

# Judicial System in Saudi Arabia



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Fahad Al Magid  
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Mansour Alhaidary  
Mariam Al Tamimi  
Mohammed Al Saeedi  
Mufleh Al Qahtani  
Musfir Al Qahtani  
Qais Al Mubarak  
Rawya Al Zahhar  
Saad Al Otaibi  
Saud Al Shuraim  
Yousef Al-Qasim  
Zaid Al Zaid



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In the Name of Allah  
Most Gracious, Most Merciful

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## Preface

The Saudi judicial system remains unfairly mysterious to those who live outside the Kingdom of Saudi Arabia, particularly in non-Muslim states, as many misconceptions and false perceptions on the Saudi judicial system are derived, in the first place, from biased media. The Saudi judicial system is often depicted as primitive and tribal in which judges possess absolute powers unchecked by any mechanism which usually result in inexplicable and contradictory rulings.

These misconceptions and false perceptions have drawn Center for Global Thought on Saudi Arabia to publish a book expounding aspects of the Saudi judicial system, aiming primarily at the non-Muslim reader who is interested in judicial matters irrespective of whether he is working in a judicial or educational institution. Our objectives in preparing this book are clear and may be outlined as follow:

**First:** to introduce the philosophical trends in the Saudi judicial system. All judicial rulings, throughout the globe, have philosophical foundations; indeed they are not made arbitrarily or out of absurdity without being based on a clear authority. Whenever our reader perceives well the

philosophical foundations in the Saudi judicial system, this will help him to reach a clear understanding irrespective of agreement or disagreement with the views expressed in this book. Yet, he would come to understand that the rulings made by the Saudi judiciary are consistent with philosophical foundations, despite the differences between judges in applying such philosophical foundations, and in this matter Saudi judges are not exception.

**Second:** to provide objective account and accurate information about the judicial environment in Saudi Arabia: much of what the media displays is presented in a biased and non-objective manner, still, out of context. Many of the important facts are falsified to serve excitement and exhilaration, and some facts are deliberately concealed. Bad enough, legal aspects of any judicial system remain full of detail and not easy to understand and explain in an article of news or a quick TV interview.

**Third:** to correct the misconceptions about the Saudi judiciary: indeed there is an impression, based on inaccurate information, permeated by some different means of media purposely aiming at discrediting the judicial system in Saudi Arabia. It is imperative that such correction of stereotyping should be made by institutions of Saudi Arabia.

**Fourth:** our purpose is to create a reliable account about the Saudi judiciary: this book is meant to be a reliable reference book of the history of the Saudi judiciary since inception up to the present time trying to draw a picture

different from the stereotypes created by Western academic circles and media.

**Fifth:** to present a future vision of the judicial system in Saudi Arabia. We have deep conviction that the Saudi judicial system is the best judicial system speaking from the point of substantive rules that are derived from precise Sharia principles – simply because they are based on infallible divine source, as Allah almighty says, “Should not He Who Has created know? And He is the Most Kind and Courteous (to His slaves) the well-Acquainted (with everything)” (Surah Al-Mulk, verse 14). However, this does not mean perfection with respect to other aspects of the substantive rules created by the legislative powers/ authorities in Saudi Arabia, and likewise with respect to procedural rules – all these are based on human discretion not amounting to perfection. We seek from writing this book to help create better understanding of the drawbacks and shortcomings in order to be remedied and for further improvement of the Saudi judicial system.

This book has been divided into four chapters covering the most important topics pertaining to the judicial system in Saudi Arabia; the chapters are:

**Chapter one: The Philosophical Trends in the Saudi Judicial System.** This chapter includes some articles that deal with the philosophical basic sources of the Saudi judicial system irrespective of whether these sources are generally agreed upon and accepted or not- these legal sources include the Basic Law of Governance and the relationship between

Sharia and law. The chapter also tackles the ethical values of the judiciary, methods of interpretation and discretion used by judges whether with respect to new facts or regarding discretion in ascertaining the causes of the respective dispute, the interpretation methods utilized by judges in interpreting Sharia or legal texts/ provisions or any other texts/ provisions. The chapter also includes the effects of faith aspects with respect to judges, disputants and lawyers. The chapter concludes with portraying characteristics of Saudi laws that distinguish them from laws of other countries.

**Chapter two: the Saudi Judiciary Experience (beginning and development):** This chapter tackles important historical facts of the emergence of the Saudi judicial system from its inception up to the present day. As well, the chapter describes in scientific manner and details the Saudi judicial institutions with respect to general courts, administrative law courts, and specialized judicial committees as to structure, formation and jurisdictions. The chapter also shows an important aspect represented in the existence of substantive and procedural laws, and throws light on the financial, commercial, penal, administrative, health etc. laws.

**Chapter three: King Abdulla Project for Reforming the Judiciary:** this is an important project; hence an entire chapter was dedicated to that project. The project of the Custodian of the Two Holy Mosques has launched an initiative to reform the judiciary branch in aspects pertaining

to procedural law, developing the judicial environment and training and qualification of the human cadre.

**Chapter four: International Debates:** we are much concerned in this chapter to reflect on the problems most debated in the media and raised by human rights organizations with regard to the judicial system in the Kingdom of Saudi Arabia. The writers independently tackle these matters and explain, from their own perspectives, the shortcomings and drawbacks; however, they simultaneously defend the judicial system in Saudi Arabia against allegations; the debates concentrate on:

- The relationship between the judicial power and the executive power and the extent of independence of the judicial power.
- The extent of religious indoctrination of judges in Saudi Arabia and the nature of *fiqh* [i.e. jurisprudential] doctrine governing their rulings.
- The extent of illogical differences between judicial rulings, and the reasons of those differences, if any, with critique of any practices, if any.
- The extent of influence of codification on the Saudi legal system, and the reasons behind non-codification of *fiqh* (jurisprudential) rules?
- The methods of evidence prevailing in Saudi Arabia and the impact they have on judicial rulings?
- The reasons why the judiciary in Saudi Arabia inflict *Hudud* and corporeal punishments? And the safeguards

relating to enforcement of those punishments on the charged persons?

- To what extent the Saudi judiciary is transparent, particularly with respect to publicity of hearings?
- The reason for the little number of judges in Saudi Arabia compared with population and the number of legal cases? and providing comparisons with other countries.
- Why selection of judges is restricted to graduates of Sharia schools excluding law schools graduates?
- The status of woman within the Saudi judicial system, and can she assumes the judge office or practice as lawyer without restrictions?
- The extent of expressing opinion on the judicial system in Saudi Arabia, and are there any restrictions on that expression?

The writings, outlined above, show independent and transparent thinking about the topics discussed, even if the discussions differ from the views held by the judiciary Establishment.



## **Chapter One**

### **Philosophical Trends in the Saudi Judicial System**

#### **Section One: Philosophical Trends in the Saudi Judicial System**

- Sources of the Saudi Judicial System
- Ethical Values of Judges
- Judges, Aspects of Faith
- Methods of Interpretation and Judicial Discretion

#### **Section Two: Characteristics of Law in the Kingdom of Saudi Arabia**



## **Sources of the Saudi Legal System**

**Prof. Zaid Al Zaid \***

Sources of the Saudi legal system are numerous in a manner allows judges broad discretion as to forming their opinions. Some of these sources are based on revelation (the Revelation) (the Holy Quran and Sunnah) and some not unanimously agreed upon between Muslim scholars –all these may be described as the Sharia sources of the Saudi legal system. In addition, there are different types of legal sources. These sources, combined together, give judges discretion to form their opinions; they combine originality of sacred and unchanging texts and contributions of learned scholars who are aware of the changes of their era.

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Discussing the sources of the Saudi legal system, our starting point shall be the Basic Law of Governance because of its high standing and because a plain and straightforward text similar to constitutions in other countries with a fundamental difference - this text is governed by the Holy Quran and Sunnah. Article one of the Basic Law of Governance provides that, “The Kingdom of Saudi Arabia is a fully sovereign Arab Islamic State. Its religion shall be Islam and its constitution shall be the Book of God and the Sunnah (Traditions) of His Messenger may God’s blessings and peace be upon him.” The Basic Law of Governance clearly provides that Sharia shall be the sole source of governance; thus all laws and regulations shall be within the orbit of Islamic Sharia principles. Having said that, there shall be two main sources of the Saudi legal system, namely:

### **First: Sharia Sources of the Saudi Legal System:**

This means sources based on revelation, which in turn is divided into two:

Part one: sources unanimously agreed upon between Islamic scholars as sources of the legal system in Saudi Arabia – these include:

Firstly: The Holy Quran: this is the Book of Allah and the revelation to Prophet Mohammed (Allah’s blessings and peace be upon him) to be the constitution of the Muslim nation governing all aspects of life. Allah Al Mighty says, “And We have sent down to you the Book (the Quran)

as an exposition of everything, a guidance, a mercy, and glad tidings for those who have submitted themselves (to Allah as Muslims).” (Surah Al Nahl, verse no. (89)). The characteristics of the Book include the following:

1. This is the speech of Allah, in word and meaning;
2. It is narrated by succession, generation after generation;
3. It comprises all fundamental Sharia principles/ rules so Muslim nations need no other writing if they adhere to its teachings.

Many verses of the Holy Quran deal with judicial issues as in the verses about the concept of justice necessitating that the whole nation, individuals and institutions, must abide by it. Examples are the verses, “Verily, Allah commands that you should render back the trusts to those to whom they are due; and that when you judge between men, you judge with justice. Verily, how excellent is the teaching which He (Allah) gives you! Truly, Allah is Ever All-Hearer, All-Seer” (Surah An-Nisa, verse No. (58)). As well Allah says, “Verily, Allah enjoins Al Adl (i.e. justice and worshipping none but Allah Alone – Islamic Monotheism) and Al-Ihsan (i.e. to be patient in performing your duties to Allah, totally for Allah’s sake and in accordance with the Sunnah (legal ways) of the Prophet (Allah’s blessings and peace be upon him), in a perfect manner), and giving (help) to kith and kin (i.e. all that Allah has ordered you to give them, e.g., wealth, visiting, looking after them, or any other kind of help), and forbids Al-Fahsha (i.e. all evil deeds, e.g., illegal sexual acts,

disobedience of parents, polytheism, to tell lies, to give false witness, to kill a life without right), and Al Munkar (i.e. all that is prohibited by Islamic law: polytheism of every kind, disbelief and every kind of evil deeds), and Al-Baghy (i.e. all kinds of oppression). He admonishes you, that you may take heed”. (Surah An-Nahl, verse (90)). And Allah says, “O you who believes! Stand out firmly for justice, as witnesses to Allah, even though it be against yourselves, or your parents, or your kin, be he rich or poor, Allah is a Better Protector to both (than you). So follow not the lusts (of your hearts), lest you avoid justice: and if you distort your witness or refuse to give it, verily, Allah is Ever Well-Acquainted with what you do”. (Surah An-Nisa, verse (135)). Also, Allah says,” O you who believe! Stand out firmly for Allah as just witnesses; and let not the enmity and hatred of other make you avoid justice. Be just: that is nearer to piety; and fear Allah. Verily, Allah is Well-Acquainted with what you do” (Surah Al-Maidah, verse (8)). And Allah says, “Say (O Mohammed, Allah’s blessings and peace be upon him): My Lord has commanded justice and (said) that you should face Him only (i.e. worship none but Allah and face the Qiblah, i.e. the Kabah at Makah during prayers) in every place of worship, in prayers (and not to face other false deities and idols), and invoke Him only making your religion sincere to Him (by not joining in worship any partner with Him and with the intention that you are doing your deeds for Allah’s sake only). As He brought you (into being) in the beginning, so shall you be brought

into being (on the Day of Resurrection in two groups, one as blessed one (believers), and the other as wretched one (disbelievers).” (Surah Al-Araf, verse (29)). And Allah says, “So to this (religion of Islam alone and this Quran) then invite (people) (O Mohammed, Allah’s blessings and peace be upon him), and stand firm (on Islamic Monotheism) as you are commanded, and follow not their desires but say: “I believe in whatsoever Allah has sent down of the Book [all the holy Books, - this Quran and the Books of the old from the Taurat (Torah), or the Injil (Gospel) of the Pages of Ibrahim (Abraham) and I am commanded to do justice among you. Allah is our Lord and your Lord. For us our deeds and for you your deeds. There is no dispute between us and you. Allah will assemble us (all), and to Him is the final return.” (Surah Ash-Shura, verse (15)).

These verses are generally considered the main sources of the legal system in Saudi Arabia; they command justice and fairness irrespective of the parties to the respective dispute/controversy. Other verses of the Holy Quran have elucidated judicial rules pertaining to offences, money, family, inheritance etc. which are deemed to be unchangeable, and judges must adhere to such principles when making rulings.

### **Second: Sunnah (Traditions):**

This means Hadith (i.e. sayings of Prophet Mohammed (Allah’s blessings and peace be upon him) or his acts or the acts of his followers approved by him. The Holy Quran, the

main source of laws, has provided for Sunnah as the second source of laws as in the verse, “by the star when it goes down (or vanishes). Your companion (Mohammed, Allah’s blessings and peace be upon him) has neither gone astray nor has erred. Nor does he speak of (his own) desire. It is only a Revelation revealed.’ (Surah An-Najm, verses (1, 2, 3 and 4)). Also, Allah says, “And whatsoever the Messenger (Mohammed, Allah’s blessings and peace be upon him) gives you, take it; and whatsoever he forbids, abstain (from it). And fear Allah; verily, Allah is Severe in punishment.” (Surah Al-Hashr, verse (7)).

The difference between the Holy Quran and Sunnah is that the Holy Quran is the revelation from Allah – that means the speech of Allah in word and meaning. As to Sunnah, it is revelation in meaning, but not in word. The words given by Prophet Mohammed (Allah’s blessings and peace be upon him) may differ from narrator to another; however, the meaning remains the same. As I cited earlier, numerous verses of the Holy Quran command to do justice, the Prophet Mohammed (Allah’s blessings and peace be upon him) said, “Behold! the Dispensers of justice will be seated on the pulpits of light beside Allah, on the right side of the Merciful, Exalted and Glorious. Either side of the Being is the right side both being equally meritorious. (The Dispensers of justice are) those who do justice in their rules, in matters relating to their families and in all that they undertake to do”. As well, the Prophet Mohammed (Allah’s

blessings and peace be upon him) said, “There are seven (kinds of people) whom Allah will shade with His Shade on the day where there will be no shade except His (i.e. the Day of Resurrection), and they are: a just ruler; a youth who grew up with the worship of Allah; a person whose heart is attached to the mosque; two persons who love and meet each other and depart from each other for the sake of Allah; a man whom a beautiful and high ranking woman seduces (for illicit relation) but he (rejects this offer by saying: “I fear Allah”; a person who gives a charity and conceals it (to such an extent) that the left hand might not know what the right has given; and a person who remembers Allah in solitude and his eyes well up”. Many other sayings of the Prophet Mohammed (Allah’s blessings and peace be upon him) have elucidated numerous judicial rules pertaining to offences, money, family, inheritance etc. which are deemed to be unchangeable and judges must adhere to such principles when making their rulings. It is worth noting that there is a specialized discipline searching methods of validating the sayings of the Prophet Mohammed (Allah’s blessings and peace be upon him) by chain of narration comprising two important conditions: ensuring accuracy of memorization of the narrator and the fairness, integrity and credibility of the narrator.

### **Third: *Ijmaa* (i.e. Unanimous Opinion):**

*Ijmaa* can be defined as the unanimous agreement of

Mujtahid (i.e. industrious, laborious and erudite) Islamic scholars in a given era on a Sharia ruling. Obviously, the definition above states the prerequisites for *Ijmaa* – it must be issued from the major Islamic scholars, and it must be reached unanimously at a given point of time on a new Sharia issue. This unanimous agreement is an original source of making Sharia compliant rules in general and in administration of justice in particular. Judges are obliged to apply rules reached through *Ijmaa*.

#### **Fourth: Qiyas (i.e. Juristic Reasoning by Analogy):**

Qiyas means finding a new Sharia rule based on reasoning in which one thing (i.e. a minor thing for which there is no Sharia ruling), is inferred to be similar to another thing (i.e. a major thing for which there is a Sharia rule) in a certain respect, on the basis of the known similarity between the things in other respects. For example, the Holy Quran provides for not inflicting harm to one's parent by way of insult as in the verse, "And your Lord has decreed that you worship none but Him. And that you be dutiful to your parents. If one of them or both of them attain old age in your life, say not to them a word of disrespect, not shout at them but address them in terms of honor." (Surah Al-Isra, verse (23)). As this verse prohibits inflicting harm on one's parent by way of insult (i.e. saying bad words to them), it can easily be inferred that, Sharia prohibits hitting parents.

The authority signifying that Qiyas is a source of



Sharia rules is the verse saying, “Indeed We have sent Our Messengers with clear proofs, and revealed with them the Scripture and the Balance (justice) that mankind may keep up justice.” (Surah Al-Hadid, verse (25)). The word “Balance” here means to be equal or proportionate. Qiyas has opened new doors to know Sharia stance as to new situations for which the Holy Quran and Hadith/ Sunnah make no provision. If a judge faces a new issue for which the Holy Quran and Sunnah make no provision, then the judge would rely on Qiyas to infer a ruling compatible with truth and justice as Sharia does not differentiate between similar things nor treat in similar manner different things.

### **Second: Sources not Subject to Agreement:**

This refers to sources where there are huge differences between Islamic scholars – some scholars consider them as source for decreeing Sharia rules, while others do not share that standing; these include:

**First:** Maslaha Al-Mursalah (i.e. Common Good): Sharia is meant to achieve the common good and avert corruption, where possible. However, some of the common good have been provided for in Sharia rules, others not; these not provided for as Sharia rules are called Maslaha Al-Mursalah such as laws regulating traffic, laws regulating formation of factories etc. Those who advocate Maslaha Al-Mursalah believe such will open new horizons to give new occurrences/ situations Sharia reasoning as such will

have good impact on the nation. Considering Maslaha Al-Mursalah as a source for creating Sharia rules will not be unrestricted process as Islamic scholars set certain controls to limit using it unnecessarily. As some Islamic scholars believe Maslaha Al-Mursalah will be used unsystematically and chaotically, they refrain to sanction it as a source for making Sharia rules.

Although of this controversy, Maslaha Al-Mursalah has found its way as a source of creating Sharia rules in Saudi Arabia as numerous Saudi laws can only be justified on the basis of Maslaha Al-Mursalah. A judge in a Saudi court will rely on Maslaha Al-Mursalah if he finds no clear Sharia rule to apply on a new occurrence/ situation, on the belief that the interests of the parties require application of Maslaha Al-Mursalah.

**Second:** Al Istishab (literary means: take as companion):

Al Istishab means that a ruling shall be valid unless an evidence has been established to the contrary; in other words, we may say a thing will remain as it is, unless a proof appears changing it. For example, if a person claims that somebody assaults him, the general rule is that that somebody is presumed innocent unless the claimant proves otherwise.

According to that source, numerous Sharia rules were created such as: certainty will not be eliminated by suspicion; as a general policy, everything is permissible; as a general rule, innocence is presumed unless proved otherwise – these

rules protect rights, establish justice and prevent injustice. These rules are adopted by the Saudi judiciary whether on the level of laws or courts' rulings.

It is worth to note that judges need to exercise discretion in understanding Sharia texts and apply the same to new facts and issues. A scholar, in general, and a judge, in particular, are required to fully comprehend the text and apply the same to situations where no established Sharia rule is found. To that extent, we would contextualize the Prophet Mohammed (Allah's blessings and peace be upon him) saying, "When a judge utilizes his skill of judgment and comes to a right decision, he will have a double reward, but when he uses his judgment and commits a mistake, he will have a single reward." Thus Sharia obviously encourages judges to exert discretion when applying Sharia principles.

### **Second: Law Sources in Saudi Arabia:**

#### **First: Basic Law of Governance:**

The Basic Law of Governance is the supreme law in the country; it resembles constitutions in other countries. The Basic Law of Governance was promulgated by the Royal Order No. A/90 dated 27/08/1412H (corresponding to 1/3/1992). The Basic Law of Governance has entrenched the rule of Sharia in the Kingdom of Saudi Arabia; it makes the Holy Quran and Sunnah dominant on the articles of the Basic Law of Governance, and as well makes the Basic Law of Governance dominant over the other laws in Saudi Arabia.

Any provision contravenes the Holy Quran and Sunnah shall be invalid. The Basic Law of Governance comprises many things including the legal aspects (rights) of the individual, the family, the citizen and the resident. Article twenty – six provides that, “The State shall protect human rights in accordance with the Islamic Shari‘ah”. This provision protects rights, prevent injustice and infringing others’ rights. Combined with the previous article, article thirty-six obliges the state to protect people, “The State shall provide security to all its citizens and residents. A person’s actions may not be restricted, nor may he be detained or imprisoned, except under the provisions of the Law.” Article thirty - seven provides that, “Residences shall be inviolable, and they may not be entered or searched without their owner’s permission except in cases set forth in the Law.” Article thirty - eight provides that, “Punishment shall be carried out on a personal basis. There shall be no crime or punishment except on the basis of a Shari‘ah or a statutory provision, and there shall be no punishment except for deeds subsequent to the effectiveness of a statutory provision.” Article forty-six provides that, “The Judiciary shall be an independent authority. There shall be no power over judges in their judicial function other than the power of the Islamic Shari‘ah.” Article forty- seven provides that, “The right of litigation shall be guaranteed equally for both citizens and residents in the Kingdom. The Law shall set forth the procedures required thereof.” Article forty-eight provides that, “The courts shall apply to cases before

them the provisions of Islamic Shari‘ah, as indicated by the Qur’an and the Sunnah, and whatever laws not in conflict with the Qur’an and the Sunnah which the authorities may promulgate.”

### **Second: Judicial Laws:**

There are numerous laws regulating the judicial power/function, whether with respect to procedure, criminal and civil, or in selection and appointment of judges and all matters relating to performing their business, administratively and functionally, and also regulation of the advocacy profession; these may be described as follows:

1. The Law for Concentration of Responsibilities of Sharia Judges: issued in the year 1372H [corresponding to 1953], however, most of its provisions have been surpassed by the new judicial laws. Yet, it is important to cite that some of its provisions not surpassed by new laws are still valid and enforceable.
2. The Judiciary Law: this laws was issued in the year 1428H [corresponding to 2007]; it comprises the following: independence of the judiciary and guarantees for independence - the Judicial Supreme Council - Jurisdictions of Courts (hierarchy of courts - the Supreme Court - the Appeal Court - first instance courts - jurisdictions of courts); the judges (appointment and promotion of judges; transfer, secondment and vacation of judges” inspection of the business of the judiciary

- disciplinary action against judges - termination of service of judges) - the Ministry of Justice - notary public (jurisdiction of notaries - appointment of notaries and inspection - validity of documents issued by notaries) - support staff in courts and notaries - general and provisional provisions.
- 3. The Board of Grievances Law: issued in the year 1428H [corresponding to 2007], and the law comprises all matters relate to administrative judiciary as formation of the board - council of administrative judiciary - circuits of the board (hierarchy of courts - the Supreme Administrative Court - jurisdictions of courts - (appointment of judges and their administrative affairs).
- 4. Arbitration Law: the law was issued in the year 1433H [corresponding to 2012] and comprises the following: general provisions - the arbitration agreement - arbitration tribunal/ panel - arbitration procedure - procedure for determining arbitration claim/s - invalidity of the arbitration award - conclusiveness of arbitration awards and enforceability - concluding provisions).
- 5. Enforcement Law: the law was issued in the year 1433H [corresponding to 2007] and comprises the following: powers of the enforcement judge - enforceable instruments - declaration of money - seizure - enforcement procedure - direct enforcement and direct enforcement in family cases - insolvency - arrest - punishments).
- 6. The Regulations of Procedure before Shaira Courts: the law

- was issued in the year 1435H [corresponding to 2014] and comprises the following: general provisions - international private law (conflict of laws) - value and venue jurisdictions - filing and lodging of lawsuits - presence and absence of parties - hearings procedure - pleas, join a party to a lawsuit, intervention, demand, suspension, stoppage and abandoning lawsuit; recusation of judges; evidence procedure; judgments, objections to judgments; expeditious courts;
7. Criminal Procedure Law: the law was issued in the year 1435H [corresponding to 2014] and comprises the following: penal suit; investigation procedure, courts powers; objections to judgments; conclusiveness of final judgments; enforceable judgments;
  8. The Regulations of Procedura before the Board of Grievances Law: the law was issued in the year 1435H [corresponding to 2014] and comprises the following: filing and lodging lawsuits; hearings; objections to judgments before administrative courts;
  9. The Legal Profession Practice Law: the law was issued in the year 1422H [corresponding to 2001] and comprises the following: defining legal profession and requirements for practice; duties and rights of lawyers; disciplinary actions against lawyers; general and provisional provisions.

### **Third: Other Laws and Regulations:**

In any jurisdiction, laws relating to substantive and

procedural matters are sources of the legal system. For example, for punishment with respect to offences relating to drug trafficking and administration, or money laundry; then the judge is obliged to apply these laws and regulations on hearing and determining any relevant case.

### **Fourth: General Principles Relating to the Judiciary:**

Sharia has accommodated the concept of Ijtihad. And given the fact that judges are allowed to apply Ijtihad in order to achieve justice and fairness, there is the concern that application of Ijtihad by judges may lead to inconsistent rulings with respect to similar factual matters/issues. To avoid that problem, and in order to make courts' rulings consistent and fair, it has been agreed to create general principles to be issued from the highest judicial authority in the Kingdom of Saudi Arabia, the Supreme Court and the Supreme Administrative Court with respect to administrative cases.

Despite the controversy concerning legal precedents between the Common Law Tradition, considering precedent as main source of the common law on the one hand, and the Continental Tradition considering precedent as interpretative only without giving it any mandatory status; the Saudi legal system, relying on some currents in the Maliki School, considers that the rulings (i.e. legal precedents) given by the Supreme Court shall bind all junior courts and may not be overruled unless by the same process by which the general principle is created.



### **The Relationship Between Sharia and Law:**

It is important to raise the question of the relationship between Sharia and law? And why do we require a law if Sharia is perfect and absolute and valid for each time and place?

The fact is that Sharia has been dealing with all kinds of problems since the advent of Islam, and still doing so - it has come to stay! That being said, time and place aspects require flexibility in a manner that would take into consideration the changing times and circumstances; hence, the Holy Quran and Sunnah texts were broad rules meant to be flexible.

Islam has encouraged unanimous agreement of Islamic scholars in a given era on a Sharia rule – Ijtihad. This has opened new horizons in creating new Sharia rules based on reasoning of established old Sharia rules – this is what generally called Islamic jurisprudence.

To avoid controversy among Islamic scholars in each new situation, the ruler may choose an opinion, following consultation with scholars, and formulate the same in a manner that would attain and embrace the interests of the people and issue that opinion in a form of law such as the Basic Law of Governance, the Labor Law, the Traffic Law, the Customs Law etc.

