided into two categories with regard to the procedure followed in bringing criminal action before the Sharī'a courts. First, those which are tried only on a demand by a private claimant, and are therefore called crimes of private rights (jarā'im al-ḥaqq al-khāṣṣ), or according to the traditional classification, ḥaqq al-'abd (human right). Secondly, those in which action can be brought by anyone, and therefore are called crimes of the public right (jarā'im al-ḥaqq al-'āmm), or traditionally, ḥaqq Allah (Divine Right). In broad terms, crimes of private rights are four: (1) the ḥadd of theft (sariqa), (2) the ḥadd of defamation (qadhf), (3) crimes of retaliation (qiṣāṣ), and (4) an offence against a parent falling within ta'zīr.

1. Theft

Most Muslim jurists, including the majority of the Ḥanbalis,[2] are of the opinion that the crime of the ḥadd of theft must not be prosecuted unless the owner of the stolen object, or his representative, demands its recovery. A minority of Muslim jurists uphold the view that an action against this crime can be brought before the court without such a demand.[3] Saudi Arabian judges differ in their views on this matter. The majority of them take the view that the owner of the stolen object, or his representative, must submit a complaint to the court in which he demands the recovery of the stolen object, otherwise the court must not receive the charge. Shaykh 'Abdullah b. Ḥasan, the President of the Judiciary from

1927-1959, supported this view. A minority of Saudi Arabian judges hold that the demand of the owner for recovery of the stolen object is not necessary. This minority is represented by Shaykh Muḥammad b. Ibrāhīm, the Muftī and last President of the Judiciary and his pupils, such as the judges of the Grand Sharī'a Court of Riyadh.[4]

It is important for us to look into the basic reasons for this controversy. The majority, who restrict the prosecution of the action against theft punishable by the ḥadd to a demand for the recovery of the stolen object by its owner, base their view on the principle of the Sharī'a that "ḥudūd shall be averted on account of dubious circumstances". They argue that the fact that the owner does not demand the recovery of his property is a sufficient reason to implement this principle.[5] They also hold that the Sharī'a lays down the principle of the "removal of doubt" for the benefit of the accused, and that the fact that the owner of the stolen object does not demand its recovery indicates doubt, the benefit of which is to be given to the accused. They also argue that the offender will not be left without punishment for his crime, since an action of ta'zīr may be brought against him.[6]

The minority view maintains that the rule of restricting the prosecution of a charge concerning the ḥadd of theft to a demand by the owner of the stolen object is not stipulated by the Qur'ān, the Sunna, or consensus (ijmā'), while the punishment of the ḥadd is explicitly stipulated; that it is not justifiable to implement a rule whose origin is not found in the sources of the Sharī'a against a rule which is explicitly stipulated.[7]

Having examined both arguments, we may conclude that the view of the majority judges, which restrict the prosecution of the ḥadd to a demand by the owner of the stolen object, is more appropriate, especially in view of the fact that the punishment of the ḥadd is so severe that the judge must take extra precautions before convicting the accused.

Once a claimant demands the recovery of his property there is no stipulation that he must pursue the prosecution until the court awards its judgement. It is the duty of the court to take the appropriate measures for trying the accused.

2. Defamation

While Muslim jurists are divided on the question as to who may bring an action against the ḥadd of theft, they all agree that in the ḥadd of defamation (qaḏhf) it is only the offended person (maqḏhūf), or his representative,[8] who may bring an action against the offender.[9] Saudi Arabian judges do not differ from their predecessors in their views on the ḥadd of defamation. If the defamation does not amount to the ḥadd, the criminal action which may be brought against the accused is not confined to the offended party. It may be brought in the same way as a criminal action for the public right. However, the offended party is given priority in this respect. But the public prosecutor may handle the prosecution in two circumstances:-

(a) If the offended party fails to bring his action within a reasonable time after the defamation has been made.

(b) If the public interest lies in prosecuting the offender immediately after his offence.[10]

Here, the question to be raised is: why should it be

admissible that defamation which does not amount to that of the ḥadd may be brought before the court, e.g. by the public prosecutor, while it is inadmissible in the ḥadd itself? The answer is that in Saudi Arabian society the accusation of zinā, if proved, is so grievous that the defamed party and the members of his family, especially the females, would suffer social detriment. To avoid such detriment, the prosecution of the alleged offender, who made the accusation of zinā, is entirely left to the will of the defamed party, who may prefer not to bring an action in order to avoid public scandal. Since the defamed party is the only one who can bring an action against the alleged offender in the ḥadd of defamation, the defamed party must pursue his case until the judgement is given.

3. Retaliation

As in an action against the ḥadd of defamation, the action against a crime of retaliation (qiṣāṣ), whether murder or the cutting off of a person's limb, may be brought only by the claimant, the heirs of the deceased person, or by the party affected, or their representative.

It must be noted here that there are technically two crimes involved in a crime of retaliation. The first is a so-called private crime, whose prosecution is left to the private claimant. The second is a public crime, whose prosecution is not confined to the claimant. The action concerning the private crime can only be initiated by the claimant or his representative, as the private interest is dominant.[11] For example, the punishment of the private crime in the case of murder is death, while the punishment of the

public crime is only five years imprisonment.[12] As both crimes come under the same class, the punishment of the smaller (the public crime) falls within that of the greater (the private crime), according to the principle of "the cumulation of crimes".[13] In other words, if the punishment of the private crime (the retaliation) is to be carried out, the punishment of the public one (the ta'zīr) is to be ommitted. Therefore, the private action is to be given priority in the prosecution. However, if the claimant waives his right, the appropriate authority will prosecute the offender for the public crime.

Saudi Arabian judges apply the Sharī'a principles concerning murder. They insist that the claimant must pursue his case till the judgement is awarded. The claimant must be the heir of the deceased, and must be of full legal competence. Where the deceased has more than one heir, they must unanimously demand the punishment of retaliation,[14] otherwise the private action cannot be brought before the court. Consequently, the public action may be initiated. When the heirs of the deceased are legally incompetent and have no guardian, or if the deceased has no heirs, the head of the state, or his representative, must take responsibility for the private right, and action for the private right would be brought in the same way as the criminal action for the public right.[15]

Although an illegal physical assault other than that punishable by retaliation, and an illegal threat of using a weapon against a person, are considered public crimes, priority in the prosecution concerning them is given to the private claimants, i.e. the persons who have been assaulted. But the alleged offenders may be prosecuted in the same way in which

other offenders accused of public crimes are prosecuted if the çlaimants do not duly demand the prosecution, or if they waive their right to pursue the case.[16]

It is necessary to note here that an action brought against a treacherous murderer (mughtāl) can only be a public one. Here it is to be mentioned that some Muslim jurists, such as the Mālikis, hold that murder by treachery (qatl al-ghīla) is a purely public crime punishable only by death, even if the heirs of the deceased pardon the murderer. According to the Ḥanbalī law, murder by treachery is treated like any other type of murder.[17] However, some independant Ḥanbalis, such as Ibn Taymiyya, are of the opinion that murder by treachery is a purely public crime.[18] Generally speaking, Saudi Arabian judges follow the Ḥanbalī law. But there are two cases in which they departed from the Ḥanbalī law. The first concerned a woman who had killed her husband treacherously; in this case the trial and the appellate judges agreed that the action which was to be brought had to be of a public nature, disregarding the demand by the son of the deceased that he was the only one who had the right to bring an action.[19] The second case concerned a person who had killed his uncle treacherously - the crime was treated by the trial court as a public crime in which the heirs of the deceased had no say.[20] Although the judgement of the trial court has not yet been confirmed, it is most likely that it will be reversed, as the President of the High Judicial Committee has indicated that the law and the practice are that murder is one class of crime as far as prosecution is concerned. The reason why the Mālikī opinion was adopted in the first case was that the heir of the deceased was the son of both the deceased and the murderer,

*Or assassination

and this made it impossible that he could act as an appropriate claimant, on the assumption that he would be bringing an action against his mother.

4. Offence against a parent

We shall now consider the question as to who may bring action against an offender committing an act constituting a crime of ta'zīr against his parent. Crimes of ta'zīr are regarded as public crimes, and criminal action in them does not depend upon the offended person.[21] The only exception to this rule is when such a crime is committed by a child against his parent. In this case, it is only the parent who may bring an action against his offending child. If the parent renounces his right to prosecute the child, the latter will not be liable to trial. The parent has also the right to pardon his child, even if a sentence had been passed against him.[22]

The reason for confining the right to initiate prosecution in such a charge to the parent is explained by the Presidency of the Judiciary as follows: "A criminal action concerning ta'zīr may be brought before court for chastising (ta'dīb) the offender, and only a parent has the right to chastise his child. Therefore, the parent is the only one who may bring action against his child."[23] The Presidency of the Judiciary does not refer to the source from which it has derived this procedural rule. However, some Ḥanbalī authorities refer to it vaguely. Al-Iqnā'[24] and its commentary, Kashshāf,[25] refer to al-Aḥkām al-Sultāniyya of Abū Ya'lā. Yet, Abū Ya'lā mentions so little about it[26] that it is not clear how this rule has originated.

It can be said that if prosecution in this kind of crime

is left only to the parent, it is rare that the offender will be prosecuted. This rule is open to criticism as it gives the parent full right to chastise his child, while it seems proper to allow chastisement only in a very limited sense. A crime of ta'zīr committed by a person against his parent, unless it was a minor offence, must be prosecuted in the same way as any other crime of ta'zīr.

B. WHO MAY BRING AN ACTION OF A PUBLIC RIGHT?

1. Individuals

According to Muslim jurists, criminal action of a public right does not need to be initiated in any specific manner. This action is to be dealt with as soon as it is brought before the court, irrespective of the person or authority making the allegation. The Sharī'a courts in Saudi Arabia apply this principle, except when the action is against a dismissed judge or an administrative governor.[27] In this case the allegation must reach the court via the High Judicial Authority or the high executive authority respectively, so that the judge and the governor may be protected from a malicious action.[28]

In theory, it is the right as well as the duty of individuals to bring an action against an offender charged with a public crime. This obligation stems from the principle of "Enjoining the Right and Forbidding the Wrong" (al-Amr bi al-Ma'rūf wa al-Nahy 'an al-Munkar).[29] It can be waived only if the head of the state or his representative takes the initiative for the prosecution of the crime. Indeed, the prosecution in this case is the duty of the head of the state

in the first place.[30] In Saudi Arabia, the head of the state has given the right to initiate criminal prosecution in public crimes to certain executive authorities, which we shall refer to later.

In actual practice, a criminal action of a public right may or may not be initiated by an individual. After having brought such an action, the individual may decline to pursue it before the court since he is not a party to the case. He may not even go beyond the act of informing the court of the crime. This manner of bringing an action is called ḥisba (anticipation of God's reward in the hereafter).[31]

The testimony of the individual who brings an action as ḥisba is admissible, while that of a private claimant, who is directly involved in the case, is not. However, a close examination of present judicial practice shows that individuals decline to bring crimes before courts, especially in the towns where living conditions and the administration have become more complicated. They are content with reporting a crime to the competent authorities, who will investigate, and in due course prosecute the alleged offenders.

2. The Committees for Enjoining the Right and Forbidding the Wrong

Hay'āt al-Amr bi al-Ma'rūf wa al-Nahy'an al-Munkar

These Committees wer first established in Ḥijāz in 1926, immediately after King 'Abdul 'Azīz assumed power. They are now widespread throughout the whole country. Although these Committees are the Saudi Arabian model of ḥisba, they have no judicial jurisdiction like that of the traditional muḥtasibīn, known in Islamic administrative justice. Before the 1960's,

these Committees had the right to detect, investigate, and prosecute in matters relating to the enforcement of religious and moral principles.[32] When investigating a crime they committed the accused to the appropriate court[33] without pursuing the case before the courts. Occasionally they appointed one of their personnel to undertake the prosecution. The right of the Committees to prosecute cases brought by them to the courts was not determined by statute or regulations. The vast powers which these Committees had brought them into conflict with the police. At one time the Committees were so strong that their power could not be withdrawn or even limited by the High Authority. However, in 1960, one of these Committees in Ḥijāz investigated a serious crime inefficiently, and this was held by the High Authority as a sufficient reason to withdraw the power of the Committees in Ḥijāz of bringing criminal actions before courts. Henceforth they were to refer crimes within their jurisdiction to administrative governors, who would take the appropriate measures.[34] In December 1960 the Committees regained a part of their previous power. They were authorized again to investigate and bring before courts crimes against religion and morality and crimes of intoxication and drugs.[35] In June 1961 their jurisdiction over the prosecution of charges concerning drugs was withdrawn.[36] In 1962 their power as investigating and prosecuting authorities was finally withdrawn.[37] It seems that this was due to the fact that these Committees continued to recruit their personnel and to deal with cases in almost the same old way which they had followed since their creation. They failed to adapt themselves to the conditions of modern life.

3. The Executive Authorities

Since the establishment of the Kingdom of Saudi Arabia, most crimes of the public right have been brought to court by the executive authorities. In Mecca, the Viceroyalty used to refer such crimes to court. In 1927, King 'Abdul 'Azīz objected to the way in which the Grand Sharī'a Court of Mecca accepted cases without their first being referred to it by the Viceroyalty. He explained that the Viceroyalty could possibly have some information regarding the case in issue which no private person or other authority had.[38] In 1928, the Consultative Council[39] decided that the Magistrate Court must not hear criminal cases until they had been referred to it by the Viceroyalty. But the Viceroyalty was not the only authority which used to bring criminal actions of the public right before the courts in Mecca. The police used also to do so in crimes falling within the jurisdiction of a magistrate court,[40] especially if they were minor ones.[41] The jurisdiction of the Viceroyalty did not conflict with that of the police since the police in Mecca were attached to the Viceroyalty.[42]

In other places the administrative governors and the police played the same role as the Viceroyalty and the police in Mecca.[43] Where there was no police post, the administrative governor was the only authority who could refer a criminal case to the court.[44] In general, most criminal charges were referred to courts by the administrative governors until 1961 when the Council of Ministers decided[45] that the administrative governors in areas where there were police posts were to refer to the courts only serious crimes.[46] Minor crimes were to be referred to courts by the police. In 1965, the High Authority

issued a regulation that crimes falling within the competence of magistrate's courts had to be brought by the police and not by the governors.[47] In practice, some governors still refer to courts many crimes, even if they are not of a serious character. Some governors are so influential that they may exceed the limit of their jurisdiction fixed by the law and act in the way that they themselves think appropriate.

When a crime is referred to the court by an executive authority, it must be handled by the appropriate public prosecutor. By the public prosecutor is meant any authority which is competent to prosecute the defendant in a criminal case. Here we must examine briefly the history of the function of public prosecution in Saudi Arabia. It is necessary to differentiate between two periods. The first period refers to an early stage after King 'Abdul 'Azīz had assumed power in Ḥijāz, when the Consultative Council assigned the function of prosecution to specific authorities. Thus, in Mecca, a department attached to the police called the "Legal Department"[48] was entrusted with the power of prosecution. The head of this department, or one of his officials in his illness or absence, was the authority who handled the cases for the prosecution.[49] In other important towns of Ḥijāz and its dependencies, officials representing the "Legal Department"[50] were appointed.[51] The chief of the police was accorded the power of prosecution in a place where there was no representative of the "Legal Department".[52]

This period was marked by two things. First, the system of public prosecution assigned to official authorities prevailed only in Ḥijāz and its dependencies. Second, public crimes

were usually prosecuted by public prosecutors. However, in other parts of the country public prosecution as such was almost unknown.

The second period began in the 1960's following the centralization of administration and the unification of the judiciary and the removal of its centre from Ḥijāz to Riyadh. During this period the system of prosecution prevailing in Ḥijāz was adopted in other parts of the Kingdom. In areas where there were no police the governor was given the power to appoint one of his officials to handle public prosecutions.[53] The "Legal Department" was transferred from Mecca to Riyadh and attached directly to the Ministry of the Interior, where it has now various functions other than undertaking public prosecutions. Therefore, public prosecutions in Mecca are now handled in the same way as in other towns. The designation of the representative of the "Legal Department" has consequently been abandoned and replaced by that of the public prosecutor. The important difference between the two periods lies in the fact that at the present time the courts are empowered to take the initiative and try a party without even notifying the public prosecutor, although this is not very commonly done.

4. <u>The Court</u>

The court may look into certain criminal cases initially without their being brought before it by any authority or a private individual. These are usually of two kinds, (a) those connected with cases pending trial and (b) non-serious cases which take place inside the court, such as contempt of court.

(a) When a criminal action of a public right is brought before the court by any of the aforementioned methods, the

court must try it even if the case involves a preponderant private right.[54] Equally, when the court hears a case and discovers that it relates to a criminal act of public right, the court may adjudge it immediately. For example, if a private claimant brings an action and the court discovers that he himself has in some way participated in the crime, the court may take the initiative and try him, without asking the public prosecutor to handle the prosecution.[55] But if the case is so complicated that it requires a preliminary investigation, the court must refer it to the police, and after the investigation has been completed the public prosecutor may prosecute the accused.[56]

(b) The Law of 1936[57] did not allow a court to try a crime committed inside it unless that crime would have fallen within its jurisdiction if it had been committed outside it. However, the Law of 1952(A),[58] which is now in force, vests the court with the right to try a non-serious crime which occurs inside it without any request for prosecution from outside, in order to protect the court from disrespect. This means that Sharī'a courts can try any crime of this type, whether or not the crime was originally within their competence. However, an examination of the judicial practice will show that although the courts are entitled to try this kind of crime, some of them prefer to commit it to a competent court as if it had taken place outside the court.[59]

This attitude may be attributed to the fact that the Sharī'a judges decline to look into any case unless they deem that they are able to do so with complete impartiality. The punishment of this kind of crime is left to the judge to

determine, and he may be inclined to pass a more severe sentence had the crime not happened in his own court. As a precautionary measure, the judges prefer to remit such crimes to another court to insure impartiality.

C. THE ACCEPTANCE OF A CLAIM OR A CHARGE FOR TRIAL

In 1928, the Consultative Council[60] decided that an action brought by a private claimant could not be accepted unless it was included in a petition to which certain stamps were affixed. This decision was applied only in the towns of Ḥijāz. However, the Law of 1952(A)[61] determines that the judge shall not demand that a claimant should submit his complaint in written form. If the crime reaches the court through a formal authority, all the papers concerning the charge will be sent to the court. Thus, the courts do not restrict the receivability of an action to any formal measure. However, the acceptance of an action by the court is subject to three conditions: (a) taḥrīr i.e. stating the case adequately, (b) the accused must be still alive, and (c) the time prescribed for trying the charge has not lapsed.

(a) Taḥrīr

The claimant or the prosecution must state the essential particulars of his case in a fairly adequate way in order that the court may know the exact nature of the charge. The accused must be known to the claimant or the prosecution by an accurate description. Although this condition is theoretically essential, it is not necessarily applied by every judge. Indeed, it was a subject of controversy between the Grand Sharī'a Court and the Court of Cassation in Riyadh. The former

accepted some cases without their being adequately stated. But the Court of Cassation ruled that a case had to be adequately stated before it could be accepted.[62] The acceptance of a case without an adequate statement may be justified on the ground that the party concerned may find himself obliged to make out a prima facie case in the trial; and that if then he was found to have made a false allegation he is to be punished[63] and he is to defray his opponent's damages.[64]

(b) The accused must be still alive

Obviously, no criminal action concerning a crime involving physical punishment can be brought against an offender who has died before he can be prosecuted. Thus, a deceased who has committed a crime of a hadd or retaliation is not liable to prosecution.[65] Here, one may ask whether it is possible to bring a criminal action against a dead accused if the punishment was monetary. The answer is in the negative, since a monetary punishment is only applicable in ta'zīr, which is meant to be chastisement,[66] and the dead cannot be chastised. One important reason for applying the punishment of ta'zīr is to deter the offender,[67] and this reason no longer exists if he is dead. Consequently, if a fine was imposed upon an offender during his life and he dies before he has paid it, the fine must be dropped.

(c) Lapse of time[68]

The lapse of the period prescribed for trying crimes has differed from time to time and from one crime to another as follows:-

(a) In 1933, a royal decree[69] determined that actions regarding crimes arising from the unlawful seizure of

land which had taken place before 1924, the year in which King 'Abdul 'Azīz invaded Ḥijāz, were not to be accepted.

(b) In 1940, the Council of Deputies[70] ruled that actions relating to murder or other crimes of violence committed in Ḥijāz and its dependencies before King 'Abdul 'Azīz assumed power could not be accepted.

(c) Actions concerning other crimes must not be accepted if twenty-five years have passed subsequent to the occurence of these crimes. If an action is brought immediately before the end of this period, it may be accepted.[71]

A private claimant may bring an action before the court after the prescribed period has lapsed if he has an acceptable excuse for the delay. An excuse accepted by the law may be: long absence, insanity, minority, or fear of a tyrannical person.[72]

Generally speaking, it may be concluded that Saudi Arabian courts accept an action without formal restrictions whenever the case seems to be prima facie. The exception to this rule is when the action is against a person who is due to leave the country. In this instance, the court must not accept the action for trial before giving a summary decision accepting the case and ordering the prevention of the accused from leaving the country until the case is decided.[73] The summary decision may be given only after the court has examined the particulars of the case as presented by the claimant or the prosecution and concluded that it was a prima facie case. If the action is brought by a private individual or a claimant, he must pledge, and also bring someone else to pledge, that they will be liable for any damages arising from delaying the

departure of the accused if the charge against him is found to be false.[74] Where the accused is a pilgrim, a foreign visitor, a foreigner who entered the country illegally, or a person whose national identity is unknown and who is to be deported, he must not be delayed for more than one month after the summary decision and before the trial.[75]

Having accepted an action, the court must immediately fix a date for the hearing.[76] The time between the acceptance[77] of an action and the hearing must be as short as possible.[78] However, the circumstance of the defendant must be given proper consideration,[79] even if he is absent from the country.[80] The court should take into consideration the proper order of cases except when a summary case pertaining to a traveller or a woman is presented, which should then be heard first.[81] But in all circumstances, priority in the hearing must be given to a case involving detention.[82]

The hearing may, however, be postponed if the claimant or the prosecution needs a longer time than that already fixed to produce his evidence.[83] In a criminal action of a private right, the hearing may be postponed on request by the claimant if no detention is involved. The postponement may take the form of the suspension, or the dropping of the action.

Before the court summons the accused to appear the claimant may move for the suspension (waqf) of his action.[84] If the court has summoned the accused, the action cannot be suspended unless the accused consents.[85] But there is one exception; namely, an action concerning a crime constituting an aggression falling within ta'zīr brought by a parent against his child, which may be suspended before or after the hearing

begins.

The suspension of an action does not mean its dismissal or the closure of its hearing, if this has begun.[86] It is only a procedural measure, which may be a temporary one if the claimant later demands that his case be heard by the court. On the other hand, it may last indefinitely if he neglects his claim. However, the suspension of the hearing cannot be made more than twice,[87] even if the defendant consents to it, on the ground that it may cause inconvenience to the court and to the defendant, if he has been already summoned to appear.

As to the dropping of a case (shaṭb al-da'wā), the Law of 1952(A) which is in force, determines that a case must be dropped if the claimant fails to appear at the time fixed for the first session[88] in the hearing without an acceptable excuse. The claimant may, however, move for the hearing of his case;[89] and if he again fails to appear without an excuse acceptable to the court, the case will be dropped once more. Henceforth, it may only be heard if so required by a high order.[90] Thus, it seems that the dropping of a case is left to the discretion of the court since the law does not specify how to assess the excuse of the absent claimant, but leaves it to the court to do so.

Next to be considered is how to drop an action against a defendant who is due to leave Saudi Arabia and to live temporarily or permanently in another country. If he appears, and the claimant fails to appear, the claim must be dropped and the defendant allowed to go abroad.[91]

The dropping of a case does not necessarily mean its dismissal. It means that the case dropped will not be heard

again as easily as if it were a fresh one.

D. SECURING THE APPEARANCE OF PARTIES

After the court has fixed a date for the hearing of a case, it must immediately notify the claimant if the action is of a private right, and the prosecution if the action is of a public right. When notifying a claimant, the summoner (muḥaddir) must ask him to sign two copies of a document, one of which is to be handed to the claimant and the other to be preserved at the court.[92] The defendant must be notified of the charge against him and the date of the hearing by a writ of summons. The summons consists of a summary of the claim or the charge[93] and two forms, which are to be signed by the defendant, one of which is to be given to the defendant.[94] Where the defendant resides in a foreign country, the summons must be served on him through the Foreign Ministry.[95] If the defendant cannot write and has no seal, or if he refuses to receive the summons, the summoner must have two witnesses testifying that the defendant has been notified of the charge and the date of the hearing. Their testimony and signature must be entered and applied respectively on the form which is to be returned to the court.[96] The time between the serving of the summons and the opening of the trial[97] has to be fixed with reference to the residence of the defendant whether inside or outside Saudi Arabia.[98]

The question to be asked here is whether a party may be compelled to appear. The judicial laws do not refer to the fact that a private claimant may be brought to court by force. They only refer to his case being dropped if he fails to

appear without an excuse acceptable to the court. But the Consultative Council,[99] the Council of Deputies,[100] and the Presidency of the Judiciary[101] have ruled that a party, whether a claimant or a defendant, had to be compelled to appear when the appropriate court deemed it necessary. Besides, the High Authority and the High Judicial Authority may order that a claimant be compelled to appear by the police. Generally, a claimant may be compelled to appear in court (i) when he makes persistant claims to judicial authorities or to the High Authority,[102] or (ii) when the case involves a serious dispute which may lead to violence, especially if the case pertains to tribal groups.[103]

Where a defendant is in custody, he is to be brought for trial on request by the competent court. Before 1971, the court could only demand the arraignment of the prisoner from the administrative governer or the chief of police.[104] At present, the court itself directly requests the custodian to produce the prisoner.[105] The demand of the court that the prisoner be presented may be verbal or written, except when the charge is serious, when the demand must be written.[106]

Where a defendant is not detained, and he has failed to appear at the first session of the hearing without giving an acceptable excuse, he is to be compelled to appear at once.[107] If the office hours of the same day pass and he has not yet appeared or been produced, the court must assign another date for the hearing within three days,[108] and request the police to search for the defendant and to notify him of the time of the new session. The governor of a place with no police is to undertake the task of the police.[109] If the defendant fails

to appear at the second session without submitting an acceptable excuse, the court must try him in default. However, if the hearing is not completed at this session, the court should summon him to appear for the last time, and if he fails again to appear he must be tried by default.[110] The only exception to this is when the defendant is a trustee of an endowment (waqf), or a guardian, who may then be summoned more than three times.[111] This is attributed to the fact that his offence may involve the rights of others, and this makes it appropriate that he should be present at the trial in person.

References and Comments

1. Such as English Law. (See, Devlin, Patrick, The Criminal Prosecution in England, London, 1960, p. 6.

2. Abū Zahra, M., al-Jarīma wa al'Uqūba fī al-Fiqh al-Islāmī: al-Jarīma, Cairo, p. 69; P.P. v. b. Qāsim, C.C. (R), D. No. 593 of 1386 (1966).

3. Ibid.

4. There are two important cases in the history of the Saudi Arabian judiciary which illustrate this difference. The first case was in 1941 in King 'Abdul 'Azīz's era. The second was in 1968. In the first case the trial judge (the judge of Ṣāmiṭa) sentenced the defendant who had stolen a camel to the ḥadd, with no demand for recovery from the owner of the camel. Having reviewed the case, the Presidency of the Judiciary decided that the sentence was defective. The Presidency argued that the owner of the camel did not officially demand its recovery, but took the initiative and recovered it himself; that in that circumstance, only the punishment of ta'zīr could have been imposed. To execute the original sentence (i.e. the ḥadd), King 'Abdul 'Azīz had to have it affirmed by Shaykh Muḥammad b. Ibrāhīm, the Muftī. As Shaykh Muḥammad affirmed the sentence it became final. [P.P. v. al-Yāmī, S.C. (Sāmiṭa), Ṣ. No. 8 of 1360 (1941); P.J., D. No. 447 of 1360 (1941); L. of P.K.O. to Vic. No. 7/7/1961 (1941)]

In the second case, the Grand Sharī'a Court of Riyadh decided that the ḥadd was to be imposed upon the defendant, though the owner of the stolen object did not sue him to recover his property. The Court of Cassation, when reviewing the case, reversed the sentence for some defects; one defect being that the owner of the stolen object did not seek its recovery. Nevertheless, Shaykh Muḥammad b. Ibrāhīm, the supreme appellate authority at that time, affirmed the original judgement, as he did in the first precedent. [See, P.P. v. b. Qāsim, G.S.C. (R), S. No. 17/1 of 1386 (1966); C.C. (R), D. No. 492 of 1386 (1966); L. of G.S.C. (R) to F.M.C. (R), No. 1362/2 of 22/3/1388 (1968)]

5. See, P.P. v. al-Yāmī P.J., D. No. 447 of 1360 (1941); for further information, see, al-Mughnī, Vol. X, p. 300; Abū Zahra, supra, p. 69.

6. L. of G.S.C. (R) to F.M.C. (R), No. 1326/2 of 22/3/1388 (1968).

7. L. of G.S.C. (R) to C.C. (R), No. 3875/1 of 14/9/1386 (1966).

8. Some Ḥanbalī jurists hold that the heirs of an offended person who dies before knowing that he has been defamed may bring a criminal action against the offender (qādhif). (Abū Ya'lā, p. 255).

9. Al-Futūḥī, p. 488; Sharḥ, p. 372; al-Mughnī Vol. X, pp. 299-300.

10. P.J., C. No. 1287/3 of 18/11/1384 (1965); al-Habdān v. al-Ghuwaynim, F.M.C. (R), D. No. 156 of 1384 (1964); P.P. v. al-Ḥarithī, F.M.C. (Ṭ), D. No. 176 of 1388 (1968).
11. Abū Zahra, supra, pp. 107-108.
12. R.W. No. 7/4/570 of 22/3/1360 (1941); R.W. No. 8/4/2104 of 26/10/1363 (1944), quoted in L. of Vic. to P.J. No. 2624 of 9/4/1372 (1952); L. of P.C.M. to M.I. No. 21441 of 8/11/1381 (1962), quoted in L. of M.I. to A.G. (Northern Border) No. 9178 of 17/11/1381 (1962).
13. Al-Mahābī v. al-Mirwa'ī, G.S.C. (M) S. of 1392 (1972). al-Tashrī' al-Jinā'ī fī al-Islām, Cairo, 1963, Vol. I, p. 92.
14. Al-Ḥadramī v. al-Ḥadramī, G.S.C. (R), Ṣ. No. 150 of 1377 (1957); al-Muẓayfirāt v. al-'Ayāyda, G.S.C. (M), R. of 1392 (1972), Vol. II, p. 89.
15. Interview with Shaykh Muhammad b. Jubayr, Chief Judge of H.J.C. (1970). For further information see, al-Mughnī, Vol. IX, p. 476; 'Awda, Vol. I, p. 81, and Vol. II, p. 142.
16. C.C., D. No. 44 of 9/5/1359; Mubārak v. 'Alī, F.M.C. (R), D. No. 253 of 1384 (1964); al-Rammāḥ v. al-Khayyāl, F.M.C. (R), D. No. 390 of 1384 (1964); P.P. v. al-Khayyāl, F.M.C. (R), D. No. 389 of 1384 (1964); P.J., C. No. 1287/3, supra; P.P. v. al-'Usaymī and al-'Uṣaymī, F.M.C. (Ṭ), D. No. 299 of 1388 (1968).
17. Ibn 'Abdul Wahhāb, M., Mukhtaṣar al-Insāf wa al-Sharḥ al-Kabīr, p. 464.
18. Al-Ba'lī, 'A., al-Akhbār al-'Ilmiyya min al-Ikhtiyārāt al-Fiqhiyya, Cairo, 1950, p. 293.
19. Interview with the President of H.J.C., Shaykh Muḥammad b. Jubayr, (1972).
20. Al-Ghāmidī v. al-Ghāmidī, G.S.C. (R), S. No. 115/1 of 1391 (1972); L. of H.J.C. to C.C. (R), No. 258 of 17/10/1391 (1971).
21. P.J., C. No. 1287/3 of 18/11/1384 (1965).
22. P.P. v. al-Shihrī, F.M.C. (R), D. No. 987/2 of 1385 (1966).
23. P.J., C., supra.
24. Vol. IV, p. 269.
25. Vol. VI, p. 122.
26. See, p. 266.
27. L. of M.I. to P.J. No. 1032 of 12/8/1352 (1933).
28. This rule is an implementation of the traditional Islamic procedure.
29. Qur'ān, Chap. 3, verse 104.
30. Ibn Taymiyya T., al-Siyāsa al-Shar'iyya fī Iṣlāḥ al-Rā'ī wa al-Ra'iyya, Cairo, 1960, p. 60; Rāghib, M. 'A., Niẓām al-Niyāba al-'Amma fī al-Tashrī' al-'Arabī al-Muqāran, Cairo, 1960, p. 43.

31. See, Baḥr al-'Ulūm M.S., Dalīl al-Qadā' al-Shar'ī, al-Najaf, 1956, Vol. I, p. 211.

32. For fuller information on these Committees, see: Instructions for Committees for Enjoining the Right and Forbidding the Wrong of 26/4/1346 (1927); Supplementary to the Regulations on Committees for Enjoining the Right and Forbidding the Wrong of 2/4/1347 (1928); M. of the Executive Committee to Vic. No. 43/2/12 of 1/6/1347 (1928); C.C., D. No. 363 of 26/7/1349 (1930); Regulations on the Committees for Enjoining the Right and Forbidding the Wrong of 24/6/1356 (1937).

33. M. of M.I. to P.C.M. No. 2713 of 23/6/1380 (1960).

34. H.O. to the President of the Committees in Ḥijāz No. 25109 of 19/12/1379 (1960).

35. L. of Minister for the affairs of the Presidency of C.M. to M.I. No. 15848 of 15/7/1380 (1961); L. of C.M. to M.I. No.16392 of 23/7/1380 (1961); L. of P.C.M. to M.I. 20721 of 9/10/1380 (1961).

36. C.M., D. No. 725 of 23/12/1380 (1961).

37. H.O. to the President of the Committees in Najd and Eastern Province No. 21203 of 6/11/1381 (1962).

38. L. from King 'Abdul 'Azīz to P.J. No. 503 of 5/3/1346 (1927); L. from King 'Abdul 'Azīz to the Chief Judge of G.S.C. (M), No. 504 of 5/3/1346 (1927).

39. D. of 4/4/1347 (1928), approved by Vic. on 11/11/1347 (1929).

40. Report made by the Inspector of the Sharī'a courts which was referred by C.D. to C.C. on 17/1/1354 (1935).

41. Statute of Directorate of Public Security, arts. 8, 71.

42. Ibid, art. 3.

43. The reference of a criminal action by the police to court was however not obligatory. They had the option to refer it to their high executive authority, (the Viceroyalty in Mecca and the administrative governors in other places) or to the competent court. (Ibid, art. 103).

44. Law of Administrative Governors and Councils, art. 28; Law of 1952(A) art. 28.

45. No. 725 of 23/12/1380 (1961).

46. Ibid; Decision called 3/J of 1961 (1380), issued by M.I. (It determines that any serious crime is to be reported to the Ministry of the Interior before any criminal action is brought before the court, so that the Ministry can be sure that the investigation is properly carried out.)

47. P.J., C. No. 1691/3 of 10/7/1385.

48. "Al-Qism al'Adlī".

49. C.C., D. No. 171 of 1/8/1352 (1933).

50. They were called "Mufawwaḍū al-Qism al'Adlī".

51. C.C., D. No. 210 of 6/11/1358 (1939); C.D., D. No. 22 of 26/4/1359 (1940).

52. L. of P.J. to M.I. No. 811 of 21/6/1377 (1957); L. of M.I. to the Director of Public Security No. 10113 of 8/7/1377 (1958).

53. L. of D.P.J. (M) to M.I. No. 10754 of 4/7/1380 (1960); M.I., C. No. 9652 of 11/9/1380 (1961).

54. P.J., C. No. 1983/3 of 15/8/1381 (1962), and C. No. 1287/3 of 18/11/1384 (1965).

55. Lūluwa v. Ahmad, S.C. of al-Jafr, D. No. 749 of 1383 (1963, and Ċ.C. (R), D. No. 46 of 1384 (1964).

56. Interview with Shaykh Ṣāliḥ al-Luḥaydān, the former Chief Judge of G.S.C. (R), and a member of H.J.C., (1970).

57. Art. 111.

58. Art. 73.

59. See e.g., P.P. v. al-Yāmī, F.M.C. (R), D. No. 191 of 1385 (1965); P.P. v. al-'Azīb, C.C. (R), No. 23/1 of 1389 (1969).

60. D. No. 77 of 1/4/1347 (1928), and D. No. 117 of 2/5/1347 (1928).

61. Art. 7.

62. See e.g., Shalfān v. Ghānim, G.S.C. (R), Ṣ. No. 86/1 of 1388 (1968), and C.C. (R), D. No. 134/2 of 1388 (1968).

63. L. of P.C.M. to M.I. No. 17993 of 11/7/1383 (1963); L. of P.C.M. to M.I. No. 1753 of 26/1/1389 (1969).

64. M. of M.I. to P.C.M. No. 178 of 2/6/1375 (1956).

65. M. of M.I. to P.C.M. No. 178 of 2/6/1375 (1956).

66. Fatwā (of Shaykh Muḥammad b. Ibrāhīm), No. 3811/1 of 21/10/1386 (1967).

67. M.J., C. No. 172/9/T of 25/9/1391 (1971).

68. According to the Ḥanbalī law, there is not time prescribed for the crimes of ḥudūd and retaliation. As to a crime of ta'zīr, the matter is different. The head of the state has power to pardon an offender committing a crime of ta'zīr before or after he has been tried. Therefore, the head of the state is entitled to fix a period within which a crime of ta'zīr may be tried. (See Abū Zahra, al-Jarīma wa al-'Uqūba fī al-Islām: al-Jarīma, Cairo, n.d., p. 82; 'Āmir, 'A., al-Ta'zīr fī al-Sharī'a al-Islāmiyya, Cairo, 1956, p. 435.

69. No. 12 of 17/1/1352.

70. D. No. 242 of 4/11/1359.

71. L. of Vic. to P.J., No. 795 of 26/1/1346 (1927); Law of 1936 art. 126. See also, L. of King 'Abdul 'Azīz to his son Faisal (Vic.) No. 7/9/606 of 26/3/1360 (1941); R.O. No. 18066 of 9/9/1387 (1967); P.J., C. No. 2392/3/2 of 1/11/1387 (1968). A civil action is treated on the same footing as a criminal action in this respect.

72. L. of P.J. to Vic. No. 112 of 23/2/1350 (1931); H.O. No. 1039 of 13/3/1350 (1931).

73. If the case is one of those in which the presence of the accused is not stipulated, the accused may leave the country before the trial has taken place if he authorizes someone to act on his behalf in the proceedings, and produces a bailsman who is liable for all the consequences resulting from the judgement. (L. of P.C.M. to M.I. No. 5061 of 16/3/1381 (1961).)

74. C.C., D. of 4/4/1347 (1928), approved by Vic. on 11/11/1347 (1929).

75. L. of P.C.M. to M.I. No. 5061 of 16/3/1381 (1961); L. of P.C.M. to M.I. No. 3965 of 15/2/1383 (1963).

76. According to Article 1 of the Law of 1931, the time between the submission of a case and its hearing must not exceed ten days.

77. In the Sharī'a court, there is no difference between the date of the bringing, and that of the acceptance, of an action since the appropriate clerk enters it on the record as soon as it is brought, and by so doing, it is in principle accepted.

78. Law of 1952(A), art. 1.

79. P.J., C. No. 1108/3/M of 21/3/1386 (1966).

80. Law of 1936, art. 4; Law of 1952(A), art. 4.

81. Law of 1931, art. 1; Law of 1936, art. 1; Law of 1952(A) art. 1.

82. Law of 1931, art. 30; Law of 1936, art. 117; Law of 1952(A), art. 75.

83. Law of 1931, arts. 6,7, 9, 16; Law of 1936, arts. 27, 30, 31, 42; Law of 1952(A), arts. 19, 21, 34.

84. Law of 1936, art. 89.

85. Ibid, art. 90.

86. Ibid, art. 91.

87. Ibid, art. 92.

88. Article 9 of the Law of 1927, the Decision of the Consultative Council No. 671 of 13/12/1349 (1931), and Article 5 of the Law of 1931 determined that a case had to be dropped if the claimant failed to appear at the first session of the hearing and did not give an acceptable excuse, but he could move for the reconsideration of his case. The High Will No.653/1184 of 1353 (1935) indicated that the court had to fix a date for another session within three days after the first session at which the claimant had failed to appear. At the new session, the court was to examine the claimant's excuse for his failure to appear and decide if it was acceptable. If it was so, the court had to hear the case in the same session. Article 37 of the Law of 1936 added that if the claimant negligently failed to appear at the third session, the case could only be heard on a high order.

89. If a new session is appointed, the proceedings should commence from the point at which the case was dropped. (P.J., D. No. 1067/3/M of 12/4/1384 (1964).)

90. P.J., D. No. 25 of 27/1/1359 (1940); Law of 1952(A), art. 32.

91. C.C., D. No. 95 of 5/6/1351 (1932).

92. Law of 1936, art. 2; Law of 1952(A), art. 2.

93. P.J., C. No. 1159/3/M of 24/4/1384 (1964), quoted in al-Ḥuqayl, 'A., 'Alāqa al-Muwāṭin bi al-Dawā'ir al-Shar'iyya, Beirut, 1967, p. 162.

94. Maj., p. 60; Law of 1952, art. 7.

95. P.J., C. No. 855/3/M of 24/3/1386 (1966), and C. No. 2505/3/M of 26/10/1386 (1967).

96. Law of 1936, art. 6; Law of 1952(A), art. 6; P.J., C. No. 1068/3/M of 15/4/1386 (1966).

97. Article 2 of the Law of 1931 determined that the period had to be at least two days. According to Article 3 of the Law of 1936 it had to be at least three days. The Law of 1952(A), which is in force, does not specify a certain period but leaves it to the discretion of the judge.

98. Law of 1936, art. 4; Law of 1952(A), art. 4.

99. D. No. 77 of 1/4/1347 (1928), approved by Vic. on 11/11/1347 (1929).

100. D. No. 91 of 19/6/1359 (1940).

101. D. No. 2108 of 6/5/1359 (1940).

102. P.J., O. No. 4226/3/1 of 21/11/1386 (1967), quoted in L. of M.I. to A.G. (M) No. 1783 of 6/2/1387 (1967); L. of M.I. to A.G. (R) No. 1908/S of 23/10/1387 (1968).

103. P.J., O., supra.

104. Statute of Directorate of Public Security, art. 329.

105. M.J., C. No. 168/1/T of 19/12/1390 (1971).

106. Statute of Directorate of Public Security, art. 329.

107. Law of 1952(A), art. 26.

108. According to Article 10 of the Law of 1927 and Article 4 of the Law of 1931, if the defendant failed to appear at the first session, he would have to be compelled to appear. If he could not be found, he would have to be tried by default in the second date fixed for the hearing.

109. Law of 1952(A), arts. 26, 28.

110. Ibid, arts. 27, 29.

111. Ibid, art. 30.

Chapter Four

T R I A L

A. CONDUCT OF TRIAL

1. In Sharī'a Courts

When the court sits to hear a case for the first time, the judge must ascertain the identity of both parties. Having satisfied himself that the parties are correctly identified, he must request the claimant or the prosecutor to state his claim or allegations against the defendant, although the court has recorded it when accepting the case prior to the trial. The most important object in making this statement is to enable the defendant to hear the claim or the allegation against him from his opponent. Another important objective for the court is to obtain an amplification of the claim or the allegation of the claimant or the prosecutor if it is felt that this was not full enough when the case was submitted to the court for acceptance.[1] After entering the statement on the record,[2] the record clerk is to read it out in the presence of both parties. Before the judge asks the claimant or the prosecutor to adduce his evidence, he usually requests the defendant to state whether he admits the charge against him. If he admits it, and the judge is satisfied that his admission is valid, the judge must give a judgement based on this admission and close the trial.

Where the defendant has to refer to his books, consult his documents, or prepare a statement of accounts, the judge must adjourn the hearing for ample time.[3] Should the new session open and the defendant has not prepared his plea or answer and has no legal excuse, the hearing must not be adjourned again for this reason.[4] If the defendant denies the claim or the charge, or refuses to answer properly whether or not he admits the claim or the charge three times,[5] the judge must then ask the claimant or

the prosecutor to produce his evidence.[6] However, where a party moves for the adjournment of the hearing in order to prepare his challenge to the contention of his rival, the court must not agree to his motion unless it feels it necessary.[7]

The hearing must be adjourned if the evidence of a party is not available, but this adjournment has to be as short as possible. If this party fails to produce his evidence at the new session, or if his evidence is unacceptable, then the hearing should be adjourned for a second time. Where he fails again to bring an admissible evidence, he is to be given a last chance to present his evidence, and he must be warned that he will not be granted any further chance to produce his evidence. If he fails yet again to produce his evidence, the court has to proceed with the hearing considering him as unable to produce evidence. Consequently, the judge will decide on the case without any further adjournment,[8] unless the party has an acceptable excuse such as the absence of his witnesses.[9] However, if a party has witnesses who reside outside the venue of the court, and it is not easy for the party to cause their appearance before the court, he may move for the postponement of the trial, and for the reception of the evidence of his witnesses by the court within whose venue they reside.[10] The trial court should then authorize that court to hear this evidence, and instruct the party concerned to produce it therein. Having heard the evidence, the authorized court is to transfer it to the trial court.[11] This mode of receiving evidence seems to be more convenient for witnesses and for the party for whom the evidence is given.

A claimant in an action of a private right who has evidence which has not been put before the court is entitled to withhold

his evidence and demand instead the oath of his rival that the claim against him is untrue, provided that the rival resides within the venue of the court and that he consents to take the oath. But if the claimant has already adduced his evidence he cannot move for the oath,[12] since the reason for demanding this oath in this circumstance is to avoid delaying the trial and burdening him with the production of his evidence, and this reason no longer exists. However, if a claimant has no evidence at all, or if he has adduced only invalid evidence, he is entitled to ask the trial court to authorize the court within whose venue the absentee resides to summon him to appear and to take the oath denying the charge against him.[13]

This measure is an implementation of a general procedural rule, that in a private action, whether criminal or civil, in the absence of his evidence, the claimant may demand the oath of the defendant denying the claim.[14] As a general rule, since a judge must give a party a fair opportunity to prove his claim or charge, he must give the opposing party the same opportunity to question his opponent, provided that the questions are relevant. Equally, the judge must enable a party to examine the witnesses for his opponent and attack their characters. The judge himself is entitled to ask a party or a witness any question which may help him in deciding the case.[15] Where the claimant refrains from pursuing his case in the court after the trial has begun, his case must be dropped. If he moves for the suspension of the case after the trial has begun, the court should consider his motion, provided the defendant consents. The measures which the court takes concerning the suspension are exactly the same as those taken for suspension before the opening of the hearing.[16] Where the claimant moves for the adjournment of the trial for any reason

other than that of the production of evidence, the judge must not accept his motion without the consent of the defendant.[17] If the action is of a public right, the prosecution cannot move for its suspension, or dropping, or dismissal, since this right does not particularly belong to anybody, but to the whole community.

However, unlike the prosecutor in an action of a public right, the claimant in an action of a private right can renounce his right at any stage in the trial. The court must thereupon dismiss it,[18] and discharge the defendant. In a case concerning both a private right and a public right where the punishment for the latter right falls within that of the former, such as the case of murder and the hadd of defamation, the defendant cannot be discharged from the punishment for the public right if the claimant renounces his private right. To pursue the case for the public right, the court itself may complete the trial without a public prosecutor, but this happens very rarely in present practice. The court usually asks the public prosecutor to undertake the prosecution. A private action of a civil character and a public action resulting from the same act, such as a road traffic accident which causes private injuries and the violation of the law, are for convenience heard usually together in one trial. Where the claimant immediately sues the accused, there may be no prosecuting authority for the offence, which is in this example the violation of the law, since the guilt of this may be established automatically by the evidence given to prove the private claim. But if the claimant neglects the case or if he renounces his right, the court must continue the trial for the public right or request the presence of a public prosecutor to undertake the prosecution.

As soon as the court is satisfied that both parties have

stated their cases and tendered their evidence it should retire and examine fully all the data and render its decision. However, if the case is trivial and the proceedings are not complicated, the court may not retire but immediately make its decision. Yet, the court may delay its decision in three circumstances:-

(a) When the court is not sure as to the right sentence, where it should inquire about it from a higher judicial authority.

(b) When the case involves a private right, and the court feels that the contending parties, especially if they are relatives, may settle their dispute between themselves.[19] The public right involved therein may be decided after the settlement (sulh). The prevailing law does not specify the period for which the decision may be delayed[20] but leaves it to the court to decide.

(c) When a defaulting defendant appears, or when the court knows of his arrival at its locality in order to appear, before the judgement is announced. Then the court must hear the defendant, in the way mentioned in "Trial by default".

Having made its decision, the court must inform the two parties of it as soon as possible.

What has been outlined above is the mode in which the trial is generally administered. But there are two special types of trial which are conducted in a somewhat different mode. These are the trial by default, and the trial of a juvenile.

Trial by Default

Judgements decreed in default are valid if they concern civil issues or criminal issues of private rights, but judgements concerning public crimes[21] cannot be given in default at all.[22] Thus, what follows is confined to criminal cases concerning private rights (as well as civil cases).

If a defendant or his representative has not appeared at all,

or if he has appeared and then failed to appear, the court should consider him absent and proceed as soon as it concludes that he is contumacious and decide on the case,[23] even if its decision is against him. Where the defendant was represented and has dismissed his representative, or if the latter has resigned, the court must summon the defendant to appear if he resides inside its locality. If he is outside its locality, the court should proceed and hear the evidence for his opponent.[24] Having received the evidence for the opponent, the court must ask him to swear that his claim is true, and then decide against the defendant by default.[25] If the court decided against the defendant only by default upon the evidence for the claimant but without his oath, its decision is invalid.[26] Should the defendant fail to appear after the claim against him has been proved partly or totally,[27] the decision based on such evidence without the oath may be valid.

However, as soon as the defaulting defendant appears, or the judge learns that he has arrived in the locality of the court, the judge must halt the proceedings till the defendant is informed of what the court has received against him, and until he is given a chance to make his counterclaim and produce his evidence.[28] Where the judge learns of his arrival at the locality of the court or if he appears after the court has decided against him, the judge must suspend his decision. When the judge has found that the defendant has a prima facie plea and valid evidence, the judge must invalidate his previous decision and initiate a new one acquitting the defendant. Should the judge hear from the defendant no such plea and evidence, he must revive his previous decision,[29] which ought to be carried out after it has been affirmed by the appellate authority[30] if it is appealable.

Finally it should be mentioned that even if a judgement by

default has been affirmed by the appelate authority, the defendant can give his plea and evidence, when he appears in the trial court, upon which he may be acquitted.[31]

By giving a defaulting defendant the right to appear in court and state his case after he has been convicted, some may think that the law is encouraging default from the trial at the expense of the time and the dignity of the court. This right may also seem to them as being at variance with the interest of justice, on the ground that it causes an unnecessary prolongation of the trial. But it may, nevertheless, be thought that the truer interest of justice lies in giving a defendant every opportunity to defend himself, even after having defaulted. The law safeguards justice from defaulting by incriminating the defendant who defaults without an acceptable excuse.[32]

Trial of Juveniles

Where a juvenile commits a serious crime,[33] and the police feel that it is necessary to detain him, he must first be committed to court for a decision as to whether or not he should be detained.[34] The court should base its decision on the available evidence which appears to be prima facie. If the court orders his detention, the case should if necessary be sent back to the police for further investigation. As soon as this investigation is completed, the case must be committed again to the court for trial. Before the court opens the trial of a juvenile, whether he has been subjected to detention or not, the police must put before the court full information about his medical, mental, and social conditions.[35] The main procedural principles which apply only to this type of trial may be summarized as follows:-

(a) The judge must examine all the documents attached to the case prior to the appearance of the defendant.

(b) The trial must not be held in public, and no one is permitted to attend it, except the judge(s), the record clerk, the witnesses, the guardian of the defendant, and the claimant, if the case is for a private right. Where it is for the public right, the public prosecutor must not handle the prosecution, but he may be replaced by the person who undertook the preliminary investigation if necessary, provided that he wears civilian clothes.[36]

(c) The court should make the trial as short and speedy as possible.

(d) The judge must take extra care to treat the defendant very gently throughout the trial[37] in order to avoid his demoralization.[38]

2. In Commercial Tribunals

According to the Commercial Law,[39] after both parties have appeared at a tribunal, the chairman must open the hearing of a case in the name of the King, and this procedure was adopted in the Commercial Council of Jeddah. But this procedure has not been applied since the formation of the Committee for the Settlement of Commercial Disputes and the Committee for Securities. In pursuance of the law, the chairman must ask the litigants which of them is the claimant immediately after the opening of the hearing.[40] This was the traditional Islamic mode of opening a litigation at a time when it quite often happened that the contending parties walked in together to the court and asked the judge to settle their case. In modern times when the appropriate clerk usually records the names of both parties, it seems to be unimportant to ask such a question. The important measure to be taken in this respect is to identify the litigants, as is common practice at the present time.

Having established the identification of the contending parties, the chairman must ask the claimant or the prosecutor to give his claim, and if it is denied by the defendant, the claimant or the prosecutor must produce his evidence. When he has adduced it, the tribunal must ask the defendant about it and give him a chance to plead against it and produce his evidence, almost in the same way as that adopted by the Sharī'a courts.

Where the witnesses for a party reside outside the locality in which the tribunal sits, this party must be given sufficient time to produce his witnesses. If it is very difficult for a party to produce the testimony in the trial court, he may request that it be received by the court in whose jurisdiction the witnesses reside, even if this court is situated in a foreign country.[41]

Although both the Commercial tribunals and the Sharī'a courts apply similar rules as far as testimony is concerned, the former accept the giving of testimony by witnesses other than the original ones, whereas the latter courts do not accept such testimony in criminal proceedings, as hearsay evidence is inadmissible in them. Commercial tribunals do not impose restrictions on the admission of testimony given before any court even if it is foreign, while the Sharī'a courts admit only this type of testimony if it is given before a national court on the authorization of the trial court.

Commercial tribunals, other than the Committee for the Settlement of Commercial Disputes, usually hear the criminal case simultaneously with the civil one, if such a case stems from one act by the same defendant, since the evidence adduced to prove the civil case by the claimant will also prove the criminal case. Nevertheless, when the claimant renounces or neglects his civil right, the tribunal must then pursue, or request the appearance of

the public prosecutor to pursue, the criminal case. It is true that the tribunal may adjourn the hearing of the criminal case if the claimant in the civil one does not appear at the time fixed for the hearing.[42] But as soon as the tribunal realises that he is neglecting his case, it will proceed with the trial for the public right.[43] This procedural rule applies also to cases involving civil and criminal action, where the civil issue is settled by arbitration or by "settlement" (sulh),[44] in which case the tribunal must proceed with the trial for the criminal issue. Unlike the Commercial Council of Jeddah and the Committee for Securities, the Committee for the Settlement of Commercial Disputes does not pursue criminal cases but it leaves this to the appropriate public prosecutor.[45]

As a general rule, the proceedings must be conducted in Arabic, yet if a party does not speak Arabic he may bring with him an interpreter whom he trusts. If he has no interpreter, the court must appoint a trustworthy interpreter for him, and this interpreter must swear that he will translate the words of the party authentically.[46]

When the contending parties have no more claims and counter-claims, and no more evidence, the chairman must announce the closure of the trial, and the tribunal must retire to deliberate on its decision.[47] But if a party submits a document to the tribunal during the deliberation, the tribunal must accept and examine it, but no verbal claim or plea is accepted.[48]

Finally, it is important to examine the mode in which a Commercial tribunal tries a case by default. The general procedural principles applied in the ordinary trial are also applied in the trial by default, but the latter trial differs from the former in the following ways. Where the defendant does not

appear at any stage of the trial without any legal excuse, the tribunal must continue his trial and decide on the case in his absence. Yet, if he disappears subsequent to the retirement for deliberation but prior to the announcement of the judgement, this judgement is regarded as having been made in his presence.[49] A defendant who is convicted by default can object to his conviction within fifteen days after he has been notified by the tribunal of its judgement against him. If he resides far from the place in which the tribunal is situated, he must be given a longer period in which to make his objection.[50] The objection of the defendant takes the form of a petition to the tribunal explaining the reasons for which he believes that both the charge and the judgement made against him are unfair. The tribunal must then accept this petition and appoint a date for re-hearing the case; it must then notify him, and also the other party if necessary, of this date.[51] If the defendant fails to appear without a legal excuse, the tribunal must dismiss his objection and revive its previous judgement which will then be final. Afterwards, the tribunal will not accept any further objection by the defendant unless he appeals his case, and the appellate authority requests the trial tribunal to look into it again.[52] However, when the tribunal re-hears the case in response to such an objection, it may acquit the defendant, or revive the previous conviction, or modify the punishement determined before, according to the evidence produced by the defendant.[53]

3. <u>In the Grievances Board and the Bribery Committee</u>

When a case reaches the President of the Grievances Board he refers it to any of the examining magistrates of the Board, who must then undertake the necessary examination. An examining

magistrate is entitled to question a party or a witness about any matter which is relevant to the case under examination. The presence of a party or a witness may be demanded by a summons or by other means which the examining magistrate thinks appropriate. If a witness failed to appear, the Board would, at the request of this examining magistrate, take the necessary measures to secure his appearance. The investigation takes place at the seat of the Board, but if it has to be carried out in a different place, the examining magistrate must have the permission of the President of the Board in advance. The examining magistrate may call one expert or more, if needed, to help him in his investigation.

Having completed his investigation, the examining magistrate must write his report and suggest the measures which are to be taken to decide on the matter in issue. This report has to be submitted to the Reviewing Committee,[54] but if the case concerns a bribe, the report has to go to the Bribery Committee.

The Reviewing Committee must then examine the investigation and all documents presented by the two parties. When the Reviewing Committee or the Bribery Committee decides that the investigation is not sufficiently thorough, it should direct the same examining magistrate who made it to complete it in the proper way. Having heard the report of the magistrate and examined his investigation and the documents attached to it, the committee concerned should give consideration to his decision if it is appropriate and in harmony with the general judicial principles. But if the committee believes that his decision is unfair or is contrary to the customary judicial practice, it is not bound by the decision and is entitled to form its own decision. The committee is entitled to call upon the examining magistrate and request him to clarify any matter included in his investigation and to give his opinion

in regard to some issue, whether the committee adopts his decision or not.[55]

In practice, the importance of the decisions or recommendations of the examining magistrates differs from one committee to another and from time to time. In the first period of the Board, these decisions were usually approved by the Reviewing Committee. This may be attributed to two factors:-

(a) The decisions of the Board at that time were more like recommendations than definitive judgements, as they are now.

(b) The Board used to look into such a large number of cases that it made it difficult, if not impossible, for the Reviewing Committee to examine those cases thoroughly.

Consequently the Reviewing Committee usually had to adopt the decisions made by the examining magistrates. At present, since the Board deals only with a limited number of cases and gives definitive judicial decisions, neither the Reviewing Committee nor the Bribery Committee necessarily adopt the recommendation of a magistrate.

In conclusion, we may refer to the differences between the mode of trial followed by the Reviewing Committee of the Board and that followed by the Bribery Committee. In the Reviewing Committee the contending parties are not permitted to be present when the Committee examines their case. Each member of the Committee examines individually the documents pertaining to the case to form his opinion. In order to form a collective opinion making the formal judgement of the Board, all members must have a conference and adopt the appropriate opinion. If they do not agree on one single opinion, the opinion of the majority must constitute the judgement of the Board.

As to the trial by the Bribery Committee, the parties

concerned are to appear and the trial is conducted in a similar mode to that of Sharī'a courts and Commercial tribunals.[56]

4. In the Customs Committees

Every Customs committee is charged with the investigation of those cases which occur within its jurisdiction. It is also empowered to interrogate the accused whether or not he has been interrogated before by any other authority. An accused must appear before the appropriate committee when the interrogation and the investigation take place,[57] in order to facilitate the task of the committee in its examination and to enable him to defend himself. The committee is the only authority which receives the evidence against, and for, the defendant, and if it is adduced before another authority, the committee is entitled to receive only what it believes to be valid.

At these committees, no authority such as the public prosecutor is charged with the prosecution, since these committees do not subject the accused to a real judicial trial, but commit him only to an investigation, which is similar to preliminary investigation.[58]

The procés verbal of a Customs committee is regarded as authentic and final to the degree that the Appellate Customs Committee does not question its authenticity, except when the accused challenges its validity on the grounds that it was forged.[59] Having completed the investigation, the committee retires to deliberate on the decision, which must be based on its own investigation.[60]

Finally, it is necessary to note that a Customs committee may give its decision by default if the accused does not appear at the date fixed for the investigation.[61] But some of the Customs

committees favour the adjournment of deciding against a defaulting accused until he is arrested and compelled to appear.[62] However, unlike a defaulting party convicted by a Sharī'a court or a Commercial tribunal, a party convicted in absentia by a Customs committee cannot object to it against its decision. He may only challenge the decision against him by way of appeal.

5. In the Forgery Committee

When a crime of forgery is committed, the necessary preliminary investigation has to be made before it is committed to the Forgery Committee. When the case is put before the Committee, the investigation must be submitted in its original form. Having received the case, the Committee must examine all the documents and reports attached to it in order to complete, or request the appropriate authority to complete, the investigation. However, this will not prevent the Committee from making further investigation if necessary at any stage of the trial.[63]

In carrying out its investigation, the Committee may consult experts such as experts in handwriting.[64]

The Committee requests the appearance of the defendant, and does not normally try any defendant in absentia. Since there is no authority representing the prosecution, the Committee is in charge of this matter; in other words it prosecutes the defendant and adjudges him. Nevertheless, it gives the defendant opportunity to defend himself and to refute the charge, and to rebut the evidence against him. Where he claims that the documents conveyed against him were falsified, the Committee takes extra care to ascertain their authenticity.

There are no statutory rules which govern the procedure of this Committee, but it follows the rules which it feels

appropriate. Thus, it may adjourn the hearing for a period, which may sometimes be a long one, at any stage.

When the Committee feels that all investigations and evidence have been completed, it retires for deliberation, where its members study the case again from the record. Having completed its deliberation, the Committee must give its decision and request the appearance of the accused and read the decision in his presence.[65]

B. GENERAL PRINCIPLES OF TRIAL

1. A sufficient number of competent judges

The tribunal which tries a case must consist of judges who are accorded judicial jurisdiction by the appropriate authority, so that its decision can be valid. Where a judge was accorded such a jurisdiction for a certain period his decisions prior or subsequent to this period are invalid. Here, it may be relevant to mention that when King 'Abdul 'Azīz conquered Ḥijāz, he dismissed some judges appointed by the previous government, but they continued to decide cases referred to them. These judges were influential religious persons who belonged to certain sects, and decided cases pertaining to the adherents of their sects. When the Saudi Arabian authorities discovered this practice they nullified the judgements of these judges given after the King assumed power in Ḥijāz.[66]

Besides judicial jurisdiction, the tribunal must consist of a sufficient number of members which varies from one tribunal to another, and from case to case, as has been mentioned in the "Second Chapter". According to the laws of the Sharī'a courts, there are two classes of cases which must be tried per curiom. These are:-

(a) Crimes whose punishments are mutilation or death.[67]

(b) Crimes whose sentences are not determined by the

Ḥanbalī Law, where the consensus of the judges is needed for the initiating of these sentences.[68]

In practice, the first class of cases are always tried by all the judges of the court, but the second class is not necessarily so tried at the present time. The remainder of cases are tried only by one judge to whom the case is referred by the chief judge of the court, who distributes cases amongst the judges including himself. However, according to the Law of 1927,[69] the judge who heard the case could not alone determine the judgement, but all judges had to examine its record colloectively and then make their decision. Yet, if the court consisted of one judge only, his decision was valid. Nevertheless, according to all laws issued after 1931,[70] the judge who tries a case alone is the only one who determines its judgement, since one judge is considered to be sufficient to decide on any case, provided that it does not involve a crime of murder, apostasy from Islam, highway robbery, the ḥadd of theft, or the ḥadd of zinā, which is tried by the whole panel of the Court's judges.

The members of a semi-judicial tribunal must collectively try any case, even if the charge is trivial. Should a member be absent when the trial is to be opened, the tribunal is to sit without him as long as the majority of the members are sitting.

2. Open Trial

As the Islamic judicial tradition adopted the rule of conducting trial in public,[71] the Saudi Arabian judiciary follows this rule in principle. But the judicial laws are so vague on this matter that no one can draw a clear picture concerning the application of the rule. The Law of 1936 and the Law of 1952(A) determine that "proceedings shall be carried on in public, except in circumstances where the court regards it to be in the interests

of morals to have it done in secret." Article 472 of the Commercial Law determines:"Proceedings shall be in public ..." Article 478 thereof states that the presiding judge must "conduct the trial in public." Thus, the judge will find himself the only authority who applies this rule in the way he feels it proper, since he is the authority who interprets these brief laws. Thus, the interpretation of "morals" is left totally to the presiding judge and this allows the interpretation of one judge to be different from that of another. Under normal circumstances, the judge must theoretically allow the public to attend the trial without discrimination. Yet, the principle of "open trial" must not contradict the principle of the "maintenance of order." The judge must prevent any member of the audience from attending the hearing if this measure is taken in the interests of keeping order.

However, the trial must not be held in public in the following circumstances:-

(a) When the defendant is a juvenile on the ground that he may be demoralized if he is tried in public.[72]

(b) Where the alleged crime may damage the reputation of the prisoner or that of any of his relatives.

(c) Where the alleged crime is regarded as dangerous to society, such as crimes involving drugs. The trial of this kind of crime is made in camera for two reasons. The first is to facilitate the task of the police in detecting the sources of drugs and the persons involved. The second is not to draw the attention of the public to the method used by the prisoner in committing his crime.[73]

Now we may turn to the judicial practice concerning "open trial". One must differentiate between two phases of the Saudi Arabian administration - the first one is prior to the centralization of administration in the early 1950's, and the

other is subsequent to this centralization. In the first phase, there were two kinds of judiciary: the judiciary in the cities of Ḥijāz, which was well organized, and the judiciary prevailing in other parts of the country which was less organized. In this latter judiciary the trial took place usually in open court. As mentioned before, the court building was often the residence of the judge and his visitors were allowed to attend trials. Sometimes the trials were conducted in the market. After the centralization of administration the Sharī'a judicial system was unified on the Ḥijāzī pattern. However, at the present time the tribunals are not, in actual practice, open to the public for the following reasons:-

(a) No one can attend the hearing unless the judge allows him permission to enter.

(b) Some judges may extend the interpretation of the law which prohibits the trial in public in the interests of "morals" to include most criminal cases.

(c) The ban on publicity concerning crimes before, during, and after the trial, and this makes it impossible for a journalist to attend the court. This is a good example of how narrow is the scope of the principle of "open court".

(d) Some tribunals do not allow entrance to any person other than parties, their representatives, witnesses, or the judicial staff, unless a person has permission to attend from an authority higher than the tribunal. For example, the author was not permitted to attend the Forgery Committee without the permission of the Deputy Minister of the Interior, although the judge who conducted the trial stated: "We know that the judicial tradition of this country is that the trial must be in open court, but it is customary that no audience attend in this committee."

(e) A judgement cannot be challenged if the trial was not made in open court. Additionally, judicial decrees do not mention that trials were performed in open court.

(f) In general, the size of the courtroom in Saudi Arabia is very small[74] compared with that in other countries whose laws determine that trial must take place in open court.[75] The size of the Saudi Arabian court is only slightly larger than that of an average office. Thus, judging from the size of the courtroom of any tribunal the trial in open court hardly exists since there is no room for an audience, specially in a case involving several parties and witnesses.

It may be concluded that the law recognises, in principle, that a trial must be held in open court, but this hardly exists in practice. Consequently, the decisions are not normally delivered in public.[76]

3. Maintenance of order

The presiding judge, or the single judge who conducts the trial alone, must prevent any act of "disturbance" and maintain the "dignity of the court" throughout the hearing. The law does not set out which acts can be regarded as "disturbance", but it leaves it to the judge conducting the trial to use his discretion. It seems, however, that "disturbance" involves any interruption of the judge, a party or his representative, or a witness. As no statement can be made during the hearing unless the permission of the judge is obtained, it may be said that any statement or comment made without his permission is accordingly considered an act of "disturbance". Since the "dignity of the court" is very essential, any act which violates this dignity, even if it was not of spoken words but of an unacceptable gesture, may also be regarded as an act of "disturbance". By virtue of the fact that the tribunal

should not permit any party or his lawyer to make any speech which is irrelevant,[77] such a speech may thus be regarded as a type of "disturbance", if it is repeatedly made.

In theory, the judge conducting the trial must take preventive measures against the source of "disturbance", but in practice, he may tolerate it if it is not excessive. Indeed, in proceedings regarding a private right, some judges may tolerate to a certain extent an argument between the contending parties without it being conducted by these judges in order to illuminate aspects of their personalities and their claims and counter-claims.[78] However, the main preventive measures against "disturbance" are four:-[79]

(a) Censure. This measure is usually taken when the act of "disturbance" is very minor and not made repeatedly.

(b) Temporary expulsion from the tribunal. This measure is usually taken against a party, whose appearance is required and who has committed an act of "disturbance" while a statement was being made.[80]

(c) Expulsion. Any person, other than a party, who violates the "dignity of the court" may be expelled from the court, and prohibited from attending it.[81]

(d) Imprisonment. A judge who conducts trial at a Sharī'a court is entitled to order a person causing "disturbance" to be committed to imprisonment for a maximum period of twenty-four hours.[82] This imprisonment is applied against those who persevere in their "disturbance" and ignore the order of the judge.

When the judge decides to send out or to expel from the tribunal a person who makes "disturbance", his decision is not technically regarded as a sentence or a punishment, it is regarded only as a preventive measure, since this decision is made by the presiding judge, and it is not subjected to the rules and

formalities to which a judicial decision is subjected. The imprisonment for twenty-four hours mentioned above is not also a sentence, but it is a disciplinary measure. Where the judge feels that the imprisonment of twenty-four hours is not sufficient, then the act of "disturbance"will amount to a crime of contempt of court, and its punishment will take the course of any other crime; in other words it is punishable by a sentence.

Finally, the question to be raised here is: can the judge maintain order by using a police or a semi-police force? It is to be mentioned that each Sharī'a court has a few summoners who are, besides their function as summoners, in charge of keeping order outside the courtroom.[83] They are not allowed to be present in the courtroom during the hearing in their official capacity, unless they are called by the judge. It is within the power of the judge to order the summoners to send out any person causing "disturbance" and refusing to leave the courtroom when he is requested to do so. Besides the summoners, there is a police post assigned to the court building or situated nearby in the large towns. The judge is entitled to use these police if needed.[84] However, their presence in the courtroom during the hearing is not allowed, unless the contending parties are so hostile that they may physically attack each other. In such circumstances when force is needed, some judges prefer to use civil officials instead of the police.[85] The intention of these judges is probably to make both parties feel that they are under no pressure of any kind by the executive. In villages and small towns the civil officials of the governor are the only force to be called, if force is needed.

4. The judge must deal with all procedural measures taken during the trial

Generally speaking, this principle does not mean that the

judge necessarily conducts the trial. It means that the judge must be present during the whole trial, whether he is the president who conducts it or merely a member of the tribunal, or the only judge who tries it. There are two objectives behind this procedural principle:-

(a) By dealing with the proceedings throughout the trial, the judge makes sure that all data presented to the court, including documents, are authentic, and all entries in the record are reliable. Thus, the record clerk must not enter anything therein unless he is instructed to do so by the judge. Similarly, he must not receive any document from a party without the permission of the judge and in his presence.[86]

(b) Where the judge deals with all the proceedings, his judgement is bound to be more accurate than that of a judge who does not deal with every measure taken in the trial. Yet, where the judge is not certain as to which kind of judgement is suitable, he can consult the judicial authority.[87] By this consultation he is still regarded as dealing with the whole trial, since the opinion of the judicial authority cannot be imposed on him if he does not agree to it.

In view of these two objectives, the judge is entitled to request a party or a witness to give his statement just as he has the right to question them about any matter concerning the proceedings. The questioning and examining of a party, or of his representative, or the cross-examining of a witness by the opposing party should be made upon request to the judge.[88] Moreover, a party who wishes to examine the documents of his opponent must first have the permission of the judge.[89]

This general principle is applied in a restricted manner by the Sharī'a courts, which try the vast majority of crimes. Yet,

the Sharī'a judiciary has known two exceptions to this general principle:-

(a) By Article 1 of the Law of 1927, it was provided that after a judge who had colleagues in his court had retired for deliberation, his colleagues must join him and examine the case from its record, and then give collective decision. Nevertheless, this exception was abolished by the Law of 1931,[90] which determined that no judge alone could make, or participate in making, a decision unless he had dealt with the case from the outset of its trial until its closure.

(b) Where a judge has retired or died before he has completed the trial of a case, his successor may continue the hearing from where it was stopped by the previous judge, on two conditions. The first is that any statement given by a party or a witness, which was then entered on the record, was signed by the one who gave it and endorsed by that judge. The second is that the succeeding judge must read all the record of the case.[91] However, a succeeding judge is not compelled by the law to start from where his predecessor had concluded, but he may look into the case from the start. However, it may be appropriate for a judge to consider what was entered on the record during his predecessor's office and to complete the hearing if the case is not complicated or serious, for two reasons.

(a) The record signed in the way mentioned above is considered authentic.

(b) This measure will speed up the trial, and this is very important when a detainee is involved.

The reason for the law being very flexible in this matter is probably to give the judge full opportunity to act according to the seriousness and the circumstances of the case. Despite this

flexibility, a judge who is transferred officially to another court must not leave for the new court until after he has completed the case which he has started to hear.[92] The semi-judicial tribunals are not as strict as the Sharī'a courts in applying this principle. In these tribunals, a member is not required to be present at every session if he examines with his colleagues all the data pertaining to the case when they retire for deliberation.[93]

5. Appearance of parties

According to the law[94] and the general practice,[95] the two parties must, under normal circumstances, appear during the proceedings in order to state their case or defend themselves. Thus, if a judgement is passed without the appearance of a party, even in a part of the trial only, it is invalid. Evidence must be adduced in the presence of the party against whom it is produced, otherwise it will not be receivable, except when his trial is conducted by default. The question now is what measure is to be taken when this party is not willing to hear the evidence? If he attends court and tries to prevent a witness from deposing his evidence by means of shouting at him, the party has to be taken away from the courtroom, and when the evidence is completely deposed and entered on the record, he has to be brought back where it is to be read out while the witness is present.[96] Yet, when the court decides that the defendant is to be tried by default for his failure to appear it should carry on with the hearing in the way, and on the conditions, mentioned when dealing with the trial by default. There are two justifications for trying a defaulting defendant in absence:-

(a) The court has taken the legal measure to enable him to appear when summoning him before the trial was opened, but he refused to appear.

(b) No one must escape justice merely by defaulting, and the normal procedure of implementing justice has to be made through trial.