Then we can conclude that the relationship between the law and Sharia is a relationship between a root and a branch. A law satisfies certain temporal and spatial aspects – it is subject to change because of changing times and circumstances.

It is obvious that sources of the Saudi legal system are

based on the Holy Quran and Sunnah being the two sacred sources – no deviation from these two sources will be permitted. Then comes *Ijmaa* as a source of the Saudi legal system. *Ijmaa* is the unanimous agreement of Mujtahid (i.e. industrious, laborious and erudite) Islamic scholars in a given era on a Sharia rule. In case of absence of clear Sharia provision in the Holy Quran and Sunnah and as well the lack of *Ijmaa*, then Qiyas - finding a new Sharia ruling based on reasoning and inference, shall apply.

There is another source of the Saudi legal system. Subject to the instructions of the ruler, Islamic scholars may deliberate, based on understanding of Sharia law, and then agree on laws to serve organizing the interests of people and achieve justice and equity.

This makes Sharia law eternal irrespective of time and place – and within that context learned scholars may contribute to advance our understanding of the Holy Quran and Sunnah.

### **Conclusion:**

Sources of the Saudi legal system are either Sharia based or law based. Sharia rules are based on the Holy Quran, Sunnah, *Ijmaa*, Qiyas and other different sources. Laws refer to the Basic Law of Governance and other laws on which judges rely in administration of justice – substantively and procedurally. Nevertheless, laws, in the last instance, are based on Sharia rules.

## **Ethical Values of Judges**

**Prof. Abdurrahman Al Sudais \***

Allah Almighty has sent out the Messengers and revealed the Books to create a just system embracing all people, Allah Al Mighty says, “Indeed We have sent our Messengers with clear proofs, and revealed with them the Scripture and the Balance (justice) that mankind may keep up justice” (Surah Al-Hadid, verse (25)). Late Imam Al Shatibi said, ‘A characteristic of Sharia is that it is unchanging system – it is a perfect system with rules that may not be outdated, with generality of rules that are valid at all times, absolute and none of its rules will fall into oblivion. Its rules generally apply to all people and are not confined to a certain category of people, valid at all times and for all events. A cause for

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any rule shall remain a cause for that rule for ever and will never change, and a condition for any matter shall perpetually remain a condition for that matter, a duty shall remain a duty, a permissible act shall remain permissible and so forth all rules – no change and no revision. As far as life continues in this earth, rules shall remain the same”<sup>(1)</sup>. Islam is the ultimate religion and Sharia is the final canon; thus Sharia supersedes, concludes and prevails over all other earlier sacrosanct canons. Having said that, Sharia invites all people on the earth to embrace and obey it. Allah Almighty says, “And We have sent you (O Mohammed) except as a giver of glad tidings and a warner to all mankind, but most of men know not” (Surah Saba, verse (28)); it is not only comprehensive and perfect, it is also kind to people, Allah Almighty says, “We have sent you (O Mohammed) not but as a mercy for all that exists” (Surah Al-Anbiya, verse (107)).

It is really remarkable and enduring the advice given by Omar ibn Al-Khatab (may Allah be pleased with him) to Abu Musa Al Ashari (may Allah be pleased with him) about judgeship when the latter was appointed as judge of Al Koufa, “judgeship is strong duty and Sunnah to be obeyed. You have to apprehend what disputants say to you, a right unenforceable is of no use. Treat people equally in justice and in your assembly, and as well treat them well so an honorable person will not be attracted to your leniency and the weak will not be disappointed of your justice. **Burden of proof** lies

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(1) Al Mowafiaqat, Al Shatibi, 1 /109

with the person making the claim, and administration of oath to be made by the denying party. Conciliation is permitted between Muslims unless such conciliation permitting a matter forbidden by Allah or forbidding a matter permitted by Allah. You should not fear to reconsider a ruling made by you if that will serve justice – a correct thing must be done; reconsidering a wrong ruling is better than sustaining it. Apprehend well all issues not provided for in the Holy Quran or Sunnah and exercise your discretion, try identical and similar matters similarly and compare similar things to arrive at fair and just rulings’. Mankind today is in burning need to this advice which guides and shows the way to justice in all walks of life advocated and exhorted by Islam centuries ago.

As judgeship has a renowned standing, judges must possess high ethical standards commensurate with the functions and responsibilities attached to that office; and as well judges must be just and of integrity. In that respect Prophet Mohammed (Allah’s blessings and prayers be upon him) said, “Judges are of three types, one of whom will go to Paradise and two to Hell. The one who will go to Paradise is a man who knows what is right and gives judgment accordingly; but a man who knows what is right and acts tyrannically in his judgment will go to Hell; and a man who gives judgment for people when he is ignorant will go to Hell”. (Narrated by Al-Tirmizi).

It was narrated that Aisha (may Allah be pleased with her)

heard Prophet Mohammed (Allah's blessings and prayers be upon him) saying, "A just judge will be strongly grilled at the Judgment Day to the extent he wished he never adjudicated between two people even in a disputed date" (Narrated by Abu Daud). Islamic judiciary has long been known as a beacon of good ethics and priceless values for achieving the supreme objective of administration of justice. The essence of justice in Islam it is the balance of Allah in the earth through which the weak reclaim their rights, the aggrieved get justice and a right seeker gets his rights.

Islam, through its rules and Sharia-based legislation, has established principles of judgeship and canons of justice not only between people but also with oneself. Allah Almighty dictates on Muslims to hold truth, be honest, avoid injustice and help the aggrieved.

### **Ethical Values of Judgeship Include:**

#### **First: Do Oneself Justice and Do Justice to Kinship**

Justice is in the middle of too much [i.e. excessiveness] and too little, and Allah Almighty has commanded to do oneself justice and to parent and kinship, Allah Almighty says, "O you who believe! Stand out firmly for justice, as witnesses to Allah, even though it be against yourselves, or your parents, or your kin" (Surah An-Nisa, verse (135)). In interpretation of this verse, Al-Tabari said, "your ethics/moral and qualities should tell you to be fair and just, even if you bear witness against yourself or against your parent

or kinship – in all these cases you should tell the truth, and you should not be biased toward the rich because they are rich nor toward the poor because they are poor, and Allah Almighty Who equals between the rich and the poor as to your obligations and duties, you people, as to bearing testimony for each justly – Allah Almighty is capable to take care of all”.<sup>(1)</sup> Allah Almighty says, “And whenever give your word (i.e. judge between men or give evidence), say the truth even if a near relative is concerned” (Surah Al-Anam, verse (152)). In interpretation of this verse, Al-Tabari said, ‘if you judge between people you should tell the truth, be just and fair even if the wronged party is a relative of you. By no way should a kin or a friend attract you not to tell the truth’<sup>(2)</sup>.

To the extent Islam commands and encourages justice, it prohibits injustice whether doing oneself injustice or to others particularly the injustice done by the powerful to the weak people or that of the rich to the poor and injustice of the rulers to the ruled. The more a human being is weak and poor, injustice to him is abhorrent. In that respect, Prophet Mohammed (Allah’s blessings and prayers be upon him) in Hadith Qudsi said, ‘O my people, I have forbidden oppression for myself and have made it forbidden by you, so do not oppress one another’, (narrated by Muslim). As well, Prophet Mohammed (Allah’s blessings and prayers be upon

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(1) Jamie Al-Bayan, Al-Tabari, 7 /584 -585.

(2) Ibid pp. 9 /666.

him) said ‘Be afraid, from the curse of the oppressed as there is no screen between his invocation and Allah.’

### **Second: Be Fair to Opponents**

A paramount quality of the rules of Sharia is that they are predicated on equity and justice even to those who hold differing views; Allah Almighty says, “O you who believe! Stand out firmly for Allah as just witnesses; and let not the enmity and hatred of others make you avoid justice. Be just: that is nearer to piety; and fear Allah. Verily, Allah is Well-Acquainted with what you do” (Surah Al-Ma’eda (8)). In interpreting this verse, the late Imam Ibn Katheer said, ‘hate of certain people should not attract you to do them injustice, you have to do everybody justice, whether a friend or a foe.’<sup>(1)</sup>

The life of Prophet Mohammed (Allah’s blessings and prayers be upon him) witnesses many events in that respect. At the time of opening (i.e. conquering) Mecca, it was reported that Osman Ibn Talha Ibn Abdel Dar closed the door/ gate of Al Kaaba and refused to deliver the key to the Prophet Mohammed (Allah’s blessings and prayers be upon him) to let him in saying, ‘if I knew he is the messenger of Allah, I would not have denied him access’. Then Ali Ibn Abe Taleb (May Allah be pleased with him) took the key forcefully and Prophet Mohammed (Allah’s blessings and prayers be upon him) entered Al Kaaba and prayed. When Prophet Mohammed (Allah’s blessings and prayers be upon

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(1) Interpretation of Holy Quran, Ibn Katheer, 3 /56.



him) came out, his uncle Al Abbas (May Allah be pleased with him) asked to be delivered the key and be allowed to be custodian of the Holy Mosque, in response to Allah Almighty verse says, “Verily, Allah commands that you should render back the trusts to those, to whom they are due; and that when you judge between men, you judge with justice. Verily, how excellent is the teaching which He (Allah) gives you! Truly, Allah is Ever All-Hearer, All Seer.” (Surah An-Nisa, verse (58)), then Prophet Mohammed (Allah’s blessings and prayers be upon him) ordered Ali Ibn Abe Taleb (May Allah be pleased with him) to return the key to Osman Ibn Talha Ibn Abdel Dar and to apologise, and Ali Ibn Abe Taleb (May Allah be pleased with him) did that; that was a cause for Osman Ibn Talha Ibn Abdel Dar to be Muslim. A revelation affirmed that custody of the Holy Mosque to be with his sons forever.

Ethical values of Islamic judiciary shall not be influenced/ affected by sentiments of love and hate and shall not differentiate between people based on status and kinship nor Islamic justice differentiates between Muslims and non-Muslims; on the contrary, all residents in Islam land, whether Muslims or non-Muslims shall enjoy Islamic justice irrespective of any sentiments of love or hate.

It was narrated by late Imam Ahmed in his Misnad on the authority of Jaber Ibn Abdullah (May Allah be pleased with him) said that, ‘When Allah Almighty bestowed Khaybar on His Prophet (Allah’s blessings and prayers be upon him)

as fay' (i.e. as a result of conquest without fighting), the Messenger of Allah (Allah's blessings and prayers be upon him) allowed (them) to remain there as they were before, and apportioned it between him and them. He then sent Abdullah ibn Rawahah who assessed (the amount of dates) upon them. Abdullah Ibn Rawaha said, "O tribe of Jews! By Allah! You are among the most hateful to me of Allah's creation, but it does not prompt me to deal unjustly with you. What you have offered as a bribe is forbidden. We will not touch it." They said, "This is what supports the heavens and the earth.' Although he hated the Jews, he did not treat them unjustly, and he declared that expressly.

The case of the dispute between the caliph Ali Ibn Abe Taleb (May Allah be pleased with him) with an infidel [i.e. kaffir] about an armor lost by the former was truly an illuminating example of the justice of Islam. In that case, the caliph Ali Ibn Abe Taleb (May Allah be pleased with him) lost his armor and found it with an infidel. They disputed before the Judge Shuraih. The caliph Ali Ibn Abe Taleb (May Allah be pleased with him) said the armor owned by him, I never sold it not bequeathed it. The judge Shuraih asked the infidel to answer the allegation of the caliph Ali Ibn Abe Taleb (May Allah be pleased with him), and he replied that the armor was his own, however I would not say that the caliph Ali Ibn Abe Taleb (May Allah be pleased with him) lying. Then the Judge Shuraih asked the caliph Ali Ibn Abe Taleb (May Allah be pleased with him) if he had a proof of what he claimed. The

caliph Ali Ibn Abe Taleb (May Allah be pleased with him) laughed and said to the Judge Shuraih you are correct, and then the judge ruled in favor of the infidel. The infidel said, ‘I witnessed these are morals of prophets – the caliph took me to his judge, and his judge ruled in my favor, ‘I bear witness that God but Allah and I bear witness that Muhammad is the Messenger of Allah’ the armor is yours, I followed the army heading to Safain and when you dismounted from your camel Al Awarag, I took it’ then the caliph Ali Ibn Abe Taleb (May Allah be pleased with him) said, ‘as you entered Islam to give it to you’.<sup>(1)</sup>

The late Imam Ibn Taimeyya said, ‘Allah Almighty ordered us to tell the truth, and say things we know, and ordered us to be fair and just. We are not permitted to repudiate a truth only because it was told by a Jew or a Christian, we should repudiate what is wrong and uphold what is correct’<sup>(2)</sup>. The late Imam Ibn Taimeyya also said, ‘justice is the duty of everyone in all instances, and injustice is not permitted even Allah Almighty required the believers to do the infidels justice in the verse, “O you who believe! Stand out firmly for Allah as just witnesses; and let not the enmity and hatred of others make you avoid justice. Be just: that is nearer to piety; and fear Allah. Verily, Allah is Well-Acquainted with what you do” (Surah Al-Ma’eda (8)), and believers were hostile to infidels by command of Allah Almighty, and Allah Almighty

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(1) Al Bidayya and An-Nihayya, Ibn Katheer, 8/ 5.

(2) Minhaj As-Sunnah An-Nabawia, Ibn Taimeyya, 2 /199.

says, “Let not the enmity and hatred of others make you avoid justice. Be just: that is nearer to piety”

### **The Third: Equality Between People in Judgeship**

A characteristic of judgeship in Islam is that it does not differentiate between the powerful and the weak, a rich and a poor all are equal before the judiciary. The Prophet Mohammed (Allah’s blessing and prayers be upon him), once said ‘The people before you were ruined because when a noble person amongst them committed theft, they would leave him, but if a weak person amongst them committed theft, they would execute the legal punishment on him. By Allah, were Fatimah, the daughter of Muhammad, to commit the theft, I would have cut off her hand’. Justice becomes valueless if it applies solely to certain segment of people while others were not subject to the rules of Sharia, and judges should always bear in mind Allah’s Almighty saying, “And that when you judge between men, you judge with justice” (Surah An-Nisa, verse (58)).

### **The Fourth: Sacrifice in Anticipation of Allah’s reward**

A Judge does not assume office to enjoy monthly remuneration and other pecuniary benefits, but sacrifice in anticipation of Allah’s reward. By supporting the weak people, enforces rights – in a sense he usually practices a religious ritual and not performing a worldly job. To that effect, Prophet Mohammed (Allah’s blessing and prayers

be upon him) said, ‘Envy is permitted only in two cases: A man whom Allah gives wealth, and he disposes of it rightfully, and a man to whom Allah gives knowledge which he applies and teaches it.’ (This is an agreed upon Hadith). And the other Hadith, Prophet Mohammed (Allah’s blessing and prayers be upon him) said, ‘Behold! the Dispensers of justice will be seated on the pulpits of light beside Allah Almighty, on the right side of the Merciful, Exalted and Glorious. Either side of the Being is the right side both being equally meritorious. (The Dispensers of justice are) those who do justice in their rules, in matters relating to their families and in all that they undertake to do’. That being said, a judge must reconcile disputants and abridge their differences so disputants will end their dispute in peace and tranquility. To that effect, it was reported that Omar Ibn Al-Khatib (May Allah be pleased with him) said, ‘persist on the disputants until they reconcile, as adjudication inherits grudge’.

### **The Fifth: Perfection**

Perfection generally is required from each Muslim, and it is required particularly from judges given the seriousness of their office, and Prophet Mohammed (Allah’s blessing and prayers be upon him) said, ‘Allah Almighty loves if one perform a certain work, he must perfect it.’ perfection includes exerting more effort than usual – and here a judge should be keen to attain the highest degree of perfection.

### The Sixth: Honesty

A judge must be honest and evade any work that may disrepute him and make him biased in his rulings, hence judges are prohibited to receive any pecuniary or moral benefits from disputants; and Allah Almighty says, ‘And eat up not one another’s property unjustly (in any illegal way, e.g., stealing, robbing, deceiving) nor give bribery to the rulers (judges before presenting your cases) that you may knowingly eat up a part of the property of others sinfully’ (Surah Al-Baqara, verse (188)). The late Imam Al Qurtobi said, ‘the essence is not to attract or bribe the rulers to rule in your favor.’<sup>(1)</sup>, and the fact is that taking any pecuniary benefit to do a public job is totally prohibited as Prophet Mohammed (Allah’s blessing and prayers be upon him) said, ‘What is the matter with a collector of *Sadaqah*. We send him (to collect *Sadaqah*), and when he return he says: This is for you and this is a present which was given to me. Why did he not sit in his father’s or mother’s house and see whether it would be given to him or not? Whoever takes any of it will inevitably bring it on the Day of Resurrection, be it a camel which rumbles, an ox which bellows, or sheep which-bleats. Then raising his arms so that we could see where the hair grow under his armpits, he said: O Allah, have I given full information? O Allah, have I given full information.’

Islamic scholars prohibit judges from accepting presents except from close relatives or those whom he were used to

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(1) Ahkam Al Quran, Al Qurtobi

give them presents, and in case of accepting a present from a party to existent dispute, Islamic scholars unanimously prohibit acceptance of presents because it is a kind of bribe. Some Islamic scholars went to the extreme with respect to safeguard the office of the judge by prohibiting judges from accepting social invitations/ interactions fearing a judge may be influenced by such invitation/ interaction in order to protect his reputation. Some Islamic scholars prefer that a judge may not get involved himself in sale and purchase transactions as such may make people biased toward him which are likely to affect his partiality, honesty and the independence of the judge, and instead they prefer such transactions to be conducted by an agent/attorney on behalf of the judge.

### **Seventh: Independence**

A judge must be independent not influenced by any personal pressure or any other pressures that may affect/ influence his rulings. Aspects of the independence of the judiciary are demonstrated in many instances in the rulings of Muslim judges. For instance the Judge Mohammed Al Miaafiri in Andalusia was ‘appointed by caliph Al Hakam Ibn Hesham and accepted appointment conditional on: enforcement of his rulings without distinction from the prince to the market guard and that if he feels incapacitated, he would retire.’<sup>(1)</sup> The book of History of Andalusia Judges reported that, ‘if the Imam instructed a judge to abandon adjudicating a certain case, he

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(1) History of Andalusia Judges, pp. 47- 48

may obey that instruction if he is incapable to arrive at a ruling; however, he may not resign office unless upon removal.<sup>'(1)</sup>

### **Eighth: Patience**

A judge must be patient; it was narrated that Prophet Mohammed (Allah's blessing and prayers be upon him) said, 'A judge should not decide between the two while he is in anger.'; but this may not be akin to weakness, and it was reported that Omar Ibn Abdul Aziz (May Allah be pleased with him) saying, 'A judge must possess seven qualities, if he missed one he is likely to be in disgrace: reason, fiqh (i.e. Islamic jurisprudence), honesty, piety, firmness, be conversant with Sunnah and good judgment.' In another narration, it reads as, 'tolerant of Islamic scholars, not weak, humiliated as this would entice disputants to fling false accusations or charges at each other and insult each other.'<sup>(2)</sup>

In conclusion, ethical values of the judge does not differ from other ordinary people; however, because of the importance of his office and the seriousness of his job, he must be fair and just with his own self and kinship and as well with those who differ with him and enemies. He is required to be impartial and independent and treat all people in equal footing without distinction, be perfect in his work of integrity and patient.

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(1) Ibid, p. 193.

(2) Al Mugni, Ibn Qudamma 10/ 40.



## **Judges' Aspects of Faith**

**Prof. Saud Al Shuraim \***

Manifestations of faith in life are difficult to explore and trace; however it must be known to learned people. The essence of life, in this World and Hereafter, is closely attached to the presence of faith in all details and acts of the human being, and as Allah AL Mighty says, “Whoever works righteousness – whether male or female – while he (or she) is a true believer (of Islamic Monotheism) verily, to him We will give a good life (in this world with respect, contentment and lawful provision), and We shall pay them certainly a reward in proportion to the best of what they used to do (i.e. Paradise in the Hereafter) (Surah An-Nahal, verse (97)). There may be numerous interpretations to what is ‘good

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life': it is said 'This world' others say, "The hereafter<sup>(1)</sup>"; yet, it is the same. We restrict our scope here to one of the most important aspects of life – the judiciary, which is one of the most critical mission entrusted to Muslims as it relates to determining two types of rights, namely, rights of Allah Al Mighty and rights of the people.

### **Correlation Between Faith and Judging Fairly:**

Faith and judging are fairly related twin, and this close and deep relationship can be demonstrated as follow:

**First:** Islamic scholars believe that faith is represented in a word, work and belief; and one of the great works is administration of justice and treating the aggrieved fairly, Allah Al Mighty says, "Verily, Allah enjoins Al-Adl (i.e. justice and worshipping none but Allah alone – Islamic Monotheism) and Al-Ihsan (i.e. to be patient in performing your duties to Allah, totally for Allah sake and in accordance with the Sunnah of the Prophet in a perfect manner] and giving help to kith and kin, and forbids Al Fasciq [i.e. all evil deeds] and Al-Munkar [i.e. all that prohibited by Islamic law], and Al-Baghy [i.e. all kinds of oppression]. He admonishes you, that you may take heed" (Surah An-Nahl, verse (90)).

**Second:** Allah Almighty has sent down the Messengers to the people with the Books preaching faith and justice, and Allah says, "It is Allah who has sent down the Book (the

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(1) Zad Al Maseer, Ibn Al Jawzi, 2/ 582.

Quran) in truth, and the Balance (i.e. to act justly) (Surah As-Shura, verse (17)). And Allah says, “Indeed We have sent Our Messengers with clear proofs, and revealed with them the Scripture and the Balance (justice) that mankind may keep up justice.” (Surah Al-Hadid, verse (25)). The two verses demonstrate that acting justly and in good faith are correlating in all faiths.

**Third:** faith calls for justice – the very purpose for which judges assume responsibility to judge [i.e. act justly] relates to all matters pertaining to blood relationship, honor and property. Judges seek help from faith and Allah, and Allah says, “And seek help in patience and As-Salat (the prayers) and truly, it is extremely heavy and hard except for Al-khashien [i.e. the true believers in Allah].” (Surah Al-Bagra, verse (45)). Truly, prayers and patience are purer characteristics of faith; hence Allah Al Mighty combines both prayers and judgeship saying, “Say (O Mohammed): My Lord has commanded justice and (said) that you should face Him only [i.e. worship none but Allah and face the Qiblah [i.e. the Kabah] in every place of worship.” (Surah Al-Araf, verse (29)); so justice necessitates fair judging as well as treating people well, and facing the Qiblah in every place of worship means praying.<sup>(1)</sup>

**Fourth:** Allah Almighty describes joining others in worship with Him as a great wrong, and in this Allah says, “Verily, joining others in worship with Allah is a great

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(1) Interpretation of Ibn Jabeer: (12/ 380).

Zulm (wrong) indeed.” (Surah Luqman, verse (13)). As joining others in worship with Allah is a great wrong then the opposite of that is faith which is justice; so to speak, judgeship and justice are correlated.

**Fifth:** the end for believers in the Hereafter is a light running forward before them and in their right hands, Allah says, “On the Day you shall see the believing men and the believing women – their light running forward before them and (with their Records – Books of deed) in their right hands. Glad tidings for you this Day! Gardens under which rivers flow (Paradise), to dwell therein forever! Truly, this is the great success!” (Surah Al-Hadid, verse (12)), and this is exactly the reward waiting for just judges as Prophet Mohammed (Allah’s blessing and peace be upon him) said, “Just people will sit on stands of light on the right Hand of Arrahmam (Allah Al Mighty), both Hands are right hand, those who judge fairly, and their people and their subjects.”<sup>(1)</sup>

### **Effects of Faith Aspects on the Judge:**

Considering the aforementioned paragraphs, and many others, they show the close correlation between faith and the judge. There must be numerous results from this close correlation including:

**First:** Justice: this is the base on which judgeship is predicated; in fact, pious judges will be driven to judge fairly and apply every possible effort to achieve that end

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(1) Narrated by Muslim, number (1827).

contemplating Allah's saying, "And that when you judge between men, you judge with justice" (Surah An-Nisa, verse (58)). If faith is deep inside the inner of a judge, he would recall the saying of Prophet Mohammed (Allah's blessing and peace be upon him), describing Allah as the Just, "Who then will judge fairly, if not Allah and His Prophet"<sup>(1)</sup>. Ibn Al Qayem said:

Descriptions of Justice,

Are deeds, words and judgment on balance.<sup>(2)</sup>

A faithful judge would say to himself, "If Allah Almighty – the omnipresent and the most powerful described Himself as the Just, then I, the weak and humble, ought to be just"; if I judge unfairly I will be punished in this World as Prophet Mohammed (Allah's blessing and prayers be upon him) said, "two wide opened doors [i.e. two types of bad acts] whoever committed them will be punished in this world: tyranny and disobedience [i.e. being undutiful to parent]"<sup>(3)</sup> or punishment will be postponed to the Hereafter, Allah says, "And the torment of the Hereafter is far more severe and more lasting." (Surah Taha, verse (127)). All these considerations attract judges to judge fairly and exert all available means to administer justice with the help of Allah Almighty.

Because of the considerations exemplified above Islamic

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(1) Bukhari (3150), Muslim (1062) narrated by Ibn Masoud (may Allah be pleased with her).

(2) Al Nonia for Ibn Al Qayem, (2/ 98).

(3) Mustadrak Al Hakim (4/ 177) it is part of the correct series" (1120)

scholars such as Imam Al Baihaqi considered justice as one of the most important pillars of faith; he said that, “the fifty one pillar of faith is to judge fairly as Allah Almighty says, “And that when you judge between men, you judge with justice.” (Surah An-Nisa, verse (58)), and Allah Almighty says, “So be not a pleader for the treacherous” (Surah An-Nisa, verse (105)), and as well Allah Almighty says, “Verily, Allah loves those who are the equitable.” (Surah Al Hujurat, verse (9)). In that context we can cite Abdullah bin Masoud (may Allah be pleased him) said, “No envy, only in two things: a man enriched and spent all money in good work, another given wisdom, he used it for good work”<sup>(1)</sup>

**Second:** The fear of Allah Almighty: A judge knowing that Allah Almighty is always there, will be less likely to do injustice, and as Allah says, “And whosoever fear Allah and keeps his duty to Him, He will make a way for to get out (from every difficulty)” (Surah At-Talaq, verse (2)). Such judge will always remain aware of the saying of the Prophet Mohammed (Allah’s blessing and prayers be upon him), “whoever made a judge between people, he is slaughtered without a knife”<sup>(2)</sup>, and he will also be aware of the saying of the Prophet Mohammed (Allah’s blessing and prayers be upon him), “there are three types of judges: one in Paradise, the other two in Hell”. All these texts will make a judge more cautious and pious, and for that reason many Islamic

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(1) Mukhtasar Shiab Al-Iman for Al Karkhi pp. 104.

(2) Narrated by Abu Dawud under the number 3571 and 3572 in Al Aḥqadīa Book, and Al Tirmazi in Al Ahkam Book under the number 1325.

scholars used to refrain from assuming that office although of all attached privileges.