Nevertheless, some semi-judicial tribunals, namely the Grievances Board, do not hold their session in the presence of parties as referred to before.[97]

6 - Equality between the two parties

It is a well established fact that any civilized law must grant the contending parties equality before the court. Islamic law and judicial practice hold strongly this principle. The Prophet commands that the judge "must regard the two parties equal when he speaks to, or points at, them; he must treat them equally in his presence;[98] he must not speak quietly to one of them and speak loudly to the other."[99] Muslim jurists set out the measures which the judge must take to apply the principle of equality between parties. The general Islamic criterion of ensuring equality is that the judge must handle the case in a way that a party who is humble does not despair of justice and impartiality, and the party who is of high standing does not hope to find favour.[100]

Early in his rule, King 'Abdul 'AzIz stated that one of his aims was to ensure equality before the law. Whether this aim has been fulfilled will be dealt with later. The judicial laws mention this equality very little.[101] In practice, the Saudi Arabian judiciary applies the principle of equality between parties, especially the Sharī'a judiciary which applies totally the Islamic judicial tradition in this respect. The courts regard parties as equal irrespective of their political position, social status, or religion.[102] The parties must sit side by side in front of the judge, enjoying the same attention. Equality is shown by the fact

that the court usually calls a party by his plain name omitting his honorary title. If it happens that one party is a prince,[103] for example, the court will not mention his title during the proceedings, but calls him by his plain name in order to show his rival that the court is not in favour of anything but justice. The courts regard the public prosecutor as a mere litigant, who must sit side by side with the defendant. The President of the Judiciary informed the Minister of the Interior - who is the chief authority for the prosecution - that "It must be known that justice requires that the public prosecutor must not be given special attention because he is the representative of the government, but he must only be regarded as a mere litigant and treated by the court in the same way in which the defendant is treated."[104] Another indication that the accused is treated equally with the prosecutor or the claimant is that the Saudi Arabian tribunal does not know the dock in which the defendant sits in some countries. Moreover, as the court must make the defendant feel secure enough to defend himself and free from discrimination, no prison officer or policemen or any person representing the executive authority is allowed inside the court, except in a case of violence.

7 - <u>Oral conduct of proceedings</u>

The main purpose of the parties being present during the hearing is to enable them to debate their cases and to hear what is stated by the opposing party or by witnesses. The most important objectives of this principle are the following:-

(a) A fact stated orally before court by the original source is bound to be more reliable than one stated in writing and recorded outside the court.

(b) When a statement is given viva voce, the court will read it over after it has been recorded, and this will enable the

person who gave it to correct any error appearing on the record. This may be illustrated by instances when an uneducated party or witness gives his statement in his own local dialect which may not be fully understood by the judge and the record clerk. The judge has to ask this party or witness about the exact meaning of his statement. This mode of recording a statement helps to eliminate errors.

(c) A witness intending to give false evidence may find it easier to do so in writing and not in words before the court. When such evidence is given orally in the court, in the presence of the party against whom it is conveyed, the witness will probably be embarrassed and nervous to the extent that the court may suspect his evidence, and therefore, subject him to a thorough examination.

(d) Parties will be more satisfied as to the fairness of the trial if the proceedings are oral, since they know that all they have said, or has been said in their favour, was heard by the court.

For these reasons, the Sharī'a and the Commercial Law hold that proceedings must be made orally.[105] "Orally" here means the giving of a statement by its original source by word of mouth. But it is accepted legally that a statement may be regarded as having been given orally in the following circumstances:-

(a) When evidence is given in the absence of a defendant, who was sent out by the court subsequent to his causing a "disturbance" when a witness for his rival was giving his evidence, on condition that it is read out in the presence of this party after he has been allowed to return to the courtroom.

(b) When facts are stated in a document produced by an official authority, provided that this document does not contain testimony required to be given viva voce, and provided that it is read in the court.

(c) When a plea was signed by the defendant and read out by the tribunal before it is entered on the record.[106]

8 - Legal representation

The Saudi Arabian Judiciary grants every party a fair opportunity to argue his case and convey any admissable evidence. However, it differs basically from the Judiciaries of other countries which have bar institutions in limiting the scope of legal representation. Generally speaking, the Sharī'a courts do not encourage legal representation on the ground that it is infinitely preferable to keep profcssionalism out of the judicial proceedings. It is true that the semi-judicial tribunals do not object in principle to legal representation conducted by a professional lawyer. These tribunals usually tolerate the lengthy arguments of lawyers which may concentrate on technicalities and on side issues,[107] which are not tolerated by the Sharī'a courts. Nevertheless, since the Sharī'a courts dominate the vast bulk of the judiciary, we shall concentrate more on legal representation at these courts.

Here, one must differentiate between criminal cases which involve public rights and those which involve only private rights. According to the Ḥanbalī law and the general practice of the courts, no legal representation is permitted in criminal proceedings regarding a public right.[108] A defendant must appear in person to argue his case. The judge may learn more about the truth of the charge and about the validity of evidence when a party argues the case. However, where the case involves both a private right and a public right and the court looks into them simultaneously, legal representation is permitted, especially if a foreigner who does not speak Arabic is involved. The extent of such permission depends on the judge himself and not on a statutory or an administrative rule. The judges who usually encounter non-Arabic speaking

foreigners, such as the judges of the Eastern Province where the oil companies are found, tend to tolerate professional lawyers. Such a tolération is mainly due to the fact that lawyers may, at the same time, act as interpreters.

Where a case concerns a private right, whether criminal or civil, the Sharī'a[109] permits representation by a member of the legal profession or by a lay person, whether the represented party is present at the court or not. The Law of 1936[110] and the Law of 1952(A)[111] determine that "every person has the right to be represented without any restrictions." In actual fact, legal representation in cases of private rights is restricted by certain conditions regarding the social and medical status of parties, the location of courts, the type of the case, the qualifications of representatives, their occupations and their nationalities. This fact may be illustrated by reference to the historical background of legal representation in Saudi Arabia. According to the judicial instructions issued in 1927 (1345)[112] by the Presidency of the Judiciary, Article 11 of the Law of 1927, and a royal order in 1930 (1349),[113] the only persons who could be represented at courts were those who had a legal reason, such as absence[114] or illness,[115] or a secluded woman (mukhaddara).[116] Where a party resided some distance outside the town in which the court was situated, he was considered absent, and thus, he could be represented.[117] Article 23 of the Law of 1931 granted a public functionary the right to appoint a representative. Minors and old persons are in practice entitled to representation[118] although their right in this respect is not recognised by the law. Article 97 of the Law of 1936 provided for the representation of all persons without regard to status. But three months later, the Presidency of the Judiciary decided[119] that the inhabitants of Mecca, Jeddah, and Madīna, were not entitled to be represented. This may be explained by the fact

that the judicial and executive authorities were against legal professionalism which they thought could lead to delay in the hearing, and to an attempt at gaining benefits for clients at the expense of justice.[120] In 1366, the Beduins living outside Madīna but within the jurisdiction of its courts were not allowed to appoint representatives but had to argue their cases in person. The reason given for this was that these Beduins were in the habit of trespassing on the properties, especially the lands, of others and claiming that those properties were their own. Where a case was raised against them, they referred to their representatives in Madīna and refused to appear since they were represented. By doing so, they made it very difficult for their rivals to pursue their cases, since they had in some cases to travel to Madīna, and this forced their rivals, especially those who were weak or poor, to give up their rights. Yet, if any of these Beduins had a legal excuse, he was entitled to appoint a representative.[121]

Article 59 of Law of 1952(A) follows Article 97 of the Law of 1936 in giving any person the right to be represented irrespective of his status. In 1955, a jurist[122] submitted a memorandum to King 'Abdul 'Azīz requesting the abolition of legal representation in the interest of justice. The King referred this memorandum to the Muftī for his opinion. The Muftī ruled that legal representation was admissible in cases regarding private rights, provided that the representatives had proper qualifications.[123]

At the present time, representation is, in practice, undertaken mostly by relatives and professional lawyers who must be[124] Saudi Arabian subjects. However, a foreign lawyer may, on permission, represent a party when no Saudi Arabian lawyer is available.[125] A former judge, or a person attested to have sufficient legal knowledge[126] can also act as representative at court.[127]

9 - Evidence must be put before court

As a general rule, the judge must base his judgment upon evidence put before him in the court so that it may be examined closely and the parties are enabled to debate it. Hence, the court must not initiate its judgment wholey or even partly, on any evidence which is unknown to the party against whom it is given, or on evidence of which this party was told but was not given opportunity to refute.[128] According to this rule, any knowledge obtained by the judge outside his court affecting evidence related to the proceedings is not admissible unless it concerns the character of a witness. Although some Muslim jurists[129] are of the opinion that the personal evidence of the judge is as admissible as any evidence, official Ḥanbalī law excludes this evidence whether it was perceived before or after the appointment of the judge.[130] This opinion is applied by the Saudi Arabian judges.[131]

10 - Speed in the handling of cases

One of the characteristic features of the Saudi Arabian judiciary, especially the Sharī'a courts, is said to be the efficient and speedy handling of cases. This fact has attracted the attention of some legal experts who encounter the Saudi Arabian courts.[132]

It is true that Article 47 of the Law of 1952(A) determines that: "No cases whatsoever shall remain in the court awaiting trial for more than one month". However, this rule has not been applied in every kind of proceedings. Its significance may be in reminding judges of the necessity of deciding cases as speedily as possible. The student of Saudi Arabian legal practice cannot fail to notice that some trials may take much longer than one month since justice requires that a case, especially a serious one, must be carefully considered and both parties given adequate time to present their

cases. Moreover, the Sharī'a courts may not necessarily apply the laws which limit the time given to a party to produce his evidence if they feel that this is contrary to equity. However, the Sharī'a courts apply several measures to speed their trials:-

(a) The judge must examine a case one day prior to its hearing, so that he may have a general idea of what is needed at the hearing.[133]

(b) The majority of the criminal cases tried by these courts are not serious, so that the court may not spend a long time considering every single particular in the proceedings.

(c) Most cases are heard by a single judge.

(d) The contending parties may go together to the court and ask it to decide on their case, especially if it is trivial, and the judge must agree to this if the case does not require a preliminary investigation and if he has time to look into it at the end of the office hours on the same day.[134] Where a hearing has to be adjourned for a party to prepare his plea or to produce his evidence, the judge ought not to adjourn it for a longer time than the end of the working hours of the same day if this is possible. Furthermore, where the court fixes a certain date for the hearing and both parties appear before the date the court ought to look into their case, if it has time.[135]

(e) Where a defendant refuses to give a complete answer to a question or request, or if he gives an irrelevant answer, the judge must request him three times to give a proper answer. If the defendant does not respond to the judge's request the court must proceed with the hearing in the same session.[136]

(f) If a party fails to appear, the court may secure his presence by force if necessary. Once the court realises that a party is behaving contumaciously or he is outside its jurisdiction,

it must try him by default if he is a defendant, and must drop his case if he is a claimant, without wasting time.[137]

(g) If a party who must take an oath refuses to appear, he must be compelled to appear.[138]

(h) The Sharī'a judges hold that detention is a type of punishment and no accused should be punished before his guilt is legally established. This principle leads them to take all legal measures to speed up the trial of a detainee, especially if the proceedings relate to a public crime.

(i) The public prosecutor should not prosecute the defendant until the evidence for the prosecution is available. Thus, most of criminal cases are decided on in one session.

(j) Generally speaking, a defendant must appear and defend himself if he is charged with a public crime. Yet, in a crime of a private right, he may be represented, but once the court realises that his representative is trying to cause delay, the court may order the defendant to appear personally and complete his case.[139]

Thus, it can be said generally that the Sharī'a courts handle cases in a speedy manner.

References and Comments

1. Law of 1931, art. 6; Law of 1952(A) art. 18.
2. Judicial instructions issued by P.J. on 25/2/1349 (1930).
3. Law of 1931, art. 7; Law of 1936, art. 27; Law of 1952(A), art. 19.
4. Law of 1936, art. 31; Law of 1952(A), art. 22.
5. Law of 1931, art. 8; Law of 1936, art. 29; Law of 1952(A), art. 20.
6. Judicial Committee, D. No.3 of 7/1/1347 (1928), approved by the High Authority on 24/3/1347 (1928).
7. Law of 1936, art. 30; Law of 1952(A), art. 21.
8. Law of 1936, art. 43.
9. Law of 1952 (A), art. 35.
10. Law of 1931, art. 11.
11. Law of 1936, art. 42; Law of 1952 (A), art. 34.
12. Law of 1936, art. 51.
13. Ibid.
14. See, Ibn al-Qayyim al-Jawziyya, al-Ṭuraq al-Ḥukmiyya, pp.74-75.
15. Law of 1936, art. 28.
16. Law of 1952(A), art. 32.
17. Law of 1936, art. 90.
18. Law of 1952 (A), art. 36.
19. Law of 1931, art. 18; Law of 1936, art. 67.
20. According to Article 18 of the Law of 1931, the maximum period was only four days. By Article 67 of the Law of 1936, the maximum was fifteen days.
21. According to the Ḥanbalī Law, the defaulting defendant who is accused of committing a public crime must not be tried in absence.
22. L. of P.J. to Vic. No. 12 of 8/4/1349 (1930), in response to H.W. No. 3459 of 4/4/1349 (1930).
23. Judicial instructions approved by the King on 25/2/1349 (1930).
24. Law of 1936, art. 137; Law of 1952 (A), art. 95.
25. L. of P.J. to Vic. No. 12 of 8/4/1349 (1930); Law of 1936, art. 54.
26. L. of King 'Abdul 'Azīz to his son Faisal (the Viceroy). No. 7297 of 22/8/1360 (1941).
27. Law of 1936, art. 53.
28. Law of 1936, art. 64; Law of 1952 (A) art. 39.
29. L. of P.J. to P.C.M. No. 1489/3 of 23/3/1380 (1960).

30. Law of 1936, art. 61; Law of 1952(A), art. 37.

31. Ibid.

32. C.D., D. No. 141 of 23/7/1360 (1941); L. of P.J. to P.C.M. No. 1489/3 of 23/3/1380 (1960).

33. L. of M.I. to A.G. (M) No. 12683 of 26/9/1388 (1968).

34. P.J., C. No. 1014/3/M of 22/4/1387 (1967), quoted in C. of the branch of P.J. in Mecca No. 1810 of 7/5/1387 (1967); M.I., C. No. 2062 of 9/4/1387 (1967), and C. No. 2502 of 2/5/1387 (1967).

35. L. of M.I. to A.G. of Eastern Province No. 2104/S of 12/7/1389 (1969).

36. Ibid.

37. L. of P.J. to M.I. No.526/1 of 16/3/1389 (1969).

38. L. of M.I. to A.G. of Eastern Province, Supra

39. Art. 478.

40. C.L., art. 480.

41. Ibid, art. 505.

42. Al-'Ulayṭ v. al-Idris, C.S., D. No. 25/90 of 1390 (1970).

43. Nāṣir v. al-Ḥamidī, C.S., D. No. 23/90 of 1390 (1970), and Fakhru v. al-Manī'ī, D. No. 28/90 of 1390 (1970).

44. About arbitration and ṣulḥ, see C.L., arts. 492-497.

45. M.C.I., D. No. 231 of 22/10/1389 (1969).

46. C.L., art. 483.

47. 'Abd al-Jawād v. al-Hazzā', C.S., D. No. 15 of 1389 (1970).

48. C.L., art. 508.

49. Ibid, art. 528.

50. Ibid, art. 531.

51. Ibid, art. 532.

52. Ibid, art. 534.

53. Ibid, art. 533; "in... v. Shihāb", C.S., D. No. 12/89 of 1389 (1969); "in... v. Abū Dīwān", C.S., D. No. 14/89 of 1389 (1969).

54. Internal Regulations of the Grievances Board, art. 8.

55. Ibid, 4, 12.

56. Interview with Shaykh 'Abdul 'Azīz al-Huwaysh, the Deputy President of the Grievances Board, and a former examining magistrate. (The review was made on August 20, 1972).

57. C.R., art. 258.

58. Cust. L., arts. 45, 52.

59. Ibid, art. 52.

60. C.R., art. 259.

61. Cust. L., art. 45.

62. Cust. v. Fāris and others, Cust. C. (R), D. No.78 of 1391 (1971).

63. "In... v. Ṣubayyān " D. No. 137/89/T of 1389 (1970).

64. "In... v. Ḥasan " D. No. 139/89/T of 1389 (1970).

65. See e.g., "in... v. al-'Abdān and others", D. No.143/90/T of 1390 (1970).

66. See, the Royal Will of which the Viceroy was informed by letter of the King's Office, No. 32/1/17 of 8/6/1358 (1939; L. of P.C.M. to P.J. No. 1046/1 of 3/12/1374 (1955).

67. Law of 1931, art. 1; Law of 1938, art. 86; Law of 1952(B), art. 67.

68. R.W. No. 647 of 20/3/1349 (1930).

69 Art. 1.

70. Law of 1931, art. 19; Law of 1936, art. 107; Law of 1952(A), art. 69.

71. See e.g., Al-Ṭarābulsī, 'A., Mu'īn al-Ḥukkām fi Ma Yataraddad bayn al-Khaṣmayn min al-Aḥkām, Cairo, 1892 (1310), p.20.

72. See, "the trial of juveniles"

73. M.J., C. No. 45/1/T of 5/3/1392 (1972).

74. The author has visited courts and semi-judicial institutions in different towns.

75. In 1968 the author visited some courts in London; he visited Durham Magistrates' Court in 1970. As a general observation these courts appeared to be larger than the average Saudi Arabian courtroom.

76. The classical Muslim jurists maintain that decisions should be delivered in public. (Riyad Maydani, "'Uqūbāt: Penal Law", Law in the Middle East, eds., Majid Khadduri and Herbert J. Liebesny, (Washington, D.C., the Middle East Institute, 1955), p.233.

77. C.L., art. 484.

78. This used to happen more frequently in the courts situated in small towns.

79. If the person who commits the act of "disturbance" is one of the officials of the tribunal, disciplinary punishment may additionally be imposed upon him.

80. P.P. v. al-'Azīb, M.C., (al-Aḥsā'), D. of 1388 (1969).

81. C.L., art. 472.

82. Law of 1936, art. 114; Law of 1952(A), art. 74.

83. About the summoners, see Law of 1938, arts. 190-200; Law of 1952(B), arts. 168-176.

84. See, Law of 1952 (A), art. 24.

85. L. of F.M.C. (R) to A.G. (R) No. 922 of 10/5/1384 (1964).

86. Law of 1938, art. 136; Law of 1952(A), art. 16; Law of 1952 (B), art. 115; L. of D.M.J. to the office of M.J.(M) No. 24/3/A of 20/1/1391 (1971).

87. Law of 1931, art. 18; Law of 1952(A), art.46.

88. Law of 1936, art. 28.

89. Law of 1936, art. 110; Law of 1952 (A), art. 72.

90. Art. 19.

91. Law of 1952 (A), art. 71.

92. P.J., C. No. 53/3/M of 6/1/1384 (1964).

93. See, the Conduct of trial of Commercial Tribunals.

94. Judicial Instructions, sanctioned by the King on 25/2/1349 (1930); Law of 1931, art. 3; Law of 1936, art. 25; C.L., art. 473.

95. See, Letter of King 'Abdul 'Azīz to his Son Faiṣal (the Viceroy) No. 8/6/942 of 15/5/1362 (1943).

96. P.P. v. al-'Azīb, M.C., (al-Aḥṣā'), D. of 1388 (1969).

97. See, Trial in the Grievances Board and the Bribery Committee.

98. According to Islamic Law and the practice in Saudi Arabia, a party or a witness usually gives his statement while he is sitting.

99. Al-Mughnī, vol. XI, p.441.

100. See, the Letter of 'Umar b. al-Khaṭṭāb, the Second Chaliph, to his judge in Baṣra, Abū Mūsā al-Ash'arī, Wakī', Akhbār al-Quḍāt, Cairo, 1947, vol. I, pp.283-284.

101. Law of 1938, art. 135; Law of 1952 (B), art. 114; C.L., art. 441.

102. Baroudi, George, p.29.

103. Ibn Sulaymān and al-Ḥaqbānī v. 'Abdullah b. Jalawī, G.S.C.(D), R. of 1389 (1969-70), pp.1-16.

104. L. of P.J. to M.I. concerning a group of people accused of stealing during the pilgrimage season of 1382 (1963). [see, the file of Judicial instructions (1383) of C.C. (R).]

105. Judicial Instructions sanctioned by the King on 25/2/1349 (1930).

106. C.L., art. 485.

107. See e.g., "in... v. al-Kurdī and others", B.C., D. of 1387 (1967).

108. L. of the Muftī to P.K.O. No. 106 of 16/10/1374 (1955).

109. C.C., D. No. 184 of 28/6/1955 (1936).

110. Art. 97.

111. Art. 59.

112. They were issued on 1/8/1345 (1927).

113. No. 831 of 5/4/1349 (1930).

114. See also, C.C., D. No. 205 of 12/8/1347 (1929).

115. See also, C.C., D. No. 191 of 16/5/1349 (1930).

116. About the conception of relationship with regard to legal representation, see L. of P.J. to Vic. No. 1050 of 26/6/1355 (1936); C.C., D. No. 220 of 12/8/1955 (1936).

117. See, C.C., D. 205 of 12/8/1347 (1929).

118. Shamma, Samir, "Law and Lawyers in Saudi Arabia", supra.

119. D. No. 878 of 23/5/1355 (1936), approved by C.C., D. No.184 of 28/6/1355 (1936).

120. See, R.O. No. 831 of 5/4/1349 (1930); See also, L. of the Muftī to P.K.O. No. 106 of 16/10/1374 (1955).

121. L. of P.J. to Vic. No. 3419 of 22/5/1366 (1947), quoted from L. of Vic. to A.G. (Madīna) No. 2599 of 22/5/1366 (1947)

122. Shaykh Muḥammad Sulṭān al-Ma'sūmī.

123. See, L. of the Muftī to P.K.O., supra.

124. About the stipulations applied to a lawyer at the early stage of the judicial development in Saudi Arabia, see, C.C., D. No. 140 of 29/4/1349 (1930).

125. See, L. of M.I. to F.M. No.43/S of 14/10/1389 (1969); M.J., C. No. 21/2/T of 5/2/1391 (1971).

126. See, Law of 1952 (A), art. 63.

127. A degree which a lawyer must have is only equal to the secondary school degree standard, or at best, a little higher, but not as high as the standard of a university degree.

128. See, C.L., art. 509.

129. About the evidence of a judge, see, al-Bahī, A.A., Ṭuruq al-Ithbāt fi al-Sharī'a wa al-Qānūn, Cairo, 1965, pp.127-145.

130. Al-Mughnī, vol. XI, p.400.

131. The President of the Judiciary informed the Minister of the Interior that a judge was only to base his judgment on evidence conveyed in the court. [C.C. (R), Judicial Instructions, File of 1383 (1963-64).] The Court of Cassation in Riyadh reversed a judgment concerning death on the ground that the knowledge of the judges alone about the kinship of the claimants to the deceased was not admissible evidence. This court held that a judge must not decide on a case according to his own knowledge. [Shalfān v. Ghānim and Budāḥ, D. No. 194/2 of 1388 (1969).]

132. See e.g., Hart, p.173.

133. Law of 1952 (A), art. 41.

134. Law of 1936, art. 10; Law of 1952 (A), art. 10.

135. Law of 1952 (A), art. 11.

136. Law of 1936, art. 29; Law of 1952 (A), art. 20.

137. Law of 1952 (A), art. 26; C.D., D. No. 141 of 23/7/1360 (1941); L. of P.J. to P.C.M. No. 1489/3 of 24/3/1380 (1960).

138. Law of 1952 (A), art. 31.

139. Law of 1936, art. 104; Law of 1952 (A), art. 66.

CHAPTER FIVE

E V I D E N C E

Introduction

"In common speech evidence is merely that which makes evident something to someone. But in law evidence is something which makes evident a fact to a judicial tribunal."[1] Though this definition is general and vague, it may be a good definition. Moreover, it is consistent with that adopted by the jurists of the Sharī'a, and therefore relevant to this study. Evidence is classified as follows:-

(a) Direct and circumstantial. Direct evidence of a fact is (i) a valid testimony of a person who perceives this fact and (ii) the production of a document which is not treated as a presumption. Circumstantial evidence in the Sharī'a has a very wide scope. Every evidence from which a fact in issue may be inferred falls within this category, i.e. presumptions - including most documents and real evidence.[2]

(b) Oral, documentary and objective. Oral evidence is that given by word of mouth, e.g. testimony. Documentary evidence is that obtained from a document - including the evidence derived from it as to its existance. Objective evidence is evidence afforded by the inspection of a material object.

(c) Primary and secondary. In relation to a document, primary evidence is usually the original document, whereas the secondary evidence of a document is usually either a copy of it, or oral evidence of its contents.

Now, we may turn to the question: what facts may be given in evidence?[3] They are facts in issue, and facts not in issue admitted for their relationship with the former facts.[4]

Facts in issue are:- (i) the constituents of the crime as alleged by the claimant or the prosecution and denied by the

defence; (ii) facts alleged by the defence and denied by the prosecution as an alibi or matters of justification or excuse.

Facts not in issue but permitted come under the following categories:

(a) Facts relevant to the facts in issue. These are facts which may form the actual details of a fact in issue,[5] facts which may support or refute an inference or presumption relating to the existence or non-existence of a fact in issue, and facts which explain a fact in issue.

(b) Facts, similar to facts in issue.[6]

(c) Other relevant facts. Briefly, these facts may be treated for convenience in the following groups:- (i) surrounding circumstances, or res gestae, (ii) state of mind of a party or a witness, (iii) identity of a party, a witness, or a relative in the case of murder, (iv) character and convictions of a defendant or a witness, (v) general reputation of a party, (vi) opinion of witnesses, and (vii) their conduct.

Having referred to facts which may be proved, we may refer to the burden of proof. As a general rule, the person who affirms a matter must prove it. Thus, the burden of the proof of a fact in issue rests upon the prosecution or the claimant throughout the proceedings. However, when the defendant adduces a fact for his defence in order to refute an evidence, justify or modify his action, to show his legal inability of committing the crime, or to establish the probity (ʿadāla) of his witnesses, he must prove it. Therefore, it can be said that the burden of proof with regard to a particular fact lies on the party who alleges this fact. The party on whom lies the burden of proof of the issue has the right to begin; that is to say makes the opening speech and renders his evidence first. The burden of proof may be dispensed with by an

admission, or by a presumption.

The burden of proof has a certain connection with the standard of proof. It has been mentioned above that the party who affirms a fact must prove it. The proof here has to be evidence introduced to make out a prima facie case; in other words, he must render the minimum of evidence capable of proving his allegation. As a general rule in criminal proceedings, the prosecution has to prove the guilt of the accused beyond reasonable doubt. Proof beyond reasonable doubt does not imply absolute certainty as to the guilt of the accused, but it implies the establishment of the truth of the accusation to the satisfaction of the judge, since the establishment of absolute certainty is almost impossible.

The standard of proof required to establish the fact that the accused has confessed to the commission of the crime has to be treated on the same grounds as that required to establish the guilt of the accused.

Burden of proof on the defence may be lighter than that on the prosecution, especially in regard to ḥudūd, as will be examined below.

Finally, it may be useful to mention that, for convenience, evidence will not be categorized into evidence as means of proof and evidences as not means of proof, as some other laws do.[7] This is because Saudi Arabian law sometimes treats evidence which is a means of proof together with evidence which is not so, as in the case of real evidence where it comes under the evidence of presumptions. Moreover, informal confession, which is a means of proof, is treated on the same footing as formal confession which is not a means of proof.

A. CONFESSION

Confession (or admission) is divided into two classes:- formal confession, which is made before the trial tribunal, and informal confession which is usually made outside the tribunal. According to the law of Saudi Arabia, both formal and informal confessions are to be made only by a party or his representative, where legal representation is permitted. The difference between these two kinds of confession is that informal confession must be proved in the same way in which a fact is proved. Unlike some other laws,[8] informal confession in Saudi Arabian law is not considered as a type of hearsay,[9] but it is classified as confession since, when proved, it is as conclusive as the formal one in most cases. Therefore, when reference is made to confession, both formal and informal types are included. This fact will be first seen when referring to the stipulations regarding confession.

Stipulations Regarding the Confessor

(1) Sanity. Confession is not admissable unless it is made by a sane party, so that it may have an effect on him.[10] Where a party or even his relatives, especially in a criminal proceedings, claim that he is not mentally sound, the court must investigate thoroughly the claim before receiving his confession, and if he is found to be insane his confession must not be received.[11] Yet, the court may exclude the claim of a party that he is insane if the court does not have a firm reason to believe that he is so. A mental depression does not affect the admissibility of the confession of a party.[12] The confession made outside the court by a murderer that he had killed the deceased was received, although he claimed that he was not aware of this confession which he could

have made while in a state of shock after realizing the latter had died.[13]

It is to be noted here that the power of the court to examine the mental state of a party is not limited to a specific method. The judge himself may undertake this examination, but if a complicated and technical examination is needed, he has to commit the party to experts.[14]

(2) Attainment of age of majority.[15] A confession concerning the commission of a crime of ḥadd or retaliation (qiṣāṣ) is inadmissible, unless the confessor is of full age.[16] Nevertheless, in proceedings regarding ta'zīr, the confession of a mumayyiz, i.e. a minor who knows reasonably the consequence of his action, may be admitted in the Sharī'a courts. It has been held that a confession to stealing by a minor was received, and hence he was sentenced to a punishment of ta'zīr.[17]

(3) Ability to speak. The confession of a dumb party is admissible if it is written. Where it is adduced by means of signs which can be understood, its admissibility may differ from one type of crime to another. In ta'zīr a signal may be admissible, but in proceedings concerning a ḥadd, the matter is controversial. Muslim jurists have differed on this question. Some of them held the view that a confession with clear signs was to be accepted even in ḥudūd. Others refused to accept it in view of a general rule in ḥudūd, which implies that doubt is to be held for the benefit of the accused.[18] The Ḥanbalī jurists differed on this issue in turn.[19] In Saudi Arabia, judging by the carefulness of the judges and the application of the above mentioned rule, one may conclude that an admission of a dumb person by signes is not valid, except in ta'zīr.

(4) Consciousness. A confession of an unconscious person

has no evidentiary weight at all. Thus, a statement made during sleep or unconsciousness or under the effect of anaesthetics or drugs is inadmissible. Equally, the admission of a party who is hypnotized is not valid. Nevertheless, there is an exception to this rule, that is the confession of a drunken prisoner which is admissible in criminal proceedings, except in hudūd other than the hadd of defamation.[20]

Stipulations Regarding Confession

(1) A confession must be made by a party. A confession may have weight only if it is made by a party against whom it may be taken or by his representative, if representation is allowed. A confession by a third person is not admissible especially in criminal proceedings. It has been held that a confession of a principal accomplice against a party was inadmissible.[21] Equally, the confession of an accessory accomplice was treated on the same footing as that made by a principal.[22] The confession made by a co-respondent that he has committed a sexual crime with the respondent does not bind the latter, and the confession by the latter does not bear any consequence as to the former.[23]

(2) It must be voluntary. Confession is not to be regarded as having evidentiary weight when it is made involuntarily, and thereupon it is not valid. An admissible confession must be made by a party by his own free will without any inducement. According to Sharh,[24] inducement is through imprisonment (or even detention), confiscation of property, beating (even if it does not amount to torture), or a threat to commit a party to any of these three types of inducement. The Saudi Arabian judges refer quite frequently to the definition of inducement as cited in the above mentioned book.[25] A promise of advantage from confession is not determined by the

majority of Muslim jurists as an inducement, but some of them hold that such a promise is reprehensible.[26] A threat of disadvantage, a promise of advantage, or a hope of forgiveness may not be regarded by the Saudi Arabian judiciaries as a means of inducement.[27] Offering money by an accomplice is not at all a means of inducement, since a confession made for the purpose of obtaining money is made voluntarily, and therefore it may be admissible. The inducement must emanate from any person who is able to carry out his threat, whether or not he is in authority.[29]

The judges are very cautious as to accepting a confession, even if it may appear to be voluntary, so much so that they usually ask a party who confessed outside the court if he has made his confession freely without being induced.[30] But although detention according to the Ḥanbalī law is a means of inducement, the judge may sometimes receive the confession of a detainee, in a non-serious case if he does not state in his plea that his confession was caused by an inducement. However, when a party confesses inside the court, he is usually asked by the judge if he is confessing voluntarily, without duress or pressure.[31] In serious crimes the judges themselves usually administer the confession.[32] By so doing, the judges have, to a large extent, succeeded in disciplining the executive when interrogating or investigating a suspect.[33]

A party who has made an informal confession and claimed that he confessed under an inducement has to prove his claim if the confession does not appear to the judge to have been so made.[34] Otherwise, the confession is to be valid[35] (except in the aforementioned <u>ḥudūd</u>). The inducement does not have to be exercised only during the confession but it may also be exercised before the

confession has been made since a party who has been subject to an inducement and did not confess then may confess later in fear of being subject to it again. Fear based on previous inducement has been treated as being a sufficient reason for invalidating a confession, even though it was made judicially, that is with no inducement.[36] Yet, if a prisoner claims that he has made his confession out of fear but he had not been subject to an inducement before he confessed, his confession is to be admissible.[37] The Court of Cassation in Riyadh,[38] when referring to the validity of such a confession, stated that the Ḥanbalī jurists related that fear without a previous inducement was a mere imagination and not a legal excuse.

Here the question may be asked: since the judges condemn the extortion of confession, why do some Muslim jurists and the Saudi Arabian executive authorities sometimes permit, or even demand, that an accused who refuses to confess be committed to some flogging or long detention? In answering this question, we may refer firstly to the fact that, according to the Ḥanbalī law, the accused who may be so treated is one who is known to have committed crimes such as theft, highway robbery, or murder. Secondly, in Saudi Arabia this treatment is usually employed when there are strong evidentiary indications that the accused has committed the crime, but these indications are not the evidence prescribed for the crime by the Law.[39] Yet, what is the value of a confession so obtained since any confession made under inducement is inadmissible? It seems that its value is that the accused may not retract his first confession in the court after he has committed himself to it and after he has been confronted with the other evidence against him. Indeed, there is a very slim chance that an accused may keep his confession when he appears in court in such a circumstance.

Apart from this, there seems to be no other reason for obtaining a confession in such a manner. Furthermore, although some Muslim jurists are of the view that the confession of an accused who admits stealing and brings the stolen object after he has been subject to such a treatment is admissible, the majority of the Ḥanbalī jurists hold the opinion that such a confession is not admissible in the case of the hadd of theft.[40] The Saudi Arabian judges do not accept this kind of confession at all.[41]

Even if the extortion of confession was conducted by mild treatment, and only after strong evidentiary indications have risen, it may be suggested that this mode of obtaining admission is not always practical, and above all it is unfair.

(3) It must be express. A statement which falls short of a plain acknowledgment of a fact is not to be construed at any rate as a confession; that is to say Saudi Arabian law does not recognize[42] implied confession.[43] Where an accused who is faced by an allegation of committing a crime does not deny it and does not answer it, he should not be taken as having made an implied confession.[44] Equally, the conduct of a party is not to be constituted as a confession. An accused who suborns a witness to perjure in his favour is not considered as having made a confession.[45] But confession must be explicit in order to be admissible, and when the words are ambiguous it will not have any effect.

According to the judicial practice, an express confession is usually oral. Yet there is an exception to this rule, where an accused is dumb. A confession of a dumb person may be construed as express when he makes it explicitly in the form of writing or a signal, provided that the proceedings do not involve a crime of hadd other than that of defamation.[46]

(4) Compatibility with allegation. Where the confession

does not appear to be completely consistent with the fact in issue, the court will not accept it on the grounds that there is no truth in it, or at least that there is a suspicion as to its truth. Muslim jurists state that the confession of an accused of Zinā who has not a sexual organ at the date given for the commission of the crime is not admissible.[47] In theft, the admission of an accused that he has stolen a sum of money or property which is more in quantity or value than what had been alleged may not be admissible. It has been held that such an admission was inadmissible for the reason that there was no Ḥanbalī authority for the view that he who admitted more than had been alleged by the claimant was to be liable for the charge, since the charge and the contents of the admission were to be compatible.[48] The President of the Judiciary[49] and the Court of Cassation[50] in Riyadh opposed for some time this opinion, but they both approved it afterwards.

(5) It must take place inside the court. Before referring to the confessions which are to be made in court during the trial, it should be mentioned that as soon as a prisoner confesses, he is to be taken by the police to the nearest Sharī'a court to record his confession therein[51] for use in the trial, especially if his crime is serious. The reason why this measure was adopted was explained in 1953 by the Crown Prince,[52] who was at that time entitled by the King to run the country, and by the Viceroy.[53] They explained that when a prisoner made a confession before the police and was put into custody with others, he could often be persuaded to deny his confession before the court, or to claim that he was induced to make his confession. To avoid this, a confession was to be so recorded before the prisoner was detained. When a confession was made outside office hours the prisoner was to be detained alone

until his confession was recorded. The task of the trial court would be easier when accepting a confession recorded by it beforehand or by another court, since the confession would not have been accepted by the recording court if it was not duly made. By so recording a confession, it was to be regarded as having the effect of the one made before the trial court, except in ḥudūd other than defamation.[54] In other words, it was valid[55] even if it concerned a crime of retaliation (qiṣāṣ).[56] The confessions which are accepted if only made before the trial court are those concerning the crimes of ḥudūd, with the exception of the ḥadd of defamation which is treated in this respect as a crime of retaliation. The trial court is to ask the prisoner, who has duly made a confession outside it, whether he confirms his confession.[57] Where there is no way of invalidating the confession, the court has to be absolutely sure, and to satisfy its conscience, that the confession is an authentic one. This caution in receiving a confession to the commission of a crime of a ḥadd is easily felt when examining the judicial practice, particularly if the ḥadd is zinā[58] or theft.[59]

However, unlike the confession to the above mentioned ḥudūd, the confession regarding the majority of crimes may be admissible when made outside the trial court, even if it is extrajudicial confession, as long as it is proved by witnesses. It happens frequently that a prisoner confesses before the police, and when he is taken to court to record his confession he denies it. When his trial opens, the police officer before whom the prisoner has confessed may give evidence in the court as to the confession. When the court is satisfied with the truth of the evidence, the confession is received.[60] Similarly, a confession made in the presence of officials[61] or ordinary persons[62] is to be treated in

the same aforementioned manner.

Retraction of Confessions in Ḥudūd

The majority of Muslim jurists are of the view that there is no objection to the judge hinting to a confessor to a crime of ḥadd to recall his confession. One of these jurists is Aḥmed b. Ḥanbal.[63] Others relate that it is not only unobjectionable to make this hint, but preferable. Shaykh Muḥammad b. Ibrāhīm, when asked by the King as to a suggestion made by a jurist that a confession must be valid after it was made, argued that this suggestion was contradictory with the Sharī'a. His reasoning was that the Prophet warded a man off several times when he was confessing before him that he had committed zinā; that the Prophet hinted for the man to retract his confession as follows:- "Perhaps you just touched"; that the Prophet said to a thief who had confessed: "I do not imagine that you have done so"; that 'Umar (the Second Caliph), when a thief was brought before him, inquired: "Have you stolen? Say no." Then the man replied "no", and 'Umar set him free.[64] In Simrān v. al-Qaṭarī, the Grand Sharī'a Court of Mecca[65] added "that some of the Prophet's Companions did the same with thieves as the Caliph 'Umar did; that 'Alī (the fourth Caliph) rebuked, or as it has also been related, drove away, or rejected, a thief when he had confessed." However, the aformentioned acts of the Prophet and his Caliphs and Companions are the only justification for the allusion by judges for the retraction of confessions. As there are no other reasons for this allusion and as the Ḥanbalī law does not concretely prefer or reject the allusion, judges in Saudi Arabia are left to use their own discretion as to this matter. A close examination of the judicial practice shows that the rule of allusion to retract confession is

usually limited to the ḥadd of zinā and that of theft. Although the ḥadd of highway robbery is treated, so far as evidence is concerned, as the ḥadd of theft, the judges do not seem to be willing to operate the rule as to the confession to the former ḥadd. The ḥadd of intoxication is not different from highway robbery, as the judges do not usually show any mercy to their offenders. This attitude of the judges may be attributed to the fact that such an allusion made by the Prophet and his Caliphs happened to be regarding the ḥadd of zinā and the ḥadd of theft, and operating the rule of allusion to these, the judges will do nothing different from the deeds of the Prophet and his Caliphs. It may be also attributed to the lack of mercy to the offenders of the other ḥudūd, probably for one of the following reasons:-

(a) Their comparatively mild punishment, such as that of the ḥadd of intoxication.

(b) Their hideousness, as in the case of highway robbery.

(c) The ever-increasing number of offenders, as evidently noticed in the number of those who consume alcohol.

Indeed with regard to alcohol consumers and highway robbers, the judges seem to be as harsh as the law permits. However, judges do not always hint to the confessor to zinā or theft to retract his confession, since they are not under obligation to do so.[66]

However, when a confessor retracts his confession, he has to be exempted from the punishment of the ḥadd on the ground that he might have falsified his confession; in other words there exists a doubt as to its truth. This is an implementation of the tradition: "Avert ye the ḥudūd on account of dubious circumstances."[67] In order to observe this tradition and other similar ones,[68] the decision is to include that the punishment of the ḥadd should not be carried out if the prisoner retracts his confession.[69] The

retraction of a confession may not only be by words, but also by conduct. A prisoner who intends to flee when he is being prepared for the execution of his sentence or after he has received part of his sentence, is to be regarded as having retracted his confession. The retraction by conduct is based on the tradition concerning Mā'iz, who was the first man to confess to have committed zinā. When Mā'iz was committed to the punishment and felt the pain he fled, but he was not let by the executors to escape the full sentence. Having been told by the executors of Mā'iz's attempt to flee, the Prophet said: "Why did you not let him go?"[70]

Since the right of retracting a confession to a hadd extends to the end of the execution of the sentence, a representative of the trial court,[71] who is an authority on the Sharī'a, has to attend the process of the execution of the sentence, so that he can stop the execution if the prisoner retracts his confession.[72] Indeed, a large number of confessors retracted their confessions when they were about to be punished, and were averted from the punishment of the hadd, so much so that the President of the Council of Ministers commanded that any final judgement by a Sharī'a court, even if it concerned a hadd, must be carried out without the presence of any representative[73] (hinting at the representative of the court). But the President of the Judiciary and the Muftī reacted to the command of the President of the Council of Ministers and informed the Minister of the Interior that "If the convicted party withdraws his confession before the execution of his sentence, the execution must not be accomplished, and he must be committed back to the trial court to consider his retraction."[74]

Finally, it may be relevant to mention that after a confession to a crime of hadd has been retracted, the crime may be commuted

into a crime of ta'zīr, and the retracted confession may then be admissible, since the role of retracting the confession does not apply to ta'zīr.

Repetition of Confession

(1) The ḥadd of zinā. According to the Ḥanbalī law a confession regarding the ḥadd of zinā is invalid unless the prisoner confesses four times that he has committed the crime, since the Prophet had not punished the confessors to zinā till they had confessed four times.[75] All the Saudi Arabian judges held this view in a very strict way. In their judgements based on confessions, they determine that the convicted persons have admitted the crimes "four times", and sometimes more than four.[76] It is not sufficient that the court may mention only that a prisoner confesses several, or a few, or many times, but it must explicitly determine the number of times of his confession, as prescribed by the law.[77]

(2) The ḥadd of theft. As to this crime, repetition is also stipulated, but only twice. The judges usually mention in their judgements that the convicts have confessed "twice". Yet, a judgement which states that a convict has confessed "more than one time" or "several times" is valid, since this implies that the confession has been made twice. This principle of repetition has been received from the Ḥanbalī law. The Presidency of the Judiciary,[78] when arguing about the inadmissibility of a single confession, referred to Kashshāf,[79] which relates that a confession of an accused of the ḥadd of theft must be made twice. Yet, the judges of the Grand Sharī'a Court of Riyadh[80] in 1966 (1386), when arguing with the Court of Cassation,[81] held the opinion that this ḥadd could be inflicted upon a prisoner who confessed only once. But this opinion did not go beyond the argument, and it

could not have gone further, since the Court of Cassation and the High Judicial Authority would have revoked any judgement based on a confession made only once. However, in practice, all judges - including those of the Grand Sharī'a Court of Riyadh - have never passed a sentence regarding the hadd of theft unless the confession has been made at least twice.

(3) Highway robbery. As the hadd of highway robbery stands on the same footing as the hadd of theft, as far as evidence is concerned,[82] it is to be said that the confession to the former hadd must be made twice, otherwise it is not receivable.

(4) Retaliation. (qiṣāṣ). Muslim jurists differ in their view as to the repetition of confession regarding retaliation. The Ḥanbalī authoritative opinion does not indicate that it is stipulated that such a confession must be repeated. By close examination of the judicial practice, one finds that all confessions concerning crimes of retaliation have been made repeatedly, but this does not mean that a confession of this type has to be repeated. All the judgements state in their recitals that confessors are convicted upon their confessions, without giving weight to their repetition.[83]

(5) The hadd of defamation. (qadhf). Since it is not necessary that a confession to a crime of retaliation is repeated on the ground that this crime involves mainly a private right, the confession to a hadd of defamation which also involves mainly a private right cannot be expected to be admitted in a stricter manner than the former; that is to say, a confession made once to a hadd of defamation may be admissible. Indeed, Muslim jurists unanimously agree to this rule,[84] and so do the Saudi Arabian judges.[85]

(6) The hadd of intoxication. The hadd of intoxication is

absolutely of a public right. As we have seen, a hadd of a public right, such as zinā and theft, is to be confessed to a specified number of times. But that of intoxication is different in this respect. Kashshāf,[86] for example, states that a confession to this hadd may be made only once exactly on the same footing as the hadd of defamation. By examining the practice in Saudi Arabia, a judgement concerning the hadd of intoxication does not mention that a confession has been repeated, even if it has been.[87] The conclusion is that in this hadd confession may be admissible if it is made only once.

(7) Ta'zīr. The confession to the remainder of crimes, the crimes of ta'zīr, is obviously not to be more strict than that concerning retaliation or the ḥudūd of defamation and intoxication, for two reasons. Firstly, ta'zīr is not as serious as ḥudūd or retaliation, since its punishment is left to the discretion of the judge, whereas the punishments of the latter are fixed by the law. Secondly, the repetition of a confession in some ḥudūd, such as zinā and theft, is required partly for widening the ground for dubious circumstances to avert the punishment prescribed for the hadd. Since ta'zīr does not come under these ḥudūd, there is no significance in trying to avert its punishment. Therefore, the confession to a crime of ta'zīr is admissible when made without repetition. In practice, the confession to a crime of ta'zīr is usually received by the judge more easily than even the confession to a crime of retaliation or to the hadd of defamation and intoxication. Indeed, there is no indication that a confession to ta'zīr has not been recieved till it was repeated.[88] As crimes and offences tried by the semi-judicial tribunals come under ta'zīr, reference may be made to the question of whether these tribunals may require the repetition of a confession. Briefly, it

is not necessary that such a confession be repeated, and its admissibility does not depend on its repetition at all.

From all that has been said, we may conclude that confession may be admissible when it is made even once only, except where it regards the ḥudūd of zinā, theft, and highway robbery.

Before ending the discussion on the repetition of the confession, there is the question as to whether this repetition has to be made in different sessions, as held by some Muslim jurists. The Ḥanbalis are of the view that a separate session for each confession is not necessary. They argue that the Prophet did not require the multiplicity of sessions.[89] In Saudi Arabia, it can be said that each time a prisoner confesses, this is likely to happen in a separate session, since the court is inclined to give a confessor a comparatively long time to reconsider his confession. Irrespective of this coincidence and irrespective of the fact that judges are extremely careful not to admit a confession unless it has been repeated, it may be suggested that the plurality of sessions is not required. Thus, the Saudi Arabian judiciaries are not different from their Ḥanbali predecessors on this question.

B. TESTIMONY

Stipulations as to Witnesses

(1) Sanity. A person whose testimony is tendered in the proceedings must be sane when he first witnessed the commission of the criminal act, and when he gives his statement in court. In other words, the testimony of an insane person is inadmissible.[90]

(2) Attainment of the age of majority. Although some minors may show intelligence, perception of the relationship between things, independent thinking, and a sense of discretion,

their testimony is inadmissible. The only exception to this is when minors are involved in a fight which results in bodily injuries, provided that they were still on the site of the fight.[91] However, some judges are of the opinion that the evidence of a minor may be admitted if he is able to give it in a way that will satisfy the judge, provided that the evidence does not concern a serious matter.[92] Nevertheless, this opinion does not seem to have ever been put into practice.

(3) Ability of Speech. Though the signal of a dumb person may be received in the confession, as we have seen, it is not receivable in testimony. However, his evidence in writing may be admissible.[93]

(4) Islam.[94] The statement of a non-Muslim cannot be considered evidence of good testimony in criminal proceedings by a Sharī'a court.[95] But the semi-judicial tribunals may receive such evidence.[96] The Forgery Committee accepted a statement made by a non-Muslim, an American employee, as testimony against a Saudi Arabian[97] employee.[98]

(5) Memory. A witness must have a reasonable memory. If he is known to be forgetful or of erroneous perception, his statement of what he has witnessed will not be received.

(6) Probity. ('adāla). Briefly, the probity of a person can be demonstrated by his compliance with religious duties, the avoidance of great sins and excess in venial sins,[99] and by behaviour according to the standards of morality and dignity in an Islamic society. The Sharī'a courts apply the rules of probity strictly, so that any evidence is to be excluded when the witness does not fulfill the principles of probity. The semi-judicial tribunals do not apply the rule of probity strictly. The Commercial Council of Jeddah is an exception.

Finally, it is to be mentioned that a person held to be with no probity (ghayr 'adl) may regain his probity by no longer sinning and by behaving according to the standards of morality and dignity of his country. In the Saudi Arabian law, there is no specific time within which a person with no probity may regain his probity, but this is left to the judge to decide.[100]

(7) Masculinity. According to the Ḥanbalī sources the role of women in the field of testimony with regard to criminal proceedings is very limited. Their testimony is limited to personal matters which concern only women and which do not usually occur in the presence and sight of men.[101] The commonly accepted view is that the evidence of a medically qualified woman (qābila) is receivable, and so is the evidence of a trustworthy experienced woman.[102]

The question is how much weight can be placed on the direct deposition of women in criminal proceedings regarding matters other than those just mentioned. The answer is that Ḥanbalī sources do not hold that it is admissible either in ḥudūd or in ta'zīr.[103] Yet, the First Magistrate Court of Ṭāyif[104] had received the deposition of two women, without any corroboration from a man, upon which the punishment of ta'zīr was inflicted. It is true that the evidence of a woman tendered in criminal proceedings is not regarded technically as testimony but as a presumption whose admissibility depends largely on the discretion of the judge. Nevertheless, the least that can be said regarding the testimony of a woman is that it may be accepted as sufficient evidence in criminal matters, whether it is classified under testimony or presumptions.

The practice of the Sharī'a courts shows that the deposition

of a woman is inadmissible to prove facts in issue regarding hudūd or retaliation (qiṣāṣ); but that it can be an important presumption of strong suspicion (lawth) as far as murder is concerned.[105]

The question of the admissibility of testimony given by a woman in semi-judicial tribunals is obscure, since their statutes and regulations do not refer to evidence at all. The exception to this is the Commercial Law[106] which is similar to the practice of the Sharī'a courts. As a general rule, evidence given by women is very rare, even in the Sharī'a courts, since they rarely participate in public life. This fact lessens the researcher's chance of finding enough material to arrive at an accurate conclusion regarding the testimony of women, particularly with regard to the semi-judicial tribunals. However, since the Sharī'a courts, which are stricter in admitting evidence, receive the statement of a woman in ta'zīr - at least as a presumption - and since crimes tried by the semi-judicial tribunals come under ta'zīr, it may be concluded that such a statement may similarly be received by these tribunals.

Stipulations Regarding Testimony

(1) Awareness of the fact testified to. The witness must be fully aware of the fact to which he is testifying when he first perceived it, and must remember this fact beyond any doubt when he gives his evidence, otherwise his evidence will be weightless. He must be well aware of the nature of the fact in issue. He must also be able to identify the alleged defendant, and the claimant if necessary, otherwise the evidence will not be valid.[107] It was held that the evidence of the witness who gave his deposition against the prisoner in the preliminary investigation, and who deposed later in the court that he was not exactly sure of his

person,[108] was not valid as conclusive evidence.[109]

(2) Voluntary Rendering. Evidence tendered in the form of testimony must be given of the witness' free will. Sharī'a courts hold that testimony given under threat is inadmissible.[110] Even courts have no power to compel a witness to give evidence because evidence made by force is invalid. Where evidence concerns murder, the court may ask witnesses to appear. In other proceedings, the courts leave the matter of producing witnesses to the party concerned.[111] If the witness who has given evidence outside the court denies, or declines to confirm, his evidence in the court, the court will exclude this evidence and will not admit it. The inadmissibility of this evidence is based on the grounds that: (i) when the witness has denied or declined to give his evidence the truth of this evidence then became doubtful, and such evidence is not receivable; (ii) when he has denied that he had evidence and afterwards he was willing to depose it, he has lied, and the testimony of a liar is not valid. Where the witness does not respond to the request of the court to appear within a reasonable length of time, the court will usually decide on the case if it is regarding a crime of a public right, without delaying the proceedings to hear his evidence.[112]

According to the Sharī'a, it is obligatory to give testimony in any proceedings concerning the case of a private right. As to public criminal proceedings, it is held by many Muslim jurists, including the Ḥanbalis, that it is preferable not to give testimony in the case of a public crime. Moreover, some Ḥanbalis are of the opinion that judges are permitted to invite a witness to abstain from giving his evidence in ḥudūd.[113] Where a case involves both a private right and a public right of a ḥadd punishment, witnesses

are obliged to give evidence on the private issue only. This matter is apparent in the case of theft. It is suggested by some jurists that the witnesses, when tendering their evidence, use the word "take" (akhadha) instead of "steal" (saraqa), so that the private right, the stolen property, may be recovered, whereas this form of testimony is not sufficient to prove the crime of the ḥadd of theft.[114] Nevertheless, if the offender is a habitual criminal, witnesses are then obliged to give their evidence against him in all kinds of proceedings.[115] Generally, witnesses are not obliged to give evidence (i) when they know that they are incompetent witnesses, (ii) when considerable harm may be inflicted upon them if they reveal their evidence, or (iii) if they realize that other witnesses have given admissible evidence.[116] The obligation of a person to testify is a religious and moral one. But as the concealment of testimony, except in what has just been mentioned above, is a sin,[117] a witness who is known to be in the habit of concealing such evidence must be punished for it.

From all that has been said, evidence by a witness is not admissible unless it is tendered voluntarily. Thus, a witness is held responsible for his deliberate evidence and he is liable to be punished if his false deposition has constituted the whole, or even part, of the conclusive evidence upon which the accused was punished. However, if he contradicted his evidence by declaring that it was false, or if it was discovered before the execution of the judgement that it was so, he is to be punished for giving false evidence.[118]

(3) The utterance of the word "testify". According to the Ḥanbalī Law, it is stipulated that a testimony has to include the formula: "I testify" (ashhadu).[119] Theoretically, the Sharī'a

courts must apply this rule strictly.[120] In practice, the courts seem to observe this rule in most cases, but a testimony could be accepted without this formula.[121] Other similar phrases are quite frequently used to introduce the evidence.[122] However, the testimony including these forms is not regarded by the judges as evidence on oath, but as evidence on affirmation. As to the testimony of experts the Sharī'a courts, in theory, can accept it only if the word "testify" or any of its derivatives is included.[123] In practice, the testimony of experts is usually accepted without such restriction.[124] The Commercial Law does not differ from the Sharī'a courts in this respect. Other semi-judicial tribunals are not usually concerned with the mode in which testimony is given.[125]

(4) Compatibility of testimony with the allegation. According to the Sharī'a, testimony must not be accepted unless the judge is satisfied with its compatibility with the facts in issue. If the court deems that the testimony is not compatible with these facts, it must be excluded.[126] Indeed, the Sharī'a courts apply this stipulation very strictly.[127]

(5) Freedom from interest or motives. Testimony must be free from any interest or motive except that of securing justice. Accordingly, the evidence of a parent or a grandparent, an offspring, a spouse, or even of a distant relative who may tend to take the side of his relative is not admissible.[128] The evidence of a member of a tribe may not be receivable since loyalty to the tribe may amount to prejudice.[129] The evidence of a person against his enemy is not valid. Equally, the testimony given by a person against his opponent is not admissible.[130] A privy is an incompetent witness for his partner. According to the Sharī'a, the evidence of an employee for his employer may not be admissible.

This rule is now practically limited to the evidence of a witness who is employed by the party for whom he gives evidence.[131] Under the Sharī'a rules, and by the practice of its judges, a party cannot testify for, or against, himself. The semi-judicial tribunals may also not receive the evidence of a witness who may seem to have an interest or motive behind his evidence.[132]

(6) A testimony must be given inside the court. The general rule is that testimony must be tendered inside the court; in other words, any testimony given outside the court is inadmissible. The reason for this stipulation is to enable the judge to observe the way in which the evidence is given, and to enable both the judge and the concerned party to examine the witnesses. Nevertheless, there are some exceptions to this rule, but they do not apply to the ḥudūd other than the ḥadd of defamation. These exceptions are the following:-

(a) Testimony attested by a Sharī'a authority. Where the deposition of witnesses has been given directly before, or even attested by, a Sharī'a authority,[133] it is usually received. The Sharī'a examining magistrates of the Grievances Board are regarded as Sharī'a authorities since they have a long association with Sharī'a affairs.[134] A testimony made before, or attested by, any authority other than the former is not usually valid.[135]

(b) Testimony received by istikhlāf i.e. a request from the trial court made to another court to carry out the hearing of testimony in its place.[136] Some Ḥanbalī jurists hold the view that this kind of testimony is not admissible in criminal proceedings,[137] but according to "Sharḥ"[138] and "Kashshāf"[139] it is admissible in criminal issues other than ḥudūd except defamation. In practice, the judges follow these two authorities.[140] Moreover, in 1972, the High Judicial Committee issued a dictum [141] determining that

evidence received by means of istikhlāf may, for convenience, be accepted even in ḥudūd.

(c) The testimony given by experts. A close examination of the judicial practice of the Sharī'a courts shows that expert witnesses are classified into three categories with regard to the way they give their evidence:- (i) female medical experts, whose appearance in court is not usually required since their written evidence is normally received,[142] (ii) tracers of footsteps (qaṣṣāṣu al-athar),[143] whose appearance is usually required,[144] and (iii) other experts, such as doctors and engineers, whose appearance may or may not be required. This matter seems to be within the discretion of the judges who usually request the appearance of witnesses in serious cases. This is most noticeable in Ḥijāz.[145] But in Najd, the judges[146] do not seem to be so much concerned with the appearance of expert witnesses, except in serious cases or when a party requests their appearance.

Although the testimony of ordinary witnesses is, according to the Commercial Law,[147] tendered in the same way as in the Sharī'a courts, the testimony of expert witnesses must be submitted to the Commercial tribunal in the form of a written report.[148] The testimony concerning Customs crimes is normally to be given inside the trial committee, whether tendered by an ordinary witness or by a Customs officer.[149] Yet, the evidence given by a police interrogator may not be tendered in the committee, but submitted to it in a written report.[150] The Bribery Committee does not usually receive testimony unless it is tendered inside it. The Forgery Committee seems to be less concerned about the appearance of witnesses. In practice, if the witnesses reside outside the town in which the Committee is instituted, their evidence may be admitted as cited in the reports of the interrogators or investigators.[151]

It usually receives the evidence of expert witnesses from their reports without asking them to appear.[152] With regard to the Grievances Board, the testimony is not given inside the trial tribunal.[153]

(7) Being rendered viva voce. Since it is generally stipulated that testimony must be given inside the Sharī'a court, it has subsequently to be rendered orally. One of the objectives of the appearance of a witness in the court is to give his evidence orally to enable the judge to see how aware is the witness of the facts to which he is testifying. But, there are exceptional instances where testimony may not be given viva voce. These are as follows: (i) Where it is not necessary to give testimony inside the court. (ii) Where the witness is dumb. (iii) Where the witnesses are police testifying on the confession of a prisoner or experts whose evidence is in writing. This usually happens if their statements are likely to be complicated, or if a long time has passed since they were written. Yet in these circumstances, the evidence will be read out in the presence of the witnesses, who will be asked to confirm whether what has been read is their evidence.[154]

How to Administer Testimony

(1) On Oath. An oath sworn by a witness is essential in some laws. In the Sharī'a, the majority of the jurists are of the opinion that a witness should not be requested to give his evidence on oath. Some of them, however, hold the view that the judge may insist on a witness taking the oath.[155] The Sharī'a courts are not in favour of using oaths. Yet, some Sharī'a judges maintain that the oath is permitted if suspicion arises as to the truth of the testimony, or as to the probity of the witness. This is

entirely within the discretion of the judges.[156] However, they seem to be reluctant to administer the oath on the grounds that the Qu'rān[157] determines that a witness should not be 'troubled', and by being asked to testify over the oath, he may be considered to have been 'troubled'. Thus, the oath in testimony is admissible in theory but not in practice as far as the Sharī'a courts are concerned. According to the Commercial Law,[158] the translator of a foreign language speaking for a party must take the oath. The translator is, to some extent, classified as a witness, since he testifies to the statement of that party. Other semi-judicial tribunals may require witnesses to take the oath. As there are no specific rules determined for these tribinals in this respect, the necessity of taking the oath is left to the discretion of the members.[159]

(2) Separation of Witnesses. The opinion of the High Judicial Authority is that the court may separate witnesses from each other, when giving evidence if there is suspicion as to the truth of their evidence.[160] This is to prevent one witness from hearing the depositions of the others, or their statements when cross-examined,[161] as this may result in inconsistencies in evidence which could make it worthless. The idea of separating witnesses upon suspicion had been held before by some Muslim jurists,[162] among whom were the Ḥanbalis.[163] In practice, the Sharī'a courts usually separate the witnesses whenever such suspicion exists and wherever the proceedings concern a serious[164] matter. Although it is well known among all Sharī'a judges that the members of the Committees of Enjoining the Right and Forbidding the Wrong are trustworthy,[165] they have been separated when giving testimony irrespective of the nature of the fact in issue.[166] The semi-judicial tribunals separate the witnesses when giving their

evidence, except when they are confronted with each other in cross-examination.

(3) Examination. In the judicial laws and regulations there are a few principles as to the examination of witnesses in the court. But in practice, the Sharī'a judge has a very large jurisdiction which is not limited to any specific manner of examination. Examination in chief as known in the laws of some countries[167] is not a feature of the Saudi Arabian Law. The party who produces the witnesses, or his representative, is not usually allowed to examine them in chief. This procedural rule may be interpreted in light of the fact that the judges are rather cautious as to the evidence of a witness, and any suspicion may affect his probity. As the party who produces the witnesses could ask leading questions which could affect the truth of the testimony if he were allowed to examine them in chief, the judge himself assumes the examination. However, it is thought that the party for whom the evidence is rendered will not be prejudiced by this procedure of examination since the purpose of examination in chief is to ask a witness to give his own account of the matter in question.

This power of the judge in questioning witnesses leads Hart[168] and Solaim[169] to claim that there is no cross-examination in the Saudi Arabian judicial system except by the judge himself. But an insight into the judicial practice will clearly show that cross-examination, not only by the judge himself but also by the opposing party or his representative, does exist. The only restriction on this examination is that it should be made upon a request to, or by order of, the judge. In practice, the judge permits a party to cross-examine a witness for the other party, with the full meaning of the word. Advocate Baroudi of the

Arabian-American Oil Company, who has many years practice in the Sharī'a courts, noticed the flexibility of the judge in permitting even the advocate of a party to cross-examine the witnesses for the opposing party.[170]

One objective of the separation of witnesses is to insure a thorough examination whether by the opposing party or his representative, or by the judge himself.

As one of the objects of the cross-examination is to attack the probity of a witness, no one with a basic knowledge of the Sharī'a courts will fail to notice that a party is permitted to cross-examine the opponent's witnesses so far as their probity is concerned. In actual fact, a party will find more room in a Sharī'a court to attack the probity of witnesses than in any other tribunal, as will be seen below. Indeed, a party plays a more active role in this respect than the judge himself since the party is the one to initiate the attack on the probity of the witnesses for the other party. The role of the judge in cross-examination lies mostly in questions which may affect the truth of the evidence and, to a less degree, the probity of the witness.

Cross-examination is also not limited to the facts in issue or to those directly relevant to them but may extend to any fact which may affect the evidence. But, it is to be mentioned here that the judge does not often administer this type of question unless the case is a serious one, and there is a reasonable ground for him to suspect the truth of the evidence.[171]

In re-examination, the judge usually asks questions whether they concern matters left in doubt after a witness has been cross-examined, or concern restoration of his probity. In principle the party or his representative may, with the leave of the judge, re-examine his witnesses, but this is not common in practice.

The kind of questions which may be asked in re-examination are those relevant to the matters which have been put in examination in chief or in cross-examination. But there is no restriction whatsoever on the way the judge may re-examine witnesses.

Finally, it may be necessary to mention that the semi-judicial tribunals follow a similar procedure to that in the Sharī'a courts in examination in chief, cross-examination, and re-examination. But there is a fundamental difference between the two procedures. In cross-examination, the semi-judicial tribunals, with the exception of the Commercial Council of Jeddah, do not usually implement the rule of attacking and establishing the probity of witnesses (al-jarḥ wa al-Ta'dīl).

Attacking and Establishing the Probity of Witnesses

After a witness has given his evidence, the Sharī'a judge must invite the party against whom the evidence was adduced to attack the probity of this witness. This can be effective if the party proves that the witness has any interest or motive behind his testimony, or that he is not a witness of probity. This rule of evidence must be applied, in theory, against any witness in Saudi Arabia except the personnel of the Committees of Enjoining the Right and Forbidding the Wrong, who are assumed to be of probity.[172] Yet, this exception is not absolute in every respect. The testimony of any of these personnel is subject to challenge if a personal motive or interest lies behind their testimony.[173] In practice, expert witnesses are not always subject to challenge,[174] although in theory they are to be subject to examination with regard to their probity. However, if a party himself moves for permission to attack their probity, the judge must grant him such permission.

Where a party has nothing to say against the probity of the witnesses of his opponent[175] or if he is unable to challenge their probity, the judge must ask the party who has produced the witnesses to prove that they are witnesses of probity (_'udūl_).[176] Here, it is to be mentioned that a party must be given ample time to seek knowledge of the character of the witnesses of his opponent. If his challenge as to their probity is frivolous, he will be asked by the judge if he has other grounds for attacking their probity.[177]

Where the party attacks the probity of the witness of his opponent, he has to produce at least two witnesses testifying to the truth of what he has said in his attack.[178] These latter witnesses are called the witnesses for the attack on probity, "_shuhūd al-jarḥ_". The party who is requested to prove that his witnesses are competent must also produce at least two witnesses, called the witnesses for the establishment of probity, "_shuhūd al-ta'dīl_", who have to testify that the original witnesses are of probity.

The witnesses attacking probity are not usually subject to any attack on their own probity, but in 'Ammāsh v. al-Ḥarqān they were attacked on the request of the judge. It has also been held that the probity of the witnesses for establishing probity must in turn be proved by at least two witnesses.[179]

However, as a general rule the court will not permit a party to produce evidence that will prove the probity of his witnesses whose probity has been legally attacked. This is simply an implementation of the _Sharī'a_ rule "attacking the probity of witnesses has priority over establishing it".[180]

One interesting characteristic feature of the _Sharī'a_ jurisprudence is the inquiry about the probity of a witness conducted

both publicly (tazkiya al-'alāniya) and secretly (tazkia al-sirr) by the judge himself.[181] This is usually applied if the party concerned cannot legally attack the probity of the witnesses for his rival. The Saudi Arabian judiciary has recognized this rule,[182] but modern judicial practice shows no sign of it being administered by judges. The knowledge of the judge regarding probity, if not legally attacked, is valid.[183]

A comparison between the ordinary witnesses and the witnesses for attacking or establishing the probity of the original witnesses shows the following facts. Firstly, an ordinary testimony of one woman may be sufficient to prove certain facts in issue, but the evidence for attacking or establishing the probity of a witness is to be given by two male witnesses at least. Secondly, the judge cannot be an ordinary witness in his own court,[184] whereas his knowledge of the probity of a witness which is not challenged by a party is admissible.[185] Thirdly, both kinds of witnesses are responsible for their false evidence.

Finally, it may be important to cast a glance at the differences between the Sharī'a courts and other tribunals in attacking and establishing the probity of witnesses. Under the Commercial Law, the rules adopted by the Sharī'a courts are applicable. Other semi-judicial tribunals do not question the probity of a witness from a religious point of view.

Number of Witnesses

According to the Ḥanbalī law, the testimony concerning ta'zīr is not sufficient unless it is given by two male witnesses.[186] The majority of the judges follow the Ḥanbalī law in this respect.[187] The Court of Cassation in Riyadh (for example) held that a punishment of ta'zīr could not be inflicted upon the prisoner unless

there were two witnesses.[188] It reversed a judgement of a court of first instance on the grounds that it passed a sentence of ta'zīr according to the evidence of one witness.[189]

Other crimes tried by the Sharī'a courts, i.e. those of qiṣāṣ and ḥudūd except the ḥadd of zinā, must be proved by at least two male witnesses if the proof rests on a testimony.[190] With regard to the ḥadd of zinā, the Sharī'a fixes the number of witnesses as at least four males. They must describe the way in which zinā was committed, and if they fail to do so to the satisfaction of the judge, they are liable to the ḥadd of defamation (qadhf).[191] As a result of this difficulty of proving zinā, it has never been known to have been proved by witnesses. Other sexual crimes may be proved by only two witnesses since they lie under the category of ta'zīr.

Under the Commercial Law, the testimony must, in every respect, be in accordance with the Sharī'a; in other words the number of witnesses has to be at least two for the Commercial crimes coming under ta'zīr. However, the evidence of one witness may be sufficient to prove a criminal charge put before other semi-judicial tribunals.

C. OATHS

According to authoritative Ḥanbalī law[192] and the practice in Saudi Arabia,[193] the oath is only usually received in civil proceedings regarding money or property. Where the claimant is not able to prove his claim, the defendant then has to swear an oath denying it.[194] Thus, an oath here is not admissible to prove facts but to dispense with, or to counter, the claim of the plaintiff. Where the defendant refrains (nakala) from taking the oath when required by the claimant, the claim is to be regarded as valid. However, if the claimant does not require the oath, which

is often suggested by the judge, his claim will automatically be dropped. Yet, it can be reconsidered when he finds evidence and wishes to make a fresh claim, or if he decides later to demand the oath from his opponent.[195]

In criminal proceedings, a defendant is not liable to oath since the rule is that the accused is innocent till proven guilty.[196] However, in the absence of evidence in the charge of murder, the defendant may be asked to take the oath.[197] Where the defendant admits that the killing was not intentional, and the claimant alleges that it was intentional but he is not able to produce valid evidence to substantiate his claim, the defendant can rebuff the claim by taking the oath that the killing was not intentional.[198] As held by Aḥmad b. Ḥanbal, if the defendant refrains from taking the oath, the punishment of retaliation will not be inflicted upon him,[199] but he has to pay the blood-money. This is demonstrated by the practice in Saudi Arabia. Thus, in a case which involves both civil and criminal action, an oath is to be required only in the civil issue if there is no evidence for the claimant, but it is not required to counter the allegation by the prosecution in the criminal issue.[200]

The general rule is that the oath is not admissible in proving the facts in issue as far as criminal proceedings are concerned. However, there are two exceptions to this rule, where oaths can conclusively prove the facts in issue in criminal proceedings. These are the cases of qasāma and li'ān.

1. Qasāma (Reiterated Oaths)

The word "qasāma" is derived from "qasam", which means oath.[201] Technically it refers to reiterated or multiple oaths made in regard to the killing of a person.[202] Qasāma had its

origin in a tradition of the Prophet related to an incident in Khaybar, an oasis inhabited by Jews, when a Muslim was found killed. The relatives of the man complained to the Prophet, and the Prophet said to them: "Fifty of you shall swear the oaths that one of the Jews had killed him, and the (alleged) killer will be surrendered to you." They said: "This is a matter which we did not perceive, how can we then take the oath?" The Prophet said: "Then the Jews shall be absolved by the oaths of fifty of them."

Stipulations for Qasāma

(a) The existence of imcriminating circumstances (Lawth).

Aḥmad b. Ḥanbal has two opinions regarding the significance of lawth. Firstly, that lawth is an apparent hostility between a deceased person and his alleged killer. Therefore, if there was no hostility, the qasāma will not be applicable. Secondly, that lawth is any circumstance which strongly indicates the likeliness that the accused has committed the killing. Thus, lawth can arise from any of the following facts:- (i) an apparent hostility; (ii) the dispersal of a crowd from a killed person, and here an accusation of the killing may be raised against any one of them; (iii) the finding of a person in possession of a sword or a knife or any other offensive weapon stained with blood near a newly dead body without there being another man, animal, or object in the vicinity which might have caused his death;[203] (iv) fighting between two groups which may have resulted in the killing; and (v) the evidence given by women, minors, or persons with no probity ('adāla).[204] Lawth, when regarded as an apparent hostility, is an issue on which Saudi Arabian judges will not disagree. But when it is regarded as the presence of incriminating circumstances, although this opinion is not confirmed by Sharḥ[205] and Kashshāf,[206]

we find that in actual practice Saudi Arabian judges regard it also as binding.[207]

(b) The description of the death. The claimant must describe the circumstances relating to the killing. This description enables the court to reach a conclusion as to whether lawth exists.[208] At the present time, it is the police who provide most of this information.

(c) The claim by all the heirs of the deceased. All the heirs of the killed person must claim that their legator was murdered, and demand retaliation (qiṣāṣ) against the alleged killer. If some of them deny that the killing was intentional or if they do not demand retaliation, then there will be no qasāma.[209]

(d) The accusation of a specific person. The claimants must accuse a specific person of killing their legator in order to be able to demand retaliation. This is the rule generally agreed upon by the Ḥanbalī authorities.[210] Some courts, such as the Grand Sharī'a Court of Riyadh, do not always apply this rule. However, the Court of Cassation has reversed the judgements in cases in which this rule was not applied. Furthermore, the Court of Cassation holds the view that when the claimants directed their accusation against a person and afterwards they accused another there should be no qasāma, on the ground that the first accusation falsifies the other.[211]

(e) The existence of male relatives. Aḥmad b. Ḥanbal holds two opinions as to the relations of the deceased who take the oaths. The first is that the relations who take the oaths must be only agnates ('aṣaba), whether they inherit from the deceased or not. The second is that they must be male heirs only, whether they are agnates or cognates.[212] This latter opinion is upheld by

"Sharh"[213] and "Kashshāf"[214] and it prevails in Saudi Arabia, although the practice has varied from time to time.[215] However, in 1969, the Court of Cassation in Riyadh determined that: "Where the oaths of qasāma are to be sworn, they are only to be taken by the heirs, for this is their own concern. The oaths taken by those who are not heirs are weightless."[216]

How to administer qasāma. Muslim jurists differ on how the fifty oaths of qasāma are to be administered. Some hold the view that it is the accused party who is to take these oaths.[217] Others, such as the Ḥanbalis, hold the view that the oaths must be sworn by the relatives of the deceased, and this latter opinion is applicable in Saudi Arabia. In most cases, it is unlikely that there will be as many as fifty competent male heirs to swear the fifty oaths. As a result, the oaths are to be allotted to them in accordance with their shares in the inheritance.[218] In conformity with this opinion, it is possible that all the fifty oaths may be taken by one man where he is the only male heir.[219]

Where any of the relatives qualified to swear declines to take his oath(s) or revokes the oath(s) he has taken,[220] or where there is no male relative or the male heirs are legally incompetent,[221] the defendant has then to swear all the oaths, one by one, denying that he has caused the death of the deceased.[222] Having so sworn all the oaths in the presence of the claimant(s), the defendant must be acquitted.

2. Li'ān (Oaths of Condemnation)

Li'ān is derived from the word la'n (curse), and it is included in the oaths sworn by a husband who has accused his wife of committing adultery[223] that his charge against her is true.

Where a man accuses a woman other than his wife of committing

adultery and has no proof, he is to be prosecuted for the hadd of defamation (qadhf) upon her request if she does not admit the accusation. But if he makes this accusation against his wife, he can avert being punished by swearing the oaths designated for Li'ān. The oaths of li'ān sworn by the husband and those sworn by the wife, whom he accuses of adultery, are stipulated in the Qur'ān (Ch. 24, verses 6-9). The husband must say four times; "I testify by God that my accusation against my wife of adultery is true." He is to repeat this oath for a fifth time, ending with these words: "The curse of God shall be upon me if I am of the liars." Having completed his oaths, he is to be acquitted. Then, his wife must counter them by swearing four times as follows: "I testify by God that he (her husband) is of the liars in accusing me of adultery." She is to repeat this oath for a fifth time adding to it these words: "The wrath of God shall be upon me if he is of the truthful." Where she refrains from taking these oaths, she is to be detained till she confesses to having committed adultery, or swears the oaths.[224]

Stipulations for li'ān

(1) Legal competence of both spouses during their matrimony. Li'ān cannot be operative unless the accusation of adultery is made by a legally competent husband against his legally competent wife. Therefore, if either spouse is, for example, a minor or insane, the oaths of li'ān have no evidentiary significance.[225]

(2) Clear accusation of adultery. The accusation of adultery must be made expressly with the word "zinā" or any of its derivatives.