Earlier judges set admirable examples. It was reported that the judge Issa bin Al Munkader was praying all night, and at the time of Tashud [i.e. when confidentially talking to Allah] he used to say: ‘O my Lord somebody brought a dispute with another and he claimed so and so, and the other party denied the allegation. I asked the claimant to prove his claim, and he provided evidence to that effect, and I’m convinced the claimant had a good case, if that was correct I seek Your help in doing it or if I was not incorrect, I seek Your help to let me judge otherwise. That was the case until he completed all the cases brought before him’.<sup>(1)</sup>

**Third:** Perfection: a Muslim judge recognizes accountability before Allah Almighty and that he must judge fairly, Allah Almighty says,” O Dawud (David)! Verily, We have placed you as a successor on the earth; so judge you between men in truth (and justice) and follow not your desire – for it will mislead you from the path of Allah (shall) have a severe torment, because they forget the Day of Reckoning” (Surah Sad, verse (26)). Obviously this will derive Muslim judges to perfection – as he will always remain aware of the fear of Allah, thus he will be well-versed of the applicable laws and regulations and attentive to the interests of disputants and always recalling the saying of the of the Prophet Mohammed (Allah’s blessing and prayers be

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(1) History of Andalusia Judges pp. 25

upon him), “Allah Almighty loves if one performs a work, he must perform it perfectly”<sup>(1)</sup>, and perfection means judging fairly and justly.

**Fourth:** Sacrifice in anticipation of Allah’s reward: a moral excellence of a judge is sacrificing in anticipation of Allah’s reward. This can only be achieved by being faithful and always remaining aware of Allah’s love of those who are just and fair.

**Fifth:** Independence: being faithful, looking forward to reward in the Hereafter and sacrificing in anticipation of Allah’s reward will make the judge relying on Allah not scrambling for transient things of the world which is the greatest merit of a judge, and Allah Almighty says, “O you who believe! Stand out firmly for justice, as witnesses to Allah; even though it be against yourselves, or your parents, or your kin, be he rich or poor, Allah is a Better Protector to both (than you). So follow not the lusts (of your hearts), lest you avoid justice; and if you distort your witness or refuse to give it, verily, Allah is Ever Well-Acquainted with what you do” (Surah An-Nisa, verse (135)).

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(1) Sahih Al Jamie Al Sagir wa Ziyadatihi, Al Bani number 1880.



### **Effects of Aspects of Faith of the Judge on the Sentenced and the Community:**

If those aspects of faith come out on the judge, then they will create a feeling of content on the sentenced and he will not question the integrity of the judge and the pain the judge took in reaching his ruling.

Even if the sentenced felt aggrieved he would excuse the judge recalling the saying of the of the Prophet Mohammed (Allah's blessing and prayers be upon him), "I'm a human being and you bring your disputes before me; some of you might be more capable to present his case, and I may rule in his favor, so if I rule in favor of someone who is not right, he should not take advantage of that ruling – this is a piece of hell"<sup>(1)</sup>.

As to the effect on community; this might be obvious. If people trust the judiciary, this will benefit the community, and the rich and the powerful will know they are equal as to treatment with the less privileged and the poor so no tyranny and injustice will occur. Similarly, the privileged and the poor will know their rights so they will be daring enough to claim it – this will spread justice, terror and crime will decrease and security will prevail which are the foundations of communities. To that effect, the prominent Islamic scholar Ibn Taimia said, "The consequence of injustice is malevolent, and the consequence of justice is benevolent, it was narrated that, "Allah Almighty supports the just state even if it does

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(1) Sahih Al Bukhari: (2680).

not embrace the Islam faith, and does not support the unjust state even if it does embrace the Islam faith”<sup>(1)</sup>.

In conclusion, there is a correlation between faith and judging fairly. The effects of faith on the judge are: justice, the fear of Allah Almighty, perfection, sacrifice in anticipation of Allah’s reward and independence. As to the impact on the sentenced and the community, both will appreciate his Ijtihad [i.e. unanimous agreement of Islamic scholars in a given era on a Sharia rule] and the pains he took in reaching his fair and partial rulings even if he errs. The result is a guaranteed security, spread of justice, enjoying rights – these are the foundations of prosperous communities.

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(1) Collection of Fatwas: (28/ 63).

## Methods of Interpretation and Judicial Discretion

### The Scientific Committee \*

Judges exercise judicial discretion from the beginning of hearing the legal case up to issuing ruling. Judges spare no effort until they manage to apply the principles of Sharia to the issue/ case brought before them. If that is the case, then there are tools used by judges to arrive at these conclusions, and methods for interpreting Sharia and legal texts and as well any other documents submitted by the parties to the legal action/ dispute. In this context, we can discuss two aspects: judicial discretion and methods for interpreting legal texts.

#### First: Judicial Discretion:

- **Discretion in Knowing the Relevant Texts:** Judges exercise discretion in identifying the Sharia and legal texts that may be applied to the facts brought before

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\* The Scientific Committee of the Centre for Global Thought prepared and drafted this article.

them. Following identification of such texts, they will move up to frame issues based on the facts presented and find the causes to know if such texts apply to the facts brought before them.

- **Framing of Issues Based on the Facts Presented:** judges exercise discretion in framing issues based on the facts brought before them and find which Sharia principles or legal provisions to apply to the facts brought to them. Each of the parties to a respective legal claim would argue to convince the judge trying the claim of the framing of issues in a manner serving their claim. For example, one party may claim that a disputed contract is a sale contract while the other may claim it is an *Ijarah* [i.e. lease] as each claim will create totally different legal positions of the respective parties. Then the judge will study the facts and evidence to arrive at an independent framing of the issues.
- **Discretion in Recognizing the Underlying Causes of the Dispute:** The judge will exercise discretion to exclude immaterial matters and concentrate on the relevant and material facts.
- **Discretion in Ascertaining the Causes of the Dispute:** This means “looking into the matter to know and ascertain the underlying causes”<sup>(1)</sup>. The objective is that the judge should ascertain the existence of Sharia

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(1) Abu Al Hassan Al Aamidi, *Al Ihkam fi Asool Al Ahkam*, inquired by Abdel Razaq Afifi, Islamic Bureau, Beirut – Damascus, Lebanon, 3/ 302

descriptions and conditions in any fact brought before him to compare any relevant Sharia or legal provisions. Whenever a judge concludes framing the facts brought before him and arrives at application of a Sharia or legal provision on the same, said judge would exercise discretion as to the extent of application of the Sharia or legal provision or contractual terms and conditions to the facts presented. If the facts concern, for example, a sale contract, then the judge would ponder the applicability of the sale terms to the facts presented, and as well to what extent the contract is affected by any breach of the obligations of either party, then he would arrive at the appropriate ruling. For instance, if a person bequeaths in order to dispose portion of his money to the poor, though this is a straightforward text, discretion on the part of the judge would be to look to know whether a person is poor or not. To reach that conclusion, a judge must use tools of interpretation of Sharia and legal provisions as well as contractual terms and conditions to ascertain that matter; this will be discussed in the following paragraphs.

- **Discretion with respect to Qiyas:** Qiyas is “applying the provision of a source or origin of a thing to [i.e. root of a problem] to a branch matter [i.e. thing]”<sup>(1)</sup>. When a

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(1) Badr Al Deen Al Zirkashi, *Al Bahr Al Muheet fi Asool Al Fiqh*, Al Kutbi Publishing House, first edition, 1414H, 7/ 83.

judge faces a new issue not provided for under a Sharia principle nor under a legal provision, the judge will seek to apply nearest provision applicable to it; this has a detailed history among jurisprudence scholars which can be referred to in Islamic *fiqh* books [i.e. Islamic jurisprudence].

- **Discretion anticipating Outcomes:** A judge exercises discretion taking into consideration the interests and corruptions likely to result from his ruling. The late Imam (i.e. scholar] Al Shatibi said, “Considering the likely consequence [*from rulings*] of a certain act is an important matter in judging whether such act is compliant or non-compliant with the Sharia principles. When exercising discretion, a judge will definitely judge and contemplate any person’s act based on the likely outcome of that act - either bringing a benefit or preventing a corruption. It may lead to unintended consequence - it may be unlawful because of a feared corruption or barring a benefit, nevertheless it may have unexpected consequence. To elucidate, if an act is described as lawful, the benefit anticipated might turn out to be a corruption equaling the benefit for surpassing it, thus such act may not be described as lawful. Similarly, if an act is described as unlawful, the corruption anticipated might turn out to be a benefit surpassing the corruption anticipated, thus such act may not be described as unlawful. This is indeed a

difficult field for a judge to exercise discretion; however, it deserves trial”<sup>(1)</sup>.

**Second: Discretion in Interpreting Texts:** Asool Al Fiqh [*i.e. Fundamentals of Islamic jurisprudence*] discipline has a vital importance in interpreting texts whether Sharia, legal or contractual. Islamic jurisprudence scholars<sup>(2)</sup> were keen to establish objective controls to interpret the intensions/ purposes of the theologians. One of the most discussed topics by the Islamic jurisprudence scholars is the significance of terms/ words [*i.e. semantically*], and in short they tackle the following:

- 1) **Significance of the Imperative:** does the imperativeness mean necessity or permission? Does it require urgency or slackness? Does imperativeness indicate repetition or not? Does imperativeness to perform something means abandoning the opposite thing?
- 2) **Significance of Prohibition:** does prohibition mean proscription or aversion? Does it require repetition or not? Does prohibition mean the imperative to do the contrary? Does prohibition require badness of the behavior/ act?
- 3) **Significance of the general and the specific/ particular:** this deals with the significance (*i.e. the*

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(1) Ibrahim bin Musa Al Shatibi, Al Mowafaqat, inquired by Abu Obaida Mashhour Al Salman, Ibn Afan Publishing House, first edition 1417, 5/ 177 -178.

(2) All terms significance (semantics) are taken, with some modifications, from Ayad bin Nami Al Salmi book [translated as Islamic Jurisprudence Not To Be Overlooked By A Scholar], Al Tadmuria Publishing House, 1426H), edition 1.

semantic aspects) of the word/ term of the general and the words/ terms that indicate the specific, the extent of specifying the general and the words/ terms used to indicate the specific, exceptions, the words/ terms used for the specific.

- 4) **Significance of the absolute and the relative:** this means that the word/ term indicates the absolute unrestricted and it has specific formulations, and this absoluteness may indicate restriction whenever certain conditions are present.
- 5) **Significance of the literal meaning:** this means the direct meaning/ connotation inferred from the apparent/ actual word/ term – this includes:
  - **The text:** when a text signifies a meaning without the need for interpretation; for example, if a law provides for a certain punishment/ sentence, then the punishment/ sentence will refer to that provision as exactly provided for in the law text;
  - **The Apparent:** when a word/ term bears two meanings where one meaning apparent such significance for what is necessary or permissible, or what is proscribable or what may be described as aversion. If there is an imperative legal provision/ text, it may be described as necessary or as permissible. Likewise, if there is a prohibition in a legal provision/ text, then it may be proscribable or may be described as aversion. However, in the earlier two cases, the apparent meaning in the former means



necessity and in the latter means proscription.

- **The interpreted:** this is the case where a word/ term is likely to bear two meanings/ connotations: one is a likely/ possible meaning and the other is very likely, and here the very likely/ possible is applicable.
  - **Inclusive Meaning:** this signifies two meanings without one being the very likely meaning. The reason for an inclusive meaning is, for example, sharing the same word/ term [i.e. the way of writing or spelling] or being a famous metaphor such using marriage for marriage contract instead of copulation.
- 1) **Significance of the Concept:** this include the following:
- **Significance of the Need:** this means a word/ term signifies a silent meaning to be judged/ inferred because of the genuineness of the speech or being valid from a Sharia or logic perspectives, for example the saying of the Prophet Mohammed (*Allah's blessings and prayers be upon him*), "*no testament for an inheritor*"<sup>(1)</sup> with the meaning that (no valid or enforceable testament for an inheritor). As well the verse, "[*Observing Saum (fasts)*] *for a fixed number of days, but if any of you is ill or on a journey, the same number (should be made up) from other days*" (Surah Al-Baqarah, verse (184)) meaning whoever is ill or on a journey may not fast and as compensation should fast in other days of his choice.

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(1) Abu Abdulla Mohammed bin Yazeed Al Qizweeni, Sunan Ibn Magah, inquired by Mohammed Fouad Abdel Baqi, Dar Ihya Al Kutob Al Arabia, 2 /905

- **Significance of the Sign:** the inherent/ hidden meaning of a speech for example the verse [addressed to the Prophet Mohammed (*Allah's blessings and prayers be upon him*)] saying, "*and consult them in the affair*" (Surah Al-Imran, verse (159)). The text requires consultation; however, it means that certain number of people should be consulted as it is impossible to consult everybody!
- **Gesture:** this means the reason/ rationale for a certain provision as for example the saying of the Prophet Mohammed (*Allah's blessings and prayers be upon him*), "*whoever brings life back to a dead land, he should own it*"<sup>(1)</sup>; this text states/ indicates that the rationale of possession of the land is to bring it back to life.
- **The Concept of Correspondence/ Agreement:** the provision of the *literal meaning* applies to the *unthinkable* whether equals the former in its cause or in case that the unthinkable matches to that provision as in the verse commanding respectful treatment of parent, "*if one of them or both of them attain old age in your life, say not to them a word of disrespect*" (Surah Al-Isra, verse (23)), then a fortiori, hitting parent is categorically prohibited. As well, as Allah Almighty prohibits trespass on the money of the orphan, thus equally it is prohibited to dispose of that money in a manner detrimental to the orphan because of sharing the same cause.

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(1) Malik Ibn Anas Ibn Malik Ibn Aamer Al Asbahi, Al Muwataa, inquired by Bashar Awad Marouf – Mahmoud Khaliel, Muassasat Al Resala, 1412, 2/ 466

- **The Concept of Disagreement:** this means using inference by particularizing by mentioning the *thing* itself while not negating the provision on *something* else, hence the counter provision of the literary meaning will match the unthinkable because of lack of cause such as necessity of paying *Zakat* on the lapse of one year. Then the concept of disagreement means *Zakat* to be paid only on the lapse of one year. Likewise, determining a certain number means that less number is not applicable. To elaborate, if a law provides for attaining a specific age for employment, the concept of disagreement means that an age under that specific age may not be employed. To apply the concept of disagreement, certain conditions must be present. The most important of these include: particularization of a thing should not be because it is the dominant thing, or be specific to a certain event, or in the case that the unthinkable is more akin to the provision of the literal meaning.

Islamic jurisprudence scholars deal with methods for challenging conflicts and preference with respect to evidence submitted and in that they study conditions for challenging conflict, mingling opposing views, abrogation, giving preference as to the sources in question, the text, giving preference because of an external factor etc. all other methods that may help the judge to make preferences when dealing with laws, regulations, etc. and evidence and pleas of disputants.

To sum up, judges have wide freedom when exert discretion and interpreting texts on the facts under question. This starts with being conversant with the applicable texts [i.e. laws and regulations etc.], exert discretion as to framing the issues brought before them, discretion in recognizing the underlying causes of the dispute, discretion in ascertaining the causes of the dispute, a *qiyas*, considering possible outcomes, exerting discretion in interpreting significance of texts such as the imperative, prohibition, the general and the particular, the absolute and the relative, significance of the literal meaning, the concept, conflict and preference – these are methods that are indispensable to judges.

## **Characteristics of Laws in the Kingdom of Saudi Arabia**

**Dr. Saad Al Otaibi \***

### **Prelude:**

It is noted that numerous law books and articles on laws in Saudi Arabia do not express the reality and nature of these laws. This starts with the sources and supreme constitutional principles, through enacting, interpreting and elucidating these laws up to the consequences resulting from compliance or non-compliance with these laws. Those writings reduce the pure legal nature of Saudi laws without recognizing the fundamental differences between the term Nizam [i.e. literary means law/ legal rule] in the Saudi legal terminology and (legal rule) in the positive legal terminology.

To understand the nature of the legal rules in the Kingdom of Saudi Arabia, it is important to start from article

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one<sup>(1)</sup> of Basic Law of Governance which provides that, “The Kingdom of Saudi Arabia is a fully sovereign Arab Islamic State. Its religion shall be Islam and its constitution shall be the Book of God and the Sunnah (Traditions) of His Messenger, may Allah’s blessings and peace be upon him. Its language shall be Arabic and its capital shall be the city of Riyadh”. The term Islamic and the provision for the constitutional nature of the Holy Quran and Sunnah means from the perspective of the Islamic constitutional jurisprudence: dominance of the principles of Sharia and the necessity to adhere to its principles in enacting laws (Nizam). This has been enshrined in article seven of the Basic Law of Governance, “Governance in the Kingdom of Saudi Arabia derives its authority from the Book of God Most High and the Sunnah of his Messenger, both of which govern this Law and all the laws of the State”.

Based on that, any attempt to understand Saudi laws from a mere positive perspective will be not objective, and likely to produce at least flawed or inaccurate results, because understanding these laws (Nizam) must start from knowing their Islamic sources and the supreme constitutional principles that govern the constitutional documents deprived from Sharia, to enable understanding their nature and characteristics and the results that are likely to ensue from application or non-application of the same.

To emphasize this important note, basic laws in the

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(1) This is the first constitutional document of the Saudi state derived from Islamic constitution in application of Islamic constitutional jurisprudence

Kingdom of Saudi Arabia affirm – as will be shown later - that the term (Nizam) and not (Law)<sup>(1)</sup> is the official term to describe any enacted laws in the Kingdom, and as well the term (the regulatory/ enacting power) and not (the legislative power)<sup>(2)</sup> which is the description given to the power making/ enacting laws (Nizam) and regulations in Saudi Arabia.

That being said, it is necessary to state the significance of the term (Nizam) in the Saudi official usage so we will be able to discuss clearly characteristics of laws (Nizam) in the Kingdom of Saudi Arabia, and from that perspective we can outline characteristics of laws (Nizam) applicable in Saudi Arabia as follows:

First characteristic: Significance of the term (Nizam) in Islamic jurisprudence:

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(1) Dr. Mohammed Al Zuhaili explains the reasons why the Kingdom of Saudi Arabia uses the term (Nizam), ‘to refer to the fact that “Nizam” is derived from Islamic jurisprudence and Sharia and not exported (taken) from positive law and foreign legislation as the case with most Islamic states that fell under colonial rule and were subject to foreign intellectual influence. Dr. Mohammed Al Zuhaili stated that he is inclined to favor the method of Saudi Arabia in using the term (Nizam) to maintain Islamic distinction in confirming the necessity for deriving rules, laws and legislation from our rich Islamic jurisprudence, our religion and be keen in adhering to that”, under article ‘Judicial Regulation in the Kingdom of Saudi Arabia’ from Encyclopedia of Contemporary Islamic Affairs, Dr. Mohammed Al Zuhaili: 4/403, edition 1-1430H/2009, Dar Al Maktabi, Damascus.

(2) It is not permitted to officially use the term (the legislator) in Saudi Arabia because it is contrary to Sharia principles. This prohibition dated back to a fatwa issued in that respect. The resolution of the Council of Ministers No. (328) dated 01/03/1396H (corresponding to 1/3/1976) states that ‘to approve not to use the term (the legislator) in laws and other regulatory matters, and use instead another appropriate word/ term’, see The Regulatory/ Legal Power in the Kingdom of Saudi Arabia, Dr. Mohammed Ibn Abdulla Al Marzouqi: 21 -22, edition of Arabia Network for Research and Publication, 2014.

(Anzima) is the plural of (Nizam) which is standard Arabic term signifies combining and joining one thing to another whether material or moral/ abstract.

We are much concerned with the legal definition of (Nizam) in Islamic jurisprudence represented in Sharia politics which is the jurisprudential background of the term (Nizam) in Saudi Arabia, and as well the definition of (Nizam) as special term in the Saudi context – the following paragraphs will elaborate that:

**First:** the jurisprudential significance of (Nizam) in Sharia politics (the historical reference of the Kingdom):

The definition of (Nizam) in the heritage of Islamic scholars based on Sharia is as follows, ‘a group of orders (imperatives), prohibitions and guidance that determine the method to be followed for certain behavior.’<sup>(1)</sup>

Dr. Fouad Abdel Moniem defined the term as, ‘a rule required by Policy based on Sharia’.<sup>(2)</sup>

(Nizam) within Islamic jurisprudence (the field of Policy based on Sharia) may be defined depending on the differences of its names<sup>(3)</sup> as, ‘general abstract rules, complying with Sharia according to specific mechanism which a ruler orders

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(1) Lexicography of Political Terms, Heritage of Scholars, Dr. Sami Mohammed, the entry of the term (Nizam), p. 230, first edition 1427H, International Shorouq Bookshop, Cairo

(2) An Introduction to Laws and Rights in the Kingdom of Saudi Arabia, Dr. Fouad Abdel Moniem (unpublished).

(3) There are many names of (Nizam) used within the heritage of jurisprudence of Sharia politics and the Islam political experience such as the Book at the early years of Islam particularly in the era of Caliphates, decrees and ordinance at the Ottoman age, the code in Morocco and journal in Tunisia. It includes names such as Al Ahkam Al Sultaniyya



all people to obey’.

This definition reveals a number of facts as to the nature of laws in relation to Policy based on Sharia that give rise to the laws applicable in the Kingdom of Saudi Arabia.

**It states the following:**

- The guardian (i.e. the ruler) is the head (at the top of the hierarchy) of the Islamic state irrespective of title: a monarch, a president or sultan or any other title.
- Is obliged to issue laws to all people, so to speak, the people and all those under the sovereignty of the state including residents and expatriates requiring them to adhere to them. The obligation is a characteristic shared between laws (Nizam) and the positive (secular) law – so this may not be depicted as a Saudi quality/characteristic only.
- The nature of this law (Nizam) is that its provisions are general and abstract – generality and abstractness are common characteristics between law (Nizam) and the positive law, so this may not be depicted as a Saudi quality/characteristic only.
- The necessary controlling element in enacting laws (Nizam) is that they should not contravene Sharia – this is the fundamental difference between laws (Nizam) (i.e. deprived from Policy based on Sharia) in Saudi Arabia, and the positive laws prevailing in other countries; this controlling element is a condition for interpreting laws (Nizam).
- Laws (Nizam) are issued according to specific

mechanism, so the term law (Nizam) here refers to laws issued by the monarch or the president of the state according to certain steps provided for in the laws [i.e. foundational laws such as the Basic Law of Governance in Saudi Arabia] for issuing laws (Nizam)<sup>(1)</sup>, contrary to the principles of Sharia not codified/ enacted which do not require to be put within a special regime as they must apply – from Sharia and legal perspectives but they are not described as laws (Nizam) and remain part of the applicable Sharia principles. There is also the concept of ‘public order’ meaning, ‘the group of political, social and economic foundation on which a certain community in a certain era is found’. This concept has considerable renown in Saudi Arabia because Sharia principles and the attached morals constitute the foundation of public order in Saudi Arabia; thus, whatsoever not provided for in laws (Nizam) issued by the enacting/ making authority [i.e. the legislative power] in the Kingdom of Saudi Arabia, shall be referred to the principles of Sharia.

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(1) The term «regulatory rules» is used to denote the laws enacted/ issued by the regulatory [i.e. legal] authority in the Kingdom of Saudi Arabia in contrast to the positive legal rules – as the concept of law as launched in this era, of connotations contrary to Sharia. It is important to emphasize those differences when explicating laws (Nizam) or using them as basis for making rules/ rulings – laws (Nizam) in Saudi Arabia because they are distinguishable by the fact that they are Sharia governed [i.e. in compliance with the provisions of the Holy Quran and Sunnah which has been provided for in article seven of the Basic Law of Governance and in many other articles of the Basic Law of Governance].

## **Second: Significance of the term law in the Kingdom of Saudi Arabia**

The term law in Saudi text means the following:

**First type:** the Basic Law of Governance<sup>(1)</sup> - this is the constitutional document promulgated by a royal order and it is supreme over all other laws (Nizam) after affirming its constitutional nature being subordinate to the Holy Quran and Sunnah only as provided for in article seven of the Basic Law of Governance.

The Basic Law of Governance has acquired that supreme standing because of its subject-matter and the principles and provisions embodied therein, providing for steps for legislative work, the methods for ratification of laws and issuing and amending the same – it is described as supreme over all other laws.

**Second type:** other basic laws<sup>(2)</sup> - these laws share with the Basic Law of Governance the method for preparation and adoption however they differ in the fact that each was confined to certain area – these laws are: the Consultative Council Law, the Council of Ministers Law and the Provinces Law. These laws are described also as basic laws according to the resolution of the Council of Ministers No. 114 dated 26/08/1412H (corresponding to 29/2/1992), and the Allegiance Law belongs to that group of laws.

These laws (Nizam) have acquired that standing from the method of preparing and issuing them as they regulate

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(1) The legislative Power in Saudi Arabia, Dr. Mohammed Al Marzouqi: 73, with minor modification.

(2) Ibid p. 74.

the legislative process; all provisions of these laws are constitutional in nature though issued in fragmented manner. Of all these laws, the Basic Law of Governance is the supreme law in the Kingdom, with the other basic laws rated as subordinate to the Basic Law of Governance but they are superior to the other ordinary laws (Nizam).

Third type: the ordinary laws (Nizam)<sup>(1)</sup>: these are other than the above-mentioned basic laws such the Judiciary Law, the The Regulations of Procedure before Shaira Courts, the Criminal Procedure Law; they have been given this description because, ‘ they are subject to the method prescribed and followed in enacting and adopting laws (Nizam); they are typically laws (Nizam)’. They have been defined by Dr. Mohammed Al Marzouqi as, ‘the binding general rules issued by the legislative power and sanctioned by a royal decree.’<sup>(2)</sup>

Ordinary laws can best be distinguished by certain elements the paramount of which is the following<sup>(3)</sup>: issued by the legislative power, sanctioned by a royal decree in accordance with article (seventy) of the Basic Law of Governance, article eighteen of the Shura [i.e. consultative] Council Law and article twenty of the Council of Ministers Law – thus any general rule approved by a royal decree shall be considered as law (Nizam) even if it were a single provision (article) or a number of articles not given the title

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(1) Ibid p. 74 -75.

(2) Ibid p. 75.

(3) Ibid pp. 86 -87.

of law (Nizam).<sup>(1)</sup>

Fourth type: the regulations relating to ordinary laws [i.e. implementing regulations or secondary enactments] mean ‘general binding rules issued by means other than the royal assent. These include the Charity Associations and Foundations Regulations<sup>(2)</sup>. From the Saudi perspective, these types of enactments are closely attached/ relate to ordinary laws in contrast to the division adopted by positive law<sup>(3)</sup>, and the regulations relating to ordinary laws are issued by the legislative power or by authorization of that power.

To sum up, the significance of the term Nizam in the Kingdom of Saudi Arabia in all types of laws discussed above have the same significance of the term (Nizam) in Policy based on Sharia – meaning an Islamic state committed to the provisions and principles of the Holy Quran and Sunnah.