(3) Denial by wife. When the accused wife confesses to having committed adultery, the accusation by her husband is to be

held true and the oaths of li'ān are not operative. However, if the wife denies the accusation and takes the oaths, li'ān will then have its criminal and civil[226] effects.[227]

D. DOCUMENTS

Documents include writings, figures, or symbols, provided that they are capable of being utilized as evidence. They are divided into two categories - private documents which emanate from private persons or public persons in their private capacity, and non-private documents which emanate from public officials and bodies.

Muslim jurists have dealt with documents. Some hold that they cannot be used as evidence in criminal proceedings. Others hold that documents are admissible, arguing that they had been recognized by the Prophet and his Companions and Pious Followers. Ibn al-Qayyim al-Jawziyya enthusiastically argued that by invalidating documents "we could not have received the Ḥadīth (Tradition) of the Prophet"[228] which was a major source of the Sharī'a.

Irrespective of this difference among Muslim jurists in the past, there is no reason for disregarding documents as evidence at the present. In principle, documents have been accepted in Saudi Arabia even in criminal proceedings. However, the Sharī'a courts do not easily accept a document containing evidence concerning the matter in issue if this evidence is against the defendant. It has been mentioned earlier in this chapter that the testimony or confession written or attested to by a non-Sharī'a authority is not usually acceptable. The Court of Cassation in Riyadh[229] made it clear that documents regarding affidavits or depositions could be reliable only if adduced or made before a Sharī'a authority.

However, the Sharī'a courts may receive a document in favour of the defendant though not issued by a Sharī'a authority.[230] Similarly, a Sharī'a court may receive a document duly executed by any authority if it is not directly concerned with the establishment of the fact in issue. For example, the written evidence of experts regarding a traffic accident or regarding the presence of alcohol in the blood of a person accused of drinking alcohol, may be received.

The semi-judicial tribunals may receive, without restriction, any official document - whether from the police, an examining magistrate, a court, or a public authority.[231] Moreover, they may admit private documents which purport to be genuine. For example, the Customs committees usually receive the commercial correspondence between businessmen or between companies as valid evidence.[232]

In pursuance of the rule:"the one who asserts must prove", a document as a means of proof must be produced by the party for whom it is given. But it appears that this rule is applicable only when a document is concerned with purely civil proceedings. A document concerning criminal proceedings may be produced at the request of the court from its official custody. Although the tribunal may request the production of the original or the copy of a document, there is no explicit statutory rule to compel an authority or even an individual who possesses the document to produce it. Yet, there is only one exception to this rule determined in Article 498 of the Commercial Law which provides that a Commercial judicial authority may request the production of a document either from private or public custody. However, public departments and corporations usually respond to the request of the tribunals to send in relevant documents, since they mostly accept

copies of these documents. Thus, the copy of a document produced as evidence may be as acceptable as the original.

Primary Evidence

An original document may be the only document of its kind in existence, such as a personal letter. It may also be of a multiple origin as, for instance, when an agreement is drawn up in duplicate, and both documents are executed by both parties. Memoranda and circulars are usually typed and a copy of them which is duly signed and sealed is regarded as the original.

Before receiving any document whether private or non-private, its execution has to be proved. The proof of execution of a document may concern either, or both, the signatures which it bears or the handwriting of the document.[233] This can be proved by the testimony of witnesses who are acquainted with the handwriting or the signature,[234] or by experts.[235]

By Article 501 of the Commercial Law, it is provided that whenever the alleged executor of a document denies his association with it, or if allegation of falsification or alteration of a document arises, the tribunal must set up a commission of at least three experts of repute to investigate the signature and writing of the alleged executor and compare them with the ones appearing in the document. The alleged executor of the document in issue may be asked to write words, similar to those appearing in the document, several times so that the commission can draw its conclusion. If his writing and signature are known to many people, four ordinary witnesses at least are to give evidence that the writing or the signature on the document is that of the alleged executor.

The execution of a document may be established on the admission of the party against whom it is produced.[236] The

admission of a defendant that the handwriting of a document is his own but that he does not remember having written it may be used as evidence against him.[237]

For an official document to be duly executed, it has to be typed, sealed, and signed by the head of the establishment. With regard to the judicial document of a judgement issued by a Sharī'a court, it must be written by hand on official paper, sealed with the seal of the court and the personal seal of the trial judge, and signed by him and by the Chief Judge of the court if he is different from the former.[238] When so executed, a document is to be regarded as admissible evidence, and its content is irrebuttable, unless it is alleged to have been falsified.[239] Where a document is alleged by the opposing party to have been falsified, he has to prove this, and the tribunal is also to inquire as to its authenticity from the authority which issued it before it can be received.[240] A mark appearing on a piece of property, such as a brand on an animal, may only be proved by witnesses who testify that such a mark is used by a certain person, family or tribe.[241] Foreign documents are officially accepted when signed by the Saudi Arabian Foreign Ministry, but the Sharī'a courts are cautious in dealing with such documents. Where a document concerns a matter relating to criminal proceedings such as the legal status of heirs living outside Saudi Arabia who demand retaliation against the murderer of their testator in Saudi Arabia, the court would not receive it unless it was duly issued by a Sharī'a authority therein, if there is any, and signed by the Foreign Ministry.[242] Proof of the identification of a person may be accounted for by his identity card (ḥafīẓa nufūs)[243] if there are no witnesses to testify to his identification, or if the court wants more evidence than witnesses.

Secondary Evidence

In the absence of the original document whether caused by destruction, loss, inconvenience, or any other means, secondary evidence is to be admissible. Secondary evidence can be in the form of a testimony, but the usual form in non-private documents is a copy[244] or an extract of the original. Here, we shall deal only with documents which are usually submitted to tribunals.

(a) Judgements. A judgement of conviction or acquittal rendered by a Sharī'a court is usually proved by a copy of the record of this judgement[245] or by a sakk thereof, or by both if they are referred to an appellate authority. Where a party has to produce a judicial document which has been mislaid or which he does not possess, this document can be proved by a certified copy taken from the register of the respective court.[246] Where a sentence was passed by a judge who died after it had been entered on the record of the court or written in a ṣakk and before it was entered on the register, it will have no weight unless it is acknowledged by both parties or evidenced by witnesses.[247] As a general rule, a copy of a judgement will have no evidentiary value unless it carries the signature of the first clerk [248] and the seals of the trial judge and court.[249] A conviction cannot be proved before a Sharī'a court by a copy of a document taken from the criminal record of a convicted person which was prepared by the police, except when the person against whom the document has been adduced acknowledges its contents. Similarly, a decree made by any tribunal other than a Sharī'a authority is not necessarily accepted by Sharī'a courts. The semi-judicial tribunals accept any judgement rendered by a Sharī'a court, even without the admission of the convicted or the evidence of witnesses.[250]

(b) Depositions and affidavits. Generally, the Sharī'a

courts do not receive any document regarding a statement made by a witness or by a prisoner except the evidence of some experts, as mentioned above. But the semi-judicial tribunals usually admit such a statement, as has been referred to earlier in "Confession" and "Testimony".

(c) Written evidence. Written evidence here means testimony or confession which has been recorded prior to the trial whether by the trial court itself or by another court. Where a court other than the trial court receives a testimony and records it, the record of this testimony has to be proved by a formal letter and a copy of the testimony as it has been entered on the record.[251] Where a confession is made before any Sharī'a court other than the trial one, it is to be entered on the record of the court and proved by a certified copy of the record.[252]

(d) Bankers Books. Copies of documents in the custody of Bankers are constantly needed by the Committee for Securities. With the purpose of causing the least inconvenience to the daily work of banks when they are not parties and with the object of easing the task of the Committees, the Committees receive certified copies to prove documents. These copies take the form of formal letters from banks with the entire contents of, or an extract from, the originals. Finally it is to be mentioned that these copies are only regarded as prima facie evidence if the banks issuing them are instituted in Saudi Arabia. These banks can be both foreign as well as national.[253] However, the Sharī'a courts may only accept such documents when they are represented through the Saudi Arabian Monetary Agency.[254]

E. REAL EVIDENCE

Real evidence means material objects other than documents produced as evidence in court. An object or a thing, as it may be called sometimes, is not confined to an inanimate object but may include an animal or even a human being. The inspection of an object is not usually made by the court. It is true that the mental condition or the discretion of a party is often decided by the court. Similarly, the court decides on the probity of a witness, partly by his reactions to questioning in court. Theoretically, the court may move out of its seat to look into a case.[255] In actual practice, however, this rarely happens in civil cases and less so in criminal cases.

According to the Sharī'a, real evidence falls within the sphere of the evidence of presumptions, as will be seen later when dealing with presumptions. This being the case, and since the evidence of presumptions is valid only in ta'zīr, it is to be concluded that real evidence is admissible in proceedings regarding a crime of ta'zīr only. However, real evidence concerning a matter which is not in issue but which relates to it may be accepted in any type of criminal proceedings.[256] However, the semi-judicial tribunals treat real evidence as a separate class other than that of presumptions. These tribunals refer to real evidence as "mu'āyana", or inspection, and "khibra", or the finding of experts. But none of these tribunals usually inspect an object which may constitute real evidence either inside or outside of them.

In the absence of an admission by the party against whom real evidence is given,[257] the material object must be proved by oral evidence identifying the object. This evidence may be given by individuals, or by the police and

other investigating authorities,[258] or by experts.[259]

F. PRESUMPTIONS

Presumptions are divided into two classes: presumptions of law and presumptions of fact. Presumptions of law are categorized as irrebuttable and rebuttable. The irrebuttable, or conclusive, presumptions are not evidentiary at all, being rules of substantive law, and consequently they have no place here. For example: a minor cannot be subject to punishments of ḥudūd or of retaliation, on the presumption that he is incapable of performing acts constituting crimes of ḥudūd or retaliation.

Rebuttable presumptions can only be drawn in the absence of rebutting evidence; in other words their evidentiary effect may be negated by a contrary inference from some other facts.

Besides the rebuttable presumptions of law, there are also rebuttable presumptions of fact. The distinction between these two classes is that presumptions of law are prescribed by law, whereas presumptions of fact are not so prescribed but drawn by judges and recognized by the law.

Rebuttable Presumptions

1. Presumptions of Law. Before referring to the presumptions regarding particular crimes, it is suggested that reference should be made first to the rebuttable presumptions of law which have general applications.

(a) Innocence.[260] Generally, the law presumes that a person accused of a crime is innocent until he is proven guilty. Therefore, the accused does not have to establish his innocence by any evidentiary means, but he who asserts must prove.[261] Thus, it is presumed that suspicion is in no way evidence.

(b) Sanity. According to the law it is presumed that a person is sane, but if a plea that he is not so is made, his insanity has to be proved. The burden of proving this plea is cast upon the defence. Where such a plea is made in the proceedings regarding a crime of hadd, the court will immediately respond to it and will accept the proof of insanity or mental subnormality.[262] But if the proceedings concern another class of crime, the judge may not permit such a proof unless he himself is convinced that the accused is insane. When the judge is in doubt, he has to consult experts and base his decision upon their reports.[263]

(c) Intention. A normal human being is presumed to intend the natural and probable consequences of his acts, and therefore is responsible for them. Yet, this presumption may be rebutted by any evidence which shows that his act was not intentional. This can be seen quite obviously in cases of killing, where the killer admits his act but claims that he did not intend to commit it. Presumptions[264] as well as oaths[265] are commonly considered as satisfactory rebutting evidence in this case. Where the act is not normally intended, such as the breakdown of a vehicle which results in the injury or death of passengers, there is no need for rebutting presumptions, provided that (i) the driver was qualified, (ii) he possessed reasonable senses, (iii) he did not violate traffic laws, and (iv) he kept his vehicle under normal check. Indeed, contrary to the rule of the presumption of intention, such a driver is to be considered innocent till proven guilty.[266]

(d) Legitimacy.* According to the Ḥanbalī law, it is presumed that a child born after six months of marriage or within four years[267] after divorce is legitimate, provided that the parents have cohabited. But if the child is born six months before the date of marriage or four years after divorce, the child is

* See special footnote on page 218

considered illegitimate. Moreover, where it is impossible for the child to belong to the husband, for example if the latter has not met his wife, the child is also regarded as illegitimate. If the child is born dead or dies immediately after its birth within six months after the marriage, it is presumed that it was conceived in a legal manner. Should the husband be too young or sexually defective to the degree that he is incapable of producing children, the child born to his wife is illegitimate. Yet, if the husband is not less than ten years of age when the conception took place, the child is legitimate.[268]

(e) Death. A presumption of the continuance of life is terminated by that of death. A person who has not been heard of for at least four years and is most likely to have died is presumed to have ceased to live. The answer to the question of how a person is most likely to have died is when he has been missing unexpectedly from his family, or in a desert or in war. If the missing person has attained ninety years of age and his absence is inexplicable, he is to be presumed dead, even if his death is only assumed on no reason other than his decrepitude.[269] Hence, the marriage of the spouse of a missing person who is considered to have died will not give rise to any incriminating or any other circumstances.

Here we turn to the special presumptions of law which may concern the crimes of ḥudūd and retaliation.

(a) Illegitimate pregnancy.* The ḥadd of zinā can be proved by the pregnancy of an unmarried woman, or a married one whose conception is not illegal,[270] in the way mentioned before. However, the accused may rebut quite easily this presumption by claiming that she was raped.[271] According to Kashshāf,[272] the presumption may be rebutted by a plea of any reasonable excuse. Yet, this presumption may be valid in a crime of ta'zīr, even though the

* See special footnote on page 218

prisoner claims that she was raped.[273]

(b) Intoxication. According to the law[274] and practice,[275] vomitting alcohol is indisputedly presumed to be an admissible evidence for the ḥadd of intoxication. As to the smell of alcohol emanating from the mouth, it is recognized by some judges as sufficient evidence for this ḥadd.[276] The Muftī, Muḥammad b. Ibrāhīm, ruled[277] that the smell of alcohol in one's breath was sufficient evidence to prove the ḥadd. Yet, he stated that the judgement of a trial judge who insisted on disregarding this presumption could not be reversed since this opinion was held by Sharḥ[278] and Kashshāf.[279] However, although the Muftī gave preference to the idea that such a smell was to be valid evidence for the establishment of the ḥadd of intoxication, his ruling has opened the door wide for the judges to accept or disregard the smell of alcohol as valid evidence as far as the ḥadd is concerned. Indeed, the majority of judges do not receive the presumption of the smell of alcohol, even if it is corroborated by other[280] presumptions.[281]

(c) Refraining from taking the oath. As has been mentioned above, the refraining of an accused from taking the oath in the charge of murder does not prove legally and beyond doubt that the accusation of murder is true.[282] Similarly, the refusal of taking the oaths of li'ān by a wife is not regarded as conclusive evidence for the ḥadd of zinā. The only admissible presumptive refraining from oath in a ḥadd is when a husband, accusing his wife of zinā, refrains from taking the oaths of li'ān, where his refraining is held as valid evidence to prove the ḥadd of defamation against him.[283]

2. Presumptions of Fact. In ḥudūd and retaliation the judge has

no discretion to extend the scope of evidence beyond what is prescribed by the law. But presumptions may be received in proceedings regarding any crime of ta'zīr. Indeed, there is no limitation imposed upon the judge in this field. The range of presumptions of fact is so wide that it includes what is categorized in some laws as real evidence or evidence of things,[284] and to some extent the documentary evidence.[285] It may be important to mention that some evidence which has fallen short of proving a ḥadd or retaliation may be received in ta'zīr as presumptive evidence. For example, the testimony of women[286] or the evidence of one man[287] may be admitted as valid evidence in the sphere of ta'zīr.

Conclusion

From all that has been mentioned in this chapter, the cogency of the evidence adduced in different kinds of crimes tried by the Sharī'a courts and by the semi-judicial tribunals may be summarized as follows:-

(1) The crime of the ḥadd of zinā may only be established by the evidence of four male witnesses, or by express confession made four times by the prisoner, or by only one presumption,[288] i.e. the conception of an unmarried woman.[289]

(2) The ḥadd of theft and the ḥadd of highway robbery may be established only by express confession made twice, or by the evidence of two male witnesses.

(3) The ḥadd of intoxication can indisputedly be established by confession, the evidence of two male witnesses, or vomiting alcohol. According to some authorities it can also be established by the smell of alcohol emanating from the accused's mouth.

(4) The retaliation imposing capital punishment can be established

only by confession or by the testimony of two male witnesses, and in the case of qasāma by fifty oaths. The retaliation involving a limb of the body may be evidenced only by confession or by the testimony of two male witnesses.

(5) A crime of ta'zīr can be established by any kind of evidence mentioned above, but if the evidence is testimony it must be given by two male witnesses.

(6) In matters confined to women, which have been mentioned above, the evidence of one woman is cogent. Similarly, the evidence of one expert (qābila) may be treated as effective evidence.

(7) Any kind of evidence produced in a semi-judicial tribunal may be regarded as cogent when it satisfies the tribunal.

References and Comments

1. Nokes, G.D., An Introduction to Evidence, London, 1967, p. 3.
2. According to English law, documents and real evidence are direct evidence.
3. Matters of common knowledge or of the law of Saudi Arabia are matters of which proof is not required, but the court will take judicial notice of them.
4. About these facts see Palmer, H.A., and Palmer, H., Wilsher's Criminal Procedure, London 1954, pp. 88-93.
5. Al-Dawsarī v. Khalaf and Khālid, G.S.C. (Ḥāiyl), Ṣ. No. 208/3 of 1386 (1966).
6. "In ... v. al-Ḥārithī", B.C., D. of 1388 (1968).
7. Such as the English law.
8. Such as the English law. (See Palmer and Palmer, p.p. 96, 100.
9. According to the Saudi Arabian law, hearsay is only testimony transferred from the original witness to a person who has not himself perceived the matter on which the evidence may be given. However, the formal Ḥanbalī authority is against receiving hearsay in criminal proceedings. (See, al-Mughnī, vol. XII, pp. 87-88).
10. See al-Yamānī v. al-zahrānī, G.S.C. (M), R. of 1381 (1961-62), vol. II, p. 9.
11. P.P. v. al-Yamī, P.J., D. No. 447 of 1360 (1941).
12. P.P. v. Dirbās, the Judicial Commission set up to try the defendant, Ṣ. No. 11/1 of 1386 (1966).
13. Al-Subay'ī v. al-Subay'ī, G.S.C. (R), Ṣ. No. 169/1 of 1388 (1969).
14. L. of P.J. to M.I. No. 1305/1 of 28/8/1383 (1964).
15. The age of majority is reached on attaining puberty or fifteen years.
16. Al-Ḥusaynī v. Ḥusnī, C.D., D. No. 189 of 22/8/1360 (1941).
17. P.P. v. Ṭāhā and others, F.M.C. (Ṭ), D. No. 320 of 1388 (1968). See also, P.P. v. al-Yamānī, F.M.C. (R), D. No. 982/1 of 1389 (1970).
18. Bahnasī, pp. 141-142.
19. Al-Mughnī, vol. X, pp. 171-172.
20. Kashshāf, p. 454; al-Mahābī v. al-Mirwa'ī, G.S.C. (M), C.R. of 1392 (1972), vol. III, p. 33.
21. "In ... v. Sa'īd Sāqār and Jum'ān, G.S.C. (R), R. of 1387 (1967), vol. XII, p. 15.
22. Hadhdhāl v. Ḥamad and Muthīb, C.C. (R), D. No. 614 of 1386 (1967) and D. No. 6/3 of 1387 (1968).
23. P.P. v. Munīra, F.M.C. (R), D. No. 882/2 of 1387 (1968); P.P. v. Zalīkha and al-Ḥaddād, G.S.C. (M), R. of 1385 (1965), vol. I, p. 68.
24. Vol. III, p. 570.

25. See, e.g. "in ... al-Zahrānī and al-Muṭayrī", G.S.C. (R), D. No. 261 of 1383 (1963); M. of Judge Muḥammad al-Badr of G.S.C. (R) to its Deputy Chief Judge No. 205 of 17/3/1384 (1964).
26. Bahnasī, p. 151.
27. P.P. v. Turkī and b. Rāshid, F.M.C. (R), D. No. 88 of 1384 (1964).
28. See, P.P. v. al-Yamānī, F.M.C. (R), D. No. 9 of 1384 (1964).
29. Al-'Unayzān v. A:G: of al-Aflāj, G.B., D. No. 249 of 1375 (1956).
30. P.P. v. al-Kurdī, G.S.C. (M), session held on 15/6/1392 (July 27, 1972), to which the author had access.
31. P.P. v. al-Barmāwī and others, G.S.C. (M), R. of 1385 (1965), vol. I, p. 68.
32. P.P. v. al-Barqāwī, F.M.C. (R), D. No. 122/20 of 1386 (1966).
33. L. of P.J. to P.C.M. No. 1699 of 6/3/1374 (1954), quoted in L. of P.C.M. to M.I. No. 4668/2 of 9/10/1374 (1955).
34. Decision of the Judicial Commission set up to try b. Khuḍayr of 1389 (1970).
35. P.P. v. b. Rāshid, F.M.C. (R), D. No. 23 of 1383 (1963).
36. "In ... v. al-Zahrānī and al-Subay'ī", C.C. (R), D. No. 365 of 1384 (1964).
37. P.P. v. Mud'ith and Muḥammad, F.M.C. (R), D. No. 95 of 1384 (1964).
38. "In ... v. al-Zahrānī and al-Subay'ī", C.C. (R), D. No. 36 of 1384 (1964).
39. M. of M.I., to P.C.M. No. 1156 of 1/2/1378 (1958); L. of P.J. to P.C.M. No. 403 of 1/5/1378 (1958).
40. Al-'Asimī, 'A.b.M., Majmū'a Fatawa Shaykh al-Islam Ibn Taymiyya, Mecca 1386 (1966) vol. 35, p. 104.
41. See e.g., P.P. v. al-Yamānī, G.S.C. (Ṭ), Ṣ. No. 289 of 28/12/1387 (1968).
42. Al-'Amūdī v. Bākarīm, C.C., D. No. 12 of 1352 (1933).
43. As to implied admission or confession in English Law, see Nokes, pp. 292-293.
44. Law of 1952(A), art. 20; al-Jayzānī and al-Jayzānī, and al-Jayzānī, F.M.C (R) , D. No. 873 of 1384 (1964).
45. Al-Muẓayfrāt v. al-'Ayāyda, G.S.C. (M), D. of 1389 (1969).
46. Interview with Shaykh Ṣāliḥ al-Luḥaydān, supra.
47. Bahnasī, p. 141.
48. M. of Judge Muḥammad al-Badr of G.S.C (R) to its Deputy Chief Judge No. 205 of 17/3/1384 (1964).
49. Interview with Shaykh Ṣāliḥ al-Luḥaydān, who was the Deputy Chief Judge of G.S.C. (R), supra.
50. "In ... v. al-Zahrānī and al-Subay'ī, D. No. 36 of 1384 and D. 365 of 1384.

51. Concerning the recording of confessions, see: P.J., C. No. 3222/3 of 19/10/1382 (1963); M.J., C. No. 45/1/T of 5/3/1392 (1972); L. of M.J. to D.M.I. No. 2024/1/N of 12/6/1392 (1972); Maryam v. Yūnis, G.S.C. (M), C.R. of 1391 (1971) vol. I, p. 32.

52. L. of Sa'ūd to Faisal No. 713 of 18/1/1373 (1953).

53. L. of Vic. to G.S.C. (M) No. 1051 of 26/1/1373 (1953), quoted in M. of M.I. to P.C.M. No. 3366 of 5/7/1382 (1962).

54. See e.g., P.C.M., C. No. 16151 of 7/8/1388 (1968).

55. P.P. v. al-Yamānī and al-Shammarī, F.M.C. (Ṭ), No. 282 of 17/5/1388 (1968).

56. Al-Barmakī v. al-Barmakī, C.C. (R), D. No. 505/1 of 1387 (1967).

57. "In ... v. b. Sāqār and Jum'ān", G.S.C. (R), R. of 1387 (1967), vol. XII, p. 15.

58. See e.g., P.P. v. 'Umar and Fāṭima, G.S.C. (M), R. of 1376 (1956), vol. II, p. 81.

59. P.P. v. al-Yāmī, P.J., D. No. 447 of 1360 (1941).

60. See, al-Suwāṭ v. Miskī, G.S.C. (J), R. of 1387 (1967-68).

61. Al-'Uṣaymī v. al-Ruways, G.S.C. (R), R. of 1386 (1966-67), vol. I, p. 95.

62. L. of P.J. to P.C.M. No. 1699 of 6/3/1374 (1954-55), quoted in L. of P.C.M. to M.I. No. 4668/2 of 9/10/1374 (1955); P.J., D. No. 297 of 22/7/1358 (1939).

63. Al-Mughnī, vol. X, p. 294; L. of the Muftī to P.K.O. No. 106 of 16/10/1374 (1955).

64. L. of the Muftī to P.K.O., supra.

65. Ṣ. No. 21 of 1385 (1965).

66. Some of them operate the "allusion" under certain circumstances, but do not do it under others. The Grand Sharī'a Court of Mecca sitting under the same presidding judge had made allusions to confessors to zinā to recall their confession, but did not make such an allusion to another confessor committing the same kind of crime. By examining the case in which the allusion was made, one will find that both the man and woman were adult, unmarried; that the intercourse was by mutual consent of both of them. In the other case, the confessor kidnapped a girl of nine years of age from a city to a suburb, kept her for twenty days till he was discovered, and raped her several times. Moreover, he was a married man, and he tried to mislead the Court by claiming that he was single, and had never been married. Obviously, if the judges made an allusion to the confessor, in the first case, probably out of mercy, they had no reason to have such mercy on the confessor in the second case, which could have caused them to hint to him to recall his confession. (See: al-Yamanī v. al-Zahrānī, Ṣ. No. 2 of 1381 (1961), and P.P. v. Zalīkha and al-Barnāwī, Ṣ. No. 105 of 1385 (1965).

67. See e.g., P.P. v. al-Qaṭarī, G.S.C. (M), D. of 1386 (1966); L. of P.J. to P.C.M. No. 3394/1 of 14/10/1387 (1968).

68. Al-Manāwī, p. 227.

69. See e.g., L. of P.J. to G.S.C. (R) No. 2107/3/1 of 7/6/1386 (1966).

70. See, L. of the Muftī to P.K.O. No. 106 of 16/10/1374 (1955).

71. P.P. v. al-Jayzānī, C.C. (R), No. 189/1 of 1388 (1968).

72. About the Commission which attends the execution of ḥudūd, see D. of C.C. No. 5 of 6/3/1376 (1956) approved by C.M., D. No. 123 of 20/7/1379 (1959).

73. H.O. No. 9707 of 25/5/1389 (1969), quoted in C. of M.I. No. 2103/S of 12/7/1389 (1969); L. of P.C.M. to M.I. No. 14401 of 14/7/1389 (1969).

74. M. of M.I. to P.C.M. No. 3161/S of 22/9/1389 (1969).

75. Sharḥ, p. 347.

76. P.P. v. al-Jayzānī, G.S.C. (R), R. of 1388 (1968), vol. XII, p. 22, and C.C. (R), D. No. 189/1 of 1388 (1968).

77. L. of P.J. to G.S.C. (R). No. 2107/3/1 of 7/6/1386 (1966).

78. P.P. v. al-Yāmī, D. No. 447 of 26/6/1360 (1941).

79. P. 144.

80. M. of G.S.C. (R), to C.C. (R). No. 3875/1 of 14/9/1386 (1966).

81. D. No. 492 of 1386 (1966) and D. No. 593 of 1386 (1966).

82. Sharḥ, p. 375; P.P. v. Sūdān and others, G.S.C. (M), R. of 1375 (1955), vol. III, p. 53.

83. See e.g., al-Ḥaḍramī v. al-Ḥaḍramī, G.S.C. (R), Ṣ. No. 150 of 1377 (1957); al-Yamānī v. al-Yamānī, G.S.C. (M), D. of 1386 (1966); al-Barmakī v. al-Barmakī, C.C. (R), D. No. 505/1 of 1387 (1967); al-Yamānī v. al-Yamānī, G.S.C. (Ṭ), R. of 1388 (1968), vol. I, pp. 92-95.
In P.P. v. al-Yamānī and Munīra, who were charged of murder and zinā, the Grand Sharī'a Court of Riyadh, supported by the Court of Cassation, held that the former prisoner was convicted of retaliation upon his confession without mentioning how many times he had confessed. As to the ḥadd of zinā it was mentioned that he was convicted after he had confessed four times. (See, G.S.C. (R), D. of 1389/1969; C.C. (R), D. No. 6/1 of 1390/1970). Thus, an unrepeated confession to a crime of retaliation, whether it concerns the life or a part of the body, is admissible. (About the confession to the crime of retaliation regarding a part of the body, see: al-Ḥārithī v. al-Ḥarithī, G.S.C. (Ṭ), R. of 1387/1967, vol. VI, p. 6.)

84. Bahnasī, p. 155.

85. Al-Buraydī v. Nūra, F.M.C. (R), D. No. 470 of 1388 (1969).

86. p. 118.

87. P.P. v. al-Tuwayjrī and al-Ḥawṭī, F.M.C. (R), D. No. 170 of 1384 (1964), and P.P. v. al-Ḥarbī, D. No. 893/2 of 1388 (1968), and P.P. v. al-Ḥarbī, D. No. 428/1 of 1388 (1968), and P.P. v. b. Jum'a, D. No. 365/2 of 1389 (1969), and P.P. v. al-Dawsarī, D. No. 445/1 of 1389 (1969).

88. See e.g., P.P. v. al-Khaybarī, F.M.C. (R), D. No 246 of 1383 (1964); P.P. v. al-'Umarī, F.M.C. (R), D. No. 312 of 1383 (1964); P.P. v. al-Rashīdī, F.M.C. (R), No. 340/2 of 1389 (1969); P.P. v. Dawsarī, F.M.C. (R), D. No. 445/1 of 1389 (1969).

89. See, al-Mughnī, vol. X, p. 167.

90. Kashshāf, pp. 416-417.

91. Muntahā, Vol. III, p. 545; Interview with Shaykh 'Abdullah b. Duhaysh, (1970).

92. Interview with Shaykh Ṣāliḥ al-Luḥaydān, supra.

93. Kashshāf, p. 417.

94. Abū Ḥanīfa is of the opinion that a Jewish or Christian woman may give testimony in virginity and in women's defects. (Ibn al-Qayyim al-Jawziyya, Al-Ṭuruq al-Ḥukmiyya fi al-Siyāsa al-Shar'Iyya), Cairo, 1953, p. 80.

95. Kashshāf, p. 417.

96. See, C.L., art. 26, s. III.

97. The whole population of Saudi Arabia are Muslims.

98. D. No. 112/89/T of 1389 (1969).

99. Sharḥ, p. 547.

100. Law of 1931, art. 15; Law of 1936, arts. 48-49.

101. Such as matters relating to bodily defects covered by dress, virginity, menstruation, accouchment, and inflicted violence. (Sharḥ, pp. 556-558; Kashshāf, pp. 433-436.)

102. L. of the Muftī to P.C.M. No. 403 of 1/5/1378 (1958); L. of P.J. to M.I. No. 3551/1 of 10/9/1387 (1967).

103. Sharḥ, p. 558; Kashshāf, pp. 433-436.

104. P.P. v. Fayḥān, F.M.C. (Ṭ), D. No. 339 of 1388 (1968).

105. Interview with Shaykh Ṣāliḥ al-Luḥaydān, supra.

106. Art. 506.

107. Al-Subay'ī v. al-Qaḥṭānī, C.C. (R), D. No. 671 of 1385 (1966); al-Ḥarbī v. al-Muṭayrī, F.M.C. (R), D. No. 148/2 of 1389(1969).

108. The prisoner became ill immediately after he was arrested. He stayed in hospital for some three months before he was tried. Both his illness and the elapse of time made the witness uncertain of his person when testifying in court.

109. P.P. v. zayd, G.S.C. (Dhahrān), D. No. 8 of 1385 (1965).

110. "In ... v. b. Jābir", S.C. (al-Ḥaqu), D. No. 19 of 1380 (1960), quoted in L. of M.I. to D.P.J. in Mecca No. 14489 of 9/11/1380 (1960).

111. al-Ṣuwāṭ v. Miskī, G.S.C. (J), R. of 1387 (1967), Vol. I, p. 7; P.P. v. Mud'ith and Muḥammad, F.M.C. (R), D. No. 95 of 1384 (1964).

112. P.P. v. al-Qarnī, F.M.C. (R), D. No. 188 of 1383 (1964).

113. Al-Mughnī, Vol. XII, pp. 4-5.

114. Bahnasī, pp. 17-18.

115. Ibid, p. 19.

116. Al-Mughnī, Vol. XII, pp. 3-4.

117. Qur'ān, al-Baqara (the Cow), verses 282-283.

118. The case of Āl-Jūdallah, G.B., D. No. 103 of 1375; al-Muẓayfirāt v. al-'Ayayda, G.S.C. (M), Ṣ. of 1389 (1969).

119. Kashshāf, p. 447.

120. L. of P.J. to Vic. No. 2142 of 9/8/1357 (1938).

121. Al-Dawsarī v. Khalaf and Khālid, G.S.C. (Ḥāyil), Ṣ. No. 208/3 of 1386 (1966).

122. These phrases are: "I testify that," "I testify in the name of Allah", "I testify for Allah the Exalted One", "I testify in the name of Allah the Almighty" and "I testify in the name of Allah the High, the Almighty". The testimony may not begin with any of these phrases, but it ends with the phrase: "and thus I testify".

123. L. of P.J. to Vic. No. 2142 of 9/8/1357 (1938).

124. See e.g., P.P. v. Mut'ib, F.M.C. (R), D. No. 362 of 1384 (1964).

125. See e.g., "in ... v. al-Shihrī and b. Mut'ib", B.C., D. of 1386 (1966).

126. Bahnasī, pp. 45-46; Rāghib, M. 'A., Jārā'im al-Ḥudūd fi al-Tashrī' al-Islāmī wa al-Qānūn al-Waḍ'ī Cairo, 1961, p. 74.

127. "In ... v. Khurd", P.J., report No. 1 of 17/1/1359 (1940); P.P. v. Yaḥyā, F.M.C. (R), D. No. 206/2 of 1385 (1965); P.P. v. al-'Awfī and al-Rābighī, M.C. (D), R. of 1389 (1969), vol. II, pp. 95-101.

128. See, Bahnasī, pp. 77-80; P.P. v. Yaḥyā, F.M.C. (R), D. No. 256/2 of 1385 (1965).

129. Al-Jiru v. b. Qurmuṭ, G.S.C. (R), Ṣ. No. 67/1 of 1386 (1966).

130. "In ... v. Khurd", P.J., D. No. 81 of 1359 (1940).

131. b. Mu'addī and al-'Anazī v. b. 'Ayyāf, C.C. (R), D. No. 694 of 1385 (1965).

132. In al-'Arīfī v. The Administrative Governor of al-Quway'iyya (a town), the inhabitants of that town were divided into two groups, one group supported the Governor and the other was hostile to him. The evidence of all the inhabitants was not accepted on the ground that they might have had interests or motives behind their evidence. (G.B., D. No. 206 of 1375 (1955).

133. L. of P.C.M. to M.I. No. 4668/2 of 9/10/1374 (1955); L. of G.S.C. (Ṭ) to G.S.C.(R) No. 2822/2/377 of 6/5/1388 (1968).

134. Interview with Shaykh 'Abdullah b. Duhaysh, supra.

135. b. Dāyil v. al-Muhāwish and b. Qublān, C.C. (R), D. No. 6/3 of 1390 (1970).

136. Istikhlāf was known amongst most of Muslim jurists as the "Letter of a Judge to a Judge" "Kitāb al-Qādī ilā al-Qādī".

137. Ibn Qudāma, S., vol. XI, p. 469.

138. P. 503.

139. P. 361.

140. See e.g., P.P. v. b. 'Abdullah, G.S.C. (al-Aḥsā'), R. of 1384 (1964), Vol. II, pp. 24-28, and R. of 1385 (1965), vol. I. pp. 82-83.

141. No. 118 of 14/4/1392.

142. L. of the Muftī to P.C.M., No. 403 of 1/5/1378 (1958); L. of S.C. of Baljurshī to its A.G. No. 879 of 6/3/1383 (1963).

143. A tracer of footsteps is often called in Saudi Arabia "marrī". The word "marrī" is attributed to the tribe of "al-Murra", whose men have shown great skill in the science of tracing footsteps. It is true that most of the tracers of footsteps have been members of "al-Murra", but there have been some tracers who do not belong to this tribe.

144. Al-'Aṣama v. al-Shayābīn, G.S.C. (R), Ṣ. No. 1539/1 of 1379 (1960); P.P. v. al-Qarnī, F.M.C. (R), D. No. 188 of 1383 (1964).

145. al-Yāfi'ī v. al-Yamānī, G.S.C. (M), D. of 1386 (1966), and al-Muẓayfirāt v. al-'Ayayda, Ṣ. of 1389 (1969).

146. The case of al-Shurayyīf and Musīm, G.S.C. (R), Ṣ. No. 19/1 of 1387 (1967).

147. Art. 505.

148. Art. 501.

149. C.R., art. 258.

150. Cust. v. al-Furayḥ and others, A.C.C., D. No. 76 of 1389 (1970).

151. "In ... v. al-Jarbān and al-Marhūn", F.C., D. No. 112/89/T of 1389 (1969).

152. "In ... v. al-Duḥaym and others", F.C., D. No. 144/90/T of 1390 (1970), and "in ... v. Ḥasan", D. No. 139/89/T of 1389 (1970).

153. Internal Regulations of G.B., arts. 4, 8; "in ... v. Ṭāhir and others, D. of 1387 (1967), and "in ... v. 'Ajlān and Ḥasan, B.C., D. No. 1103 of 1386 (1967).

154. Al-'Usaymī v. al-Ruways, G.S.C., (R), C. R. of 1386 (1966-67), vol. I, p. 95, and C.C. (R), D. No. 225 of 1386 (1966).

155. See, Ibrāhīm, A.I., Ṭuruq al-Qaḍā' fi al-Sharī'a al-Islamiyya, Cairo, 1928, pp. 314-315.

156. Interview with Shaykh Ṣāliḥ al-Luḥaydān, supra.

157. Al-Baqara, verse 282.

158. Art. 483.

159. In 1970, in the case against b. Khuḍayr, when the member of the Forgery Committee who was conducting the trial began to administer the oath to a witness, his attention was drawn by the representative of the Grievances Board who was a former Sharī'a judge to the fact that the witness did not have to

take the oath. As the other members were in favour of the oath, the witness had to swear the oath.

160. L. of P.J. to M.I. No. 1305/1 of 28/8/1383 (1964).

161. Sāra v. Ẓāfī, F.M.C. (R), D. No. 1031/2 of 1387 (1968).

162. Bahnasī, pp. 50-51.

163. Al-Mughnī, vol. XI, pp. 452-453.

164. Al-Habdān v. b. Ghuwaynim, F.M.C., (R), D. No. 156 of 1384 (1964).

165. P.J., C. No. 3402/3/J of 26/8/1383 (1964).

166. P.P. v. b. Suwaydān and b, Rāshid, F.M.C., (R), D. NO. 472 of 1384 (1964). and P.P. v. Nāẓir and 'Ubayd, D. No. 449/2 of 1388 (1968).

167. Such as the English law, (Palmer and Palmer, p. 100).

168. P. 171.

169. P. 124.

170. Baroudi, p. 31.

171. See, al-Quraynī v. al-Quraynī, G.S.C. (R), Ṣ. No. 3838/1 of 1386 (1966).

172. P.J., C. No. 3402/3/J of 26/8/1383 (1964).

173. See, L. of P.J. to M.I. No. 1556/1 of 20/11/1383 (1964).

174. See e.g., P.P. v. al-Shihrī, F.M.C., D. No. 738/2 of 1389 (1969).

175. See e.g., P.P. v. Muḥammad Thābit and others, F.M.C. (R), D. No. 769/2 of 1388 (1968).

176. See e.g., al-Subay'ī v. al-Subay'ī, G.S.C., (R), Ṣ. No. 169/1 of 1388 (1968).

177. Ibid.

178. Al-Gharīb v. Al-Huzaym, G.S.C. (R)R. of 1384 (1964-65) vol. XVIII, p. 10; Sāra v. Hādī, F.M.C. (R), D. No. 1031/2 of 1387 (1967).

179. G.S.C. (R), R. of 1384 (1964-65), vol. V. p. 19; C.C. (R), D. No. 429 of 1385 (1965-66).

180. Al-jarḥ muqaddam 'alā al-ta'dīl. See, "in ... v. Khurd", P.J., D. No. 81 of 1359 (1940).

181. See, Bahnasī, pp. 34-37.

182. The Judicial Commission, D. No. 3 of 7/1/1347 (1928).

183. P.P. v. Nūra, F.M.C. (R), D. No. 729/2 of 1386 (1966); Interview with Shaykh Ṣāliḥ al-Luḥaydān, supra.

184. Shalfān v. Ghānim and Budāḥ, C.C. (R), D. No. 194/2 of 1388 (1969).

185. P.P. v. Nūra, supra.

186. Sharḥ, p. 556.

187. Interview with Shaykh Ṣāliḥ al-Luḥaydān, supra.

188. P.P. v. b. Sadḥān, C.C. (R), No. 61 of 1384 (1964), quoted in M. of F.M.C. (R) to P.J. No. 2000 of 13/9/1388 (1968).

189. P.P. v. al-'Awfī and al-Rābighī, C.C. (R), No. 174/2 of 1389 (1969).

190. Sharḥ, p. 556. Also see e.g., al-Yamānī v. al-Jayzānī, C.C. (R), D. No. 41/1 of 1387 (1967); Simrān v. Sūdān and others, G.S.C. (M), R. of 1375 (1955-56), vol. III, p. 53.

191. Al-Futūḥī, Vol. II, p. 466.

192. Al-Mughnī, Vol. XII, p. 126.

193. Qābūs v. al-Ḥāsir, P.J., D. No. 300 of 1358 (1939); b. Khunayzān v. Ghurm Allah, S.C. of Ẓafīr, D. of 1358 (1939), quoted in C.D., D. No. 300 of 9/8/1358 (1939).

194. Al-Mughnī, Vol. XII, pp. 123-124. Also see, Nāṣir v. Bā Khashwayn, F.M.C. (R), D. No. 220 of 1384 (1964); al-Sūrī v. Ḥātam, F.M.C. (R), D. No. 876 of 1389 (1969).

195. 'Ammāsh v. al-Ḥarqān, G.S.C. (R), R. of 1384 (1964-65).

196. P.P. v. al-Nufay'ī and others, S.M.C. (M), D. No. 1 of 1382 (1962).

197. Al-Jiru v. Banī Wāhib Shahrān, C.C. (R), D. No. 661 of 1386 (1967).

198. L. of P.J. to G.S.C. (R), No. 3706/3/1 of 14/10/1386 (1967).

199. Al-Mughnī Vol. X, pp. 6-7, and Vol. XII, p. 126; Shalfān v. Ghanīm and Budāḥ, G.S.C. (R), S. No. 86/1 of 1388 (1968), and, C.C. (R), D. No. 134/2 of 1388 (1968).

200. Ibrāhīm v. al-Yamānī, F.M.C. (R), D. No. 482/1 of 1387 (1967); P.P. v. al-Yamānī, F.M.C. (R), D. No. 483/1 of 1387 (1967).

201. Al-Shawkānī, M. b. A. b. M. Nayl al-Awṭār, Cairo, 1952, Vol. VII, p. 38.

202. Sharḥ, p. 332.

203. In modern times, this can be detected by an efficient scientific method in most cases.

204. Al-Mughnī, Vol. X, pp. 9-11.

205. See, p. 332.

206. See, p. 68.

207. Muḥsin v. 'Aqīl, G.S.C. (M), S. No. 96 of 1385 (1966), affirmed by C.C. (M), D. No. 81 of 1386 (1966); al-Suwāṭ v. Miskī, G.S.C. (J), R. of 1387 (1967-68), Vol. 1, p. 7, affirmed by C.C. (R), D. No. 77/2 of 1388 (1968).

208. Āl-Burayk v. Āl-Burayk, G.S.C. (R), S. No. 64/1 of 1388 (1968) and C.C. (R), D. of 1388 (1968).

209. Muḥsin v. 'Aqīl, supra; al-Suwāṭ v. Miskī, supra.

210. Kashshāf, p. 67.

211. Al-Quraynī v. al-Quraynī, C.C. (R), D. No. 596 of 1386 (1967).

212. Al-Mughnī, Vol. X, pp. 26-27.

213. P. 334.

214. P. 74.

215. See e.g., Hadhdhāl v. Ḥamad and Muthīb, G.S.C. (R), Ṣ. No. 57/1 of 1386 (1966); al-Quraynī v. al-Quraynī, supra.

216. Shalfān v. Ghanim and Budāḥ, D. No. 194/2 of 1388 (1969).

217. Bahnasī, p. 209.

218. Sharḥ, p. 334.

219. Muḥsin v. 'Aqīl, supra.

220. Shalfān v. Ghānim and Budāḥ, supra.

221. Fatwā No. 1527/3/1 of 4/8/1382 (1962).

222. See, al-Mughnī, Vol. X, p. 37; Kashshāf, p. 76. See also, Hadhdhāl v. Ḥamad supra.

223. See, al-Mughnī, Vol. IX, p. 2.

224. Kashshāf, p. 210.

225. P.P. v. Nūr, G.S.C. (M), Ṣ. No. 185/7 of 1391 (1971).

226. The most important of these civil consequences are: (i) an immediate divorce, (ii) the prohibition of their re-marriage, and (iii) the illegitimacy of the child born as a result of the alleged adultery.

227. Kashshāf, pp. 208-210.

228. Al-Ṭuruq al-Ḥukmiyya, pp. 204-213.

229. b. Dāiyl v. al-Muhāwish and b. Qublān, D. No. 6/3 of 1390 (1970).

230. P.P. v. b. Khuḍayr, supra.

231. See e.g., Cust. v. al-Qash'amī and al-Furayḥī, A.C.C., D. No. 76 of 1389 (1970).

232. Cust, v. al-Jawharī, C.C. (J), D. No. 2 of 1390 (1970).

233. "In ... v. al-Jarbān and al-Marhūn", F.C., D. No. 112/89/T of 1389 (1969).

234. Ibid.

235. "In ... v. Hasan", F.C., D. No. 139/89/T of 1389 (1970).

236. P.P. v. al-Dawsarī, F.M.C. (R), D. No. 401/2 of 1388 (1968); "in ... v. al-Shihrī and Ibn Mut'ib", B.C., D. of 1386 (1966).

237. The Judicial Commission which tried Walīd Dirbās in Riyadh, Ṣ. No. 11/1 of 1386 (1966).

238. P.J., C. No. 1607/3/M of 20/6/1386 (1966).

239. See e.g., Law of 1952(B), art. 65.

240. See e.g., "In ... v. Rozīna", F.C., D. No. 137/89/T of 1389 (1970).

241. Al-Qawāwda v. al-Damānīn, C.D., D. No. 401 of 29/8/1358 (1939).

242. See e.g., Ghallātī v. Yaslām, G.S.C. (R), R. of 1386 (1966-67), Vol. I, p. 82.

243. M.J., C. No. 27/2/T of 14/2/1392 (1972).

244. A copy may take the form of (i) an examined copy, which has to be compared with the original, (ii) a certified copy, that

has been certified to be a true copy, or (iii) an office copy which is an official judicial document.

245. C.C., D. No. 183 of 27/10/1353 (1935).

246. Law of 1952(B) art. 71.

247. Ibid, art. 76.

248. Ibid, arts. 94, 106.

249. Ibid, art. 77.

250. See e.g., "In ... v. Bakr", G.B., D. of 9/7/1381 (1961); "In ... v. b. Muqhim", Forgery Committee D. No. 140/89/T of 29/12/1389 (1970).

251. P.J., C. No. 34/3/J of 2/8/1383 (1963).

252. Interview with Shaykh Muḥammad b. Jubayr, supra.

253. See e.g., M.F. v. al-Rawqī, C.S., D. No. 27/90 of 1390 (1970); Fakhru v. al-Mānī'ī, C.S., D. No. 28/90 of 1390 (1970).

254. M.J., C. No. 894 of 15/2/1392 (1972).

255. Law of 1936, art. 128; Law of 1938, arts. 99, 142, 196; Law of 1952(A), art. 86; Law of 1952(B), arts. 80, 120, 173.

256. Al-'Aṣama v. al-Shayābīn, G.S.C. (R), D. No. 1539/1 of 23/8/1379 (1960).

257. P.P. v. al-Zayd and others, F.M.C. (R), D. No. 377 of 1384 (1965), affirmed by C.C. (R), D. No. 83 of 1385 (1965); P.P. v. al-Qaḥṭānī, F.M.C. (R), D. No. 357/2 of 1388 (1968).

258. See e.g., "in ... v. Mahdī and 'Abduh, B.C., D. of 1387 (1967).

259. P.P. v. Munīf, F.M.C. (R), D. No. 755 of 1387 (1967).

260. This presumption is based on the principle of "al-barā'a al-aṣliyya".

261. L. of the Muftī to P.K.O. No. 38 of 16/9/1374 (1955); Fatwa included in L. of the Muftī to the King No. 2000 of 13/9/1388 (1968).

262. P.P. v. al-Qāsim, C.C. (R), D. No. 593 of 1386 (1966).

263. L. of P.J. to M.I. No. 1305/1 of 1383 (1964).

264. 'Ubayd v. Hayā, G.S.C. (R), Ṣ. No. 134/1 of 1388 (1968), and C.C. (R), D. No. 476/1 of 1388 (1968).

265. Al-Zāmil v. al-Ṣīkhān, G.S.C. (R), R. of 1385 (1965-66), Vol. I, p. 65.

266. Fatwa determined in Letter from the Muftī to the king, No. 1725 of 24/12/1380 (1961).

267. See, the "Conclusion".

268. See, Sharḥ, pp. 212-213.

269. See, Kashshāf, p. 222.

270. L. of P.J. to M.I. No. 3512/6 of 1/8/1388 (1968).

271. See e.g., Amina v. Maqbūl, G.S.C. (Jayzān), R. of 1388 (1968-69), Vol. II, pp. 192-194.

272. P. 350.

273. See e.g., Amina v. Maqbūl, supra.

274. Sharḥ, p. 358.

275. E.g., P.P. v. b. Suwaydān and b. Rāshid, F.M.C. (R), D. No. 472 of 1384 (1964).

276. See, M. of M.I. to P.C.M. No. 759 of 22/5/1374 (1954).

277. Fatwa No. 38 of 16/9/1374 (1955).

278. P. 358.

279. P. 118.

280. The entity of alcohol in the blood is not admissible in the case of the ḥadd of intoxication. (See, P.P. v. Munīf, F.M.C. (R), D. No. 755 of 1388 (1968).

281. P.P. v. al-Jifrī and others, F.M.C. (Ṭ), D. No. 346 of 1388 (1968).

282. E.g., Shalfān v. Ghānim and Budāḥ, C.C. (R), D. No. 134/2 of 1388 (1968).

283. See, "Li'ān".

284. P.P. v. Turkī and others, F.M.C. (R), D. No. 368 of 1384 (1964).

285. P.P. v. al-Dawsarī and Mūḍī, F.M.C. (R), D. No. 401/2 of 1388 (1968).

286. P.P. v. Fayḥān, F.M.C. (Ṭ), D. No. 339 of 1388 (1968).

287. P.P. v. al-'Awfī and al-Rābighī, M.C., (D), D. No. 197 of 1389 (1969).

288. As mentioned before, real evidence comes under presumptions as far as Sharī'a courts are concerned.

289. See, Decision of the Judicial Commission formed from P.J. and G.S.C. (M), No. 161 of 25/11/1354 (1936). This Commission was formed according to a royal will of which P.J. was informed by L. of Vic, No. 11326 of 29/9/1354 (1935).

* As we have seen, it is generally presumed that a child born four years after divorce is illegitimate, and therefore the mother may be prosecuted for committing zinā (illegal sex relations). By examining the sources on which this opinion was based, we shall find that it was not based on valid grounds. Some jurists, such as Ibn Ḥazm, upheld that a child born more than nine months after the termination of marriage would be illegitimate, and the mother would be charged with zinā. Thus, the Indian Evidence Act of 1872, according to which a child could be legitimate only if born within two hundred and eighty days after marriage, was not alien to traditional Islamic law. As it is only just to abolish a rule which was based on inaccurate information and whose validity is challenged by modern medicine, it is suggested that there is need for reform in this matter. (See, Ibn Ḥazm, al-Muḥallā, Cairo, 1352 (1933), Vol. X, pp. 315-316; Indian Evidence Act, s. 112.)

Chapter Six

A P P E A L

Historical

The concept of appeal is not strange to the Sharī'a. The parties to a certain case which had been decided by a judge[1] complained to the Prophet of the judgement. The Prophet heard the statement of both parties and he affirmed the judgement.[2] If appeal, in substance, had been alien to the Sharī'a, the Prophet would not have accepted the complaint of the parties in the first place. 'Umar, the Second Caliph, in his letters to the governors and judges of the provinces, laid down some of the most fundamental rules of judicial procedure.[3] In his instructions to Abū Mūsā al-Ash'arī, he instructed him in the following words: "Let not a judgement in a case which you have given, but which you reviewed again in your conscience, and were guided in it to a more sound judgement, be a hindrance to you from returning to the decision which you know is right, for what is right can never be annulled by anything."[4]

Anyone acquainted with Islamic jurisprudence cannot fail to realise that Muslim jurists have recognised appeal in principle. They have dealt with the attack on, and the reversal of, judgements. The question to be dealt with here concerns appeal in form, i.e. whether there was a court of appeal in Islamic judiciary. Some writers claim that the tribunal of wālī al-maẓālim had appellate jurisdiction.[5] Others maintain that this tribunal had exactly the same jurisdiction as that of a supreme appellate court in modern times.[6] However, the examination of the power[7] of wālī al-maẓālim shows that he was not, at all, entitled to review the judgement of a judge. He merely had the power to expedite the execution of such a judgement and only then if it was awarded against a person who used, or tried to use, his influence to avoid or delay its

execution. Wālī al-maẓālim was also empowered to decide personal quarrels or disputes as a tribunal with original jurisdiction. These two functions of wālī al-maẓālim have probably confused those writers and made them think that the institution of al-maẓālim was an appelate tribunal. Therefore, the claim that the jurisdiction of wālī al-maẓālim was a supreme, or even an ordinary, appelate tribunal does not seem to be accurate. In the classical Islamic judiciary, there was no judicial institution which had only appellate jurisdiction. Muslim jurists allocated the power of reversing a judgement to the same judge who awarded it, or to another judge of the same rank as the former. However, although the traditional Islamic judiciary was not familiar with separate appellate institutions, the Sharī'a opens the door for the adoption of an appellate system suitable for the need of the times. Thus, the contemporary Muslim states which apply the Sharī'a wholly, such as Saudi Arabia, or partly, such as for example the Sudan,[8] have adopted appellate institutions in their judiciaries. We shall now consider the functioning of these institutions in Saudi Arabia.

The Right of Appeal

Although the laws regulating the Sharī'a judiciary mention explicitly the right of the defendant to appeal against any appealable criminal sentence, they do not refer clearly to the right of the claimant to appeal. But a royal will[9] issued in 1932 determined that if either of the two parties felt aggrieved by a decision below, he had the right to appeal against this decision. The Presidency of the Judiciary decided in the same year that the claimant would be entitled to demand appeal if the lower court decided to dismiss his claim.[10] In 1971, the Ministry of Justice

made it clear that the claimant possessed the right to appeal.[11] In practice, the right of the claimant to appeal against criminal judgement has been recognized fully by the judges[12] in much the same way as appeal against a civil decision.[13]

The Commercial Law also does not determine that the claimant has the right to appeal. Nevertheless, in practice, the claimant has been entitled, exactly like one who has his case before a Sharī'a court, to appeal against the decision below.[14]

The question to be asked is whether the prosecution has the right to appeal. The laws governing the procedure of the Sharī'a courts do not refer to this question. Besides this, the practice of these courts before the conversion of the Presidency of the Judiciary into the Ministry of Justice in 1970 showed no evidence of appeal by the prosecution against an appealable decision.[15] The President of the Judiciary told the Minister of the Interior who is the chief authority for the public prosecutors that he had no right to object to any decision given by a Sharī'a court.[16]

Denying the prosecution the right to appeal did not evolve from any law or regulations, but it was deeply rooted in the judicial practice. Here, one may ask: why did the judiciary in many respects regard the public prosecutor as being on the same footing as a claimant, but treat him differently in the sphere of the right to appeal? The possibility of committing an error in law, which necessitates the recognition of the right of a claimant to appeal, exists when the charge is brought by the prosecution. Therefore, the denial of the right to appeal by the prosecution does not seem to have any reasonable grounds.

However, the Minister of Justice, who succeeded the President of the Judiciary in presiding over the judicial authority in 1970,

recognized the right of the prosecution to appeal.[17] Since then, the practice of the judges makes it clear that the prosecution may now object to a decision below and request the committal of the case to the Court of Cassation.[18]

Unlike the laws of the Sharī'a judiciary, the Customs Regulations[19] state clearly that the representative of the government, the Customs General Directorate, has the right, just as the defendant[20] has, to appeal against a decision below. In practice, the Customs General Directorate has been very active in the sphere of appeal.[21] This fact may not be unexpected since most of the members of the original Customs committees do not have any legal education nor any long legal experience.

It may be relevant here to note that a party who feels aggrieved may appeal in the form of a complaint to the "High Authority", al-Maqām al-Sāmī, the King or the President of the Council of Ministers (who happens to be the King at the present time), or to certain Ministers. The "High Authority" may also receive any complaint against any decision.[22] A party who feels prejudiced by the decision of a Sharī'a court can, in principle, complain to the High Judicial Authority.[23] A complaint against the decision of a Commercial tribunal other than that for the Committee of the Settlement of Commercial Disputes[24] lies to the Minister of Commerce and Industry.[25] A person convicted by a Customs committee, whether original or appellate, may appeal to the Minister of Finance.[26]

Period for Appeal

The period for appeal in Sharī'a courts has varied from time to time. The Law of 1927[27] determines that this period must not be more than twenty days. The Law of 1936[28] shortened the

period to ten days, and this was confirmed by the Instructions of 1962.[29] The Instructions of 1967[30] gave the original court the right to fix the period for appeal, provided it was not less than ten days and not more than fifteen days.

According to the Commercial Law,[31] the period for appeal is thirty days. But an appeal against a decision concerning the violation of the Law of Weights and Measures and the Law of Commercial Agencies must be made within fifteen days.[32]

The Customs Laws[33] and Regulations[34] provide that the period for appeal must not be more than fifteen days. But if the domicile of the defendant is unknown, or if he refuses to receive the decision served on him outside the tribunal, the period is thirty days after being notified of the decision.[35]

In practice, the Sharī'a courts do not always apply the laws regarding the period for appeal. Although accepting an appeal after the prescribed period may lead to delay, the judges seem to be in favour of allowing a party who feels aggrieved by the original decision an extra period. The underlying idea may be that when a case is looked into by more than one court of different degrees, this may ensure a greater justice. Thus, the judges find this type of delay justifiable. However, appellate judges may not accept an appeal after the prescribed period if the sentence appealed against is trivial or if the appeal itself does not seem to be bona fide.[36]

The semi-judicial tribunals do not accept any appeal made outside the prescribed period.[37] Hence, with the expiry of the period for appeal their decision becomes final, unless the appellant complains to the High Authority and this authority agrees that the case be re-examined.

It is important to consider the question whether the execution

of a decision under appeal is to be held in abeyance while it is pending examination by the appellate authority. The criminal decision of a Sharī'a court pending review must be arrested till it has been affirmed by the appropriate appellate court.[38] According to the Commercial Law,[39] decisions under appeal are not liable to execution, unless the "temporary execution"[40] of a decision has been ordered by the original tribunal. It is true that in 1967 the decisions regarding securities given by the Committee for the Settlement of Commercial Disputes had to be carried out immediately after they had been awarded, even if they were under appeal.[41] However, since 1968 when the hearing of cases involving securities was invested in the Committee for Securities, decisions concerning securities have been subject to arrest while being reviewed.[42] As to the Customs committees, an appeal shall, in theory, operate as a stay of execution.[43] In practice, the decisions below may be carried out immediately after they have been awarded,[44] but the decisions given by the Appellate Customs Committees must stay while they are pending the review of the Minister of Finance.[45]

Method of Appeal

Review in the Sharī'a courts system may be classified into two categories, automatic and ordinary review. The automatic review lies against sentences imposing death, mutilation, or any punishment on a juvenile. It is also applicable in convictions regarding a trustee of endowment (waqf), or the principal of bayt al-māl,[46] and in decisions concerning real estate, and decisions given by default.[47] Appeal to a Grand Sharī'a Court from the decision of a magistrate's court comes under this category, since the latter court, used to commit some of its criminal

decisions to the former for revision before 1957, even without any request from either party.[48] The original court must automatically refer any decision which comes under this category to the appropriate appellate court, which must in turn review it. Although some judges may commit their decisions for review to the appellate court before the party concerned has served an appeal, and the appellate court may review such decisions,[49] this type of review is not categorized under automatic review. It only lies under the category of ordinary review, since neither the trial court nor the appellate court is obliged by the law to take any measures to review these decisions.

As the decisions of the Bribery Committee[50] and those of the Forgery Committee[51] must be committed to the President of the Council of Ministers (the High Authority) for revision, this process may be classified as automatic review. Similarly, since both the decisions given by the Committee for Securities,[52] and the decisions awarded by the Appellate Customs Committees[53] must be subject to revision by the Minister of Commerce and Industry and the Minister of Finance respectively, such revision may fall within the category of automatic review.

The ordinary review is that which does not arise without demand from a party who has the right to appeal. Thus, when dealing with the question of how to appeal against a decision, reference will be made only to ordinary review. Having awarded its decision and informed both parties of it, the Sharī'a court must ask them to state whether or not they object to the decision. The statement of each party must be entered, and each of them must apply his signature or affix his seal on the record.[54] The entry of such a statement is probably made for two reasons. The first is to speed the submission of the appeal (lā'iḥa al-i'tirāḍ).

In this case, the court usually requires an intending appellant to include in the statement in which he demands appeal an undertaking that if the prescribed period elapses before he has submitted his appeal he forfeits his right to appeal.[55] The second reason is to deny leave to appeal, if it seems fit, to a party who did not object duly to the decision but later demanded appeal,[56] since he has renounced his right to appeal by accepting the decision. Yet, the Sharī'a judges[57] may sometimes grant leave to appeal to a party who has renounced his right, especially if he requests appeal within the prescribed period, or if the case is serious. However, when a party wants to appeal against an appealable decision, the Sharī'a court must give him a document called ṣakk.[58] Although the ṣakk as a whole gives only the substance of the record,[59] those sections relating to the evidence and the grounds for the judgement are mentioned in detail, with the evidence given verbatim.[60]

The ṣakk is provided for an appellant who will study it in the preparation of his appeal. In theory, the appeal is necessary to commit a decision for review[61] with only one exception. That is when an appellant claims to have mislaid the ṣakk before he prepared his appeal and if he requests a copy thereof within the prescribed period to enable him to write his appeal. If, in such a case, the time limit fixed for appeal expires before he has submitted the appeal, the court must then commit the decision to the appellate court.[62] In practice, judges may refer the case to the appellate court without an appeal after the prescribed period has passed, or even when they feel that this period will elapse before the intending appellant serves his appeal.[63]

Now, we may refer to the nature and the form of an appeal. According to Article 75 of the Law of 1936, the appeal should give the grounds for which an appellant objects to the decision below.

The exact form of an appeal is not referred to by this law or by any other law governing the Sharī'a courts. In practice, an appeal varies from a very sophisticated[64] to a very simple one. It may be prepared by a lawyer, or by an expert, who may argue logically in order to impress the appellate judges. But on the other hand, quite frequently an appeal is prepared by the appellant himself or by a layman who does not know the appropriate legal approach. In actual fact a considerable number of appeals take only the form of notice[65] to the original court stating that the appellant demands appeal, without setting out any grounds for his objection to the decision.[66]

However, the appeal should be compiled with any supporting data which the appellant did not produce in the trial, whether it is old data or data discovered after the original court had given its decision. Having received the appeal and the supporting data, if there are any, the court below must study its decision and re-examine the case in view of the appeal and other relevant documents. If it then feels that its decision must be altered in any way, it ought to alter it itself without referring it to the appellate court.[67] But if it thinks that the decision is proper, it must then commit the appeal and its enclosure, the ṣakk, a copy of the record,[68] and the file of the case to the appellate authority,[69] as soon as possible.[70]

Prior to 1963, the original courts had to commit their decisions which were being appealled against to the appellate court through the Presidency of the Judiciary.[71] The Presidency was acting merely as a connecting link between the original and the appellate court.[72] But this method of reference seems to have created delay, which was the reverse of the original intention of Article 3 of the Instructions of 1962. In 1963, the Presidency

instructed both the original court and the appellate court to make their contact directly, unless the sentence involved death or mutilation where it had to be referred first to the Presidency.[73] By Article 6 of the Instructions of 1967, it was provided that an appealable sentence must be committed directly to the Court of Cassation without exception. Yet in practice, a sentence involving death or mutilation was still referred first to the Presidency until the Presidency ceased to exist in 1970. However, the Ministry of Justice (established in 1970) does not act as the Presidency did in this respect; that is to say, decisions appealed against are referred directly by the original courts to the appellate ones.[74]

Having examined the mode in which a party may appeal against an original decision in the Sharī'a courts system, it may be necessary to refer to the question of how an appeal is to be made against the decision of a semi-judicial tribunal. According to Article 544 of the Commercial Law, an appellant must submit a petition to the administrative governor appended to his appeal [75] which must give the grounds on which the appellant objects to the decision. The administrative governor shall then refer the appeal to the trial tribunal.[76] The trial tribunal must provide the respondent with a copy of the appeal in order to enable him to prepare his counter-statement, which is to be submitted to this tribunal within one week. Having received the counter-statement, the original tribunal must commit the relevant documents of the case to the appellate tribunal.[77]

Unlike the Sharī'a court, the Commercial tribunal cannot reconsider its decision in view of the appeal, but must transfer the case to the appellate tribunal.

The move for appeal against the decision of a Customs committee varies from one appellant to another. Where the appellant is the General Customs Directorate, the appeal is referred directly to the appellate tribunal.[78] If the appellant is the defendant then he must, according to the Customs Regulations,[79] submit his appeal to the administrative governor, who shall refer it to the appellate tribunal. Yet, in practice, the defendant may also submit his appeal to the Customs house sited in the locality of the trial tribunal, which will send it to the General Customs Directorate, and the Directorate will refer it to the appellate tribunal.[80] Additionally, he may submit the appeal directly to the appellate tribunal.[81]

Neither the Customs Law nor the Customs Regulations specify the nature and the form of an appeal. However, in practice an appellant should set out, in any form, the grounds for his objection to the decision below.

Scope of Reveiw

The decisions below which are subject to appeal are as follows:-

(a) The decision of a lower tribunal which determines the non-receivability of a claim,[82] or determines its dismissal after it has in principle been accepted.[83]

(b) The decision of a Sharī'a court which is given on the acquittal or the conviction of one accused of dealing with narcotic drugs or of committing a traffic offence.[84]

(c) The decision concluded after trial.

A decision other than any of these three types will not be subject to review even if it forms a basis for the judgement, but it will only be reviewed together with the final decision. This

appellate rule has probably been adopted as a measure to restrain any interruption in the trial and to secure, to some extent, a speedy handling of the matter in issue. It is true that in 1927, a royal decree[85] vested the Reviewing Committee with the power to interfere with the proceedings below once it was brought to its notice that the lower court was proceeding with a case contrary to the procedural principles of the Sharī'a. Nevertheless, in practice, the appellate courts have not been in the habit of interfering in the proceedings below.

However, when the laws refer to the appellate power over such a decision, they mention that this power is the affirmation or the reversal of a decision below. They do not mention whether or not this power extends to the variation of a sentence. By interpreting the laws literally, the appellate review should only lie against a conviction and not a sentence. Yet, in practice, the appellate power is not restricted to the affirmation or the reversal of a judgement, but it may sometimes extend to include the variation of a sentence.[86]

When the case is committed to an appellate authority this authority must, according to the law, bear in mind that the appellate purpose is to secure justice irrespective of which issue was appealed against, and which party made the appeal. This appellate concept has given rise to the following consequences:

(1) The entire content of the decision on appeal is open to the review of the appellate authority, even if the appeal was only directed against a part thereof.[87] According to this norm, the common practice has been that an appellate objects to the decision as a whole without objecting to a specific point.

(2) The appellate authority may alter the offence charged on appeal when it believes that a finding of guilty of one offence

is to be changed to a finding of guilty of another offence.[88] Thus, the sentence, having been reviewed, may then be increased as well as decreased, provided that it is a sentence which could have been passed below.

(3) No party to appeal may be allowed priority over the other since appeal may be to the advantage or the disadvantage of either party. Consequently, the judgement appealed against by the defendant alone or by the prosecution in his favour may however be amended to his disadvantage, insofar as kind and amount of punishment are concerned. The principle that an appellant cannot be prejudiced by his own appeal is thus not acceptable to the Saudi Arabian judiciary.[89]

(4) An accused person who has not requested appeal may, just as though he has made a request for appeal, benefit from the reversal or the alteration of the judgement appealed against by another accused if the reversal or the points altered are applicable to the former.

(5) A judgement is not reversed on a purely technical error if the original tribunal could have come to the same conclusion without it.[90] Yet, there are some appellate members of semi-judicial tribunals who may reverse a decision on a technical error, as will be seen later.

Having seen that a judgement on appeal may be affirmed, reversed, or varied, we may now examine the question of when affirmation, reversal, or variation may be applied.

A. <u>By a Sharī'a appellate authority</u>

For convenience, the question of when to affirm a judgement will be dealt with after dealing with those of when to reverse it. Generally speaking, a decision below may only be reversed when it

contradicts the Qur'ān, the Sunna or consensus (ijmā'),[91] or when it is against what the trial judge believes to be a proper judgement,[92] in cases where determination of the sentence is left to the judge himself.[93] The Muftī[94] and the President of the Judiciary of Najd, having acted as an appellate authority, maintained that the decision of the trial judge ended the case; that the grounds just mentioned were the only valid grounds for reversal. Article 6 of the Instructions of 1962 adopted the opinion followed by the Muftī. Article 13 of the Instructions of 1967 did not refer in this respect to whether a judgement could be reversed if the judge ruled in a case contrary to what he believed to be the proper judgement. This does not, by implication, mean that the judgement of a judge, who did not resort to his discretion when he ought to have done so, may not be reversed. It seems that this ground for reversal is not mentioned in the Instructions because usually a judge does not pass a sentence which does not seem to him to be the proper one, unless he has been subject to pressure of some sort. But, as we have seen, the Saudi Arabian judge is immune from any pressure. However, it will be seen that the determination of sentences of most crimes are left to the discretion of the trial judges as they see fit; that appellate judges cannot reverse such sentences merely on the ground that these judges have different opinions from those of the trial judge. This implies that if a trial judge did not so determine the sentence, for some reason, when he ought to have done so, his judgement must be reversed if the appellate authority feels that the judgement is improper.

However, the grounds for the reversal of a decision can be found more clearly in the practice of courts. Generally, these

grounds may be classified into the following categories:-

(a) The dismissal of a prima facie case, or the receivability of a non-preponderant claim or charge (da'wa ghayr muḥarrara), which usually does not specify adequately the alleged offender or his wrong.[95] This has been a common ground for the reversal of judgement concerning murder.

(b) The violation of the stipulations and the procedural rules regarding evidence. Indeed, most reversed judgements have been reversed on the grounds that trial courts did not observe these stipulations and rules. Since these have been examined earlier, we shall not refer to them here.

(c) The non-observance of the principles concerning trial, with almost only two exceptions, "open trial" and "speedy handling". Appellate courts usually do not give any consideration as to whether the trial was in public or in camera when they feel that both parties were given equal opportunity to state, and prove, their claims and counter-claims. Similarly, if the appellate court thinks that the trial court delayed the proceedings unnecessarily, the appellate court cannot reverse the decision on this ground alone inasmuch as the party was not prejudiced by the delay.

(d) The arrival of the court at a wrong judgement, even if it was based on valid evidence.

(e) Excess of jurisdiction with regard to the type of offence, the person accused, and the place in which the offence was committed. The appellate court may not reverse a judgement merely on the ground that the trial court has erroneously assumed its competence, if the case is not serious, and the appellate judges deem that the proceedings below were not prejudicial to either party.[96] Yet if the appellate authority feels that a sentence given by an incompetent court is not proper, even if its

determination was left to the trial judge to decide, it will then reverse it. Where a case decided by an incompetent court is serious, and the appellate authority is not satisfied with the judgement, the latter will reverse it even without giving any reason for the reversal other than the incompetence of the court below.[97]

(f) Newly discovered evidence, or even evidence which was not produced before the trial court.

When dealing with the question of when and how a sentence may be varied, one should distinguish between a sentence fixed by the law and a sentence which is not so fixed but is left to the judge to decide. The power of an appellate authority with regard to the variation of a sentence only lies when the sentence is thus fixed. In the criminal sphere, the fixed sentences are those concerning retaliation or a ḥadd. A sentence imposing a fixed punishment is usually varied for any of the following reasons:-

(a) Where the evidence on which the decision below was based does not amount to the standard of proof prescribed by the law for imposing a penalty of retaliation or a ḥadd on the accused, but it indicates that the accused is, however, guilty. In this circumstance as a punishment of ta'zīr ought to have been applied by the original court, the appellate court will then decide that the sentence must be varied to comply with the available evidence.[98]

(b) Where the accused, whose perpetration of the crime has been established, is legally incompetent, the sentence imposing retaliation or a ḥadd must then be commuted into that of ta'zīr on the ground that such a sentence is inapplicable therein.[99]

(c) In the case of a sentence passing a ḥadd, the sentence must be commuted into a sentence of ta'zīr if there has been any dubious circumstance, for the Prophet says: "Avert ye ḥudūd on

account of dubious circumstances".

The question to be asked here is whether or not a sentence imposing a punishment of ta'zīr, which is left to the judge to decide, can be varied. Where the Court of Cassation disagrees with a sentence of ta'zīr, it usually states in its decision that it cannot object to the sentence because the trial judge had the right to impose it as he felt appropriate.[100] Even if the supreme appellate authority does not agree with this type of sentence it usually states that its opinion does not concur with the sentence,[101] but if the trial judge insists on his sentence it should be carried out.[102] On a few occasions, the High Judicial Authority has disagreed with sentences of ta'zīr concerning rather serious crimes or recidivists on the grounds that the sentences were too lenient to deter a criminal. Yet, the sentences had to be carried out, and all that the High Judicial Authority did was only to advise the judges to adopt non-lenient sentences where the crimes were serious,[103] or where the defendants had relapsed.[104]

The fact that a sentence of ta'zīr is not liable to variation has given consequences. The first is that the appellate judges may sometimes be tempted to find any defect on the face of the record, upon which they may invalidate the judgement which they feel is too severe.[105] Second, although presumptions are in principle considered as admissible[106] evidence as far as ta'zīr is concerned, the appellate judges may reverse a severe judgement based on presumptions. These judges justify this reversal on the grounds that the guilt of the accused cannot be inferred from these particular presumptions.[107] However, since the law in this respect gives the trial judge the power to impose any sentence within the range allowed by the law, the only alternative measure

open to the appellate judges is to reverse the conviction even if their real objection does not lie against the conviction, but only against the sentence itself.