Second characteristic: Supremacy of Islamic Constitution (the Book and Sunnah) over all Laws (Nizam) in Saudi Arabia:

We will explain that characteristic in the following paragraphs.

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(1) Dr. Mohammed Al Marzouqi gave as example the royal decree No. 43 dated 29 /11 /1377H (corresponding to 14/6/1958) concerning penalties to be applied to those who abuse powers of office, and the royal decree No. (4) dated 01/ 03 /1410H (corresponding to 1/10/1989) concerning attachment.

(2) See The Regulation in Saudi Law, Naif Al Ghamdi, 76, these regulations was issued by a resolution of the Council of Ministers on 1410H (corresponding to 1989).

(3) Commenting on this matter, Dr. Mohammed Al Marzouqi said, ‘it is clear that the concept of regulations in Saudi law differs as to the concept prevailing among positive law jurists and there were many contemporary studies and research tried to attach that concept with Saudi law. The legislative Power in Saudi Arabia, Dr. Mohammed Al Marzouqi: 77, footnote (19).

### **First: the Book and Sunnah**

These are two terms well known to all Muslims. The Book means Holy Quran the revelation to Prophet Mohammed (Allah's blessings and prayers be upon him); it concludes religions and Prophet Mohammed (Allah's blessings and prayers be upon him) as ultimate Messenger of Allah Almighty.

Sunnah means all acts and sayings attributed to Prophet Mohammed (Allah's blessings and prayers be upon him) as established by Hadith ulema (scholars of Sunnah) - Prophet Mohammed (Allah's blessings and prayers be upon him) sayings known as verbal Sunnah, his acts are known as action Sunnah and finally his acceptance of acts and sayings done by others which are called reported Sunnah

Both the Book and Sunnah are known as Islamic Sharia as they are the original sources.

As to the term 'constitutionality' the scholar Mohammed Taqi Al Ameeni said, 'the Quran as constitution contains those general principles and abstract rules and legislative outlines on which personal and social life is built, and basis of the state are established and so its administration and arrangements striking a harmony between potential disposition and changing character and between changeless foundations and changing elements.'<sup>(1)</sup>

With respect to constitutional aspects of the Holy Quran,

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(1) Faith Intellectual Foundations of Islam Based Constitution: 7, reviewed by Dr. Abdul Haleem Awais and Dr. Abdou Zayed, impression 1405H (corresponding to 1984), Dar Al Sahwa, Cairo.

he said, ‘An Islam based constitution more wide in range than the concept of the constitution in politics, as it is confined to only formation, planning, arrangements and administration of the state; so it can be defined as the total of principles and rules that coordinate hierarchy of the state, the public’s rights and establishing ties between all those elements.<sup>(1)</sup> That meaning was derived and inferred from religion and all Messengers were commended to establish.<sup>(2)</sup>

## **Second: Supremacy of the Book and Sunnah and Adherence to their Provisions**

Supremacy of the Book and Sunnah with respect to rooting provisions and enacting laws (Nizam) is an established fact – they are prerequisite of believing in Islam as held by all Islam scholars and in all Islam doctrines and schools.<sup>(3)</sup>

Islam is different in concept compared to religions in Western thought which confines religion in the ‘relationship with metaphysical powers’ while Islam in reality is a faith and Sharia, hence it is a religion that governs the state in a

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(1) To have access the statistics of the whole constitutional texts relating to contemporary constitutions, starting from provisions of constitutional principles and ending with detailed provisions, see the Encyclopedia of the Principles of Political, Social and Economic Thought, Dr. Khadeeja Al Nabrawi under Outlines of Islamic State pp. 737 – 1575, part one and part two.

(2) Faith Intellectual Foundations of Islam Based Constitution: 7, reviewed by Dr. Abdul Haleem Awais and Dr. Abdou Zayed, impression 1405H (corresponding to 1984), Dar Al Sahwa, Cairo.

(3) See the reply to Al Ikhnai of Abe Al Abbas Ibn Taimiyya: 67, impression of 1404H (corresponding to 1983) with corrections and comments by Sheikh Abdurrahman Ibn Yehia Al Muaalimi, The General Presidency of the Administration of Scientific Research, Fatwas and Guidance, Riyadh

unique way totally different from theocratic and religious state. In parallel to that state, Sharia scholars and statesmen are all subject to the provisions of Sharia<sup>(1)</sup> which govern all branches of law including constitutional law and international law.

It is the duty of every Muslim, whether a ruler or a ruled, to adhere to and comply with Sharia as represented in the Holy Quran and Sunnah. The constitutional provisions in the Holy Quran include the following: the verse, “But no, by your Lord, they can have no Faith, until they make you (O Mohammed) judge in all disputes between them, and find in themselves no resistance against your decisions, and accept (them) with full submission” (Surah An-Nisa, verse (65)), and, “It is not for a believer, man or woman, when Allah and His Messenger, have decreed a matter that they should have any option in their decision. And whoever disobeys Allah and His Messenger, he has indeed strayed into plain errors” (Surah Al-Ahzab, verse (36)), and “O you who believe! Obey Allah and obey the Messenger, and those of you

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(1) In that sense Dr. Tharwat Badawi, a leading constitutional jurist, said about the Islamic state established following the destruction of the Persians and the Roman states, ‘... it was the first legal state in which the ruler was subject to the rule of law, and exercised his powers in accordance with supreme rules to which he was bound. The caliph was restricted to rule according to the rules of the Holy Quran and Sunnah, and his powers were limited and not above the rights and freedoms enjoyed by the people. These rights and freedoms were provided for under Islam. As well, Islam provides for the safeguards for protecting such rights and freedoms against any violations by the rulers. Islam has known the idea of individuals’ rights ten centuries ago before being advocated by the philosophers of the Social Contract in the sixteenth century’, Political Organizations: 138, Dar An-Nahda, Cairo, 2005.



(Muslims) who are in authority. And if you differ in anything amongst yourselves, refer to Allah and His Messenger, if you believe in Allah and in the Last Day. That is better and more suitable for final determination (59) Have you not seen those (hypocrites) who claim that they believe in that which has been sent down to you, and that which was sent down before you, and they wish to go for judgment (in their disputes) to the Taghut (false judges) while they have been ordered to reject them. But Shaitan (Satan) wishes to lead them far astray” (Surah An-Nisa, verses (59) and (60))

Islam scholars agree that the essence of Islamic political system is inherent in achieving two main objectives, namely: uphold religion and policing our life in earth to achieve justice in all personal and institutional relationships, internal and external.

It should be noted that this meaning is not confined to Sharia scholars but it is something deeply rooted in true Islamic culture as Muslims believe that the state, the government and the people must be subject to the supreme Islamic constitution (the Book and Sunnah).

### **Third: The Kingdom Commitment in its Constitutional Document to the Supremacy of (the Book and Sunnah) over all Laws including The Basic Governance Law:**

As the supremacy of Sharia and the constitutionality of the Book and Sunnah are applicable in the Islamic state, the Basic Law of Governance provides for this axiom which is taken for granted by Muslims. For that reason, such has

been provided for in the supreme constitutional document in the Kingdom of Saudi Arabia known as the Basic Law of Governance.

Article one of the Basic Law of Governance provides that, ‘The Kingdom of Saudi Arabia is a fully sovereign Arab Islamic State. Its religion shall be Islam and its constitution shall be the Book of God and the Sunnah (Traditions) of His Messenger, may God’s blessings and peace be upon him (PBUH). Its language shall be Arabic and its capital shall be the city of Riyadh’.

And article seven of the Basic Law of Governance provides that, ‘Governance in the Kingdom of Saudi Arabia derives its authority from the Book of God Most High and the Sunnah of his Messenger, both of which govern this Law and all the laws of the State.’

Both articles determine an essential quality of the characteristics of laws (Nizam) represented in the Kingdom’s adherence to the supremacy of the (Book and Sunnah) and prevalence of all the state’s laws (Nizam) including the Basic Governance Law. Article one of the Basic Governance Law has provided for three matters as follows:

First: it describes the state as Islamic and this means in the Islamic constitutional jurisprudence: the Kingdom must adhere to Islamic laws (Nizam).

Second: the provision that the religion of the state is Islam meaning in Islamic terminology: Islam must govern the state and the government must adhere to that in all instances – including changeable and unchangeable Islamic rules that

are appropriate at all times and to all places.

Third: express provision that the supreme constitution of the state is the Book and Sunnah – the sources of the constitutional principles and ordinary laws (Nizam) and regulations.

There are secondary characteristics deprived from this characteristic which will be dealt with later in this article.

Third characteristic: All Laws (Nizam) in the Kingdom are derived from the Book and Sunnah:

All laws (Nizam) in Saudi Arabia must be derived from the Book and Sunnah, and no law (Nizam), regulation or article contravening the Book and Sunnah shall be enacted, and if any, it shall be null and void because it would be unconstitutional. This has been provided for in article seven of the Basic Governance Law, ‘Governance in the Kingdom of Saudi Arabia derives its authority from the Book of God Most High and the Sunnah of his Messenger, both of which govern this Law and all the laws of the State.’

As well, article sixty-seven of the Basic Governance Law provides that the Book and Sunnah shall be the basis for any enacted law (Nizam) or regulations, the said article provides that, ‘The regulatory authority shall have the jurisdiction of formulating laws and rules conducive to the realization of the well-being or warding off harm to State affairs in accordance with the principles of the Islamic Shari‘ah. It shall exercise its jurisdiction in accordance with this Law, and Laws of the Council of Ministers and the Shura Council.’

In this regard, Sheikh Abdulla Ibn Khunain, a prominent

Saudi jurist, said, ‘Sharia is the base of all laws (Nizam) applicable in Saudi Arabia – as provided for in article seven of the Basic Governance Law – so any law (Nizam) must be derived from Sharia’<sup>(1)</sup>

Thus the supremacy of Sharia is affirmed over all laws (Nizam) in Saudi Arabia without exception, a matter which has been provided for precisely in article seven of the Basic Law Governance. That being said, Sharia scholars have qualified/ adapted the study of laws (Nizam) in Saudi Arabia within the context of Policy based on Sharia. This is a lasting effect of the term law (Nizam) where Sharia scholars have contributed in reviewing laws (Nizam), and contributed to enacting them, as well as to issuing relevant *fatwas*.

As a result, it is obvious to us that all (the rulers and the ruled, judges, advocates) must adhere to applicable laws (Nizam) because they are based on the principles of Sharia. Then obligation to adhere to laws (Nizam) is a religious obligation.

Fourth characteristic: Interpretation of Laws (Nizam) in the Kingdom Based on the Book and Sunnah:

A characteristic of laws (Nizam) in Saudi Arabia is that these laws must not contravene Sharia (the Book and Sunnah). Interpretation of these laws, judicially or otherwise, must adhere to the principles of Sharia, and no deviation will be accepted in this respect. Failing to observe this fact have led many jurists and lawyers, not well-acquainted with the principles of Sharia, to provide flawed interpretations and

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(1) Explanation of the Saudi Sharia Pleading Law: 1/ 7 - 8.

clarifications to Saudi laws and regulations.

Sharia is the reference and source of all laws and regulations, and as well it is the reference in all matters pertaining to interpretation – it may not be possible that Sharia is the source of all Saudi laws and regulations while interpretation is based on other references.

In this respect, Sheikh Abdulla Ibn Khunain, a prominent Saudi jurist, said, ‘Sharia is the governing authority of all applicable laws and regulations applicable in the Kingdom of Saudi Arabia as provided for under article seven of the Basic Law of Governance; every law or regulation must be derived from Sharia and shall be the reference with respect to any interpretation of these laws and regulations. If it appears that there are any deviations from Sharia; this is something not intended at all. And as Sharia is the source of enacting laws and regulations, it is also the reference for any provisions, conditions and restrictions not expressly provided for in these laws and regulations.’<sup>(1)</sup>

It obvious that any interpretation of laws and regulations must be based on the principles of Sharia; hence, any interpretation contravening these principles shall be unacceptable and void. That being said, jurists shall be conversant with the principles and rules of Sharia.

Fifth characteristic: Requirement of a Sharia Qualification for Assuming the Jude Office:

Article forty-eight of the Basic Governance Law provides that, ‘The courts shall apply to cases before them

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(1) Ibid: 1/ 7 - 8.

the provisions of Islamic Shari‘ah, as indicated by the Qur’an and the Sunnah, and whatever laws not in conflict with the Qur’an and the Sunnah which the authorities may promulgate.’

The importance of this characteristic may be stated as follows:

**First:** application of the principles of Sharia requires qualified and competent people [i.e. judges] to resolve cases brought before them in accordance with applicable laws (Nizam) and regulations.

For that reason, Sharia scholars stipulate that a judge must be conversant with Sharia principles as this will bar him from making any ruling contravening Sharia principles.

Dr. Mohammed Al Zuhaili said, ‘it must be a condition that a Sharia judge must hold bachelor degree in Sharia as he will try many matters that pertain to Islamic jurisprudence, Sharia terminology and other intricate issues. A law degree holder usually does not study all family matters such as marriage, divorce, maintenance, inheritance and wills, while Sharia graduates study these subjects in detail as well as other matters relating to Islamic jurisprudence, Hadith and terminology.’

This stipulation has expressly provided for in article thirty - one of the Basic Governance Law of the minimum qualifications required for whoever assumes the judge office; besides, he should enjoy the qualifications and competencies provided for under Sharia.

The qualifications and credentials required to meet the

stipulation mentioned above has been mentioned specifically in another law as, ‘to obtain a Sharia degree from a Sharia school in the Kingdom, or any other equivalent degree, provided that in the latter case, he should pass an examination to be prepared by the Supreme Judicial Council.’

These are important stipulations covering the level of qualifications required from those who would assume the judge office, equipping them with the qualification and education required under Sharia. These are the minimum conditions required as agreed upon between Sharia scholars. This is contrary to assuming the judge office under secular legal systems where knowledge of Sharia is not required.

Whoever assumes the office of the judge and not possessing knowledge of Sharia and how to apply its principles to facts of lawsuits brought before him, even if he acquires a law degree, is not qualified from a Sharia perspective to try and hear matters relating to Sharia – simply because he would be lacking the qualifications and competencies required under Sharia.

**Second:** laws (Nizam) and regulations will be subject to scrutiny to ascertain whether they comply with Sharia principles while positive (secular) laws are not subject to that scrutiny but only subject to constitutional law.

**Third:** courts’ rulings made according to Sharia shall be reasoned against Sharia principles and this can only be made by judges educated and trained under Sharia principles.

We conclude this by stating that a judge not qualified and trained as Sharia judge will not be permitted to assume the

judge office in Saudi Arabia.

In that regard, Sheikh Mohammed Ibn Ibrahim Al Al-Sheikh, Mufti of the Kingdom of Saudi Arabia and former Chief Justice of Saudi Arabia said, ‘lawyers may not assume the office of judge because their rulings will be reasoned based on the positive (secular) law that contravenes Sharia principles’<sup>(1)</sup>

Educating and qualifying under Sharia law does not conflict with being conversant with positive laws so a Sharia judge can better understand the laws (Nizam) and regulations enacted in light of positive laws.

In conclusion, Saudi laws (Nizam) and regulations must be looked at from a different angel as they have certain characteristics that are different from positive and secular laws. These characteristics include: Saudi laws (Nizam) and regulations are derived from the Book and Sunnah, supremacy of Islamic constitutional principles, Saudi laws (Nizam) and regulations should be interpreted in a manner not contravening principles of Sharia and that judges must be educated and trained under Sharia.

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(1) Fatwas and Messages of Sheik Mohammed Ibn Ibrahim Ibn Abdullattif Al Al-Sheikh: 12263/, first impression 1399H (corresponding to 1979), Government Print House, Mecca Al Mukaramma.





## **Chapter Two**

### **The Saudi Judicial Experience**

#### **Section One: A Short History of the Saudi Judicial System: Beginning and Development**

#### **Section Two: The Judicial Institutions of the Judiciary**

- Administrative Law Courts
- Quasi-Judicial Committees and Tribunals
- Substantive and Procedural Law

## **A Short History of the Saudi Judicial System: Beginning and Development**

**Dr. Yousef Al-Qasim \***

The Judiciary in the Kingdom of Saudi Arabia is an exceptional subject in its own. The judges' rulings have always relied on the jurisprudential discretion exercised by judges in accordance with the principles and rules of Sharia, and definitely they have never relied on man-made rules. Nonetheless, the judiciary in the Kingdom is by no means an exception to the judiciary in other countries in terms of administrative regulations and formalities. It had a humble beginning as it was the case with the most advanced countries.

For example, 'before the adoption of the US Constitution in 1789, the then thirteen united states were ruled by a

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convention called the “Articles of Confederation”. That Convention formed a weak federal Congress and left most powers in the hands of the states. All of the functions of the federal government, in accordance with the articles of that Convention, were delegated to the Congress, and there was no separation between the legislative and the executive powers, and as well there was no federal judicial power<sup>(1)</sup>. This indicates that a degree of totalitarian rule was exercised by the executive power in the United States of America in that earlier era, as the executive branch had some of the legislative power.

Similarly Britain had a humble beginning, as ‘England had no specific judicial system during the early times of the Anglo-Saxons, nor during the reign of the Normans, as the administration of justice and the rule of the country were considered in those ages a function of the Monarch, and then that function assumed on behalf of the Monarch by a higher council called the Magnum Concilium [i.e. Great Council] - a jurisdiction of that council was to assume responsibility for the administration of justice. Upon evolvement of the Common Law courts (courts of non-codified law), that council had lost much of its judicial powers. As the Monarch was the source of justice, they used to preside over the court themselves, and resolved most issues presented. Then from 1607 on, the House of Commons decided not to allow the

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(1) Comparative Judiciary and its Applications, by Dr. Mohammed Nasr Mohammed, p. 55

Monarch to hear legal cases, or consider making any decisions therein; and to prevent the Monarch from interfering directly in the business of the courts or their judges; however, the Monarch continued, somehow, to exert indirect influence on judges. During the era of the Tudors and thereafter, the Monarch stopped interfering in the affairs of courts<sup>(1)</sup>. This is how the judiciary developed around the world irrespective of the manner/s different states were formed or constructed.

And the judiciary in Saudi Arabia was not an exception in its inception and development; it had a modest beginning. However, the judiciary during the reign of King Abdul Aziz had started to take a new real form and later evolved into a well-established system. At the beginning, King Abdul Aziz would hardly ever interfere in it. Nevertheless, determination of cases was in the hands of learned men who had the ability to consider the issues based on their knowledge of Sharia principles. Indeed, this was something which was considered as a sign for progress and development in Saudi Arabia excluding some Bedouin areas not forming part of the King's authority immediately after the opening of Riyadh in the year 1319H (corresponding to the year 1902). It was the elders of Bedouin who were the judges among clans and communities of the Bedouin, and the tribal custom indeed provided the source of settling disputes between disputants, and therefore this period of time may not be counted as part of the Saudi

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(1) Encyclopedia Of British (sic) Judiciary, Professor Fahmi Mahmoud Shukri, pp. 13 - 14.

experience; it was beyond its authority contrary to what was portrayed by some Western travelers and explorers.

### **Some Western Travellers' Distortion of the Saudi Judiciary during the Formative Years of the Kingdom:**

To tell the truth, Western travelers did not share the same degree of objectivity when wrote about their travels into Saudi Arabia; some of them tried to discredit the Saudi judiciary in its first experience, or described it in an over-simplified manner, intentionally or not; however, others tried to display it realistically to a large degree<sup>(1)</sup>, and the first model include:

- 1) The Danish traveler Carsten Niebuhr, of a German origin, claimed that the office of the judge in the Arabian Peninsula was assumed based on the principle of inheritance, and that no person was to hold that office unless he were a descendant of Sheikh Mohammed Ibn Abdul Wahab<sup>(2)</sup>. This traveler though travelled in the Arabian Peninsula in the year 1174H (corresponding to the year 1761), during the first Saudi state, gave untrue account of the judiciary, as many judges were not related to Sheikh Mohammed Ibn Abdul Wahab family,

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(1) The Dutch orientalist Snouk Horgronje was one of the western travellers who wrote briefly about the judiciary during his travels in Saudi Arabia as was reported by the historian Hamad Al Jasser in his book 'Western Travellers in our Country', pp. 139 – 140.

(2) A Journey to Riyadh, Louis Belly, p. 65 – this has been extracted from the Cultural Aspects in the Writings of Travellers in the Arabian Peninsula in Modern Age, study and Analysis, Ahmed Al Saleem, p. 441.

including judge Hamad bin Muammar (1160 – 1225H) (corresponding to 1747 - 1810), judge Abdul Aziz Al Huzzain (1154 – 1237H) (corresponding to 1741- 1821), and others as well<sup>(1)</sup>.

- 2) The American traveler Cheesman, who visited the Kingdom in the year 1341H (corresponding to the year 1923), said in his book 'Arabian Peninsula – the Unknown' that 'the judiciary's rulings under Wahhabi were restricted to matters relating to: blood money, murder, flogging until death, and these punishments fit the community brutal, unlike civilized society'<sup>(2)</sup>. He gave a false and untrue account of the judiciary! By the same token, an Arab can similarly produce a biased writing about Western courts by saying for example, 'the US state courts system is concerned with collection of taxes and the killing of human beings?', on the basis that some American courts issued sentences of death and fine in exchange for some felonies: would this be an objective judgment? Of course not, and so we would criticize the account of Chesman. The blood money and murder do constitute only a small fraction compared to the other issues, and Islam (or Wahhabism) has no provision for flogging until death! In addition to that, the rulings for death and blood money are justified legally, and with reason.
- 3) The Belgian explorer Philip Leibniz, who came to the Kingdom in the year 1371H (corresponding to

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(1) Judiciary in the Kingdom of Saudi Arabia, the Ministry of Justice, pp. 61 – 63.

(2) Arabian Peninsula – the Unknown, Chessman, pp. 256 – 257, this has been extracted from the Cultural Aspects in the Writings of Travellers in the Arabian Peninsula in Modern Age: Study and Analysis, Ahmed Al Saleem.

1951), just about two years before the death of King Abdul Aziz, claimed that the source of Wahhabi law is tribal custom<sup>(1)</sup>. This is merely over-simplification, and Sheikh Mohammed Ibn Abdul Wahab Allah, may Allah's mercy be upon him, to whom, and his disciples that the traveler refer, and do not recognize at all types of adjudication prevailing among Bedouin people, to the extent considering it, in its entirety, contrary to Sharia principles, which is the only source they adhere to. These three accounts reported by the travelers and others did not tell truth, and failed to give a true and accurate account of the Saudi judicial experience in its early stage.

The objectives of the presentation of these accounts is to show the distortion of some travelers and foreign orientalists of the experience of the judiciary in the Kingdom, and to emphasize the need to document the Saudi experience from within starting from the third Saudi state [i.e. the contemporary state] up to the present day. In addition, we want to emphasize and encourage the importance of unbiased reading by Westerners, so they would not fall victim to distortion.

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(1) Cultural Aspects in the Writings of Travellers in the Arabian Peninsula in Modern Age, Study and Analysis, Ahmed Al Saleem, pp. 441 – 443, and see An exploring Journey, Philip Leibniz, p. 91, translated from French; it seems that the traveller is of French origin or may later acquire French nationality, as some described him as French. See an article in Riyadh paper <http://www.alriyadh.com/692067> under the title a review of the book 'An exploring Journey in the Mid of the Arabian Peninsula' written by the Belgian Philip Leibniz, Hamoud Al Ofaisan.



### **The Establishment of the Judiciary at the Beginning of the Modern Saudi State (After Opening of Riyadh, and before the Unification of the Kingdom)**

As documented by historians, the beginning of the third Saudi State - the modern state - by its Founder King Abdul Aziz bin Abdurrahman Al Saud began by entering Riyadh in the fifth of Shawwal 1319H (corresponding to January 15, 1902). In that period starting from 1319H (corresponding to 1902) up to unification of the Kingdom, the judiciary in Najd followed the traditions during the reign of the first and second Saudi States. One of the most prominent features of that period was the reliance on the Hanbali School, ease of judicial procedure and simplicity. The judges were to meet people at home and in the market and might invite them to meeting in Riyadh to discuss some of the general affairs when presented to them. Nomination of a person to hold a judge office would take place when they attended lessons in mosques and studying the books of Al-Hanbali fiqh [i.e. jurisprudence]. At the same time there was a need for judges even if they could not finish that study. These cases considered during that time:

- 1) In cases relating to public rights such as gross indecency, for example, the Emir would refer the case to the judge, and the judge would hear from disputants, and then would judge and eventually the Emir would execute.
- 2) In cases relating to private rights, this may take the form of:
  - a) If the dispute relate to a real estate, it was likely be

referred from the Emir to the judge who would issue a ruling, and often would please the two parties. In rare cases, the aggrieved party would seek re-consideration from King Abdul Aziz. The King would again refer it to a senior judge for reconsideration – that was a kind of early form of appeal.

- b) If the dispute relate to a simple matter such as selling food, clothes or animals, and so on, disputants willingly would go directly to the judge, at any time where the judge might be found and at any time during day, without being referred by Emir, then the judge would adjudicate the matter<sup>(1)</sup> - that what might be called in modern terms ‘expedient justice’.

### **The Evolution of the Judiciary after the Unification of the Kingdom up to the year 1428H (corresponding to 2007)**

#### **The Sequence of Issuance of Procedural and Administrative Laws:**

The first law organizing the work of courts was issued on 09/05/1344H (corresponding to 19/03/1926) a few years before the unification of the Kingdom of Saudi Arabia which was called the Temporary Reform Articles for Sharia Courts and composed of fifteen articles and included a number of judicial procedure such as restricting the scope of lawsuits, the number of times of judicial inspection, the date of the hearing and the number of judges allowed to sit on each court and the like. The Conditions and Structure of Sharia

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(1) See the History of the Kingdom of Saudi Arabia, Dr. Abdulla Al Othaimain, 2/309 – 311. On the judiciary in Najd following the stability of the Hanbali Doctrine, see the memories of Hamad Al Jasser 1/ 514 -515.

Courts Law was issued on 21/02/1346H (corresponding to 20/08/1927) which was the first administrative law in Hejaz, superseding the Ottoman ordinances and establishing a number of courts in Mecca, Medina, Jeddah and others. It also established a court for expedient matters (to consider some misdemeanors and punishments and some *Hudud*, and financial claims not exceeding thirty pounds), a Major Sharia Court (to consider all lawsuits outside the jurisdiction of the expedient matters court, including property). In the Major Sharia Court, the lawsuits were heard by a single judge, and then rulings were to be issued, unanimously or by majority, by the entire members of the Court. The Major Sharia Court was cancelled later; however, major offences such as murder were heard and determined by the full members of the Court – this tradition is prevalent up to this day. Matters relating to damage to property were used to be considered by only three judges. On 29/02/1350H (corresponding 16/07/1931) the Sharia Trials Procedure Law was issued to be used as a basis for court proceedings and operation and composed of thirty six sections. It provided for a process for filing complaints, a process for determining sessions and summons of parties, hearing of lawsuits and organizing submittal of evidence and the like. The same law was re-enacted after making amendments and additions in the year 1355H (corresponding to 1936) as the Pleading Law in one hundred and forty-two sections which included further details and procedures. In the year 1357H (corresponding to 1938) the Concentration

of the Responsibilities of the Judiciary Law was issued in two hundred eighty two sections, and was meant to specify the powers of the judiciary and make their tasks clear. The two laws were re-enacted on 24/01/1372H (corresponding to 14/10/1952), with some amendments and additions, under the names The Concentration of the Responsibilities of the Sharia Judiciary Law in two hundred and fifty eight sections, and The Regulation of Administrative Work in Sharia Circuits in ninety six sections. The Concentration of the Responsibilities of the Sharia Judiciary Law determined the different judicial institutions, the jurisdictions, operation, appointment of a single judge or more in each court etc. The Regulation of Administrative Work in Sharia Circuits regulated the administrative work and pleading. With the issuance of these two laws, the operation of courts was stabilized. Then around 14/07/1395H (corresponding to 23/07/1975) the Judiciary Law was issued to regulate the general framework of the judiciary in the Kingdom, the rights and duties of judges and establishing the Ministry of Justice and its functions – that law was the foundation in laying down the organization of the judiciary and operation of courts. On 14/05/1421H (corresponding to 08/15/2000) the Sharia Pleading Law was issued comprising two hundred sixty-six sections and provided for a procedure for litigation, strengthening the pleading procedure in force in the Kingdom since its inception, pointed out the local jurisdiction and conflict of law, the manner of filing lawsuits; it canceled the Regulation

of Administrative Work in Sharia Circuits and as well some sections of the Concentration of the Responsibilities of the Sharia Judiciary Law. On 14/07/1422H (corresponding to 02/10/2001) the Criminal Procedure Law was issued comprising two hundred and twenty five sections providing for investigation, trial and ways to contest penal rulings, maintaining the sanctity of the people and their homes and offices and vehicles, protecting the media and prohibiting censorship except for compelling reasons.<sup>(1)</sup>

### **The Hierarchy of Courts:**

After a month and a half from the unification of the Kingdom, a judiciary presidency was established in the Western Region in Mecca on 24/07/1344H (corresponding to 07/02/1926), to oversee the judiciary of Hejaz courts and adjacent districts. With respect to Najd and its adjacent areas, single judges were appointed in big cities to determine all types of cases brought before them. On 21/02/1346H (corresponding to 20/08/1927) a court for expedient matters was formed together with a Major Sharia Court. In the year 1375H (corresponding to 1955) two presidencies of the judiciary were established:

- 1) Presidency of the Judiciary in the Western Region with authority over the Northern Province and the regions of Aseer and Jizan; it included an appeal body supervising a group of courts and notaries.

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(1) See, the Judiciary in the Kingdom of Saudi Arabia, the Ministry of Justice, pp. 77, 80, 85, 86 and 89, and see, The Ministry of Justice, pp. 44-46, 98 – 101 and 102 – 104.

- 2) Presidency of the Judiciary in the Central Region with authority over the Eastern Province and Hail and adjacent areas taking responsibility for appeal matters and supervising a group of courts and notaries.

The presidencies mentioned above were consolidated in a presidency headquartered at Riyadh to become the only supervisory body of the judiciary - that was on 18/10/1379H (corresponding to 15/04/1960), and thus the Presidency of the Judiciary in the Western Region became a branch. In the year 1381H (corresponding to the year 1961) an independent cassation (appeal) court was formed to consider rulings of the courts in the capital Riyadh with a branch in Mecca. The Court of Cassation under the structure of the Presidency of the Judiciary consisted of three circuits: a penal circuit, a family circuit and third one for other matters. Following the formation of the Court of Cassation, litigation was based on three stages:

- 1) The Presidency of the Judiciary,
- 2) The Court of Cassation,
- 3) Other types of courts.

At late of 1389H (corresponding to 1970) a judicial body was formed under the name The Supreme Judicial Commission coincided with the operation of the Ministry of Justice in the year 1390 (corresponding to 1970) and this body was the nucleus of the foundation of the Supreme Judicial Council in the year 1395 (corresponding to 1975) under the Judiciary Law. The Supreme Judicial Council is formed of two committees: a permanent committee of five

members, and a general panel composed of the members of the [permanent committee]. The tasks of the Supreme Judicial Council are: to express an opinion on matters relating to the judiciary upon request of the Minister of Justice, setting judicial principles, and reviewing some of the major rulings such as murder. Section five of this Law provided for the structure of the following hierarchy of courts:

- 1) The Supreme Judicial Council,
- 2) The Court of Cassation,
- 3) General courts.
- 4) District Courts.

These last three courts are under the judicial supervision of the Supreme Judicial Council; however, administratively and financially are under the Ministry of Justice. Parties do not appear before the Court of Cassation, but it upholds or rejects rulings according to a specific mechanism, and the general courts consider real estate, title deeds, guardianship and other matters, and the district courts vary into four categories:

1. Expedient matters courts,
2. Family (marriage and bail) courts,
3. Juvenile courts,
4. Juvenile care centers courts.

Expedient matters courts hear and try misdemeanors cases, imprisonment, some *Hudud* cases, and financial claims not exceeding twenty thousand Saudi Riyals. The family (marriage and bail) courts determine matters relating to entitlements to social security, evidencing marriage

contracts, divorce and divorce ((of wife) for consideration payable by the wife). The juvenile courts hear and try cases of minors attaining seven years old not reaching eighteen in matters relating to misdemeanors, imprisonment and *Hudud* not involving damage. The juvenile care centers courts determine cases involving girls not attaining thirty years old. Then came the latest amendment under the new Judiciary Law dated 19/09/1428H (corresponding to 01/10/2007) restructuring anew the courts by creating the Supreme Court, courts of appeal, and new specialized courts.

### **The Doctrinal Hierarchy of the Judiciary:**

Article nine of the Temporary Reformist Articles for Sharia Courts issued on 05/09/1344H (corresponding to 19/03/1926) provided that ‘reliable books of the Four Schools shall be consulted in reviewing and adjudicating presented issues and cases’; thus this article of the Law decides the reference to guide judges in contemplating rulings - the Four Schools of Jurisprudence. By this, the state widened the scope of discretion to judges to benefit from the treasury of Islamic jurisprudence extending from the second century of Hijra (**corresponding to 8th Century**) until the fourteenth century of the Migration of the Prophet Mohammed (fourteenth century of Hijra) (corresponding to the twentieth century). The Saudi authorities *prima facie* did not interfere with the judiciary in Hejaz, Al Hasa, Al Qatif and Aseer which were governed, before the unification of the Kingdom, under Hanafi School



as a legacy of being part of the Ottoman Empire, however the situation gradually changed. Hejaz Region was a special case as judges in Mecca were used to be appointed by the Ottoman capital (Istanbul), and the judges used to apply principles of the Hanafi School. After independence of Hejaz under Sharief Ibn Ali, the chief judge remained adhered to the Hanafi School, however with judges applying the principles of the three other Schools. There was a Major Sharia Court, a court for expedient matters and a commercial court. After King Abdul Aziz united Hejaz Region with other regions of the country, he took into account the circumstances of that particular area, and have benefited from their experience in the formations of the courts, regulation of procedures, and kept the judiciary applying the four Schools of Islamic jurisprudence for two years. Following the establishment of the judiciary, it issued a resolution, ratified on 24/03/1347H (corresponding to 10/09/1928), requiring that judicial decisions in all courts to be in accordance with what decreed by the late Imam Ahmed Ibn Hanbal. The same resolution described the sources to which judges should refer, unless in cases of difficulty, where judges were permitted to refer to any of the other three jurisprudential Schools; these references include Sharia texts Muntaha Al Eradat and Kashaf Al Qinaa both authored by Imam Al Bahooti<sup>(1)</sup>. Thus it is important to emphasize that

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(1) See the History of the Kingdom of Saudi Arabia King Abdul Aziz Era, Dr. Abdulla Al Othaimain, 2/311 – 313. On the judiciary in the Kingdom of Saudi Arabia, The Ministry of Justice, p. 68, 77 and 80-82, An Overview of the Judiciary in Najd before stability of the reform, see the memories of Hamad Al Jasser 1 /507.

when Hanbali School was chosen as main source of making judicial rulings, the other three jurisprudential Schools were not abandoned or prohibited, nevertheless, judges were required to refer to them whenever such is appropriate; however, judges were still asked to provide reasoning and justification for excluding the Hanbali School principles and applying instead the principles of any of the other three Schools.

The courts' adherence to what decreed by the late Imam Ahmed Ibn Hanbal was an earlier codification of the substantive law in Saudi Arabia, a codification not limiting the jurisdiction of the judge whenever such is deemed appropriate. People may question why the Hanbali School was chosen as the main reference for making court rulings? The answer is: the Hanbali School and Hanbali scholars had their presence in the Arabian Peninsula since the tenth Hijri century, and that influence increase after the middle of the twelfth Hijri century; however, this does not mean that there is no scholars from other doctrines in Najd Region, as in Al Hasa District there are Hanafi, Maliki and Shafie scholars, but the intended signal is to the large number of Hanbali compared with others, in addition to ease of reviewing the books of Hanbali fiqh with the spread and the clarity of its expression, clarity of reasoning, and the fact that the doctrine was the last school of Islamic jurisprudence - it benefited from the other Schools. In addition, the Hanbali School is one of the richest schools, even in each single issue it may

have more than three discretions/ opinions, and the doctrine thus would widen the scope of discretion to the judge.

In the fifties of the last Hijri century (corresponding to the 1930s), there was a desire of the decision makers to mitigate the size of the differences between judges and narrowing the gap between their judgments, so scholars from Najd were invited to meet their counterparts from Hejaz's in Mina. After talks and discussions that lasted for three days, they decided to create a reference based on the Hanbali School along the lines of the 'Journal of Courts Rulings' laid down by the scholars on the tradition of Abu Hanifa during the era of the Turkish state, and Sheikh Ahmed Al Qari, chief of the major court of Mecca Court, was entrusted to prepare that journal, and then to be presented to the scholars for approval. It seemed that the working on the journal stopped because of the death of Sheikh Ahmed in 1359H (corresponding to 1940), then the task was assigned to the Supreme Court, and courts are still take Hanbali School as main reference which gives judges the discretion to consult and apply other jurisprudential doctrines whenever such is deemed appropriate<sup>(1)</sup>.

Based on the foregoing, we conclude that the beginning of the judiciary in the Kingdom of Saudi Arabia in terms of organization and procedure was modest as the cases with other states, however, the substantive rules, being based on the principles of Sharia, remain the same as they are valid

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(1) On the judiciary in Najd following the prevailing of the Hanabali School, see the memories of Hamad Al Jasser 1/ 518.

for each time and for each place. The rulings of the judges are based on jurisprudential discretion in accordance with the Sharia principles. The judiciary was not as depicted by some biased Western travellers as based on inheritance and tribal custom. The judiciary continues as it was before the unification of the Kingdom in terms of procedure, then many laws were promulgated and developed continuously. As well, the courts arrangements and jurisdictions were changed accordingly. And the Four Schools of Islamic jurisprudence continue to constitute the main reference for making laws and courts rulings, then this was restricted to the Hanbali School without prejudice to the other three Schools whenever judges deem applying the principles of either of the other three Schools such is appropriate.

## **Institutions of the Judiciary (The General Courts)**

**Dr. Mansour Alhaidary \***

### **Prelude:**

Judicial systems throughout the world take either of the two prominent regimes: the Unified Judicial System or the Dual Judicial System. Pursuant to the Unified Judicial System there is a single judicial regime in the state where all types of legal disputes will be tried and determined irrespective of the nature of the parties involved. On the other hand, under the Dual Judicial System there are specialized courts to try administrative disputes where the state is a party, and other structure of courts to try and determine other types of cases.

The Kingdom of Saudi Arabia has adopted the Dual Judicial System as the Board of Grievances considers the

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legal cases where the state is a party, while the general courts hear and try all other types of legal cases, save for certain types of disputes entrusted to other specialized committees and tribunals such as the Committee for Banking Disputes and the Committee for Resolution of Securities Disputes, the Customs Committee which is hoped to join the general courts regime soon as provided for under the Royal Decree No. M/78 dated 19/09/1428H (corresponding to 30/09 2007).

### **Structure of the General Courts Institutions:**

The judicial system of any state requires a number of laws dealing with the judicial affairs in a comprehensive and systematic manner. In Saudi Arabia, the advent of the Judiciary Law under the Royal Decree No. M/78 dated 19/09/2008 has commenced a new era in the Saudi legal system. The Judiciary Law distributes the jurisdictions and tasks between judicial authorities/ bodies irrespective of whether such jurisdictions relate to administrative matters, the judges, the judicial environment, or to the substantive aspects of the judicial process. Below is a brief account of the judicial institutions of the Saudi legal system.

### **First: The Supreme Judicial Council:**

The Judiciary Law details the jurisdictions of the Supreme Judicial Council (formerly, the Supreme Council of the Judiciary) which have been changed fundamentally. The changes were represented mainly in removal of the substantive aspects and maintaining the administrative aspects only. The

substantive judicial powers were transferred to the Supreme Court as the case in other countries. Under the new law, the Supreme Judicial Council has its own budget, a secretariat comprising a judge and meets at least bi-monthly to discuss all matters falling within its jurisdiction.

**Composition of the Supreme Judicial Council:** The Supreme Judicial Council is composed of a president, to be appointed by a royal order, the Supreme Court Chief as deputy, four full-time working judges of an appeal court chief grade level, the Under-Secretary of the Ministry of Justice, the Head of the Bureau of Investigation and Public Prosecution and three members holding the same qualification of an appeal judge.

**Jurisdictions of the Supreme Judicial Council:** The jurisdictions of the Supreme Judicial Council may be categorized as follow:

**Administrative Jurisdictions: These include the following:**

**Responsibility for the Employment and Services of Judges:** This responsibility includes the following:

- The stage of pre-joining the Judiciary: nomination of candidates, conducting interviews, selection process pursuant to the rules relating to selection of judges and law clerks, preparation of tests for those who hold degrees equivalent to Sharia schools degrees.<sup>(1)</sup>
- Responsibility for the affairs of incumbent judges with

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(1) The Judiciary Law, section 6 section 31.

respect to promotion, disciplinary actions, secondment, training, transfer from one court to another, granting all types of vacations, allowing a judge to reside in a place other than his place of work, arrest or release when caught involved in offences, termination of service when required etc.

- 1) **Formation of the Judicial Inspection Department:** The Supreme Judicial Council shall form a department for judicial inspection and appoint its members from the appeal judges, first instance courts' judges. This department shall be responsible for judges' professional performance and for investigating complaints from or against judges in connection with discharging their responsibilities and functions, and as well the said department assumes the role of prosecutor in matters relating to disciplinary actions against judges.<sup>(1)</sup>
- 2) **Formation of circuits for disciplinary actions against judges:** The Supreme Judicial Council shall be responsible for forming a circuit from its own members for considering disciplinary actions against judges in relation to any violations they commit pursuant to a specific procedure.<sup>(2)</sup>
- 3) **Formation of courts:** The Supreme Judicial Council shall be responsible for forming courts provided for under the Judiciary Law; these are: the general courts, the criminal courts, the family courts, the commercial

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(1) Ibid, section 55 and section 60.

(2) Ibid, section 59.



courts and the labor courts.<sup>(1)</sup> The Supreme Judicial Council may also form specialized courts after obtaining the consent of the King.<sup>(2)</sup>

- 4) **Merger of courts:** The Supreme Judicial Council may merge some types of courts with another whenever such merger is required.<sup>(3)</sup>
- 5) **Cancellation of courts:** The Supreme Judicial Council shall have jurisdiction to cancel courts whenever there are reasons requiring that cancellation.<sup>(4)</sup>
- 6) **Determining venue and value jurisdictions of courts:** Although this jurisdiction has been detailed in the Regulations of Procedure before Sharia Courts; nevertheless the Supreme Judicial Council, when forming new courts under the Judiciary Law, may determine the venue and value jurisdictions in a manner not violating other laws.<sup>(5)</sup>
- 7) **Formation of specialized circuits within courts:** As some places within the Kingdom of Saudi Arabia may not require the existence of specialized circuits, in this case the Supreme Judicial Council may form specialized circuits within the general courts structure to include, for example, criminal circuits, family circuits, labor circuits and commercial circuits.<sup>(6)</sup>

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(1) Ibid, section 6/.

(2) Ibid, section 9.

(3) Ibid, section 6/.

(4) Ibid, section 6/.

(5) Ibid, section 6/.

(6) Ibid, section 6/.

**8) Appointment of courts' chiefs and their assistants:**

The Supreme Judicial Council shall have the jurisdiction to appoint appeal courts chiefs and their assistants provided that the appointees are among appeal courts' judges, and as well, the Supreme Judicial Council also appoints first instance courts' chiefs and their assistants.<sup>(1)</sup>

**9) Nomination of the members of the Supreme Court:**

The Supreme Judicial Council shall have the jurisdiction to nominate members of the Appeal Court and submit names to the King.<sup>(2)</sup>

**10) Nomination of the Supreme Court Circuits Chiefs:**

The Supreme Judicial Council shall have the jurisdiction to appoint chiefs of the circuits of the Supreme Court such as the criminal circuits' chiefs, the family circuits' chiefs, the labor circuits' chiefs and the commercial circuits' chiefs based on the recommendation of the Supreme Court Chief.<sup>(3)</sup>

**11) Determining the number of judges to sit on general courts and family courts:**

The Supreme Judicial Council shall have the jurisdiction to determine whether the circuits of the general courts such as the enforcement circuits, the traffic circuits, the family circuits, the commercial circuits or the labor courts to be composed of a single judge or three judges.<sup>(4)</sup>

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(1) Ibid, section 6/.

(2) Ibid, section 10/ 3.

(3) Ibid, section 10/ 5.

(4) Ibid, sections, 19, 20, 21, and 22.

**12) Determining the cases to be tried by a single judge in criminal cases and with respect to general courts:**

Criminal cases in specialized circuits are usually heard and tried by three judges, and as well general courts try and hear some cases by more than one judge except with respect to minor cases which may be heard and tried by a single judge; thus the Supreme Judicial Council will determine which criminal cases to be heard and tried by a single judge and the cases to be heard and tried by a single judge within the hierarchy of the general courts.<sup>(1)</sup>

**13) Permitting courts to try cases outside courts' premises:**

As a general rule, cases are considered inside courts' premises except for cases where the facts require visiting the dispute place; however, the Supreme Judicial Council may decide to allow courts to consider cases outside their premises.<sup>(2)</sup>

**14) Formation of a circuit or more circuits to consider Haj and Omrah cases:**

given the huge number of Haj pilgrims and visitors during Omrah and the expeditious nature of their cases, the Supreme Judicial Council may set up circuit/s, when the need arises, to consider cases relating to Haj pilgrims and Omrah visitors in Mecca.<sup>(3)</sup>

**15) Resolving conflicts of jurisdictions and conflict of rulings:**

The Supreme Judicial Council may form a

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(1) Ibid, sections 19 and 20.

(2) Ibid, section 26.

(3) Ibid, section 26 /2.

committee to resolve matters relating to conflicts of jurisdictions and shall be composed of a member of the Supreme Court, a member of the Board of Grievances or from the other body/ authority entrusted to resolve the matter, a member of the Supreme Judicial Council (as chairperson of the committee) to resolve the conflict. Likewise, such committee will also determine the manner to enforce conflicting rulings issued from two different authorities.<sup>(1)</sup>

**16) Agreement to transfer some of the jurisdictions of notaries:** The Minister of Justice may assign to authorities/ bodies/ persons other than notaries certification of contracts and acknowledgments after obtaining the approval of the Supreme Judicial Council of the relevant regulations issued by the Minister of Justice.<sup>(2)</sup>

**17) Permission to publish judicial rulings:** The Research Centre of the Ministry of Justice assumes responsibility for publishing selected courts' decisions after obtaining the approval of the Supreme Judicial Council.<sup>(3)</sup>

**Organizational Jurisdictions: These include the following:**

**1) Issuing the regulations relating to the operation of the Supreme Judicial Council:** The Judiciary Law provides that the Supreme Judicial Council shall issue

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(1) Ibid, section 27.

(2) Ibid, section 79.

(3) Ibid, section 71/ 3.

- the regulations organizing its operation/ business.<sup>(1)</sup>
- 2) **Issuing regulations organizing the circuits considering Haj pilgrims and Omrah visitors' cases:** The need for forming special circuits to consider Haj pilgrims and Omrah visitors require issuing special regulations to regulate the process of forming such circuits, selection of judges and determining value and venue jurisdictions.<sup>(2)</sup>
  - 3) **Issuing regulations relating to judges service affairs:** These regulations relate to responsibility for the affairs of incumbent judges with respect to promotion, disciplinary actions, secondment, training, transfer from one court to another, allowing all types of vacations, allowing a judge to reside in a place other than his place of work, arrest or release judges caught involved in offences, termination of service when required.<sup>(3)</sup>
  - 4) **Issuing regulations relating to the inspection of the judiciary:** This requires guaranteeing quality of the performance of the judiciary with continuous inspection and evaluation of judges' performance and determining each judge competence and ability to continue assuming their office.<sup>(4)</sup>
  - 5) **Issuing rules regulating jurisdictions of courts' chiefs, their assistants and powers:** these rules are supposed to state the powers of courts chiefs, their assistants and powers with respect to running courts.<sup>(5)</sup>

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(1) Ibid, section 8/4.

(2) Ibid, section 26/ 2.

(3) Ibid, section 6/b.

(4) Ibid, section 6/c.

(5) Ibid, section 6/.

- 6) **Issuing regulations relating to selection of judges:**  
These regulations must regulate substantive and procedural aspects for selecting judges.<sup>(1)</sup>
- 7) **Issuing regulations regulating judges' leave for study:**  
These regulations will organize judges' taking leave for study purposes whether for study at the Higher Judicial Institute or at any other law school inside or outside the Kingdom of Saudi Arabia.<sup>(2)</sup>
- 8) **Regulating the business/ operation of law clerks:** a law clerk is the first career step in the hierarchy of the judiciary which is a training period for two years during which the law clerk will be tested to ensure his capability to continue his career in the judiciary otherwise he will be dismissed by a resolution of the Supreme Judicial Council. These regulations also deal with training of the law clerk during the probation period which is often through assisting senior judges to benefit from their experience and to practice under their supervision.<sup>(3)</sup>
- 9) **Identifying works/ functions similar to judging:** because of the crucial need to appoint judges, it is possible to transfer personnel from institutions/ associations similar to judging to the judiciary; then the Supreme Judicial Council shall have jurisdictions to identify and determine these types of institutions/ associations.<sup>(4)</sup>

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(1) Ibid, section 6/.

(2) Ibid, 6/.

(3) Ibid, section 6/.

(4) Ibid, section 6/.

- 10) Issuing regulations relating to support staff:** The Supreme Judicial Council participates in preparing regulations setting out the rules and procedures pertaining to the tasks of the support staff. i.e. clerks, notes-takers, registers-recorders, researchers, translators, experts, secretaries etc.<sup>(1)</sup>

**Supervisory and Developmental Jurisdictions: These include the following:**

- 1) Supervising performance of judges and operation of courts:** this comes in line with the jurisdictions of the Supreme Judicial Council and the regulations and rules it issues and in accordance with the provisions of the other laws relating to the judiciary.<sup>(2)</sup>
- 2) Submittal of recommendations:** The Supreme Judicial Council shall be responsible for submitting its recommendations made in relation to its jurisdictions to the competent authorities.<sup>(3)</sup>
- 3) Preparation of the annual report:** The Supreme Judicial Council shall prepare a comprehensive annual report at the end of each year stating the achievements and obstacles and its recommendations and submit the same to the King.<sup>(4)</sup>

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(1) Ibid, section 81.

(2) Ibid, section 6/.

(3) Ibid, section 6/.

(4) Ibid, section 6/.

## Second: The Supreme Court:

The Supreme Court is the highest court in the hierarchy of general courts in Saudi Arabia where all cases determined by the first instance courts and appeal courts may be brought before it for appeal, and its decisions and rulings in that respect shall be final and conclusive.<sup>(1)</sup>

Formation of the Supreme Court: the Supreme Court shall be composed of a chief in the grade level of a minister to be appointed and dismissed by a royal order, and an adequate number of the grade level of appeal court chief.<sup>(2)</sup> Specialized circuits shall be formed within the Supreme Court as required to be composed of three judges save for the penal circuits trying major offences which shall be composed of five judges.<sup>(3)</sup>

Jurisdictions of the Supreme Court: The jurisdiction of the Supreme Court may be classified with respect to the specialized circuits or the general jurisdiction as follow:

- 1) **Ensuring that the rulings and laws are compliant with Sharia principles:** this relates to the jurisdiction of the general courts as follow:
  - Review of rulings and decisions concerning major punishments issued by appeal courts, either by upholding or overruling them<sup>(4)</sup>.

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(1) The Regulations of Procedure before Sharia Courts, section 198.

(2) Ibid, section 10 /3.

(3) Ibid, section 10 /4.

(4) Ibid, section 11 /1



- Review of the rulings and decisions issued or upheld by the appeal courts in matters not relating to major punishments by upholding or overruling them without considering the facts relating to such cases if the appeal relates to any of the following:
  - Contravening the principles of Sharia or laws issued by competent authorities;
  - Rulings issued by courts not properly formed;
  - Rulings issued by incompetent court or circuit;
  - Mistakes in framing facts or giving them improper descriptions.<sup>(1)</sup>
- 2) **Consider matters which the Law provides to be considered by the general panel, these are:**
- Change of previous judicial principle/ rule whether the suggestion for change brought by an appeal court or a circuit from within the Supreme Court.<sup>(2)</sup>
  - Determining the general principles in matters relating to the judiciary. This is one of the most important issues relating to the *general panel* of the Supreme Court. Proper implementation of this jurisdiction will make rulings more uniform and more predictable. The *general panel* is composed of the chief of the Supreme Court and all members.<sup>(3)</sup>
  - To consider issues that any law provides to be considered by the *general panel*.<sup>(4)</sup>

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(1) Ibid, section 11 /2.

(2) Ibid, section 14.

(3) Ibid, section 13/ 2/a

(4) Ibid, section 13 /2/b.

- 3) **Consider any applications for re-consideration:** this concerns applications for rulings already upheld by the Supreme Court.<sup>(1)</sup>
- 4) **Determining matters regarding title deeds in Mina and other Holy Places:** As no title deed is permitted to be issued in these holy places, so if a dispute arises and a party produces a title deed, the matter must be decided/considered by the Supreme Court.<sup>(2)</sup>
- 5) **Perform the function/ task of the ‘Permanent Committee of the Supreme Judicial Council’:** This concerns the transitional period of implementing new laws, these tasks include:
  - To consider re-trial of a dispute after being called off for the second time because of absence of the claimant.
  - Determine conflicts pertaining to venue jurisdictions between courts.
  - Determine conflicts pertaining to venue jurisdictions between courts in criminal cases.<sup>(3)</sup>

### **Third: The Appeal Courts:**

The appeal courts are the second in the hierarchy of the general courts where appeals against rulings of the first instance courts will be brought before them, whether brought before them willingly by the aggrieved party in some cases, or mandatorily even in case that the aggrieved party accepted the ruling, and its rulings are subject to overruling by the

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(1) The Regulations of Procedure before Sharia Courts, section 202.