The attitude of appellate judges towards presumptions has led them to be accused of what has been thought by some trial judges to be double-standards, since they may accept presumptions as sufficient evidence in some cases, and not in others.[108]

Irrespective of this accusation, the appellate judges may find justification for the revocation of the conviction of an accused, whose guilt seems evident, in three principles of the Sharī'a. The first is so-called al maṣālih al-mursala,[109] i.e. the general welfare, which "represents a moderate form of the modern idea of equity as adopted by English law".[110] This principle aims at general justice allowing a bad action to be committed in order to prevent a worse one.[111] In the context of judicial review, the reversal of a severe sentence below may at worst be regarded as a bad action and the severe sentence itself a worse one. To secure equity for the defendant whose family[112] may also suffer by the execution of the sentence, and to avoid the violation of the law, which entitles the trial judge to pass the sentence as he feels appropriate, the only door open to the appellate judges is the reversal of the judgement, though it may rank as a bad action. The second principle, according to which the appellate judges may revoke a conviction when they cannot vary a sentence, is based on the tradition: "It is better that a judge may err in awarding acquittal than that he may err in awarding punishment".[113] Thus, when appellate judges believe that a sentence is too severe, they may consequently believe that the trial judge has erred in passing such a sentence; that the only remedy open to them is to resort to

the reversal of the conviction itself, acquitting the defendant on the ground that acquitting him is, at least, better than punishing him unfairly. The third principle, upon which the appellate judges may reverse a judgement imposing sentence of ta'zīr, is the "avertion of ḥudūd by dubious circumstances". This principle is operative in the sphere of crimes of ḥudūd by all Saudi Arabian judges; its application to ta'zīr is a controversial matter. Judges who believe that the term "ḥudūd" is confined to those crimes whose punishments are fixed by the Sharī'a do not apply the principle, so far as ta'zīr is concerned. On the other hand, the judges who have the opinion that the definition of "ḥudūd" may, in its widest sense,[114] include all public wrongs may also apply the principle to ta'zīr. Although the judges who hold this opinion represent only a small minority amongst Saudi Arabian judges, some appellate judges have adopted the latter definition, especially those of the Court of Cassatiom in Riyadh. By including ta'zīr in "ḥudūd" in this respect, these appellate judges extend their power over the reversal of all kinds of judgements concerning any public wrong.[115] Thus, the principle of the "avertion of ḥudūd by dubious circumstances" may provide the appellate judges with the legal justification which they need to reverse a severe judgement with which they disagree, especially if it is based on presumptions.

The third consequence arising from the fact that a sentence of ta'zīr may not be disposed to variation is the tendency of some judges to allude, in their decisions, to wālī al-amr, the King or the President of the Council of Ministers, to reduce the sentence, or even to pardon the prisoner altogether, since both have the power to do so.[116] They adopt this measure apparently in an attempt to prevent the execution of a severe sentence, which they

think improper, when they have been unable to find any defective element in the evidence or on the face of the record.

Having dealt with the questions of when to reverse and vary a judgement, one may briefly mention that a judgement of a lower court has to be affirmed by the appellate court when there is no error in law or in fact, and where there is no defect on the face of the proceedings below. However, if appellate judges state in their decision that they have no lawful grounds to reverse a judgement for its severity,[117] such a statement is treated as an affirmation of the judgement below.

B. By a semi-judicial tribunal

Now, we may glance at the grounds on which a decision of a semi-judicial tribunal may be reversed or varied. The general grounds for the reversal of such a decision are the following:-

(1) The dismissal of a prima facie claim or charge.[118]

(2) Illegal judgement.[119]

(3) Excess of jurisdiction.[120]

(4) Non-observance of the evidentiary rules.[121]

(5) Insufficiency of evidence.[122]

(6) The production of valid new evidence.[123]

(7) The occurance of a procedural error which may affect the judgement[124] or prejudice the substantial right of a party.[125]

As we have seen earlier, a purely technical error does not in general cause the reversal of a judgement below by an appellate tribunal. Nevertheless, the Appellate Customs Committee and the Appellate Customs of Riyadh may reverse a judgement upon an informal error.[126] They consider this error as an element of doubt, and thereupon they give the defendant the benefit of the doubt by reversing the judgement. But the main reason for reversing

a judgement on a technical point is probably their desire to discipline trial members. Though most of the members of the trial Customs committees are not legal experts and they may need to be disciplined, one may favour the practice of the Appellate Customs Committee of Jeddah,[127] which does not reverse a judgement upon a purely technical error. Indeed, the reversal of a decision on a technical error which is not prejudicial to the substantial right of the accused does not seem in agreement with the aim of the legislator to keep law and order. The variation of a sentence is only open to a semi-judicial appellate tribunal if the sentence below is not within the limits specified by the legislature. Unlike a Sharī'a appellate authority, a semi-judicial appellate authority cannot vary a sentence on questions of propriety, if within the legal limits.

Where there are no grounds upon which a decision below may be reversed or varied, the appellate tribunal must then affirm the decision.

How Appellate Authorities May Exercise Their Power

When dealing with the question of how a Sharī'a appellate authority may exercise its power one must distinguish between an ordinary appellate authority, i.e. the Committee of Review, the Chief Local Judge in the towns of Ḥijāz, and the Courts of Cassation, and between the supreme appellate authorities, i.e. the President of the Judiciary prior to 1970, the Judicial Commission of 1970, and the High Judicial Committee. An ordinary appellate authority possesses the power to order a new trial by a judge other than the one whose decision was reversed upon his refusal to reconsider the decision in the light of the remarks made by the appellate authority, either to vary or to revoke it.[128] But it

does not have the power to initiate a judgement as a substitute for the judgement below. Thus, the rule that "the decision of the Court of Cassation ends the case"[129] is not operated in cases of reversal since such a decision only puts an end to the validity of the decision below. However, the decision of the appellate authority shall not set aside the original decision in the following two circumstances:

(i) When new admissible evidence supporting the decision reversed is produced.[130]

(ii) When the case is committed to the supreme appellate authority because of delay arising from the difference between the ordinary appellate and the trial judge(s), and where the supreme authority approves the decision below.

It is true that a case is brought to an end when the Court of Cassation affirms the original decision if appeal thereon does not lie to a supreme appellate authority, but this may be attributed to the fact that the original decision is the one which ends the case since the Court of Cassation did not object to it. The rule that "all Sharī'a courts shall follow the judicial instructions of the Court of Cassation" is equally not applied. In practice, trial judges are only obliged to observe such instructions in two instances. First, when a technical error, which does not affect the judgement, has occurred in the proceedings below. In such a case the appellate court sends the decision to the original court for remedy.[131] Second, when the instructions regard the transfer of a case to another judge or court after the appellate court has reversed the judgement.

As to the supreme appellate authority, one should differentiate between its power as a final appellate authority for sentences imposing death or mutilation, and its power as an

authority which ends the difference between an original and an appellate court concerning other sentences. In its capacity as a final appellate authority one must examine its power when it was represented by the last President of the Judiciary, Shaykh Muḥammad b. Ibrāhīm (1959-1969), and as it is now represented by other authorities. Shaykh Muḥammad had the power to affirm the concurring decisions of the original and the appellate courts or to affirm either one of them if they were different.[132] It was also within his power to reverse both of the conformable decisions of the original and the appellate courts. Where he reversed both decisions he often remitted the case to another court for a fresh decision, especially if the case was serious.[133] Besides this, he had the power to decide himself on the subject-matter, but he rarely exercised this power. Since he possessed such power, he was clearly entitled to quash a conviction. Furthermore, Shaykh Muḥammad had the power to arrest a judgement affirmed by the appellate court if he was not quite satisfied with it and if he was also unsure of the sentence which ought to have been imposed on the prisoner.[134] He usually arrested the judgement when the sentence imposed death in a case of qasāma.[135] Shaykh Muḥammad probably justified the suspension of such a sentence by the fact that his action was not an infringement of either the private or the public right since the defendant was still in custody. The convicted party himself would probably not be aggrieved by his confinement, since there was still a chance that the capital sentence might be commuted or that he might even be pardoned. The other supreme appellate authorities may affirm the congruous decisions of the original and the appellate court, or may affirm either of them if they are different. Additionally, it may

reverse both of them if they are corresponding, and in this case it should follow the same procedure as that adopted by the Court of Cassation; that is to say, order a fresh trial by another lower court. Unlike Shaykh Muḥammad, this supreme appellate authority possesses no power to quash a decision and free the prisoner.

When the supreme appellate authority is acting merely as an authority to put an end to the difference between an original court and an ordinary appellate one (now the Court of Cassation), it may only affirm either the original or the appellate decision.[136]

The appellate Commercial tribunal, having reversed a decision, must remit the decision, with its remarks and instructions thereon, to the original tribunal to rectify any error in the decision and amend the judgement. If the decision has been committed to the appellate tribunal for the second time without its remarks and instructions being carried out by the trial tribunal, the former must again remit the case to the latter. But if the case is brought before the appellate tribunal for the third time and is still defective, the tribunal must then form its own opinion on the subject-matter of the appeal, and substitute it for the opinion of the tribunal below. The judgement of the appellate tribunal may be contrary to, or only partly different from, the original judgement. Since the appellate tribunal has power to reverse the judgement below and substitute a fresh judgement for the former, if the case has been committed to it for the third time, it may then quash the conviction. The reason why the appellate tribunal has the power to decide on the subject-matter of the appeal when the decision below has been committed to it three times whilst the Court of Cassation (in the Sharī'a judicial system) has no such power, is probably because the former is the ultimate Commercial

judicial authority, which has to interfere to prevent an excessive delay.

However, if the case is referred back to the appellate tribunal after the trial tribunal has examined the remarks of the former and insisted on the legality of its own decision, the appellate authority may, if it is convinced, dismiss its instructions and affirm the decision below.

The appellate Customs tribunal, when varying or reversing a judgement, must make its own decision on the subject-matter of the appeal and substitute it for the judgement below. Although the appellate tribunal possesses the power to quash a conviction,[137] it does not have power to remit a decision below to the trial court for amendment. The lack of this power is probably the most important difference between the appellate Customs committee and the Court of Cassation (of the Sharī'a judiciary) and the appellate Commercial tribunal. Yet, the Appellate Customs Committee of Jeddah usually remits a decision below, provided that the error is only a technical one which does not affect the judgement.

The Procedure

According to the laws and regulations governing the Sharī'a judiciary, no one, including the parties concerned, is allowed to attend the sessions of an appellate court.[138] However, Article 25 of the Instructions of 1967 entitles the chief judge to permit a person whose appearance is necessary to attend the sessions. But, like other laws, these Instructions determine that all the proceedings must be in camera with regard to the public or even to either party. Hence, a party may only appear if he is to clarify a point, or provide a document concerning the case in issue. In theory, the appellate authority must receive a party, if necessary,

in the same manner followed by the original court;[139] in other words, it should receive him in the presence of his rival when that is possible. In practice, the appellate authority may, only if necessary, summon a party to appear in the absence of his rival. Thus, the secrecy of the proceedings of the appellate tribunal necessitates the submission of all material documents concerning the appeal which have been specified earlier. Besides, the appellate authority may ask the trial judge to clarify a certain point concerning his decision,[140] and the judge must then respond as soon as possible.[141] Moreover, a party may file in a fresh relevant document while the case is pending review. However, since the appellate proceedings are conducted in camera, and no party is allowed to attend the sessions except for questioning, it is superfluous to talk about the possibility of oral argument and legal representation in appellate courts.

Here, one may refer to the mode in which the appellate court may examine cases. According to Article 22 of the Law of 1938, all the judges had to participate collectively in examining a case from the outset of the first session until they awarded their decision. The presiding judge had to ask the chief clerk to read out all the documents concerning the case in question to enable the judges to hear and form their opinions. Documents had to be examined by the judges in subsequence as follows:-

(a) The correspondence regarding appeal sent by the lower court or by the High Judicial Authority.

(b) The decision below represented by the sakk.

(c) The appeal, if a written appeal was served on the original court.

(d) The documents submitted by the parties, whether to the trial court or to the appellate court.

(e) The record of the case if necessary.

After each document had been read the judges then made their remarks thereon, which had to be recorded by the chief clerk.[142] When the documents had been so examined, all the remarks had to be studied by all the judges before they finally gave their decision.[143]

Nevertheless, since the establishment of the Courts of Cassation in 1962, a new method of examining a case has been adopted. Cases are distributed equally among judges, including the chief judge,[144] who study them thoroughly and make their remarks. Once a judge has completed the study and made his remarks, all judges including the chief judge must meet to examine the whole case and the remarks of this judge and give their decision.[145] Thus, most of the time of an appellate judge is spent in doing solitary reading and writing since the preparatory study of the case by one judge takes longer than the final study by the whole panel of judges. The new method of examining a case is probably intended to avoid delay, and to cope with the ever increasing number of cases committed for review. This new method allows the appellate court to deal with several cases at the same time, according to the number of its judges, whereas the old method would not have allowed the court to deal with more than one appeal at a time.

The question why the appellate court deals with documents, and does not rehear the case afresh from the parties concerned, is not answered by the judicial authority. Yet, it may be thought by some authorities to be unfair to subject a person to trial twice for one case. It is true that, after the reversal of a judgement, a new judge or court must rehear the case, but not every case should be so reheard. In actual fact most of

the cases sent for review are not reversed, and accordingly they are not reheard.

Although the supreme appellate authorities follow a similar procedure to that followed by ordinary appellate authorities, the last President of the Judiciary, Shaykh Muḥammad b. Ibrāhīm, adopted a different mode in examining a case on appeal. He usually referred it to the members of the Committee of the Presidency of the Judiciary to examine it and give their opinions. After he himself had examined the case and studied the opinions of the members, he gave his decision.

The appellate Commercial tribunal and the appellate Customs committee follow a similar procedure to that of the Sharī'a appellate courts when they examine a case on appeal. For example, they hold their session in camera and they deal only with documents without allowing parties concerned to be present. Nevertheless, they may request the appearance of a party, if necessary, to clarify a statement in his appeal or to provide relevant data. When the appellant members feel that an investigation by experts is needed, they take the necessary measure to carry out the investigation.

The Decision

The ideal decision is that which is unanimously awarded, but if the judges do not agree on one opinion concerning a judgement below, the opinion of the majority is the official decision of the appellate court. Where there is no majority but the judges are divided equally in their opinions, the head of the judiciary will give the "casting opinion".[146] A dissentient judge must give his opinion in writing and mention the legal grounds upon which it is based. Although the opinion of the dissentient judge does not

carry any weight as far as the decision below is concerned, it must be kept by the appellate court.[147] Theoretically, the decision reversing a judgement must be furnished with the legal grounds upon which the decision is based.[148] Thus, one may expect such a decision to be carefully drafted, lengthy, and well documented, but in practice it is usually not so. In general, the decision tends to be in the form of a rather short statement containing general principles and a minimum of supporting authorities. Where the decision is affirming the original judgement, even with the existence of a dissenting opinion, it does not usually give reasons or supporting authorities, but it states that "after studying the case, the judgement was found authentic and that it conformed with the legal principles."[149]

Should the appellate court affirm the judgement, it will then send a copy of its decision to the original court and, if the judgement is not subject to a further review, the judgement must be carried out. Where the appellate court disagrees with the judgement below, it must first inform the trial court of its opinion and accordingly ask it to vary or reverse the judgement. Should the trial court find the opinion of the appellate court appropriate, it must then alter its judgement.[150] Where it disagrees with the appellate opinion believing that its judgement is proper, or even more appropriate, it may send a memorandum, elaborating its opinion and defending its judgement, to the appellate court.[151] The appellate court, having examined the memorandum and found it convincing, may reconsider its decision and affirm the judgement below.[152] However, if the appellate court, after examining the memorandum, still holds its previous opinion, it will then immediately reverse the judgement.[153] Having reversed the judgement, the appellate court must remand the case to another

judge or court of the same rank as the judge or the court whose judgement was reversed.[154] The decision taken by the new judge or court must also be committed to the appellate court for review.[155] However, the appellate court may retract its decision, of which it has informed the court below, on two bases. First, when new admissible evidence is produced, which necessitates the alteration of the appellate decision, whether it was affirming or reversing the judgement below. Second, when the trial court has reconsidered its judgement, already affirmed, according to certain grounds, which the appellate court must believe to be sufficient to change the judgement.[156] According to Article 20 of the Law of 1938, the appellate court had to obtain the approval of the King or the head of his government in order to be able to change its previous decision. Yet, in modern practice, the appellate court does not even inform the King or his government when it wants to replace its previous decision by a new one.

The last President of the Judiciary, Shaykh Muḥammad, when acting as a supreme appellate authority, used to elaborate his decision by stating the most important authorative opinions on the subject. He usually issued the decision in the form of a letter to the respective authority to be carried out.

If the members of the appellate Commercial tribunal or the appellate Customs committee cannot agree on a single opinion when deciding on an appeal, the concurring opinions are considered to be the official decision.[157] This decision must set out the legal grounds upon which it is based and upon which the decision below was reversed or amended. Like Sharī'a appellate judges, the members of an appellate Commercial or Customs tribunal may change their decision when new evidence is produced.

Delay

Article 24 of the Law of 1931 determined that the period of reviewing a case must not exceed one month. Article 86 of the Law of 1936 and Article 45 of the Law of 1952 resolved that the maximum period had to be only twenty days. Article 25 of the Instructions of 1962, and Article 27 of the Instructions of 1967, which are now in force, resort to the one-month period which was fixed by the Law of 1931. However, even in one month the appellate court may not always be able to deal with an appeal. In actual practice an appeal may await examination for a longer time than that prescribed. This delay may be attributed mainly to the following reasons:

(a) The review of cases is not always made in the order of their arrival. Cases concerning detainees are to be given priority in this respect over other cases.[158] The review of other cases may accordingly take longer than one month. Moreover, criminal cases, even if they do not involve detention, have priority over civil ones,[159] and this may cause an excessive delay as to the latter.

(b) The appellate court may, at any stage, postpone the review of a decision on lack of sufficient information or for a necessary extensive investigation.[160] Although the period allowed for such a postponement is a maximum of thirty days, this period may elapse before the examination of the case under review has been resumed. This fact may explain why the Instructions of 1967[161] do not fix a specific time for the postponement, but they leave it to the appellate court to decide. However, this opens the door for a postponement even longer than thirty days.

(c) Before 1963, the appellate court had to make its contact with courts below through the High Judicial Authority, and this

resulted in unnecessary delay. In spite of the fact that the appellate court has been making direct contact with the lower courts since 1963, any contact concerning a sentence imposing death or mutilation must be made via the High Judicial Authority.[162] Although Article 4 of the Instructions of 1962 states that the High Judicial Authority shall not examine correspondence and documents concerning such a contact, the President of the Judiciary, for example, used to examine them. When one bears in mind that the President of the Judiciary had many activities and functions, one feels that a delay was bound to occur.

(d) When a judgement below is reversed after the trial court has refrained from altering its decision, to comply with the opinion of the appellate court, the whole case will then be reheard by another lower court.[163] The examination of the case by the appellate court, the argument between the appellate judges and the trial judge, the rehearing of the case, and the committal of the new decision below to the appellate court for review[164] may result in an excessive delay.

(e) The appellate court (now the Court of Cassation) is not divided into several divisions each handling a specific type of case.

Delay is also bound to occur when a case is committed to the supreme appellate authorities, especially the High Judicial Committee which is operating now, for the following reasons:

(a) The High Judicial Committee, as mentioned above, generally follows the procedure adopted by the ordinary appellate authority (now the Court of Cassation), and most of the reasons causing delay there are bound to occur in the procedure of the High Judicial Committee.

(b) Since the supreme judicial authority must review the

most serious cases, i.e. those involving mutilation or death as punishment, or cases which have been the subject of a long dialogue between the ordinary appellate judges and the trial judges, this authority must examine such cases thoroughly. Indeed, it has to examine all the documents pertaining to the case in issue including the records and the original and appellate decisions. It may also exchange memoranda with the courts. This procedure suggests that delay may be inevitable.

(c) The fact that cases and all correspondence between the supreme appellate authority, i.e. the High Judicial Committee, and courts below must go through the Ministry of Justice[165] creates unnecessary delay.

The delay in the proceedings of the semi-judicial appellate tribunals is liable to be greater than in the proceedings of the Sharī'a appellate authorities. This is because the members of the semi-judicial appellate tribunals work part time, and for comparatively shorter office hours.

Automatic Appeal

A judgement which is automatically committed to a Sharī'a appellate court is to be reviewed in the same way as a judgement subject to ordinary review. Hence there is no need to mention the review of a judgement subject to automatic appeal. However, we shall briefly deal with the automatic review accorded to the High Authority (al-Maqām al-Sāmī), who is in this respect the President of the Council of Ministers, against the decisions of some semi-judicial tribunals. These are the Grievances Board, the Bribery Committee, and the Forgery Committee.[166] We shall also refer to the automatic review vested in the Minister of Commerce and Industry in respect of both the decisions of the Committee for

Securities and the Committee for Applying the Penalties Prescribed in the Law of Weights and Measures, and the Law of Commercial Agencies. Additionally, we will glance at the automatic review vested in the Minister of Finance concerning the decisions of appellate Customs committees.

(1) Soon after the decision of any of these semi-judicial tribunals has been awarded, it must be sent for review without notifying the party concerned. Having examined the decision and found it appropriate, the High Authority will then confirm it and notify the parties, and order the respective authority to carry it out. But if the High Authority is not satisfied with the decision because of a substantive or even a technical error he may take one of two courses. First, he may make his remarks and remit them with the decision to the original tribunal to amend it accordingly. Second, he may refer the decision to one or more of the legal advisors of the Council of Ministers to look into it very closely before he remits the decision to the original tribunal. Having received the remarks of the High Authority, the trial tribunal must then study these remarks and examine its decision again. Where it agrees with the remarks it must accordingly amend its decision. But if the trial tribunal does not agree with the opinion of the High Authority, it will inform the latter that it believes that the original decision is proper. The trial tribunal is under no obligation to carry out the remarks or the instructions of the High Authority in as far as judgements are concerned. Where the trial tribunal insists on its opinion, the High Authority himself may not decide on the subject-matter, although his decision can finalise the case, but he may refer the case to the Council of Ministers as quite frequently happens. The Council of Ministers will then examine the case and decide on its merits. However,

neither parties nor witnesses will be called in this stage of review, but the High Authority or the Council of Ministers, if the case is referred thereto, will only deal with the documents pertaining to the case.[167]

(2) The appellate function of the Minister of Commerce and Industry was assumed, as mentioned earlier, after the Reviewing Committee had been abolished in 1388/1969. The Commercial trial tribunal, having given its decision, must commit it to the Minister to decide whether it is conformable to the legal provisions. The Minister, when reviewing a decision, will not see a party who feels aggrieved by the decision below. Yet the party may submit an appeal thereon which must be examined by the Minister on the condition that this party serves it within the prescribed period for appeal. The Minister, having examined the decision, usually refers it to one or more of the legal advisors of his ministry for close study and thereafter the whole case is committed to him. If the decision below seems to be just, he is to affirm it. But if he objects to the decision for any reason, he will remit it together with his remarks to the trial committee to observe the remarks and alter the decision accordingly. Where the remarks concern technical points, the trial committee usually observes them; but if they concern the substance of the decision, and the committee disagrees with the opinion of the Minister, the committee will insist on its decision. In this case, the Minister, not having reconsidered his opinion, will finalise the case by deciding on the subject-matter.[168]

(3) The Minister of Finance is to review any decision made by the appellate Customs committees by means of examining only the decision, but he may, if necessary, request the committal of all relevant documents to him. The usual practice is that the Minister

will not call a party or a witness, but only decide according to the relevant documents. The Minister of Finance examines the decision in a similar way to that in which the High Authority and the Minister of Commerce and Industry examine the decisions reviewable by them. This means that the Minister of Finance may decide immediately on the decision or refer it first to some of his legal advisors before he gives his final decision.[169]

Prerogative Proceedings

In the absence of the availability of appeal against proceedings or a decision, a party can seek further consideration of his case only by a complaint, probably in the form of a grievance, either to the High Authority or to the High Judicial Authority. Such a complaint can be made only by a private party, and not by a party who represents the community, such as the Public Prosecutor. Although the High Authority tends to give consideration to any complaint, except when it regards a case pending trial, the High Judicial Authority does not accept the complaint unless it challenges, on good grounds, the malfunctioning of the machinery of the court.

Where a complaint made to the High Authority lies against the decision of a Sharī'a court, this Authority usually refers it to the High Judicial Authority to deal with it in the way it deems appropriate.[170] But the High Authority may occasionally refer it directly to any Sharī'a authority,[171] or order the formation of a Sharī'a judicial commission,[172] to examine the case. Where the complaint is directed against the decision of a semi-judicial tribunal, it will be decided on by the High Authority himself, after having consulted the experts, or by the Council of Ministers, if the tribunal below insisted on its own opinion.

The High Judicial Authority may itself decide on the complaint or remit it either to an appellate or to an original court. It may also set up a special Sharī'a commission to deal with the question.[173]

Generally, this type of complaint occurs when the complainant genuinely thinks that the court has failed to exercise its jurisdiction judicially. Yet, some persons have used it, especially when complaining to the High Authority, to delay the execution of a judgement which is not in their favour. Apparently, they are encouraged by the fact that they are not liable to any physical or monetary punitive measure at the first complaint.

When the complaint is accepted, an examination of the case will be ordered. The order may, for simplication, be classified as follows:

(1) an order made when the court has refused to examine the case of the complainant, which is within its jurisdiction, or when it appears that the court has neglected it in such a way as to amount to refusal. This order is similar to "mandamus" in English Law.

(2) An order made where:-

(a) a court has assumed a jurisdiction which it does not possess. However, this order, if it exists in practice, would be very rare.

(b) There has been a defect on the face of the proceedings, and this is the most common order.

(c) A conviction has been awarded fraudently. Such an order is not a common one.

Apparently, orders of this category are similar to "certiorari" in English law.

(3) An order given to restrain a court from proceedings

when it is exceeding its jurisdiction, or when it purports to have failed to act judicially. This order is the equivalent of the English "prohibition". It is usually made only by the High Judicial Authority. If, and this is extremely seldom, the High Authority accepts a complaint in this respect, he refers it to the High Judicial Authority. This may be attributed to the fact that the High Authority does not interfere in judicial trials.[174]

References and Comments

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6. Hasan and Hasan, p. 294.
7. For this power, see, al-Māwardī, pp. 73-74; Abū Yaʻ Lā, pp. 61-63.
8. See, the Laws of the Sudan, Vol. XI, pp. 14-17.
9. No. 39 of 21/1/1351 (1932).
10. Maj., p. 29; L., of P.J. to Vic. No. 3185 of 25/11/1357 (1938).
11. D.M.J., C. No. 98/1/T of 1391 (1971).
12. See e.g., al-Manṣūr v. b. Masʻūd, C.C. (R), D. No. 116/2 of 1389 (1969).
13. Appeal against a civil decision concerning money or property is recognized by the Law of 1927 (Art. 7).
14. Ba Kẖashab v. al-Tāylāndī, R.C.C., D. No. 2 of 1387 (1967); Bank al-Andunīshīn v. Al-Sulṭān, R.C.C. D. No. 12 of 1388 (1968).
15. See P.P. v. Sinhāt and others, S.M.C. (M), D. No. 1 of 1382 (1962); M. of P.J. to P.C.M. The text is in the File of 1383 of C.C. (R); L. of P.C.M. to P.J. No. 10960 of 29/5/1389 (1969); P.J., C. No. 7/2/T of 15/1/1390 (1970).
16. L. of P.J. to M.I. No. 1434/1 of 11/10/1382 (1962).
17. L. of M.J. to M.C. (J) No. 732/3/Q of 10/3/1391 (1971); L. of M.J. to A.G. (M) No. 352 of 16/4/1391 (1971); M.J., C. No. 126/2/T of 25/7/1391 (1971); L. of M.J. to D.M.I. No. 2024/1/N of 12/6/1392 (1972).
18. See e.g., P.P. v. Nūr, G.S.C. (M), S. No. 185/7 of 1391 (1971); C.C. (M), D. No. 2182 of 1391 (1971); P.P. v. Mūdī, G.S.C. (M), C.R. of 1391 (1971), Vol. I, p. 82, affirmed by C.C. (M), D. No. 1905 of 1391 (1971).
19. Art. 252.
20. For the right of the defendant to appeal, see Cust. L., art. 45, C.R., art. 257, s. 2.
21. See e.g., Cust. v. al-Shammarī, A.C.C., D. No. 7 of 1389 (1969); Cust. v. Kẖalaf and Muḥammad, A.C.C. (R), D. No. 8 of 1391 (1971); Cust. v. al-Shakrān and Ḫanash, A.C.C. (J) D. No. 6 of 1392 (1972).

22. See e.g., M.I., C. No. 335 of 22/1/1374 (1954); M. of M.I. to P.C.M. No. 2491 of 14/8/1380 (1961); Cust. v. al-Mus'ir, A.C.C. (R), D. No. 15 of 1391 (1971).
23. See e.g., Maj., p. 29; M.J., D. No. 455 of 24/2/1392 (1972).
24. L. of P.C.M. to M.I. No. 1018 of 18/1/1390 (1970); M.C.I., C. No. 77/M of 24/1/1390 (1970).
25. M.C.I., D. No. 729 of 7/11/1388 (1969); R.D. No. M/5 of 11/6/1389 (1969).
26. See e.g., L. of M.F. to President of G.C.D. No. 358 of 11/4/1390 (1970).
27. Art. 15.
28. Art. 72.
29. Art. 10.
30. See, arts. 3, 5.
31. Art. 543.
32. R.D. No. M/5 of 11/6/1389 (1969).
33. Art. 45.
34. Art. 264.
35. No explanation concerning the difference in the periods for appeal was given.
36. See e.g., M. of M.I. to P.C.M. No. 1374 of 27/5/1389 (1969), Ghālia and others v. Ibrāhīm, G.S.C. (R), S. No. 524/9 of 1385 (1966); al-Manşūr v. b. Mas'ūd, C.C. (R), D. No. 116/2 of 1389 (1969).
37. See e.g., al-'Amūdī v. al-Naghī, R.C.C., D. No. 3 of 1387 (1967); Cust. v. Hādī and Salīm, A.C.C. (J), D. No. 12 of 1392(1972).
38. Law of 1952(A), art. 50.
39. Art. 558.
40. Concerning "temporary execution", see C.L. arts. 520-524.
41. M.C.I., D. No. 137 of 20/2/1387 (1967); L. of D.M.C.I., to C.S.C.D. (R), No. 178/M of 3/3/1387 (1967).
42. D.M.C.I., C. No. 643/W of 22/5/1392 (1972).
43. C.R. art. 265.
44. Cust. v. al-Mutayrī, A.C.C., D. No. 2 of 1390 (1970) regarding C.C. (Qarya), D. No. 24 of 1390 (1970); Cust. v. al-Mus'ir, A.C.C. (R) D. No. 15 of 1391 (1971).
45. L. of M.F. to the President of G.C.D., No. 358 of 11/4/1390 (1970); M.F., D. No. 4/1907 of 30/7/1391 (1971).
46. If the convict is a pilgrim and the sentence is not death or mutilation, the automatic review may not arise.
47. See, Chap. II, "The Court of Cassation".
48. See, Chap. II, "The Grand Sharī'a Court".
49. P.J., C. No. 1470/2/M of 4/6/1384 (1964).
50. Law of Combatting Bribery, art. 17; the report of the Ministerial Commission which was appointed according to the

Decision of the Council of Ministers of 10/1/1385 (1965) to decide between the conflicting opinions of the President of the Grievances Board and one of the legal advisors of the Council of Ministers concerning some procedural rules. The report was adopted by the Council of Ministers in its Decision No. 226 of 29/3/1385 (1965).

51. "In ... v. 'Ayyāḍ and others", F.C., D. No. 274/92/T of 1392 (1972); Interview with the President of F.C., General Sa'īd Kurdī (24/8/1972).

52. D.M.C.I., C. No. 643/W of 22/5/1392 (1972); R.D. No. M/5 of 11/6/1389 (1969).

53. M.F., D. No. 4/1907 of 30/7/1391 (1971).

54. Law of 1938, art. 81; Law of 1952(B), art. 62; Instructions of 1967, art. 5. See also P.J., C. No. 3408/3/J of 27/8/1383 (1963).

55. P.P. v. Nūr, G.S.C. (M), C.R. of 1391 (1971), pp. 61-62, 71-73, 78, 83.

56. It is determined in Article 22 of the Law of 1931 that a party who does not raise any objection to a decision when he is informed of it has no right to demand appeal, even if the prescribed period has not yet passed. (See also M.J., C. No. 126/2/T of 25/7/1391 (1971).

57. See e.g., P.J., C. No. 3408/3/J of 27/8/1383 (1963).

58. Previously, the term i'Lām was often used instead of the term Ṣakk to designate the above mentioned document.

59. Commission (representing the Committee of Supervising the Judiciary and the Grand Sharī'a Court of Mecca) formed to decide on the form of the Ṣakk, D. No. 3 of 7/1/1347 (1928).

60. Law of 1931, art. 20, Law of 1936, art. 68, Law of 1952(A) art. 42.

61. See e.g., Law of 1936, art. 73.

62. L. of P.J. to C.C. No. 1232 of 15/10/1353 (1935); C.C., D. No. 183 of 27/10/1353 (1935); L. of P.K.O. to P.C.D. No. 54/1/4 of 6/1/1354 (1935).

63. See e.g., P.J., C. No. 1470/2/M of 4/6/1384 (1964); M.J., C. No. 78/2/T of 6/5/1391 (1971); P.P. v. Mūḍī, G.S.C. (M), Ṣ. No. 161/5 of 5/7/1391 (1971); P.P. v. Nūr, G.S.C. (M), C.R. of 1391 (1971-72), Vol. II, pp. 61-62, 71-73, 78, 83.

64. See e.g., the appeal of al-Shurayyif concerning the ṣakk of G.S.C. (R) No. 19/11 of 1387 (1967).

65. See e.g., the appeal of the representative of al-Mirdās and Nūra concerning G.S.C. (R), D. No. 338 of 1383 (1963).

66. There is only one exception to the rule in the whole history of the Saudi Arabian Judiciary. In 1928, the Consultative Council determined in its Decision No. 90 that it was within the power of the court to deny a party leave to appeal unless he set forth that the decision was contrary to the principles of the Sharī'a. Since most of the people could not have been well conversant with the principles of the Sharī'a concerning legal matters, and since there had been no proper legal

representation or a professional legal consultation, this decision was unfair. Hence, the law which followed this decision did not make the validity of an appeal dependant on any specific condition concerning its nature.

67. Instructions of 1962, art. 10.

68. When the Grand Sharī'a Court in Mecca was invested with the power of reviewing the decisions of the Magistrate's court there, copies of the records were not committed to the former with the relevant documents. Nevertheless, when a case was reviewed upon a royal will or a high order, then a copy thereof was to be compiled with the other documents, and the Sakk became irrelevant. (al-Shihrī v. b. Jābir, L., of G.S.C. (M), to P.J. No. 558/4 of 1376 (1956); L. of P.J. to S.M.C. (M) No. 5657/3 of 1376 (1957).

69. See e.g., Instructions of 1967, art. 6.

70. According to the Law of 1936 (art. 76), the court must refer the case to the appellate authority within twenty-four hours after the former has received the appeal.

71. See e.g., Law of 1952(A), art. 44.

72. Instructions of 1962, art. 4.

73. P.J., C. No. 6298/3 of 1383 (1963).

74. Interview with the Minister of Justice, Shaykh Muḥammad al-Ḥarkān, (24/7/1972); Interview with the Director of the Office of the Minister of Justice and the Secretary of the Judicial Council, 'Aqīl Miḥdār, (24/7/1972).

75. In theory, the submission of an appeal within the prescribed period is necessary for the committal of a decision appealed against by the claimant, but the matter is not so when the appellant is the defendant. When the defendant objects to the decision and the prescribed period has expired before he has submitted his appeal, the decision and the file of the case must be sent to the appellate tribunal for review. The reason given for this is that the execution of a decision objected to by the defendant may, without being reviewed, prejudice him. (C.L., arts. 513, 558). Nevertheless, in practice, the request for review by the defendant who fails to submit duly his appeal will not be considered; in other words, the decision below becomes then final. (See e.g., L. of C.S.C.D. (R) to D.M.I.C. No. 973/H of 28/12/1387 (1967); al-Ka'bī v. Ṭāriq, R.C.C., D. No. 13 of 1388 (1968).

76. C.L., arts. 544, 546; R.C.C., C. No. 498/M of 12/8/1387 (1967).

77. C.L., art. 546; C.C., D. No. 150 of 6/9/1353 (1934); C.C.,D. No. 165 of 26/9/1353 (1934); R.C.C., C. No. 498/M of 12/8/1387 (1967).

78. See e.g., Cust. v. al-Furayḥī and others, A.C.C., D. No. 76 of 1389 (1970).

79. Art. 264.

80. Cust. v. al-Mus'ir, A.C.C. (R), D. No. 15 of 1391 (1971) regarding the decision of the Customs Committee of Qarya No. 61 of 1390 (1970).

81. Interview with the President of A.C.C. (R), Dr. Muḥammad al-Mulḥim, (13 Aug. 1972).

82. L. of P.J. to Vic. No. 3183 of 25/11/1357 (1938).

83. L. of C.C. (M) to G.S.C. (M) No. 4341 of 29/12/1391 (1971).

84. As has been mentioned before, a Sharī'a court does not pronounce a sentence on such an accused person since it does not agree with penalties for drugs or traffic offences, fixed by statute. It only decides on whether or not the evidence given against the accused is admissible, and if it is so, the administrative authority will pronounce the sentence. (See, C.C.M., D. No. 961 of 28/12/1387 (1968); L. of P.O.P.C.M. to M.I. No. 281 of 4/1/1388 (1968) ; P.J., C. No. 191/2 of 14/1/1386 (1966).

85. Dated 24/2/1346 (1927).

86. Thus, an appellant usually attacks the judgement without mentioning that his objection is either to the conviction or to the sentence.

87. See e.g., Custb. v. 'Abid, A.C.C. (J), D. No. 10 of 1392 (1972) concerning Cust. C. of Northern Border, D. No. 18 of 1390 (1970).