(2) The Regulations of Procedure before Sharia Courts, section 235.

(3) The implementation mechanism for the Judiciary Law, Part one/second/2.

Supreme Court pursuant to certain procedure set forth in the Regulations of Procedure before Sharia Courts<sup>(1)</sup> and the Criminal Procedure Regulations<sup>(2)</sup>.

**Formation of the Appeal Courts:** Each province / district in the Kingdom of Saudi Arabia shall have an appeal court or more than one if the need requires, exercising its duties through specialized circuits and each circuit shall be composed of three judges except criminal circuits, considering serious offences, which shall be composed of five judges. Needless to say, each judge shall hold a grade level of an appeal judge. It is permitted to establish specialized appeal circuits in provinces adjacent to administrative areas.<sup>(3)</sup>

**Circuits of the Appeal Courts:** to achieve judicial specialization, the Judiciary Law creates quantitative specialized circuits as follow:

- **Law circuits:** these circuits consider rulings made by the general courts.<sup>(4)</sup>
- **Criminal circuits:** these circuits consider rulings of the criminal courts or of the criminal circuits within the general courts.<sup>(5)</sup>
- **Family circuits:** these circuits consider the rulings of the family courts or of the family circuits within the general courts.<sup>(6)</sup>

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(1) The Regulations of **Procedure** before **Sharia** Courts, section 293.

(2) The Criminal Procedure Regulations, section 192.

(3) The Judiciary Law, section 15/ 1.

(4) Ibid, section 16.

(5) Ibid, section 16.

(6) Ibid, section 16.

- **Labor circuits:** these circuits consider the rulings of the labor courts or of the labor circuits within the general courts.<sup>(1)</sup>

**Jurisdictions of the Appeal Courts:** The appeal courts consider the rulings made by the first instance courts in cases that are subject to appeal; considering rulings may take either of the two following approaches:

**First: examination of rulings:** this is the case where a party to an action applies for examining a ruling not in his favor without going for pleading unless the other party files for appeal, then the appeal court will reconsider and examine the respective ruling; this will result in one of the following three scenarios:

- 1) Upholding the ruling of the first instance court;
- 2) Instructing to fulfill the remarks of the ruling made by the first instance court;
- 3) Overruling the ruling, in part or in whole, and issuing a new ruling, and to the extent that the first instance court does rule for non-jurisdiction, the matter will be brought back to the first instance court for re-trial.<sup>(2)</sup>

The Supreme Judicial Council shall determine the rulings exclusively to be tried/ considered in this manner.<sup>(3)</sup>

**Second: Allowing pleading by the parties:** The appeal court may consider the appeal in the presence of disputants

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(1) Ibid, section 16.

(2) Ibid, section 17.

(3) The Regulations of Procedure before Sharia Courts, section 185/ 2.

and allow them to submit pleadings in cases where it deems that necessary. The appeal court will fix a date for appearance of the parties. It may uphold the ruling of the first instance court, or overrule the ruling, in part or in whole, and issue a new ruling, and to the extent that the first instance court does rule for non-jurisdiction, the matter will be brought back to the first instance court for re-trial.<sup>(1)</sup>

### **Types of Rulings Appealed against:**

Rulings subject to appeal may be categorized into three classes:

**First:** Rulings that must be examined: these are the types of rulings on cases that the first instance courts must submit to the appeal courts for examination even if the parties do not request that. These are the following cases:

- Rulings issued not in favor of those represented by guardians or trustees of endowments or those who claimed less amount, except rulings with respect to mortgage, borrowing, notarizing companies contracts/ agreements or increasing their capital or purchase of property to a minor – all these are not subject to mandatorily appeal unless the Supreme Judiciary Council decides otherwise.<sup>(2)</sup>
- Rulings issued not in favor of government organs or those who claimed less amount.<sup>(3)</sup>
- Rulings made in absentia.<sup>(4)</sup>

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(1) Ibid, section 185 /3.

(2) Ibid, section 185 /4.

(3) Ibid, section 185/ 4.

(4) Ibid, section 185/ 4.

**Second:** Rulings not subject to appeal: these are rulings in minor cases that are less important to be appealed against before the appeal courts, and these types of cases will be determined by the Supreme Judicial Council.<sup>(1)</sup>

**Third:** Rulings subject to appeal: these are rulings relating to cases not filed before appeal courts only upon request of the aggrieved party, so if such party is content of the ruling made not in his favor there will be no need to appeal against the ruling – this category includes rulings relating to cases not classified under the two previous categories.<sup>(2)</sup>

**Fourth:** first instance courts: the first instance courts are the first in the hierarchy of the Saudi courts structure, general and specialized, and any of the parties to an action may appeal against rulings issued by them.<sup>(3)</sup>

Formation of first instance courts: first instance courts shall be formed in districts, provinces, centers and its circuits shall be composed as follows:

**First:** general courts: general courts function through specialized courts as follows:

- **Enforcement circuits:** shall have the jurisdiction of judicial enforcement as provided for under the Enforcement Law whether enforcing judicial rulings or any other enforcement instruments.<sup>(4)</sup>
- **Circuits for one party unilateral transaction:** these concern matters falling outside the jurisdictions of

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(1) Ibid, section 185/ 1

(2) Ibid, section 185/ 1.

(3) Ibid, section 177.

(4) The Judiciary Law, section 19.

notaries and other courts.<sup>(1)</sup>

- **Circuits for resolving actions arising from road accidents and traffic violations:** these have the jurisdiction for resolving compensation matters resulting from death or damage to property. As well, these circuits resolve all violations provided for under the Traffic Law and its Implementing Regulations.<sup>(2)</sup>
- **Circuits for resolving disputes relating to real estates:** These circuits relate to disputes relating to ownership, rights attached to property, disputes relating to damage resulting from property or those who benefit from the property, eviction actions, actions regarding payment of rent, actions regarding prevention of trespass to possession, actions for reclaiming possessions. These circuits do not resolve matters relating to property transferred through inheritance as such fall under the jurisdiction of the family courts.<sup>(3)</sup>
- **Circuits for resolving all lawsuits:** these circuits are formed in districts where there are no specialized courts in such types of cases; they consider family matters cases, commercial actions, and labor disputes in districts where such types of specialized courts do not exist.<sup>(4)</sup>

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(1) Ibid, section 19.

(2) Ibid, section 19.

(3) The Regulations of Procedure before Sharia Courts, section 31/a

(4) Ibid, section 32.

- **All cases not falling under the jurisdiction of other specialized courts:** The general courts hear and try all cases not falling under the jurisdiction of other authorities/ bodies such as the Board of Grievances or specialized courts such as the criminal courts, the labor courts, the commercial courts and the family courts, or not falling under the jurisdictions of the specialized committees and tribunals such as the Committee for Banking Disputes and the Committee for Resolution of Securities Disputes, the Customs Committee.<sup>(1)</sup>

Each circuit of the general courts shall be composed of a single judge or three judges as determined by the Supreme Judicial Council.<sup>(2)</sup>

**Second:** Criminal courts: criminal courts function through specialized circuits as follow:

- **Circuits for resolving *Qasas* [i.e. punishment] and *Hudud* cases:** these circuits try cases where the claimant claim private/ personal right with respect to any punishment, *Had* for libel, or the cases where the claimant demand application of *Sharia Hudud*, namely, the offences of apostasy, drinking liquor, robbery and theft.<sup>(3)</sup>
- **Circuits for chastisement:** these circuits try criminal cases not falling under the category of *Qasas* and

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(1) Ibid, section 31.

(2) The Judiciary Law, section 19.

(3) Ibid, section 20.



*Hudud* referred to above.<sup>(1)</sup>

- **Circuits for juvenile cases:** these circuits try cases of the juvenile, males and females, who are under age; they have certain regulating procedure.<sup>(2)</sup>

Each circuit of the criminal courts shall be composed of three judges except the offences that the Supreme Judicial Council determines to be decided by a single judge as minor offences.

**Third:** Family courts: The court shall be composed of specialized circuits and each circuit shall be composed of a single judge or more as determined by the Supreme Judiciary Council<sup>(3)</sup>. Family courts may include specialized circuits as the needs may dictate; the jurisdictions include the following:

- Marital cases such as marriage, revoke of marriage, divorce, divorce ((of wife) for consideration payable by the wife), custody of children, maintenance, visit of children etc.;
- Certification of endowment, wills, prove of relationship, absence, death, determination of heirs;
- Inheritance, division of inheritance including property;
- Ascertaining appointment of guardians and trustees of endowments and permission to dispose of assets and dismissal of guardians;
- Ascertaining the attorney given by the dump who does

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(1) Ibid, section 20.

(2) Ibid, section 21.

(3) Ibid, section 21.

not know how to write and read;

- Marrying a female having no guardian or a female unfairly debarred from marriage by her family;
- Actions arising from other matters relating to family law<sup>(1)</sup>.

**Fourth:** Labor courts: The labor courts shall be composed of one circuit or more as the circumstances require, and each circuit shall be composed of a single judge or more as determined by the Supreme Judiciary Council; the jurisdictions include:

- Disputes relating to contracts of employment, wages, rights, work injuries and compensation;
- Disputes relating to employers' inflicting disciplinary penalties on employees, or relating to waive/ not to inflict such penalties;
- Disputes relating to inflicting penalties provided for under the Labor Law;
- Disputes relating to dismissal from work;
- Complaints filed by employers and employees whose objections against decisions made by the organs of General Organization of Social Insurance with respect to registrations, subscriptions or compensation;
- Disputes relating to employees subject to the provisions of the Labor Law including Government employees.
- Disputes arising under implementation of the Labor Law and social Insurance Law without prejudice to the

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(1) The Regulations of Procedure before Sharia Courts, section 33.

jurisdictions of the courts and the Board of Grievances.<sup>(1)</sup>

**Fifth:** Commercial courts: The court shall be composed of specialized circuits and each circuit shall be composed of a single judge or more as determined by the Supreme Judiciary Council; the jurisdictions include:

- All commercial disputes between merchants whether original or incidental;
- Actions against the merchant because of his main activity or secondary activity;
- Disputes between partners/ shareholders in companies;
- All disputes and violations relating to commercial laws without prejudice to the jurisdiction of the Board of Grievances;
- Disputes relating to bankruptcy and placing under guardianship and eliminating placing under guardianship;
- Other commercial disputes.

It is permitted to form specialized circuits whether criminal, family matter, labor or commercial within the general courts hierarchy in districts, provinces or centers where no specialized courts were formed.

Based on the forgoing, it is obvious that the Kingdom of Saudi Arabia has adopted the Dual Judicial System which itself is divided into two structures, namely, general courts and administrative courts. And the general courts are composed of three classes: first instance courts, appeal courts and the Supreme Court each class with certain

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(1) Ibid, section 34.

jurisdictions. The jurisdictions of the general courts include: resolving real estate disputes, criminal courts, labor courts, commercial courts, family courts, enforcement courts, and any disputes not falling under specific jurisdiction, will fall under the general courts' jurisdiction.

## **Administrative Law Courts**

**Dr. Abdurrahman Al Rais \***

### **Prelude:**

Administrative Law Courts are considered as a source of making administrative law rules. Administrative Law Courts are not only courts for applying law, but also for making it. Administrative Law Courts are required to lay down rules for better solutions for resolving disputes that arise between the administration [i.e. the state/ government] on the one hand, and individuals or institutions/ organizations on the other. Even in case of absence of Sharia or legal provisions for resolving the underlying disputes, said courts are required to make law. Hence, when a judge of an Administrative Law Court finds no provision to apply to the facts brought before him, he must exert discretion and lay down the rules for resolving the dispute, taking into consideration striking a

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balance between public interest and private interest.<sup>(1)</sup>

Most of administrative law jurists agree that Administrative Law Courts are a source for creating binding legal rules, as administrative law judges work to lay down the general legal rules that bind the government/ state.<sup>(2)</sup>

Because of that importance, the Kingdom of Saudi Arabia has adopted the dual judicial system, and as a result divides the judiciary into two systems: the general courts structure and the administrative law courts structure. No doubt, this system achieves many benefits including specialization as Administrative Law Courts have the jurisdiction to resolve disputes in which the government/ state is a party<sup>(3)</sup>, hence the Board of Grievances Law was promulgated by the Royal Decree (M/78) dated 19/09/1428H (corresponding to 30/09/2007) which provides in section one the venue jurisdiction of the Board of Grievances, its administrative structure and location stating that, 'The Board of Grievances is an independent administrative law courts system directly responsible to the King with its headquarter located in Riyadh.' The phrase 'independent administrative law courts system' means that the courts/ circuits of the Board of Grievances shall have the jurisdiction to resolve disputes in which the government/ state [i.e. as administration body and

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(1) See Dr. Jabber Saeed Hassan Hamoud, *Administrative Law in the Kingdom of Saudi Arabia*, Dar Al Muaid, impression 1, 2000, p. 44 – 45.

(2) Ibid, p. 45.

(3) See Dr. Hani Ibn Ali Al Tahrawi, *Administrative Law Courts in Saudi Arabia 'Reasons for Cancellation'* Law Office of Kateb Ibn Fahad Al Shamari, impression 1, 2012, p. 12.

not as sovereign governing power] is a party to the dispute, because the acts of the government/ state taken as governing power are considered sovereign acts not subject to review as stressed in section fourteen of the Board of Grievances Law providing that, ‘Courts of the Board of Grievances are not permitted to consider disputes relating to sovereign acts’.

The judges of the Board of Grievances enjoy, like other judges, a number of safeguards represented in their independence, not influenced by any other authority other than adherence to the principles of Sharia and legal rules in making their rulings, not subject to removal only in cases specified by law, may not be transferred to other jobs only upon their consent or because of promotion, not subject to be sued with respect to performing their responsibilities only in accordance with the conditions and rules relating to disciplinary actions taken against them.<sup>(1)</sup>

The Saudi legal system has shown interest in regulating the sources from which judges of Administrative Law Courts may derive legal rule/s to apply to the facts under consideration based on the principles of Sharia and all relevant laws and regulations in reliance on Policy based on Sharia. To that effect, article forty eight of the Basic Governance Law promulgated by the Royal Order No. (a/90) dated 27/08/1412H provides that, ‘The courts shall apply to cases before them the provisions of Islamic Shari‘ah, as indicated

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(1) See section (1 – 4) of the Judiciary Law promulgated by the Royal Decree No. (M/78) dated 19/09/1428H (corresponding to ...) as section one of the Board of Grievance Law refer to these sections.

by the Qur'an and the Sunnah, and whatever laws not in conflict with the Qur'an and the Sunnah which the authorities may promulgate. As well, section one of The Regulations of Procedure before the Board of Grievances promulgated by the Royal Decree No (M/3) dated 22/01/1435H (corresponding to 25/11/2013) confirms that principle as follows, 'The courts of the Board of Grievances shall apply to cases before them the provisions of Islamic Shari'ah, as indicated by the Qur'an and the Sunnah, and whatever laws not in conflict with the Qur'an and the Sunnah'. To activate that principle, the Board of Grievances Law has created a second appellate stage represented in the Supreme Administrative Court having the jurisdiction for considering appeals against rulings made by the administrative appeal courts in instances that the respective rulings contravene the principles of Sharia or the laws not in conflict with Sharia principles<sup>(1)</sup>.

### **Administrative Law Courts Council:**

#### **Formation of the Council:**

The Saudi legal system has paid much attention to administrative, organizational and developmental aspects of the administrative courts in Saudi Arabia by establishing a council called the Administrative Law Courts Council. This Council is concerned with the development and improvement aspects and operates under the chairmanship of the President of the Board of Grievances and the membership of: the Chief

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(1) The Board of Grievances Law, section (11).



of the Supreme Administrative Court, the senior deputies to the President of the Board of Grievances and four members of the grade level of appeal judges to be appointed by a royal order.<sup>(1)</sup>

### **The Jurisdictions of the Administrative Law Courts Council:**

The Administrative Law Courts Council has numerous administrative, organizational and developmental responsibilities / jurisdictions that can be clarified as follow <sup>(2)</sup>:

**First: Administrative jurisdictions:** The Administrative Law Courts Council have the jurisdiction to consider employment matters of judges such as appointment, promotion, secondment, training, enjoying vacations, termination of service etc., and to supervise courts, the judges and their performance, the creation of specialized courts after obtaining the consent of the King. The Council is also responsible for the three courts of the Board, namely, The Supreme Administrative Court, the administrative appeal courts and the administrative courts.

**Second: Organizational jurisdictions:** The Administrative Law Courts Council shall take responsibility for issuing regulations relating to the judges employment affairs, judicial inspection, enacting laws regulating the

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(1) The Board of Grievances Law, section (4).

(2) See section (6) of the Judiciary Law refers to section (5) of The Board of Grievances Law and section (8) of the Board of Grievances Law.

jurisdictions of courts' chiefs, their assistants and powers besides issuing rules explaining the methods for selection of judges, procedure and controls for granting judges leaves for post graduate studies, determining the judicial functions/works qualifying for occupying judicial posts and finally regulating the works of law clerks.

**Third: Developmental jurisdictions:** The Administrative Law Courts Council submits to the King its recommendations with respect to its jurisdictions in order to develop work within the Saudi administrative courts structure.

### **Convention of the Administrative Law Courts Council and issuance of resolutions:**

The Administrative Law Courts Council convenes under the chairmanship of its President at least once every month, and convention shall not be valid unless on presence of at least five members and resolutions shall be passed by the majority of the members of the Council <sup>(1)</sup> as the case with other councils because sometimes it is difficult and impossible to convene meetings.

### **The Supreme Administrative Court:**

#### **Formation of the Supreme Administrative Court:**

The Supreme Administrative Court shall be composed of a president and sufficient numbers of judges of the grade

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(1) The Board of Grievances Law, section (6).

level of appeal court chief. The location shall be in Riyadh and will operate through specialized circuits each consisting of three judges. The Supreme Administrative Court Chief shall be appointed by a royal order of the rank of the level of a minister, and his service may be terminated by a royal order and shall possess the prerequisites required for holding the position of an appeal court chief. During his absence, the most senior judge may act as deputy to the President. Members of the Supreme Administrative Court shall be appointed by a royal order upon recommendation of the Administrative Law Courts Council.

The structure of the Supreme Administrative Court includes a general panel presided over by the President of the Supreme Administrative Court and the membership of all judges and the most senior judge acts as deputy to the President of the Supreme Administrative Court. The general panel shall convene in the presence of its President or his deputy and meetings shall be valid if attended at least by two thirds of its members including the President or his deputy and its resolutions shall be passed by majority vote.

### **Jurisdictions of the Supreme Administrative Court:**

The Supreme Administrative Court represents the highest judicial authority/ body of the courts of the Board of Grievances, and it is considered a second-tier appeal court second to the administrative appeal courts. The jurisdictions of the Supreme Administrative Court with respect to the specialized circuits or the general panel as follows:

- 1) Determination of judicial principles: if a circuit of the

Supreme Administrative Court considers to overrule a rule decided in an earlier ruling issued by the same circuit or any other circuit, the said circuit must submit its finding to the President of the Supreme Administrative Court who would refer it to the general panel of the Supreme Administrative Court to determine it.

- 2) To consider appeals against rulings made by administrative appeal courts if the basis of appeal:
  - a) Contravenes the principles of Sharia or laws not in conflict with Sharia or mistakes in interpretation or application of law/ legal rules including breach of a judicial principle made in a ruling of the Supreme Administrative Court;
  - b) Issued by incompetent court;
  - c) Issued by a court not properly formed according to law;
  - d) Mistakes in framing or describing facts;
  - e) Deciding a matter already adjudicated between the disputants;
  - f) Conflict of jurisdictions between courts of the Board of Grievances<sup>(1)</sup>.

The appeal should be filed by an appeal statement to be lodged by the appellant or his representative before the administrative appeal court which made the ruling provided that the appeal statement must include the information about the ruling appealed against, an abstract, the reasons for the appeal and the demands requested.

The concerned department of the administrative appeal court must send the file to the Supreme Administrative Court

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(1) Ibid, sections 9, 10 and 11.

on the day following satisfying the formalities of the appeal, and the concerned department of the Supreme Administrative Court must record the appeal and the appellee must be informed of the appeal statement.<sup>(1)</sup>

### **Administrative Appeal Courts:**

The Saudi legal system allows litigation on two stages: the preliminary stage before first instance courts (administrative courts) and the appeal stage before the administrative appeal courts.

Appeal is the most important safeguard granted to litigants enabling the parties to an action to file an appeal against the ruling made by a first instance court (the preliminary court) before another court and before judges other than the judges of the first instance court who are more experienced, thus making litigation nearer to the spirit of justice sought by the disputants.

This stage allows the parties to an action another chance for pleading and defense, and gives the judiciary the chance to review the ruling subject to appeal to ensure validity of the procedure and the extent of the appropriateness of application of the principles of Sharia, the laws or the regulations.

It is noteworthy that administrative appeal courts have remained for a long time a law court concerned with papers only and examining rulings without giving the parties the chance to appear before them.

However, under the new Board of Grievances Law, the administrative appeal courts have become trial courts, so

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(1) Pleading, sections 45, 47 and 48.

to speak, they may reconsider the dispute in the presence of the parties who shall have the right to plead and appeal against the rulings these courts made before the Supreme Administrative Court.

### **Formation of Administrative Appeal Courts:**

Administrative appeal courts are composed of a chief and sufficient number of judges each of a grade level not less than an appeal court judge; they exercise their jurisdictions through specialized circuits each composed of three judges.<sup>(1)</sup>

### **Jurisdictions of Administrative Appeal Courts:**

Administrative appeal courts have the jurisdiction to consider rulings made by the first instance courts (administrative courts) and shall make rulings after hearing the statements of the disputants in accordance with the procedure prescribed under the Regulations of Procedure before the Board of Grievances.<sup>(2)</sup>

The period given for filing appeals shall be thirty days as from the date of the parties' receipt of a copy of the ruling made by the first instance court, or from the date specified for receipt in case of the parties' absence/ failing to appear.<sup>(3)</sup> This means that failing to submit the appeal within the prescribed period by the parties to the action will result in an inevitable result – the ruling will become final, conclusive and enforceable.

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(1) The Board of Grievances Law, sections (8) and (9).

(2) The Regulations of Procedure before the Board of Grievances, section (12).

(3) Ibid, section (33)

The appeal shall be made in an appeal statement to be lodged by the appellant or his representative with the first instance administrative court provided that it shall include information of the ruling appealed against, an abstract, the reasons and demands of the appeal.

The concerned department of the first instance administrative court must send the appeal statement to the administrative appeal court within a period not exceeding three days of the date of satisfying the appeal procedure taking into account that the concerned department of the administrative appeal court will register the appeal on the date of receipt and notify the appellee of the appeal statement.<sup>(1)</sup>

### **Administrative Courts:**

The Saudi legal system has restricted the jurisdiction of administrative courts to hear and try administrative disputes in which the government/ state is a party having public authority, hence the administrative law courts will monitor the operation/ business of the government/ state – this is in conformity with Sharia [i.e. not in conflict with the principles of Sharia] and lawful [i.e. not in conflict with existing and applicable legal rules] monitoring of the executive power<sup>(2)</sup>. The Saudi legal system restricts the jurisdiction of the administrative courts to try administrative

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(1) Ibid, section (36).

(2) See Dr. Fouad Mohammed Musa Abdel Kareem, Administrative Decisions and their Applications in the Kingdom of Saudi Arabia, Public administration Institute, pp. 176.

disputes only is an affirmation of the rulings made by the administrative courts in that respect, and an earlier ruling states that, ‘it is well-known that the Board of Grievances, as per its laws and regulations together with its decisions, is the competent administrative law court having the jurisdiction to hear and determine all administrative disputes in which the government/ state is a party’.<sup>(1)</sup>

In another ruling, ‘the Board of Grievances is the administrative law courts having the jurisdiction to hear and determine all administrative disputes in which the government/ state is a party and relates to a certain administrative situation where the government/ state acts not as sovereign authority’<sup>(2)</sup>

### **Formation of Administrative Courts:**

Administrative courts are composed of a chief and sufficient number of judges; they exercise their jurisdictions through specialized circuits each composed of three judges and may also be composed of only one judge.<sup>(3)</sup>

### **Jurisdictions of the Administrative Courts:**

The administrative courts shall have the jurisdiction to

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(1) The decision of the case (2/1) of the year 1401H cited by Dr. Mohammed Ibn Barak Al Fozan, *The New Judicial Regulation in the Kingdom of Saudi Arabia, a comparative study of Islamic fiqh (i.e. jurisprudence)*, print 1. 2010, p. 313.

(2) The decision of the case (728/1/g) of the year 1401H cited by Dr. Mohammed Ibn Barak Al Fozan, *The New Judicial Regulation in the Kingdom of Saudi Arabia, a comparative study of Islamic fiqh (i.e. jurisprudence)*, print 1. 2010, p. 313.

(3) The Board of Grievances Law, sections (8) and (9).



determine the following:

- a) Claims concerning employment rights whether such rights pertain to pecuniary or administrative rights provided for in the civil service laws, the military service laws and retirement laws for the civil service and the military service; these cover all employees, civil and military, in the service of the state and their heirs.
- b) Actions filed by interested parties claiming cancellation of a final administrative decision lacking any of the five elements of the administrative resolution, namely, the jurisdiction element, the formality element, the venue element, the cause element and the purpose element.
- c) Administrative resolutions that are subject to appeal before administrative courts include disciplinary actions issued by a government body against state's employee, and the resolutions issued by the quasi-judicial committees when resolving a certain dispute, the disciplinary councils, the public associations etc.
- d) Compensation claims against the state's acts that caused harm to the interested party even if such act was taken in implementation of a correct administrative resolution.
- e) Claims relating to contracts in which the state is a party.
- f) The disciplinary actions filed by the Bureau of Investigation and Public Prosecution acting in the public interest after finalizing the investigation procedure against the state's civil employees because of violation of their duties, abuse of office etc.

demanding dismissal and other punishments entrusted to the administrative courts.

- g) Other administrative disputes not dealt with in the previous sections<sup>(1)</sup>. We understand that administrative courts shall have the jurisdiction to determine all administrative disputes whether provided for expressly as in the sub-sections (a, b, c, d, e, f) or generally in the section (--).

In order to create stable legal positions, the Saudi legal system has provided for specific periods for filing administrative actions before administrative courts as detailed in The Regulations of Procedure before the Board of Grievances.

Based on the foregoing, it is obvious that the Saudi legal system has adopted the dual judicial system which is divided into two regimes: a general courts structure and administrative law courts structure. The administrative law structure is divided into three categories: first instance courts, administrative appeal courts and a supreme court; with each having certain jurisdictions. They have common jurisdiction represented in determining employment rights claims, claims for cancelling administrative resolutions, claims for cancellation of the resolutions of quasi-judicial committees, the claims for compensation for the acts of the state [i.e. not in its capacity as sovereign power], claims relating to contracts with the state [i.e. not in its capacity as sovereign power], disciplinary actions taken against the state's employees and any other administrative disputes.

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(1) Ibid, sections (13).

## Quasi-Judicial Committees and Tribunals

Dr. Musfir Al Qahtani \*

Judgeship or considering peoples' injustices occupy higher ranking in entrenching principles of religion – it is critical in applying religious principles to worldly matters. Judges are the refuge for the oppressed and the security for the scared; no happiness and no tranquility in earth unless there is just rule and just judiciary. Allah Almighty says, “O Dawud (David)! Verily, We have placed you as successor on the earth; so judge you between men in truth (and justice) and follow not your desire – for it will mislead you from the path of Allah. Verily, those who wander astray from the path of Allah (shall) have a severe torment, because they forgot the Day of Reckoning.” (Surah Sad, verse 26). Allah Almighty says, “And We have sent down to you (O Mohammed, Allah’s blessings and peace be upon him) the Book (this Quran) in truth, confirming the Scripture (Books) that came before it and muhaiminan (trustworthy in highness

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and a witness) over it (old Scriptures). So judge among them by what Allah has revealed, and follow not their vain desires, diverging away from the truth that has come to you.” (Surah Al-Maidah, verse 48). Allah Almighty says, “And the heaven He has raised high, and He has set up the Balance. In order that you may not transgress (due) balance.” Surah Ar-Rahman, verses 7 and 8). Allah Almighty says, “”Indeed We have sent Our Messengers with clear proofs, and revealed with them the Scripture and the Balance (justice) that mankind may keep up justice. And We brought forth iron wherein is mighty power (in matters of war), as well as many benefits for mankind, that Allah may test who it is that will help Him (His religion) and His Messengers in the unseen. Verily, Allah is All-Strong, All-Mighty”. (Surah Al-Hadid, verse 25). The previous verses clearly signify the necessity of justice and fairness.

The legal system in Saudi Arabia has evolved through numerous stages and has expanded horizontally and vertically with respect to laws and institutions. This evolvment has reached its highest point with the advent of the royal initiative under the Royal Decree No. (M/78) dated 19/09/1428H comprising the promulgation of the Judiciary Law and the Administrative Law. A seven billion Saudi Riyals has been allocated to develop this vital sector through a comprehensive strategic reform plan.

The legal structure in Saudi Arabia has recently witnessed new developments by promulgating new laws and regulations including The Criminal Procedure Regulations and The Regulations of Procedure before Sharia Courts. All

the same, there are numerous independent quasi-judicial committees/ tribunals that are not subject to the jurisdiction of general courts nor administrative courts. The jurisdiction of these committees is to settle the disputes within the remit assigned to such committees under law, and the decisions reached may be final and binding on relevant parties.

Establishment of these quasi-judicial committees was a response to the need to have specialized machinery to deal with certain types of disputes. These committees are still functioning in discharging the tasks assigned to them. Qualified and competent personnel are responsible for running these committees; they contribute to the development of the concept of qualitative judging.

It is important to note that the existence of these quasi-judicial committees raises numerous problems about their operation and the enforcement of, and appeal against, their rulings/ decisions. Under the new reform of the judicial system these quasi-judicial committees will be brought under the remit of the general courts under new general Sharia rules to apply to all persons – individuals and legal persons. So a new system of specialized courts, with specialized judges, will be created and issued rulings will be subject to appeal before appeal courts. In addition, the Supreme Court will be responsible for proper application of Sharia rules. This will be supported by the fact that the enforcement judges will enforce all rulings made by all judicial and quasi-judicial institutions. This means that the operation of quasi-judicial

committees and tribunals will be referred to the specialized courts under the new regime.

The legal problem relating to the existence and operation of these quasi-judicial committees and tribunals, having over seventy-four (74) jurisdictions, is still unsettled. If a claimant wants to file a case, he must first ask about proper jurisdiction – disputes relating to commercial papers are heard and determined before the Committee for Settlement of the Disputes of Commercial Papers of the Ministry of Commerce & Industry, and a libel claim must be filed before Printed Matter and Publication Committee of the Ministry of Culture and Information, a claim for removal of a power generation station must be filed before the Committee for Settlement of Electricity Disputes of the Electricity and Co-generation Regulatory Authority, and an insurance claim must be filed before a committee for settling insurance disputes, and as well the case with customs claims, medical mistakes claim etc.

The practice referred to above is still prevailing despite the Royal Decree decreeing that general courts and administrative courts shall have the jurisdiction to settle all disputes arising under the territory of Saudi Arabia. Some of these quasi-judicial committees and tribunals, namely, the Committee for Settlement of Banking Disputes, the Committee for Settlement of Disputes of Commercial Papers and the Customs Committee were temporarily exempted from that reform/ review. The Executive Work Machinery

of the Judiciary Law No. (M/78) dated 19/09/1428H (corresponding to ...) has provided with respect to the quasi-judicial committees and tribunals that,

“The Supreme Judiciary Council shall conduct, following commencement of work, a comprehensive study of the status of the committees (the Committee for Settlement of Banking Disputes, the Committee for Settlement of Disputes of Commercial Papers and the Customs Committee) which were exempted from the organizational arrangement of the judiciary organs and settle any controversy and submit any findings within a period not exceeding one year to complete the regulatory procedure.

The jurisdiction of the quasi-judicial committees trying any criminal, commercial or civil disputes shall be transferred to the general courts system following the amendments of The Regulations of Procedure before Sharia Courts, the Criminal Procedure Regulations, and The Regulations Procedure before the Board of Grievances.

The committee formed in the Bureau of Experts at the Council of Ministers shall assume, within a period not exceeding one year of the effectiveness of the Judiciary Law, a review of the laws affected and suggest amendments in accordance with the necessary legal procedure, and shall study the status of the quasi-judicial committees and tribunals that currently trying administrative disputes and whose decisions are subject to appeal before the Board of Grievances and suggest recommendations in that respect.

The posts/ jobs relating to the quasi-judicial committees, whose functions to be transferred to the general courts' jurisdiction, including judicial jobs and support staff qualified to fill judicial posts will be appointed in judicial and consultative jobs as required. The technical committee, in collaboration with the Supreme Judiciary Council and the Ministry of Justice and representatives of relevant bodies will determine what jurisdictions to be transferred with respect to each committee as to jobs, employees and financial allocations.

The Supreme Judiciary Council will determine a transitional period, following the amendment of The Regulations of Procedure before Sharia Courts and issuance of The Regulations Procedure before the Board of Grievances, for the competent courts to exercise the functions transferred from quasi-judicial committees. Cases pending before said quasi-judicial committees, together with all relevant records and papers, shall be transferred, in coordination between the Supreme Judiciary Council and the relevant authority, to the general courts for adjudication; this shall observe the local/ geographical jurisdiction and giving notice to the Ministry of Justice".

With the lapse of more than one year of the issuance of that decision/ resolution which brought to its ambit even the exempted committees, little has been done to bring all judicial bodies under one competent authority and thus ending conflict and duality. Some interested sources believe



that the comprehensive study with respect to the position of these exempted committees whether to continue as quasi-judicial committees or to join the umbrella of the general courts structure has not yet been conducted. Also, it is not clear whether the committee formed at the Bureau of Experts at the Council of Ministers has ever carried out study of the laws that might be affected by the transfer of the business of the quasi-judicial committees to the general courts' jurisdiction and making necessary amendments to such laws. That was supposed to be carried out within one year from the effective date of the Judiciary Law. Some interested sources also realize that the transitional period would be administratively difficult particularly with respect to transferring the business of the quasi-judicial committees to the jurisdiction of general courts as the Ministry of Justice and the Supreme Judiciary Council will be required to deal with more than twenty-seven governmental authorities which will require much time and effort to deal and close this matter.

In this regard, there are certain important issues worth to be mentioned in the business of these committees and the judicial position relating to these committees; these may be summarized as follow:

**First:** the quasi-judicial committees and tribunals were formed because of the rising need to lay down laws taking into account the interests of the country and people, and there was a need to create a body capable of settling any disputes arising under the operation of the respective law/s. The judicial authorities, then, were not capable to

respond to that development for technical reasons such as not finishing enacting the criminal procedural laws and the pleading laws on the one hand, and objective reasons relating to the legitimacy / Sharia compliant of some bodies and background of the existing disputes which led to the expansion of formation of these committees because of the growing need. Dr. Mohammed Al Mazrouie mentioned another reason for formation of these quasi-judicial committees that is, “resulting from the instability of the notion/ idea of codification of judgments that are binding on judges, so the Saudi authorities were compelled to create a body [i.e. quasi-judicial committee] for each law/ regime to adjudicate disputes and violations to that law/ regime”.

**Second:** the resolutions made by the quasi-judicial committees may be summarized as follows:

- 1) Decisive resolution of disputes without intervention of any other judicial authority; examples include the labor disputes committees, and customs disputes committees which are formed of two instances hierarchy – a first instance committee and an appeal committee;
- 2) Dismissal conditional upon approval of the senior person in charge in the respective department; examples include disciplinary action against military men and violation committed by students;
- 3) Amicable settlement such as banking disputes though its nature requires deciding the matter and not only reaching settlement;
- 4) Imposing direct punishment/ penalties on occurrence of the violation without trial such as violations of the

water, electricity, municipality and traffic.

Formation of the quasi-judicial committees was made through five instruments, namely, royal orders, supreme orders, royal decrees, resolutions of the Council of Ministers and ministerial decisions; no such committees were formed but under one of the above-mentioned instruments.

**Third:** to what extent the decisions/ rulings issued by these quasi-judicial committees are binding on disputants: this has to do with two things: type of the decision on the one hand, and enforceability of the decision on the other. Conclusiveness differs based on the strength of the authority issuing the instrument establishing the respective quasi-judicial committee, and the powers vested on that committee; however, enforceability requires three things:

- 1) **Confirmation of the responsible person:** some of the laws require confirmation for the operation of these committees, thus making them closer to administrative committees. Yet, the resolutions of other committees are considered enforceable immediately following issuance without the need for any confirmation.
- 2) **Examination:** the resolutions of some committees are subject to examination if the aggrieved party does not accept the resolution. A complaint/ appeal may be filed before an appeal committee or before the judiciary. The resolutions of some of these committees are final following confirmation. Some laws allow quasi-judicial committees to pass final rulings in cases of fines and preliminary rulings in cases of penalties other than sentences such as imprisonment and confiscation.

- 3) **Appeal:** some of the laws do not provide for appeal against resolutions made by quasi-judicial committees. This opens the door wide whether appeal is possible in absence of provision; and one may suggest that the general rule is to appeal so no provision for appeal is needed, while others believe that there must be provision for appeal to allow appeal. This debate also differs whether the case is before a military committee or a civil one because of change of the nature of the work of either committee. The Board of Grievances has the general jurisdiction to supervise the operation of all these quasi-judicial committees; it receives appeal against resolutions made by these committees and has the right to alter, cancel or support these committees. In some cases, the Board of Grievances may hear and try violations such as confiscation or imprisonment as first instance court.

It is important to note that the committees whose decisions are final were those formed after 1412H – the date of promulgation of the Basic Law of Governance in the Kingdom of Saudi Arabia, whereas all laws and regulations issued following the promulgation of the Basic Law of Governance has provided for the right of the judiciary, as a general rule, to supervise the decisions of these committees.

**Fourth:** we can conclude from the foregoing that the status/ position of the quasi-judicial committees is temporary, and the delay in bringing them to the ambit of general or administrative court structure may be attributed to the delay of enacting the criminal procedure law and the Sharia pleading

laws and their implementing regulations, and as well to the delay in opening the specialized courts despite the lapse of more than seven years of the promulgation of the Royal Decree. In order not to further delaying determination of the disputes between adversaries to the Government authorities and other parties, the competent authorities decide to retain/hold the quasi-judicial committees up to the completion of the structures of the Ministry of Justice and the Supreme Judiciary Council. As long as the quasi-judicial committees are not part of the proper Saudi judicial system, problems in that respect will not end. In the last two years we notice some steps in dealing with that deficiency, namely:

- 1) The Council of Ministers approved in its session dated 08/01/1435H bills/ drafts of the most important laws that would help facilitating the transfer of the business of the quasi-judicial committees to the general and administrative court structure; these laws are: The Regulations of Procedure before Sharia Courts, The Criminal Procedural Regulations, The Regulations Procedure before the Board of Grievances – this constitutes a step forward.
- 2) The Minister of Justice launched in August 2014 the specialized courts by opening courts and circuits of family matters in Riyadh, Mecca, Jeddah, Medina and Dammam with jurisdiction to hear and try divorce, divorce ((of wife) for consideration payable by the wife), maintenance, custody of children etc.; it is hoped that further steps will be taken to open the remaining other specialized courts once administrative and technical

apparatuses are prepared. This is an indication that quasi-judicial committees will be brought under the structure of general and/ or administrative courts. It is worth mentioning that committees in the Ministry of Interior and the Ministry of Labor are preparing for that change.

**In conclusion:** there are more than seventy quasi-judicial committees in Saudi Arabia that have been formed under different circumstances; however, many problems are facing the operation of these committees as to their independence, competence of persons running these committees, appeal of their decisions – all these problems combined together have driven the Saudi authorities to consider bringing such committees under the umbrella of the general and administrative courts structure. The Committee for Settlement of Banking Disputes, the Committee for Settlement of Disputes of Commercial Papers and the Customs Committee were exempted from that change and were subject to a study though the period given to complete that study has already lapsed.

The issuance of the laws and their implementing regulations and opening of specialized courts may accelerate bringing these committees under the umbrella of the general and/ or administrative courts structure.

To sum up, the existence of the quasi-judicial committees and tribunals was a result of certain circumstances. The current reform of the Saudi legal system will tackle all shortcomings and bring these committees under the umbrella of the general and/ or administrative courts structure in Saudi Arabia.

## **Substantive and Procedural Law**

**Prof. Abdulla Al Nasser \***

It is well established under the discipline of law that a legal rule, considering the content of the legal rule and its subject matter, is divided into two main categories: the substantive rules and the procedural rules.

The substantive rules mean the binding legal rules that determine rights and duties whether laid down by the legislative power or out of a personal behavior made by an individual. The significance of these rules relates to the subject to the right itself, and determines matters that in reality are part of the essence of the right such as stating the trueness of right or duty: how it emerges, to be exercised

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and ultimately ends. The examples include: the rules that prohibit commission of offences or stating the sources and provisions of the legal right and the punishment likely to result from breach of that legal rule.

As to the procedural rules: they mean the mandatorily rules showing the procedure to be followed to acquire or exercise rights, or that must be followed in case of breach of rule.<sup>(1)</sup> Procedural rules do not relate to the right itself; however, they are indispensable and closely attached to it, so each right seeker will be enabled to fully enjoy his right.

Some people believe that Saudi Arabia is void of any substantive and procedural laws and regulations; on the contrary, tens of substantive and procedural laws and regulations were issued that regulate all aspects of social, economic and commercial life and others, and as well other aspects of life are regulated by rules and provisions of Islamic fiqh (i.e. jurisprudence] without codification or enactment per se. Examples of areas regulated and organized by enactments include the following:

**Political laws:** the Basic Governance Law, the Council of Minister Law, the Shura [i.e. Consultative] Council Law, the Districts Law, the Allegiance Law of Succession.

**Judicial and Human Rights Laws:** the Judiciary Law, the Board of Grievances Law, the Regulations of Procedure before Sharia Courts, the Criminal Procedural Regulations,,

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(1) See Abbas Al Saraf et al..., Introduction to Law: Theory of Law – Theory of Right, Dar Al Thaqafa, Amman, 2008, p. 33



the Regulations of Procedure before the Board of Grievances, the Arbitration Law, the Legal Profession Practice Law, the Enforcement Law, the Ministers' Trial Law, the Bureau of Investigation and Public Prosecution Law and the Law for Combating Human Trafficking.

**The Commercial Laws:** The Companies Law, the Commercial Papers Law, the Commercial Registry Law, the Commercial Agencies Law, the Professional Companies Law, the Commercial Books Law, The Settlement Preventing from Bankruptcy Law, the Trading Names Law, the Foreign Investment Law, the Patent Law, the Commercial Data Law, the Trademarks Law, the Commercial Pledge Law, the Capital Market Law, the law for Control of the Cooperative Insurance Companies, the Competition Law, the Regulations of the Association of Protecting Consumers, the Time-sharing Law, the Anti-Commercial Fraud Law etc.

**Media Laws: the Printed Matter and Publication Law,** the Press Establishments Law, the Law for Registration, the Documents and Records Law, the Copyrights Law, the Law for Regulating Broadcasting and Television.

**The Civil Affairs Laws: the Nationality Law,** the Passports Law, the Civil Affairs Law etc.

**The Security and Criminal Laws:** the Counterfeit Paper Money Law, the Prisons and Arrest law, the Civil Defense Law, the Law for Punishments for Impersonation of Public Officers, the Anti-Bribery Law, the Terrorism Financing Law, The Drugs Combating Law, the Weapons and Ammunition

Law, the Explosives Law, the Anti-Money Laundry Law etc.

**Educational Laws:** The Old Education Law, the Illiteracy Law, the Higher Education Council Law, the Diplomatic Studies Institute Law, etc.

**The Municipal Laws:** the Roads and Buildings Law, the Public Statistics Law, the Census Law, the Municipalities and Villages Law, the Real Estate Development Funds Law, the Public Utilities Protection Law, the Law for Non-Saudis Ownership and Investment of Real Estate, the Real Estate Registration Law, The Expropriation of Real Estates for Public Interest Law, the Municipalities Law, etc.

**The Military Laws:** The Officers Service Law, the Individuals Service Law, the Militarily Retirement Law, the Militarily Medals Law etc.

**The Civil Service Laws:** the Civil Servants Disciplinary Law, the Civil Service Law, the Civil Retirement Law, the Public Pension Agency Law, etc.

**The Agricultural and Environmental Laws:** the Fallow Lands Distribution Law, the Saline Water Conversion Corporation Law, the Hunting, Investment and Protection of Water Resources Law, the Reserve and Protected Areas Law, the Animals Hunting and Poultry Law, the Sewerage Treatment Law, the Environmental Law, the Foster and Farms Law, the Animal resources Law, the Fodder Law etc.

**The Tourism and Archeology Laws:** the Archeology Law, the Hotels Law, the Recorded Heritage Protection Law, etc.

**The Health Laws:** The Health Law, the Private Laboratories Law, the Medical Profession Practice Law, the Private Clinics Law, the Fertility and Sterility Treatment Law, the Pharmaceutical Preparations and Institutions Law, the Psychological Care Law etc.

**The Energy:** the Mining and Industry Law: the Saudi Industrial Development Fund Law, the Mining Industry Law, the Electricity Law, etc.

**The Labor and Social Insurance Laws:** the Regulations for Charity Organizations and Associations, the Cooperative Health Security Law, the Disabled Care Law, the Labor Law, the Social Security Law, the Cooperatives Law, the Unemployment Law etc.

**The Financial and Supervision Laws:** the Collection of Zakat Law, the Saudi Arabian Monetary Agency Law, the Banking Control Law, and the Public Audit Chamber Law, the Customs Uniform Law, the Income Tax Law, the Credit Information Law, The Real estate Finance Law, the Finance Companies Control Law, the Capital Market Law etc.

**Differences between Substantive and Procedural Rules:**

Based on the definitions given to substantive and procedural rules, we can differentiate between the substantive rules embodied in laws such as the Companies Law, the Nationality Law and the Counterfeit Paper Money Law and other group of procedural laws such as the Criminal Procedural Regulations, the Regulations of Procedure before Sharia Courts and the Legal Profession Practice Law,.

In Saudi law, it is difficult to differentiate between substantive rules and procedural rules, and vice versa, because of the nature of the rules embodied in these laws.

For example, section seventy three of the Regulations of Procedure before Sharia Courts, a procedural law, provides that, ‘the administration and control of the court session is the responsibility of the judge presiding over the session, and in order to maintain order the judge may command anyone who disrupts order to get out of court, and if that someone refuses to obey that command, he will be subject to imprisonment for twenty four hours, and such decision shall be final; however, the court may withdraw that decision’. Although the said section is procedural in nature determining responsibility for maintaining order during court session, however, the same section provides for punishment that may be inflicted by the judge in charge which might be described as substantive rule, so the section simultaneously stating the right and the manner to exercise it. The Criminal Procedural Regulations includes a similar section although it is procedural law.

This means that the Saudi law applies what may be called dual rules – rules embodying elements of both: the substantive and the procedural. Although there is a trend tends to create mere procedural rules as in the Regulations of Procedure before the Board of Grievances and the Regulations of Procedure before Sharia Courts; however, such trend has not yet achieved clear separation between substantive and procedural rules.

Going through the sections of the Medical Profession Practice Law, a substantive law, concerned with stating the conditions for practicing and the duties and responsibilities of the practitioner, we find that Chapter Four of the said Law deals with matters such as investigation and trial resulting from professional medical mistakes. In addition, the Law deals with matters concerning the formation of the Sharia health commission entrusted the responsibility for investigation and determination of penalties, the location, membership and meetings of the commission – these are purely procedural matters that have nothing to do with medical professional practice, and will only come into play upon occurrence of a violation to the Health Profession Practice Law.

In any case, the Saudi legal system includes many laws containing purely procedural rules that are void from any substantive nature such as the Regulations of the Conciliation Center Law<sup>(1)</sup> whose objective is to settle disputes through conciliation by means of its offices spread in courts premises and notaries' offices. The said Law lightly deals with the functional structure of the conciliation centers, formation of offices and prerequisites to be available with respect to those who conduct its business which are procedural matters concern settlement of the disputes between disputants over a personal right.

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(1) Issued under the Resolution of the Council of Ministers No. 103 dated 08/04/1424H and circulated under the No. 13/t/4905 dated 27/04/1434H (corresponding to 09/03/2013).

In contrast to that there are laws where the substantive element is dominant such as the penal law named Counterfeit and Imitation of Paper Money Law<sup>(1)</sup> as the said Law provides for penalties for those who counterfeit or imitate money inside or outside the Kingdom, or brought to the Kingdom any counterfeited or imitated money, and as well the said Law provides for penalties for those who commit accomplice or attempt with respect to those offences.

Each category of these rules is important. If the substantive rules lay down rights and obligations with the relevant provisions, regulate the relationship between members of the community and provide for the penalties deterring violations of these rights on the one hand, the procedural rules show how to enforce rights, protect them and provide for impunity on the other.

It is obvious that the procedural rules were laid down to protect rights provided for under substantive rules thus represent the backbone of the judicial system – without the procedural rules, rights and duties become meaningless.

### **Sharia is the Source of Substantive and Procedural Rules:**

Both substantive and procedural rule are compliant with the principles of Sharia and to that effect article eight of Basic Law of Governance provides that, ‘Governance in the Kingdom of Saudi Arabia shall be based on justice,

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(1) Issued on 21/07/1379H (corresponding to 19/01/1960).

Shura (consultation), and equality in accordance with the Islamic Shari‘ah’; thus, any law, regulations, resolutions or orders must be compliant with the principles Sharia (i.e. the provisions of the Book and Sunnah).

A review of the substantive and procedural rules will show that the substantive rules are based on one of the following sources: the Book [i.e. the Holy Quran] and Sunnah and other Sharia secondary sources, namely, *Ijmaa* [i.e. unanimous opinion], *Qiyas* [i.e. juristic reasoning by analogy], *Sad Al Zaraie* [i.e. an act not prohibited itself, but feared may lead to committing prohibited act] *Istihsan* [i.e. consider something/ act as permissible/ tolerable], *Maslaha Mursalah* [i.e. an interest not provided for under Sharia] custom, and the authority of the ruler to decree what is permissible. These are the sources on which Policy based on Sharia relies – a science that studies the acts of the rulers not in conflict with Sharia principles and based on the interests of people in absence of a Sharia principle.

**Examples of substantive rules based on Sharia principles include the following:**

- The rule of Sharia Must Govern: this has been affirmed by article forty eight of the Basic Law of Governance providing that, ‘The courts shall apply to cases before them the provisions of Islamic Shari‘ah, as indicated by the Qur’an and the Sunnah, and whatever laws not in conflict with the Qur’an and the Sunnah which the

authorities may promulgate’. This legal rule is derived from mandatory verses of the Holy Quran: Allah Almighty says, ‘And so judge (you O Mohammed) among them by that Allah has revealed and follow not their desires, but beware of them lest they turn you (O Mohammed) far away from some of that which Allah has sent down to you. And if they turn away, then know that Allah’s Will is to punish them for some sins of theirs. And truly, most of men are Fasiquun [i.e. rebellious and disobedient to Allah]’. (Surah Al-Maidah, verse ((49). And Allah Almighty says, ‘It is not for a believer, man or woman, when Allah and His Messenger, have decreed a matter that they should have any option in their decision. And whoever disobeys Allah and His Messenger, he has indeed strayed into a plain error” (Surah Al-Ahzab, verse (36)). And Allah Almighty says, “O you who believe! Obey Allah and obey the Messenger (Mohammed), and those of you (Muslims) who are in authority. (And) if you differ in anything amongst yourselves, refer it to Allah and His Messenger, if you believe in Allah and in the Last Day. That is better and more suitable for final determination’. (Surah AN-Nisa, verse (59)).

- The rule of Consultation: this is where the Basic Law of Governance states that governance of the land shall be based on consultation. Article eight of the Basic Law of Governance provides that, ‘Governance in the



Kingdom of Saudi Arabia shall be based on justice, Shura (consultation), and equality in accordance with the Islamic Shari‘ah’, and article one of the Shura (Consultative) Council Law states that the two verses below constitute the foundation of governance in Saudi Arabia, ‘And by the Mercy of Allah, you (Mohammed) dealt with them gently. And had you been severe and harsh-hearted, they would have broken away from about you; so pass over (their faults), and ask (Allah’s) forgiveness for them; and consult them in the affairs. Then when you have taken a decision, put your trust in Allah, certainly, Allah loves those who put their trust (in Him)’ (Surah Al-Imran, verse (159)), and Allah Almighty saying, ‘And those who answer the call of their Lord [i.e. to believe that he is the only One Lord (Allah), and to worship none but Him Alone], and to perform As-Salat (the prayers), and who (conduct) their affairs by mutual consultation, and who spend of what We have bestowed on them’.

Examples of the substantive rules founded on secondary Sharia sources include the following:

- The rule of Disregard the Intention of the Bribed Given that He Took the Bribe: this has been enshrined in section two of the Anti-Bribery Law, ‘each public officer demands for himself or for any other person, or accepts or receives a promise or a gift to omit to perform a work of his job, or claims it is part of his job,

even if such omission is lawful, shall be considered as bribed and shall be subject to the penalty provided for in section one of this Law'. The commission of the offence will not be affected by the intention of the public officer to do what he promised to do<sup>(1)</sup>, as the section states that the state has the right to penalize the public officer who acquires a benefit for himself or someone else in return for giving a benefit to a person not deserving that benefit, and then based on *Sad Al Zaraie* rule disregarding the intention of the bribed person.