88. P.P. v. al-Qāsim, C.C. (R), D. No. 593 of 1386 (1966).

89. The appellate disciplinary tribunal in Saudi Arabia has no power to give a decision which is to the prejudice of the defendant who appealed against the decision below. (D. of the Legal Advisors of C.M. No. 77 of 28/2/1385 (1965).

90. Instructions of 1967, art. 18; C.L. art. 548.

91. Where there is no provision determined by the Qur'ān or the Sunna applicable to the case in issue, the provision agreed upon by Muslim authoritative jurists (by consensus) is considered to be of binding force.

92. These are the grounds for the reversal or the alteration of a judgement as set forth by Muslim jurists. (Madkūr, p. 360).

93. As seen before, if there is no sentence determined by the Qur'ān, the Sunna or by Muslim authoritative jurists (by consensus) which is applicable to the case in issue, the judge must work out a judgement according to the spirit of the Sharī'a by means of what is called analogy. (qiyās).

94. L. of the Muftī to P.K.O. No. 38 of 16/9/1374 (1955).

95. L. of P.J. to P.C.M. No. 3394/1 of 14/10/1387 (1968).

96. First Magistrate's Court is inclined recently to hear cases belonging to Beduins or cases involving Beduins and dwellers, which must, according to law, be heard by the Second Magistrate's Court. But the Court of Cassation does not reverse the judgements of the First Magistrate's Court upon the excess jurisdiction.

97. L. of P.J. to G.S.C. (R), No. 1012/3/1 of 1386 (1966).

98. For details, see Chap. V, Confession and Testimony.

99. P.P. v. Sulaymān, C.C. (R), D. No. 492 of 1386 (1966).

100. See e.g., P.P. v. al-Zayd and others, C.C. (R), D. No. 83 of 1385 (1965).

101. L. of the Muftī to P.K.O. No. 38 of 16/9/1374 (1955).

102. L. of P.J. to A.G. (R) No. 1641/1 of 19/6/1384 (1964).

103. D.P.J., C. No. 7/2/T of 15/1/1390 (1970).

104. M.J., C. No. 43/1/T of 4/3/1392 (1972).

105. See, M. of G.S.C. (R) to C.C. (R) No. 3875/1 of 14/9/1386 (1966).

106. C.C. (R), D. No. 2868 of 1388 (1968).

107. P.P. v. b. Sadḫān C.C. (R), D. No. 107/2 of 1388 (1968); M. of F.M.C. (R) to P.J. No. 2000 of 13/9/1388 (1968).

108. M. of F.M.C. (R) to P.J. supra.

109. This principle is accepted by the Ḥanbalī jurists only in its narrowest sense. (See Ibn Badrān, pp. 136-138). But the majority of Muslim jurists, including some Ḥanbalīs resort to al-maṣāliḥ quite often. (Al-Khuḍarī, p. 391; al-A'ẓamī, pp. 58-60).

110. 'Alī, p. 42.

111. Ibid.

112. P.P. v. b. Salāma and others, the opinion of the member of C.C. (R) Shaykh al-Bawārdī, (1385/1965).

113. Al-Manāwī, pp. 226-227.

114. When the term "ḥudūd" is mentioned in Qur'ān it means bounds or limits. (See e.g., Chap. II. verses 187, 229, 230). In the Sharī'a, any act exceeding its limits is a wrong of a criminal nature. Hence ta'zīr may come under "ḥudūd" in this sense.

115. P.P. v. al-'Awfī and al-Rābighī, C.C. (R), D. No. 174/2 of 1389 (1969).

116. P.P. v. al-Zayd and others, C.C. (R), D. No. 83 of 1385 (1965).

117. Ibid.

118. See e.g., Sinjāb v. Khuqīr, R.C.C., D. No. 9 of 1387 (1968) concerning C.S.C.D. (R), D. No. 110 of 9/6/1387 (1967).

119. Cust. v. al-Shakrān and Ḥanash, A.C.C. (J), D. No. 6 of 1392 (1972), concerning Cust. C. of al-Janūb, D. No 140 of 1390 (1970).

120. Sābā and others v. Sharika al-Tiǧāra al-Maḥdūda (J), R.C.C., D. No. 11 of 1388 (1968), regarding C.E.C.D. (J), D. No. 50 of 1386 (1966); Cust. v. Nazīh, A.C.C. (J), D. No. 13 of 1392 (1972).

121. C.L., art. 549.

122. Cust. v. Khalaf and others, A.C.C. (R), D. No. 8 of 1391 (1971). Compare it with D. of C.M. No. 909 of 20/5/1388 (1968).

123. Raḍwān v. al-Shurbatlī, R.C.C., D. No. 10 of 1388 (1968), regarding C.S.C.D. (J), D. No. 25 of 1386 (1966).

124. C.L., arts. 547, 549.

125. D.M.C.I. (President of R.C.C.), C. No. 498/M of 12/8/1387 (1967).

126. Interview with Mr. Nizār al-Mahāiyrī (Secretary of A.C.C., Member of Cust. (J), and legal advisor of G.C.D.),(29/8/1972); Interview with Dr. al-Mulḥim, supra.

127. Cust. v. Ḥamīdū, D. No. 2 of 1392 (1972), regarding Cust. C. (J), D. No. 24 of 1391 (1971).

128. See e.g., Instructions of 1967, art. 17.

129. Ibid, art. 21.

130. See, P.J., C. No. 1470/2/M of 4/6/1384 (1964); Law of 1952(A), art. 37.

131. Instructions of 1967, art. 18.

132. L. of P.J. to C.C. (R), No. 60/2/1 of 17/1/1384 (1964); L. of P.J. to G.S.C. (R), No. 593 of 23/9/1386 (1966).

133. L. of P.J. to G.S.C. (J), No. 7943 of 22/12/1386 (1967).

134. L. of P.J. to F.M.C. (R), No. 945/9 of 12/4/1384 (1964).

135. See, Chap. V. Qasāma.

136. Interview with the President of the High Judicial Committee, (1972).

137. Cust. v. al-'Alī, A.C.C. (J), D. No. 21 of 1392 (1972), regarding Cust. C. (J), No. 45 of 1391 (1971).

138. Law of 1938, art. 30; Law of 1952(B), art. 29; Instructions of 1962, art. 22.

139. Law of 1938, art. 33.

140. Ibid, art. 19; Law of 1952(B), art. 22; Instructions of 1962, art. 18; Instructions of 1967, art. 11.

141. P.J., C. No. 1696/2 of 7/6/1382 (1962); L. of P.J. to G.S.C. (R), No. 2644/3/1 of 25/11/1383 (1964).

142. Law of 1938, art. 38.

143. Ibid, art. 23.

144. Instructions of 1962, art. 13; Instructions of 1967, art. 9.

145. Instructions of 1962, art. 14; Instructions of 1967, art. 10.

146. Instructions of 1967, art. 21.

147. Law of 1927, art. 5; Law of 1938, art. 28; Law of 1952(B), art. 27; Instructions of 1962, art. 17; Instructions of 1967, art. 22.

148. Law of 1927, art. 5; Law of 1938, art. 24; Law of 1952(B), art. 23; Instructions of 1962, art. 16; Instructions of 1967, arts. 13, 15.

149. "In ... v. Ghānim", C.C. (R), D. No. 68 of 16/9/1386 (1966); 'Uqāb v. Nāṣir, C.C. (R), D. No. 38/1 of 1389 (1969).

150. S.C. of Thādiq altered its judgement No. 72 of 1389 (1969) regarding Ṣāliḥ v. al-Sahlī, according to the decision of C.C. (R), No. 185/2 of 1389 (1969); L. of S.C. of Thādiq to C.C. (R), No. 444 of 11/11/1389 (1970); L. of S.C. of al-Aflāj to C.C. (R), No. 118 of 27/1/1390 (1970).

151. Instructions of 1967, art. 14.

152. Instructions of 1962, art. 9; Instructions of 1967, art.15.

153. Instructions of 1967, art. 15; "in ... v. al-Zahrānī and al-Muṭayrī", C.C. (R), D. No. 36 of 1384 (1964).

154. L. of P.J. to G.S.C. (R), No. 358/3/1 of 14/2/1384 (1964).

155. Al-'Ajālīn v. Fāliḥ, C.C. (R), D. No. 154/1 of 17/3/1390 (1970).

156. See, al-Quraynī v. al-Quraynī, C.C. (R), D. No. 24/2 of 1387 (1967); Āl-Burayk v. Āl-Burayk, C.C. (R), D. No. 259/1 of 1388 (1968).

157. According to C.L. (Art. 552), if the appellate tribunal has two opinions held by an equal number of members, the opinion which is approved by the president of the tribunal is the official one.

158. See e.g., Instructions of 1967, art. 20; M.J., C. No. 66/3/T of 14/4/1392 (1972).

159. See e.g., Instructions of 1967, art. 20.

160. The appellate court may subject the case on appeal for an investigation at any stage of the review. (al-Buraydī v. Nūra, C.C.(R),D. No. 96/2 of 1389 (1969).

161. Art. 28.

162. P.J., C. No. 1298/3 of 16/3/1383 (1963).

163. Instructions of 1967, art. 17.

164. Āl-'Ajālīn v. Fāliḥ, C.C. (R), D. No. 154/1 of 17/3/1390 (1970).

165. Regulations for the High Judicial Committee, art. 10.

166. The High Authority (the King or the President of the Council of Ministers) must approve a sentence of death or mutilation before it is carried out. However, in practice, this authority cannot interfere to alter the sentence. The power of the High Authority in this respect is to request a further investigation by the judicial authority, or to fix the time for the execution of the sentence.

167. See e.g., "in ... v. al-Zahrānī, B.C., D. of 1386 (1966); C.M., D. No. 363 of 25/4/1392 (1972), quoted in L. of P.O.P.C.M. to M.I. No. 8035 of 29/4/1392 (1972).

168. Interviews with Mr. M. al-'Āmūdī and Mr. 'A. Jazzār, President of C.S. (J) and President of C.S. (R) respectively.

169. See e.g., Cust. v. al-Yāmī and al-Yāmī, A.C.C. (R), D. No. 9 of 1391 (1971); Interview with Mr. al-Maḥāiryī and Dr. al-Mulḥim, supra.

170. L. of King 'Abdul 'azīz to Vic. No. 12/26/26 of 15/10/1353 (1935); L. of King 'Abdul 'Azīz to the Deputy of C.C. No. 11984 of 4/11/1361 (1942); C.D., D. of 27/12/1358 (1940).

171. M.I., C. No. 335 of 22/1/1374 (1954).

172. H.O. No. 21916 of 20/11/1389 (1970).

173. R.D. of 24/2/1346 (1927); R.W. No. 39 of 21/1/1351 (1932).

174. See, Law of 1927, art.5; R.D. of 24/2/1346(1927); Law of 1931, art. 32; Report of the Commission of 'Ushayra, approved by the King in his letter to Vic. No. 67/2/6 of 14/2/1355 (1936).

Chapter Seven

CONCLUSION

Appreciation of the System of Judicial Proceedings

Judicial procedure in the Saudi Arabian legal system has been the subject of much criticism. Some writers claim that it is rigid and shamefully inefficient. Others maintain that criminal as well as civil proceedings are inconsistent and at variance with the needs of this century, and that judicial reform is long overdue. In our view, this criticism is largely unjustifiable and stems from a lack of appreciation of the historical and constitutional background of the Saudi Arabian legal system. A common assumption is that Saudi Arabian courts conduct their proceedings literally in the manner laid down in the works of the classical Muslim jurists and in accordance with fixed and rigid rules. This is a grave misconception, for the classical jurists themselves determined most of the rules of procedure according to the needs of their time. At the present time, even strict Muslim jurists maintain that most procedural rules are not set out in a rigid manner by the Sharī'a, and that therefore these rules can be adapted to changing circumstances. As we have seen, Saudi Arabian courts apply procedural rules which are, to a large extent, different from those held by the classical jurists, and this indicates the steady evolution which has been already achieved.

In this study, an attempt has been made at an objective and critical analysis of criminal procedure in the Saudi Arabian legal system, with the object of making a comprehensive assessment of its merits and demerits. As we have seen, the absolute independence of the judiciary is established beyond doubt. This basic fact, together with the supremacy of the

principles of the Sharī'a constitute, in our opinion, its greatest strength. We have seen that both parties enjoy full equality before the law and are given the right to prove their claims and counter-claims in the full meaning of the term. An accused is considered innocent until proven guilty. Most cases are liable to appeal to assure a party who feels aggrieved that his case will be examined by more than one court of different degree. Judges use their discretion in applying equity in making their decisions. The process of justice is easily accessible to all. If a party makes a false accusation or claim, he is liable to pay the cost incurred by the other party, and to punishment. A party who loses his case, whether in an original or appellate court, is not liable to pay any cost to the court. The reason for this is that justice must be available freely for every one. Generally speaking, cases are handled speedily and efficiently, especially in the Sharī'a courts, which constitute the main part of the judiciary.

Although the Saudi Arabian judiciary, especially the Sharī'a courts, has, on the whole, succeeded in rendering justice in the ever-increasing number of cases, there are certain aspects and rules of procedure which are open to criticism, and which we shall deal with briefly here.

(1) The Semi-Judicial Tribunals. As we have seen the semi-judicial tribunals which exist beside the formal judiciary are generally unstable, and lack the experience and the efficiency which the Sharī'a courts have. Some of them administer their trials in a manner similar to investigation. Their members do not have the judicial immunity enjoyed by the

Sharī'a judges. This immunity is essential for guaranteeing impartiality. While not wishing to reflect on the impartiality of these tribunals, we must emphasize that, where there is no judicial immunity, there is always the possibility of being influenced by the executive authority.

The existence of the semi-judicial tribunals has resulted in overburdening certain executive officials and authorities, who are supposed to concentrate only on their original duties. As we have seen, the High Authority, the Council of Ministers, the Minister of Commerce and Industry, and the Minister of Finance all act as appellate authorities for certain semi-judicial tribunals.

The semi-judicial tribunals are overshadowed by the Sharī'a judiciary, which has general jurisdiction. This fact has resulted in neutralizing these tribunals whenever a case is brought before a Sharī'a court. If a semi-judicial tribunal insisted on deciding a case which lies within its competence, its action could lead to conflict with the Sharī'a courts, and this in turn could result in serious delay. We may conclude that the semi-judicial tribunals should be integrated into the Sharī'a judiciary, the formal judiciary in Saudi Arabia.

(2) Interrogation and Preliminary Investigation. Hitherto, it has been difficult to draw a distinction between interrogation, the inquiry for establishing the suspicion, and the preliminary investigation, the inquiry for establishing the accusation, since both are conducted by the police. Experience has shown that the police are usually inclined to establish the accusation of a suspect somewhat too readily, and this is

a sufficient reason to withdraw the power of the inquiry for establishing the accusation from the police and to entrust it to another authority, which must at least be semi-judicial. The police must conduct only the interrogation. But they should handle their inquiry without judicial interference since they are performing only an administrative task. It is true that the prospective judicial law, the Draft Law of the Judicial Authority, provides for the withdrawal of preliminary investigation from the police and for its allocation instead to a semi-judicial authority called "al-Niyāba al-'Amma", i.e. the "Public Prosecution". However, this law has not yet been enforced, and even if it were, the complete and effective withdrawal of preliminary investigation from the police will probably not be easily achieved. Indeed, the prospective law itself says nothing concerning the way in which the "Public Prosecution"is to administer investigation. It plainly mentions that this authority shall function in accordance with a law which is yet to be promulgated, the "Law of Criminal Procedure". The last indication is that some years may pass before its promulgation. As we have seen under "Evidence", the judges often do not receive the minutes of the police. If these minutes were prepared by a judicial or even semi-judicial authority, the judges would be likely to accept them, as they usually receive evidence given before another court or before the examining magistrates of the Grievances Board. Thus, it is important that preliminary investigation must be entrusted to an authority other than an administrative one without delay.

Assuming that the "Public Prosecution" will soon be

entrusted with pursuing the investigation, we still believe that this is not the appropriate authority for performing this function. This is not to suggest that this authority will be unfair to the accused since it is also the authority which will prosecute him; but since it will be on the side of the prosecution, it may be inclined to see things from the point of view of that side exclusively. This possibility leads us to the conclusion that the preliminary investigation in a case and the decision to prosecute the accused must be undertaken by a judicial authority. This does not mean that the court itself should perform this task, but that it should be entrusted to a judicial officer or magistrate.

(3) The Bail System. There is no comprehensive bail system in Saudi Arabia. While bail is fully recognized in civil cases,[1] it is not so in criminal cases. In 1938 the Presidency of the Judiciary held that bail was not acceptable in ḥudūd, retaliation, and in ta'zīr. But the Presidency did not object to bail if it concerned only minor offences.[2] This kind of bail was granted to the accused by executive authorities, the police, or the administrative governor.

In 1961 the Council of Ministers[3] decided that a person accused of committing a non-serious crime had the right to demand release on bail; and that if he had to be detained for completing the investigation, he must not be detained for more than three days. But not every accused can afford to be bailed out for three reasons. (a) The bail in a crime must be a personal appearance bail (Kafāla ḥuḍūriyya); that is to say, someone must sign a written pledge to produce the accused if

the police demand his appearance. Should the bailsman fail to do so, he may suffer serious consequences - including imprisonment.[4] (b) The country is so vast, and the communications in some rural areas are so poor that the accused may not be easily able to contact a relative or a friend who may stand bail for him. (c) The principle of "habeas corpus", which could be used to challenge the refusal of bail, is unknown to the Saudi Arabian judiciary.

It is true that there are three factors which to some extent may mitigate the lack of a comprehensive bail system. (i) The law and practice give priority to the hearing of a case involving a detained person.[5] (ii) The courts usually insure a speedily handling of cases. (iii) The term which the defendant served in custody is counted as part of the sentence. However, the fact that even non-serious crimes may be referred to courts by administrative governors may seriously delay the prosecution. Statistics show that there has been a considerable number of cases where the defendants were kept in custody for a longer duration than their jail sentences.[6]

With regard to the second factor, it may be argued that the speedy handling of a case cannot always be effective as far as detention is concerned, since most cases are appealable, and since neither the original court nor the appellate court will grant the defendant bail. Indeed, in 1939 the Council of Deputies[7] decided that the trial court must order the release of the defendant as soon as it realized that he was innocent, even if the decision was liable to appeal. In 1940, the Director of Public Security,[8] when countering criticism of

conditions in prisons, claimed that no one could be confined without the order of the court. In 1971 the Ministry of Justice[9] issued a regulation determining that the court must order the release of the defendant as soon as it concluded that he was innocent. However, the practice shows that the courts, whether original or appellate, do not usually order the release of the defendants in serious cases, even after they have been acquitted. If it happens that the court orders the release of a defendant, the police cannot release him unless the administrative governor or the Ministry of the Interior agrees, even if the case is not serious.[10]

Concerning the third factor, it may be argued that not every accused is found guilty, and not every guilty person is sentenced to imprisonment. Moreover, if the sentence was imprisonment it could be for a term shorter than that which the prisoner may have served in custody.

From all that has been said, it is clear that a bail reform is urgently needed. The question is whether it is possible to adopt a somewhat comprehensive bail system without violating the Sharī'a. The reason why the judges do not grant bail to a detained person is that corporal punishment or imprisonment must not be inflicted on the bailsman if the defendant failed to appear.[11] However, the vast majority of crimes come under ta'zīr whose penalty can be monetary as well as corporal or imprisonment. Where the punishment is monetary, there should be no objection to bail in the same way as in civil cases. The Sharī'a is concerned only in carrying out the punishment which the accused deserves. Whenever it is possible

to secure the appearance of the offender, there is no objection to bail in the principles of the Sharī'a. But it is suggested that bail should not be granted in serious crimes. In other crimes there seems to be no reason for not granting bail even if the sentence is corporal or imprisonment, since it is unlikely that the defendant will have any advantage in failing to appear before the law.

In any reform of the bail system in Saudi Arabia, the principles of equity and the presumptions of innocence, as well as the practical circumstances of society must be given maximum consideration. Another important suggestion may be the adoption of the principle of "habeas corpus" not only with regard to bail but to all kinds of confinement.

(4) Legal Representation. In Chapter Four, we have seen that the Sharī'a judiciary does not allow legal representation in criminal proceedings, and this fact has resulted in the lack of a well-organized legal profession in Saudi Arabia. The judiciary has, in practice, succeeded in performing speedy and fair trials by avoiding the usual dramatic and lengthy speeches and arguments offered by lawyers. This fact is evident to persons who have come into contact with the Saudi Arabian practice. On the other hand, it may be argued that professional representation may speed up the court process. Indeed, a lawyer can be an important help to the court in excluding irrelevant material, and to his client in offering appropriate legal advice. In view of the active role of the Saudi Arabian judge in conducting the trial in general, and the cross-examination in particular, and his power in dismissing a lawyer

who does not behave properly, there seems to be no genuine objection to widening the scope of legal representation. However, the time has come for the Saudi Arabian law to adopt a comprehensive system in which the responsibility, the qualification, and the functions of advocates should be defined.

(5) Rules Concerning Evidence. Certain rules of evidence do not seem to be adequate, and there is need for reform in this field.

We have seen that the party concerned must cause his witnesses to be present in the court. The cost is incurred by the witnesses themselves or by the party for whom they are testifying. Since the Saudi Arabian law excludes the idea that it is the losing party who is to pay legal costs, we may suggest that it would be in the interest of justice if the legal costs of witnesses were paid through some system of "legal aid", especially if the party is indigent.

Now we consider the rule concerning the "probity of witnesses". Some judges apply this rule so strictly that the evidence of people who do not possess fairly high standards of religion, morality, and dignity may not be received as conclusive evidence. Others are not so strict in applying the rule of "probity" arguing that it would lead to the exclusion of the testimony of a large number of people, and therefore to the acquittal of many offenders, and the waiver of the rights of others. Some early Muslim jurists had advocated this view before. Ibn Taymiyya, for example, maintained that the standard of "probity must be according to the circumstances of the time."[12] However, the fact that people are becoming somewhat

less religious, and that the standards of morality and dignity differ from time to time and from culture to culture, requires a degree of flexibility in the standard of "probity".

Next we consider the evidence of women in criminal proceedings. There is no space to mention the legal opinions of jurists on this matter. Briefly, the main reasons for not accepting evidence given by women as conclusive testimony in criminal proceedings are four: (i) that women are generally forgetful; (ii) that they do not usually participate in public life, and this makes it rare for them to witness actions constituting crimes; (iii) that they may be dominated by men; (iv) that they are more emotional than men.

That there is no basic difference between the memory of a man and that of a woman is a fact proved by modern science, psychology, and common sense. As to the second reason, it may be said that, with the spread of modern education for girls in Saudi Arabia, women will sooner or later find themselves taking a greater part in public life. That women may be dominated by men, and that they are naturally more emotional than them may be true to a certain degree. But these two reasons are not sufficient for disregarding the evidence of women as conclusive testimony. Some Muslim jurists, such as Ibn Ḥazm,[13] accepted the testimony of women even in proceedings regarding hudūd or retaliation; that is to say, the acceptance of such evidence was a matter of controversy. The jurists who disregarded the evidence of women in criminal proceedings accepted it in personal matters concerning women. They accepted the testimony of one woman, while they held that the evidence of one man was

not sufficient to prove even ta'zīr. There is no reason why the evidence of women concerning a criminal act which was committed exclusively in their presence should not be similarly accepted. Our conclusion is that the evidence of women should be made acceptable, especially in ta'zīr.

As we have seen, in qasāma (repeated oaths) the heirs of the deceased must take the oaths required to commit the defendant to capital punishment. But even with the existence of lawth (incriminating circumstances), it does not seem fair that the heirs can swear that the defendant has intentionally caused the death of the deceased, whereas they did not witness the alleged murder. This fact caused many jurists to allocate the oaths to the defendant. It has also caused the supreme appellate authorities to take the greatest care and caution before affirming sentences of qasāma when the oaths were sworn by the relatives of the deceased. This was apparent during Shaykh Muḥammad b. Ibrāhīm's office, who withheld such sentences in the hope that some extenuating circumstances might have risen. Equally, if the oaths are to be taken by the defendant, it is not just to acquit him on his own oaths with the existence of incriminating circumstances. This fact caused some jurists to challenge the validity of qasāma as a whole. Others argued that neither the Prophet nor his Caliphs applied qasāma, and that it was first applied by the Umayyad Caliph Mu'āwiya b. Abī Sufyān (d. 680).[14] Our own conclusion is that qasāma is not practical, and its application is not precisely determined by the Sharī'a.

(6) Delay in Appeal. We would like to make the following suggestions with a view to reduce delay in the stage of appeal.

First, it is suggested that the correspondent not only be duly notified of his rival's appeal but also given a copy of the appeal, if a written appeal has been made, in order to enable him to submit a counter-statement. Besides being just, this may help the appellate judges in coming to their decision more speedily.

As we have seen, when the Court of Cassation disagrees with the decision below, it informs the trial court of its opinion, requesting the alteration of the decision according to its remarks and instructions. But the trial judge can insist on his own decision if he still believes that it is proper. Since the Court of Cassation does not have the power to make a decision of its own and substitute it for the original decision, it can only demand that the case be reheard by a new judge or court. The new decision is also subject to the review of the Court of Cassation exactly in the same way as the first one. It is then possible that the case may continue to travel between the original courts and the Court of Cassation, until the supreme judicial authority interferes. Although it is appreciated that the trial judge be at complete liberty to determine the judgment which he feels appropriate, it is on the other hand necessary to end the case as quickly as possible. The trial court's disputing of the decision of the appellate court would lead to serious delay in some cases. It is suggested here that the Court of Cassation be also granted power to decide on the merits of the case when a delay is liable to occur.

Possible Future Developments

One of the developments which will take place when the Draft Law of the Judicial Authority comes into force will be the creation of the "Public Prosecution", as a department attached to the Ministry of Justice. The Department of "Public Prosecution" will consist of the Attorney General, whose office is in Riyadh, the Assistant Attorney Generals, the Chief Public Prosecutors, and the Deputy Public Prosecutors, whose number will be determined according to need.

The "Public Prosecution" will undertake the preliminary investigation in criminal cases. It will initiate and pursue prosecutions regarding the crimes of the public right. It will act as a litigant on behalf of Bayt al-Māl and incompetent persons, and for the interest of endowments (waqf). It will also supervise and inspect prisons, listen to complaints by prisoners, and take appropriate measures to release detained persons or prisoners whose confinement does not seem to be legal.

The members of the "Public Prosecution" must have the same qualifications as judges, and therefore they enjoy most of the priveleges of judges. Problems concerning the functions of the "Public Prosecution" which do not fall within the competence of the High Judicial Council are to be handled by a special council comprised of the Minister of Justice, as president, and the Deputy Minister of Justice, the Attorney General, and two judges of the Court of Cassation, as members.[15] These privileges and immunities are accorded to the members of the "Public Prosecution" in order to enable them to be independent

of the executive.

The assignment of a large part of the functions of the police to the "Public Prosecution" may lead to conflict between these two authorities, at least in an early stage of the enforcement of the new law. Such conflict may in turn give rise to serious delay in the prosecution. However, the public prosecutors are meant to be highly educated and experienced, and this will be useful in excluding irrelevant material. The prosecution of minor cases can be left to the police, with the object of avoiding unnecessary delay.

The Draft Law of the Judicial Authority will change, to a considerable degree, the structure of the administration of Justice. The most important change will be the creation of The High Judicial Council. (Majlis al-Qaḍā' al-'Alī). This council will have competence to:

(a) Issue rulings on questions referred to it by the King or the President of the Council of Ministers.

(b) Find solutions to legal problems referred to it by the Minister of Justice.

(c) Decide on any conflict between the courts and the "Public Prosecution", if referred to it by the Minister of Justice.

(d) Review sentences imposing death or mutilation, in its capacity as the final judicial authority.

The Council will comprise two boards - the Permanent Board (al-Hay'a al-Dā'ima), which will consist of five full-time members, and the General Board (al-Hay'a al-'Amma), which will consist of the members of the Permanent Board, two chief judges

of courts of first instance, the Chief Judge of the Court of Cassation or his Deputy, the Deputy Minister of Justice, the Public Prosecutor, and the Minister of Justice, acting as the President of the Board. The Permanent Board is more active than the General Board which only meets when the Council is to give solutions to a legal problem referred by the Minister of Justice.[16] The judicial power of the Council is similar to that of the President of the Judiciary, and to the High Judicial Committee, which now functions as the supreme appellate authority, and which will cease to exist when the Council starts to function. The Minister of Justice was accorded the power of the last President of the Judiciary, Shaykh Muḥammad, but it is clear that the Minister will not possess such power. Since the Minister of Justice is a member of the cabinet, it is only appropriate that his power should be limited.

The Draft Law of the Judicial Authority amalgamates the two Courts of Cassation into one court, whose seat will be Riyadh. The new Court of Cassation will consist of three divisions, one of which will be criminal. The number of the judges will be determined according to need. An appeal is examined by three judges unless it concerns a sentence of death or mutilation, where it is to be reviewed by five judges.[17]

As to the lower courts, the change is also considerable. There will be only two classes of courts, Public Courts (Maḥākim ʻĀmma), and Summary Courts (Maḥākim Juz'iyya). The Law does not specify the jurisdiction of each class. It states that this is to be determined by a decision of the Minister of Justice upon the recommendation of the High Judicial Council.[18]

In other words, the present lower courts will continue to function for some time after the enforcement of the new law. Judging by experience, a considerable time may pass before the Public Courts and the Summary Courts begin to function.

Another important development is the creation of the "Department of Legal Research" (al-Idāra al-Fanniyya li al-Buḥūth), which is to be attached to the Ministry of Justice. The functions of this department will include the following tasks:-

(a) The selection and classification of legal principles derived from the decisions of the Court of Cassation and the High Judicial Council.

(b) The preparation of these selected decisions for publication.

(c) The undertaking of legal research required by the Minister of Justice.

(d) Answering questions raised by the judges.

(e) The study of the legal principles according to which Sharī'a judges give their judgments, in order to assure conformity with justice and to commit them to the High Judicial Council for approval.[19]

Although an attempt in 1927 to publish judicial decisions and codify the body of laws[20] was unsuccessful, it seems that the "Department of Legal Research" will function as planned since its creation comes as a result of a natural process of legal development. In this way, the application of the Law of the Judicial Authority will give rise to the publication of judicial reports consisting of selected cases, which will be

of great value to judges, lawyers, the members of the prospective "Public Prosecution", researchers, and all interested persons. Although 'precedents' in substantive law are not in theory a source of law, they may be so in practice. In actual fact, the reference to certain authorities or the mere adherence to a specific school of law, by a judge, is in a way a recognition of 'precedents'. A judge may find that the solution of a problem in the decision of another judge is more applicable than that stated by a jurist who lived in a different age. Since there is no objection to reference to precedents regarding procedural rules, with the exception of certain evidenciary rules, precedents will be useful in replacing any procedural shortcomings.

The enforcement of the prospective law will mark the beginning of the decline of the supremacy of the Ḥanbalī law, and the adoption of a broader approach, probably within the Sunnī concept at first, to legal problems, which Saudi Arabia has not known. The principle of "ijtihād", or the giving of independent legal opinion, will provide justification for this new legal approach against possible objection by conservative elements. Eventually, a fairly comprehensive legal codification will emerge in Saudi Arabia.

The publication of selected cases giving access to precedents and codification will all lead to a departure from total reliance on Ḥanbalī authorities. It has been suggested by some legal experts that the application of the Law of the Judicial Authority would lead to the integration of the semi-judicial tribunals into Sharī'a judiciary. Such integration

does not seem to be particularly intended by the legislature. This law, contrary to other preceding judicial laws, recognizes the competence of the semi-judicial tribunals.[21]

Any further legal development must evolve through natural processes and after deliberate and conscious review, and not through hasty and ill considered imitation of the laws of other countries with a different culture and way of life. The Saudi Arabian legislature should always give full consideration to the cultural, social, and economic circumstances of the country, with due regard to its unique position as the spiritual centre of the Islamic World.

References and Comments

1. For further information see, H.O. No. 3567/2604 of 19/12/1349 (1931); H.W. quoted in C. of M.I. No. 9958 of 17/9/1384 (1965).
2. See, C.C., D. No. 261 of 21/10/1357 (1938); C.D., D. No. 96 of 8/5/1358 (1939).
3. D. No. 725 of 23/12/1380.
4. Baroudi, George, Supra.
5. Law of 1931, art. 30; Law of 1936, art. 117; Law of 1952 (A), art. 75; al-Ḥuqayl, pp. 184-187.
6. P.J., C. No. 1691/3 of 10/7/1385 (1965).
7. D. No. 498 of 27/11/1357.
8. His M. to Vic. No. 6672 of 6/10/1359.
9. C. No. 143/3/T of 29/8/1391.
10. O. of M.I. to A.G. of Eastern Province No. 470/S of 7/3/1387 (1967), and O. No. 386 of 9/1/1389 (1969); M.I., C. No. 988/6 of 3/8/1389 (1969).
11. See, M. of M.I. to P.C.M. No. 278 of 2/6/1375 (1956).
12. See, the opinion of Shaykh Muḥammad b. Jubayr, the member of C.C. (R), No. 531 of 10/9/1385 (1965), opposed to the decision of the majority on the case of ʻAmmāsh.
13. Muʻjam Fiqh Ibn Ḥazm al-Ẓāhirī, University of Damascus, 1966, Vol. II, pp. 535-536.
14. See, Bahnasī, pp. 203-207.
15. Arts. 37, 87, 92, 94, 98, 116, 123, 124.
16. Arts. 6-9.
17. Arts. 10, 12, 13.
18. Arts. 22-24.
19. Art. 126.
20. After he had assumed power in Ḥijāz, King ʻAbdul ʻAzīz decided to codify the body of laws, which he intended to be based on the four Sunnī laws; the codification was to be undertaken by a select body of outstanding jurists. The process of the codification was, as planned, to begin with a transitory stage in which controversial legal principles were to be studied and decided on by the Committee of the Presidency of the Judiciary. (See, Umm al-Qurā, August 26, 1927.) However, this codification was not put into practice.
21. Art. 29.

GLOSSARY

of Arabic Legal Terms Appearing in the Text

'adāla : the probity which a witness must possess.

'adl (pl. 'udūl) : (a witness) of probity.

amīr : governor.

al-amr bi al-ma'rūf wa al-nahy 'an al-munkar : enjoining the right and forbidding the wrong.

arsh : compensation for bodily injury.

'aṣaba : agnate.

ashhad : I testify.

barā'a : innocence.

Bayt al-Māl : Traditionally: the public treasury. In Saudi Arabian usage, the authorities guarding the rights of absentees and minors without guardian or relatives.

da'wa ghayr muḥarrara : non-preponderant claim or charge.

dustūr : constitution.

fatwā : legal opinion.

fiqh : jurisprudence.

al-furū' : subsidiary issues.

ghayr 'adl : (a witness) without probity.

ghayr muḥṣan : legally competent person who has never been married.

ḥadd (pl. ḥudūd) : crime with fixed punishment.

ḥadīth ḍa'īf : weak tradition.

ḥadīth ṣaḥīḥ : authentic tradition.

ḥaqq al-'abd : human right.

ḥaqq Allāh : Divine Right.

ḥaqq ‘āmm : public right.

ḥaqq k̲hāṣṣ : private right.

hijra (pl. hijar) : settlement.

ḥirāba : highway robbery.

ḥisba : anticipation of God's reward in the hereafter.

ijmā‘ : consensus.

ijtihād : individual legal opinion.

ijāra : lease.

imām : religious leader.

istik̲hlāf : request from the trial court made to another court to carry out the hearing of testimony in its place.

al-jarḥ wa al-ta‘dīl : attacking and establishing the probity of a witness.

kafāla ḥuḍūriyya : personal appearance bail.

Kātib al-‘Adl : Public Notary.

k̲hibra : finding of experts.

lā’iḥa al-i‘tirāḍ : statement of appeal.

lawth : the existence of incriminating circumstances.

li‘ān : oaths of condemnation.

majlis : council.

maḥkama : court.

Al-Maqām al-Sāmī : High Authority.

maqd̲hūf : offended party in a case of defamation.

marrī : tracer of footsteps. (Originally: a member of the tribe of "al-Murra", who are experts on this.

al-maṣāliḥ al-mursala : general welfare.

maẓālim : grievances.

mu‘āyana : inspection.

mughtāl : treacherous murderer.

muḥaḍḍir (pl. Muḥaḍḍirūn) : summoner.

muḥṣan : legally competent person who has been married.

muḥtasib (pl. muḥtasibūn) : person who looks after the public interest.

mujtahid (pl. mujtahidūn) : jurist qualified to make individual legal opinion (ijtihād)

mumayyiz : minor who knows reasonably the consequences of his action (usually of at least seven years of age).

musāqāa : crop sharing.

nakala : refrain.

niẓām (pl. nuẓum) : legislation, law, or regulation.

qābila : nurse or midwife.

qadhf : defamation.

qādī : judge.

qasāma : repeated oaths.

qaṣṣāṣ al-athar : tracer of footsteps.

qaṭ' al-ṭarīq : highway robbery.

qatl ghīla : murder by treachery.

Qiṣāṣ : retaliation.

ridda : apostasy from Islam.

ṣakk : document containing the substance of the record of a case.

sariqa : theft.

Shāhid (pl. shuhūd) : witness.

Sharī'a : the law of Islam.

shaṭb : dropping.

shūrā : consultation.

shurb : intoxication.

siyāsa shar'iyya : legislative policy: the principle of legislation within the spirit of the Sharī'a.

sukr : intoxication.

ṣulḥ : settlement.

Sunna : the Tradition of the Prophet.

Sunnī : orthodox.

ta'dīb : chastisement.

tadqīq : review.

taḥrīr : stating the case adequately.

ta'līmāt : instructions.

tamyīz : review.

Ta'zīr : crimes whose punishments are left to the discretion of the appropriate authority to determine.

tazkiya al-'alāniya : an inquiry about the probity of a witness conducted publicly.

tazkiya al-sirr : an inquiry about the probity of a witness conducted secretly.

'ulamā' (sing. 'ālim) : the doctors of Islam.

wālī al-amr : head of state.

waqf : endowment.

waqf al-da'wā : suspension of the case.

waṣiyya : bequest.

zinā : illegal sex relations.

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