Procedural rules take the same course – either derived from Sharia main or secondary source.

Examples of procedural rules based on sharia include:

- The rule of “Innocence is Presumed”: Section three of the Criminal Procedural Regulations provides that, ‘no criminal penalty may be imposed on a person unless it is proved that he committed an act prohibited by Sharia or law’. This section indicates that as a general rule an accused is presumed innocent, and Allah Almighty says, ‘O you who believe! If a Fasiq (liar – evil person) comes to you with any news, verify it, lest you should harm people in ignorance, and afterwards you become regretful for what you have done’, (Surah Al-Hujrat, verse (6)), and Allah Almighty says, ‘Certainly,

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(1) The Anti-Bribery Law, section 2.

conjecture can be of no avail against the truth. Surely, Allah is All-Knower of what they do” (Surah Yunis, verse (36)).

- The rule of “It is Permissible to Search the Charged”: As section forty three of the Criminal Procedural Regulations provides that, ‘a police officer may search a charged person in instances where such charged person may be arrested, and search may include his body, cloth and belongings’. This procedural rule is approved under Sunnah according to the following Hadith, ‘ I heard `Ali saying, “Allah’s Messenger sent me, Az-Zubair and Al-Miqdad somewhere saying, ‘Proceed till you reach Rawdat Khakh. There you will find a lady with a letter. Take the letter from her.’ “ So, we set out and our horses ran at full pace till we got at Ar-Rawda where we found the lady and said (to her). “Take out the letter.” She replied, “I have no letter with me.” We said, “Either you take out the letter or else we will take off your clothes.” So, she took it out of her braid. We brought the letter to Allah’s Messenger and it contained a statement from Hatib bin Abi Balta to some of the Meccan pagans informing them of some of the intentions of Allah’s Messenger.

A procedural rule founded on a secondary Sharia source is the following:

- The rule of “A Judge Support Staff may not Perform

any Work if the Charged Person is a Relative”: This has been enshrined in section seven of the Regulations of Procedure before Sharia Courts, ‘summons servers and clerks and other support staff in courts may not perform any work in actions relating to them, their spouses, relatives up to stage four’. This procedural rule is based on the element of *Sad Al Zaraie* meaning closing the door of an act not prohibited itself, but feared may lead to committing prohibited act.

Sources of Substantive and Procedural Rules under the Saudi Law.

Sources of Substantive and Procedural Rules under Saudi Law:

**First: Provisions of the Book and Sunnah:** substantive and procedural rules come from the two main sources of Sharia law: the Book and the Sunnah, being the foundation of any law in Saudi Arabia. To that effect, article one of the Saudi Basic Law of Governance provides that, ‘The Kingdom of Saudi Arabia is a fully sovereign Arab Islamic State. Its religion shall be Islam and its constitution shall be the Book of God and the Sunnah (Traditions) of His Messenger may God’s blessings and peace be upon him.’ As well, section one of the Criminal Procedural Law provides that, ‘The courts shall apply to the cases brought before them the principles of Islamic Sharia as dictated in

the Book and Sunnh and laws enacted by competent authorities’.

We note that penal laws in Saudi Arabia do not provide punishment of *Hudud* and *Qasas* [i.e. punishment] which are substantive provisions and in which the judge refer to the provisions of Sharia as found in the Holy Quran, the Sunnah, the *Ijmaa* and *Qiyas*<sup>(1)</sup>. An example is the Medical Profession Practice Law which does not specify the punishment for a physician deliberately killing a patient or making any of his organs defective taking the medical profession as cover-up to achieve an intentional purpose describing a poisonous drug in order to be administered by the patient thus gaining an interest from the death of the patient. This act shall be considered pre-determined killing requiring inflicting *Qasas*.

In dealing with civil liability, section twenty seven of the Medical Profession Practice Law mentions only what may be considered as medical mistake such as mistake in treatment, lack of care, lack of knowledge of technical matters or of proper use of medical technical equipment, however, it does not state the punishment to result from that mistake, so the section goes as follows, ‘each medical mistake made by the Practitioner and results in harm to the patient shall require compensation, and the Sharia medical commission shall determine the amount of that compensation’. So the section

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(1) See Abdel Fattah Khider, Substantive and Procedural Characteristics of the Penal Law in Saudi Arabia, the Publisher, Arabian Books, p. 25.

refers determination of the punishment to the Sharia medical commission to act according to the principles of Sharia.

**Second: Islamic fiqh [i.e. jurisprudence] references:**

these are the books/ references embodying the heritage of secondary sources of substantive and procedural rules derived from the Holy Quran and the Sunnah; and this is natural as many provisions provided for in the Holy Quran and the Sunnah relate to detailed matters which were dealt with in an exponent manner in these secondary sources<sup>(1)</sup>.

**Third: Laws promulgated by Royal Decrees:** since the unification of the Kingdom of Saudi Arabia, the state has issued a lot of laws regulating commercial transactions, and some substantive and procedural rules of these laws and regulations were mentioned above.

**Fourth: resolutions, regulations and orders issued by legislative and executive authorities:** In addition to the previous sources and laws, the resolutions, the regulations and orders issued by the legislative and executive authorities are considered sources of substantive and procedural rules in Saudi Arabia. Given that these types of secondary legislation/ rules require certain expertise and technical knowledge they were left to the respective executive authorities to

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(1) See Abdel Fattah Khider, Substantive and Procedural Characteristics of the Penal Law in Saudi Arabia, the Publisher, Arabian Books, p. 25.

make<sup>(1)</sup>. An example of this rule is section eleven of the Medical Profession Practice Law which provides that, ‘Upon examining a patient criminally injured or infected by an endemic disease, the practitioner must immediately notify the competent security and health authorities, and the Minister shall issue a resolution of the diseases that must be reported and the authority to be reported to’. This rule prescribes a duty on the part of the practitioner towards the state represented in the security and health competent authorities inside the Kingdom of Saudi Arabia. Another example is section one hundred twenty of the Labor Law which provides that, ‘the Minister shall issue the rules and controls necessary to regulate part-time work, specifying the mutual obligations on both the part-time employee and the employer’; thus the section gives the Minister the right to issue the substantive rules for regulating part-time work.

To sum up, it is obvious that the legal rule is divided into two: a substantive rule relating to the right subject - matter and determines the matters that are in the heart of the right its essence; and procedural rules stating the procedure to be followed to acquire or practice that right. There are different criteria to distinguish between the two types of rules. The above exposition shows that the laws in Saudi

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(1) Dr. Jafaar Abdel Salam and Emad Al Sharbini: an Introduction of the Fundamentals of Legislation in Saudi Arabia, Dar Al Kittab Al Gamie for Publication, p.

Arabia deal with political, judicial, social, media, financial, commercial, economic, militarily, civil, health, industrial etc. aspects in life combined with non-codified Islamic fiqh [i.e. jurisprudence].

Indeed the sources of all these substantive and procedural rules is the Sharia principles whether based on direct texts from the Holy Quran or from Sunnah or else form other secondary Sharia sources.





## **Chapter Three**

### **King Abdulla Project for Reforming the Judiciary**

- Introduction:
- Section One: Reform of the Procedural Aspects
- Section Two: Development of the Judicial Environment
- Section Three: Development of Human Cadres

## Introduction

Development of the judiciary has become a central issue of the Government of the Kingdom of Saudi Arabia in relation to developing and modernizing the state's institutions. This has been represented in King Abdullah project for developing and reforming the judiciary launched in the year 1430H (corresponding to 2010) with a budget of seven billion Saudi Riyals.

### **King Abdullah Ibn Abdul Aziz Project for reforming the judiciary aims at the following:**

**First:** Setting a long term strategic plan for the Ministry of Justice for the coming twenty years, i.e. from 1430H – 1450H to reform the judiciary in all relevant areas and to help the Ministry of Justice to perfectly achieve its mission. The plan includes ambitious future vision, a clear message, effective values, and criteria for assessment; and as well to set clear objectives and formulating the required strategies to reform and develop that vital function.

**Second:** Preparing an executive phased plan for the first five years including programs, projects and scientific

initiatives to achieve the long term objectives of the plan, and formulating mechanisms for execution, a timetable and budgets and benchmarks for measuring the quality of performance.

**Third:** Setting mechanisms that help in carrying out monitoring, periodical review, improving the strategic plan in addition to adopting and spreading planning and strategic thinking in the operation of the Ministry of Justice and its relevant departments.

In this chapter, we will throw light on the most important parts of the project by discussing three main issues:

- 1) Developing of procedures including development of numerous aspects of the judiciary including matters relating to procedural steps, spread of judicial culture and alternative dispute resolution.
- 2) Development of the justice environment by tackling matters relating to expanding premises (courts), utilization of technology to serve judges, electronic transactions and creation of an information center.
- 3) Training of the human resources cadres including judges and administrative supporting staff.

## **Section One**

### **Development of Procedural Aspects**

**Dr. Mansour Alhaidary \***

King Abdulla Ibn Abdul Aziz project for reforming the judiciary seeks, together with efforts to be exerted by other authorities, to develop many aspects of judicial process including matters relating to procedural laws, spread of judicial culture, alternative dispute resolution and documentation; below is a brief account of each of these aspects:

#### **First: Procedural development:**

Since the formation of the Kingdom of Saudi Arabia, many laws and regulations were issued for regulating litigation. The Sharia Trial Procedure Law was issued in

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the year 1350H (corresponding to 1931) which arranged certain matters in relation to trial procedure before courts besides the provisions of the Courts Formation Law<sup>(1)</sup>. And in the year 1355H (corresponding to 1936) the Pleading Law was issued which was broad in nature compared with the earlier law and added more stuff.<sup>(2)</sup> The Concentration of Responsibilities of Sharia Judges was amended in subsequent enactments in the year 1357H (corresponding to 1938) which comprised the same provisions provided for in the previous laws; however, with deletion and addition of provisions relating to pleading.<sup>(3)</sup> In the year 1372H (corresponding to 1952) the Regulation of Administrative Works of Sharia Circuits Law was issued which was similar to the pleading law; however it was issued under a new name and with new amendments. And within the same year, the pleading law referred to above was issued for the second time under the name the Regulation of Administrative Works of Sharia Circuits Law with new amendments<sup>(4)</sup>. The latest and amended version of this procedural law under the name Regulations of Procedure before Sharia Courts was issued in the year 1435H (corresponding to 2014) including the following: general provisions, international jurisdiction, venue and value jurisdictions, filing of lawsuits and lodging, appearance and absence of parties, session procedure, pleas,

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(1) Judicial Organization in the Kingdom of Saudi Arabia, Saudi Al Dareeb, p. 334.

(2) Ibid, p. 336.

(3) Ibid. p. 325.

(4) Ibid. p. 336.

intervention, suspension, and abandoning of disputes which truly represents concise experience of the Saudi general law courts with respect to procedural law.

As to penal procedure, there was no specific procedural law dealing with the provisions relating to those who were charged in criminal cases, only applying general rules of Islamic jurisprudence and applying the Law of Procedure before Sharia Courts when there was no conflict with the nature of the criminal case. In the year 1422H (corresponding to 2001), the first law of criminal procedure was issued. It sets forth many provisions relating to arrest, investigation, trial, objecting to rulings and enforcement of such rulings. Following the launching of King Abdulla Project for Reforming the Judiciary and the relevant amendments to many laws, the new Law of Procedure before Sharia Courts was issued in the year 1435H (corresponding to 2014) dealing, among other things, with the criminal case, investigation procedure, methods of objection against rulings, conclusiveness of final rulings and enforceable rulings.

With respect to administrative law (system of administrative law courts), Rules of Procedure before the Board of Grievances were issued in the year 1409H (corresponding to 1988) dealing with procedural aspects relating to actions filing within the jurisdiction of the Board of Grievances. Following the launching of King Abdulla Project for Reforming the Judiciary and the Board of Grievances

resumption of its natural role only as administrative courts structure, that fact required amending those rules to be issued in new cloths under the name the Law of Procedure before the Board of Grievances in the year 1435H (corresponding to 2014) including filing and lodging of legal actions, trying and determining actions and objections against rulings of administrative law courts.

As to enforcement of judicial rulings, this matter was pursed before more than one authority/ body, so trying to escape enforcement was a prevailing practice because of absence of clear laws dealing with that matter. It was inevitable to issue an effective law tackling enforcement of judicial rulings. Thus the Enforcement Law was issued in the year 1433H (corresponding to 2012) including powers of the enforcement judge, executive order, disclosing information about money/ assets, provisional seizure, enforcement procedure, direct enforcement, family law matters, insolvency and custody, punishments – it is really a remarkable law provided that resources are available and effectively implemented.

### **Second: Spread of Judicial Culture:**

One of the most important tasks of the Ministry of Justice, together with other governmental bodies, towards society is to disseminate judicial culture to all according to the project of King Abdulla Project for Reforming the Judiciary, so everyone will know his rights and how to



pursue his rights through legal means. Dissemination of judicial culture includes developing the skills of judges, clerk judges and judicial support staff of the judiciary in the Kingdom of Saudi Arabia. Some of the officers may interpret laws and regulations in a manner compatible with personal perceptions. Dissemination of judicial culture also includes spreading that culture to those who are outside the judiciary as we see many legal cases are filed without any legal grounds, or without knowing the pertinent judicial body before which such legal claims ought to be brought.

No doubt, much effort must be exerted from many governmental and other institutions and bodies in spreading that culture. In addition, citizens must take initiative in raising their awareness in developing their legal knowledge. As well, service providers must show the citizens their rights and duties when providing their services, as the majority of citizens are neither aware of such rights and duties nor aware of how to obtain knowledge of those rights. It is noteworthy that spread of judicial culture requires the following:

**Publication of laws and regulations to the public:** recently, it has become customary that many governmental authorities publish copies of the laws and their implementing regulations and any relevant instructions in the course of conducting their businesses. No doubt this will help greatly in spreading judicial culture among the public; however, this still falls short of making public all circulars and internal rules that govern the business of these authorities.

**Publication of procedure and measures of litigation:** the Ministry of Justice has done a great job in this respect, as filing claims can be made electronically through the website of the Ministry of Justice though a claimant is still required to confirm in person filing his claim; and we hope this may be avoided in the future so that that confirmation and ascertaining of the IDs of the claimants will be made electronically.

**Publication of Judicial Rulings: The Ministry of Justice,** in collaboration with the Supreme Judicial Council, has prepared the code of judicial rulings and published many judicial rulings. Although this falls short of expectations, in quantity and quality, yet such will help specialized and non-specialized reader to have an idea of judicial trends about published matters, and as well to know the rights and duties so putting him in a good position to deal with such matters.

**Comment on Judicial Rulings:** comments on published judicial rulings made by jurists and specialized persons may help in shedding light on the published rulings, and would test the extent of judges' ability applying Sharia and legal rules and provisions on the facts presented by the parties. This in turn will help judges in avoiding mistakes in future, and as well it will help law students and non-specialized persons to better understand applicable aspects of laws and regulations.

**Specialized Media Publication:** The Ministry of Justice published two periodical journals: Al Adl Journal (i.e. Justice

Journal) and Aqadhaiyah Journal (i.e. The Judicial Journal) which are two specialized journals in judicial matters and law. Nevertheless, the Ministry of Justice, lawyers and jurists must work hard to raise legal consciousness in society through all means of media, including new means of media, conduct debates and forums and establish voluntary centers that provide free legal aid to those in need.

**Cooperation with Educational Institutions:** The Ministry of Justice has signed a number of agreements with local and international universities to benefit from their expertise with respect to legal matters; these universities include: Imam Mohammed Ibn Saud Islamic University, Dammam University, Princess Nora University, and Southern Illinois University at Carbondale in the United States of America. Agreements with local universities such Princess Nora University includes issues pertaining to preparation of educational materials, holding symposiums, meetings to raise awareness of female students and encouraging scientific research relating to spreading judicial culture. In cooperation with the Ministry of Education, the Ministry of Justice may seek to introduce a subject on spreading judicial culture in the curriculum of all levels of education, so students will be familiar with their rights and duties from early stage.

### **Third: Alternative Dispute Resolution:**

#### **a) Conciliation:**

According to the nature of the judiciary in Islamic jurisprudence -to which the Saudi judiciary adheres- Allah Almighty says, “And making peace is better” (Surah An-Nisa, verse (128)), and as well Allah Almighty says, “There is no good in most of their secret talks except (in) him who orders *Sadaqah* (charity in Allah’s Cause), or Marouf (Islamic Monotheism and all the good and righteous deeds which Allah has ordained), or conciliation between mankind; and he who does this, seeking the good Pleasure of Allah, we shall give him a great reward” (Surah An-Nisa, verse (141)). Based on that, a judge must first seek to reconcile disputants and end dispute without issuing a ruling, unless either of the disputant insist on issuing a ruling. All books on Islamic jurisprudence on all Fiqh Schools contain detailed chapters on conciliation explaining its provisions in striking clarity.

Attempts at reconciling disputants were and still very popular and usually conducted through individual efforts, anticipating Allah’s reward, without consideration. In order to formalize that procedure and create a friendly environment for it, the Saudi authorities issued in the year 1435H (corresponding to 2014) rules regulating setting up offices for conciliation, and these rules govern the operation and procedure of those offices. The offices work hard to reconcile between disputants in an impartial manner, and either party to a dispute will be entitled to present his case

to a conciliation office even if the dispute was brought to a court; this meant to reinforce the standing of conciliation as a mechanism for resolving disputes. It was reported that caliph Omar Ibn Al Khatab (My Allah peace be upon him) once said, ‘urge and insist on disputants till they get reconciled as resolving matters through a judge will likely result in creating grudge between people’.<sup>(1)</sup>

### **b) Arbitration:**

Arbitration, as a means for resolving disputes was well known in Islamic jurisprudence before fourteen centuries, and the Holy Quran provides for arbitration as a means for resolving marital differences in the verse, “If you fear a breach between them twain (the man and his wife), appoint (two) arbitrators, one from his family and the other from her’s; if they both wish for peace, Allah will cause their reconciliation. Indeed Allah is Ever All-Knower, Well-Acquainted with all things” (Surah An-Nisa, verse (35)). All books on Islamic jurisprudence on all Fiqh Schools contain detailed chapters on arbitration explaining its provisions in striking clarity.

The Saudi legislators dealt with arbitration in the year 1350H (corresponding to 1931) in the Commercial Court Law, where disputant traders were allowed to appoint an appropriate arbitrator and then court will uphold the arbitrator decision whenever it was duly made. The Saudi Chambers of

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(1) Ibid, 1 /84.

Commerce Law issued in the year 1365H (corresponding to 1946) which permits chambers of commerce to set up offices for arbitration within said chambers to arbitrate between traders whenever traders agree on that. In the year 1389H (corresponding to 1969), the Labor and Workman Law was issued which permitted arbitration between employers and employees without the need to go to court.

Afterwards, the Saudi legislators recognized the necessity to enact arbitration law including commercial matters and others to create a substitute mechanism for resolving matters to reduce burden of the judicial system, so the first arbitration law was issued in the year 1403H (corresponding to 1985) embodying many positive things and less negative things which affected the effectiveness of the law.

In the year 1433H (corresponding to 2012) the new Arbitration Law was issued comprising general provisions, arbitration agreement, arbitration panel, arbitration procedure, procedure for resolving arbitration claim, invalidity of arbitration award, conclusiveness and enforceability of arbitrations awards and conclusive provisions. The Arbitration Law grants the arbitration panel wide powers not available under the previous law, and makes arbitration awards enforceable and not subject to appeal unless for invalidity action for reasons set forth in the Arbitration Law.

In the year 1435H (corresponding to 2014), the Council of Ministers of the Kingdom of Saudi Arabia made a resolution

establishing the Saudi Commercial Arbitration Center. The Ministry of Justice relies on the so called Sharia alternative disputes resolution, namely, conciliation and arbitration, and that each one shall have an institutionalized mechanism.

In conclusion, there are many developments in the reform process including reform of the procedural laws pursuant to incessant reform such as the Law of Procedure before Sharia Courts and the Law of Criminal Procedure and the Law of Procedure before the Board of Grievances in conformity with practical needs and amendments of other laws.

Reform includes spreading judicial culture through specialized publication and means of media and others and still there is much work to do. The reform includes also resolution of disputes by alternative means particularly through setting up conciliation offices for amicable disputes resolution, activation of the arbitration law to accelerate resolving and settling disputes in a swift manner that maintains confidentiality of parties.

### **Fourth: Attestation Regulations:**

Following the approval of the Supreme Judicial Council, the Minister of Justice issued a decision on Muharam 1436H (corresponding to November 2014) approving the “Attestation Regulations” assigning some of the tasks of the notaries to others; this is an achievement coincided with activation of specialized Saudi courts, and empowering lawyers (law practice profession) within the judicial regime

by assigning some attestation responsibilities to them. These Regulations give flexibility in issuing powers of attorney, attestation of contracts through law firms practicing in the Kingdom.

An important advantage of these Regulations is that such will reduce pressure on notaries and will allow issuing powers of attorneys and attesting contracts during non-official Government working days. Powers of attorneys and contracts made under these Regulations shall be valid documents; hence they will become executive instruments that will be presented to enforcement judges directly without the need to present them to courts to decide on them. The Ministry of justice has created a special department (the General Notarization Department) assuming responsibility over attestation work such as receipt of applications for electronic licensing, issuing of licenses through committees to be formed by the Ministry of Justice and monitoring the operation of attestation offices to guarantee compliance with the relevant regulations and instructions – the objective is to mitigate the burden of notaries and serve citizens and residents alike.



## Section Two

### Development of the Judicial Environment

#### The Scientific Committee \*

**First:** Development of the Organizational and Administrative Structure of the Ministry of Justice: One of the most important targets of King Abdulla Project for Reforming the Judiciary is the development of the organizational and administrative structure of the different institutions of the judiciary in order to increase its effectiveness and determine the powers of each administrative organ to avoid any overlapping of powers and turfs or any potential conflicts. To that end, four main agencies, three support agencies, numerous departments and support units have been created in the Ministry of Justice as follow:

- 1) **The Ministry of Justice Agency for Attachment and Enforcement:** This Agency is responsible for attachment and enforcement matters in the attachment circuits

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\* The Scientific Committee of the Center for Global Thought on Saudi Arabia has prepared and drafted this article.

in different courts in the Kingdom of Saudi Arabia, and as well taking responsibility for enumerating the number of enforcement judges needed and the relevant specialized support staff in respective circuits besides taking responsibility for matters relating to training.

- 2) **The Ministry of Justice Agency for Arbitration and Conciliation Affairs:** This Agency is responsible for setting up and supervising conciliation centers and attached offices in matters pertaining to issuing arbitration licenses, supervising arbitrators, submitting the proposals necessary for alternative disputes resolutions and preparing implementing regulations for arbitration and conciliation laws.
- 3) **The Ministry of Justice Agency for Attestation Affairs:** This Agency is responsible for attestation before notaries, registration of real estates, and attestation of contracts of marriage. The objective of establishing this Agency is to integrate attestation services and transform them into electronic services as far as possible together with achieving efficiency and quality.
- 4) **The Ministry of Justice Agency for Planning and Development Affairs:** This Agency is responsible for planning and preparing necessary studies for developing the judicial environment with respect to aspects pertaining to organizational structure and human cadres in a manner that would contribute to development of the judicial institutions and transform the Ministry of Justice work into highly institutionalized and efficient business to achieve better results.

**The Ministry of Justice Support Agencies:**

- 1) **The Ministry of Justice Support Agency for Courts Affairs:** This support agency assumes responsibility for supporting courts affairs and present proposals for developing the work of courts. The affairs of appeal courts and specialized courts and administration of general courts are closely associated with this support agency.
- 2) **The Ministry of Justice Support Agency for Outsourcing:** This support agency is concerned with supervising departments for recording/ lodging statements of claims and summons departments; it also supports technical units such as engineering departments and experts with respect to matters relating to judicial support.
- 3) **The Ministry of Justice Support Agency for Notaries Affairs:** This support agency is concerned with the notaries' affairs including determination of the needs for regulating and organizing notaries business. As well, all employment and professional matters of notaries are associated with this support agency.

**The New Departments of the Ministry of Justice:**

- 1) **Property Registration and Attestation Department:**  
This Department is responsible for registering property (real estates) as provided for under the Property Registration Law and its Implementing Regulations including attesting and registering rights pertaining to the real estate units.
- 2) **Legal Affairs and International Cooperation**

**Department:** This Department is responsible for communicating with international bodies to give clear and comprehensive picture of the judicial system in Saudi Arabia, and to benefit from different international experience through strengthening cooperation relationships with states and regional bodies in relation to legal and judicial matters. This Department coordinates international participation of the Ministry of Justice, and as well responsible for forming an information bank to comprise information about the international interaction and participation with respect to judicial matters in order to serve the judicial activities in the Kingdom of Saudi Arabia, and to prepare proposals regarding international conventions relevant to the work of the Ministry of Justice.

- 3) **Judges Training Department:** This Department is concerned with training judges and as well concerned with all matters relating to improvement of the performance of judges in light of current and future needs. This Department shall be responsible for contacting training institutions/ bodies and nomination of judges for training besides following up the improvement of judges and their performance and the skills they acquire.
- 4) **Combating Money Laundering and Terrorism Financing Department:** This Department was set up to activate and reinforce the supervisory role of the Ministry of Justice with respect to the bodies under its control. The Department monitors suspicious financial transactions, protects the judicial institutions, courts and notaries from any penetration that might camouflage suspicious

transactions, receives information from judicial bodies about any suspicious transactions and submit the same to the competent authorities. The Department also prepares awareness programs in cooperation with the different bodies/ authorities.

- 5) **Quality Control Department:** The objective of creating this Department is to promote institutional performance of the Ministry of Justice and its attached bodies through developing a quality control system, policies and procedures for pursuing and assessing operation and mechanisms for improving the services provided by the Ministry and its different organs, and as well to pursue implementation of the adopted policies.
- 6) **The General Department of Courts' Branches:** This Department is responsible for supervising the courts business, develops procedure for operation and pursues their affairs. The Department is concerned with planning the financial needs of the courts' branches and develops their organizational structures and environment, besides incessant perusal to ascertain the validity of procedure and compliance with applicable laws and regulations.
- 7) **The General Department of the Affairs of Appeal Courts:** This Department is responsible for supervising the business of the courts of appeal and improves their operation. The Department is also responsible for planning to determine the technical and human needs of specialized courts and develop the organizational structure and improve the work environment of such courts.
- 8) **The General Department of the Affairs of Specialized**

**Courts:** This Department is responsible for supervising the operation of specialized courts. The Department is also responsible for planning to determine the technical and human needs of specialized courts, develop the organizational structure and improve the work environment of such courts.

### **Newly Formed Units**

- 1) **The Coordination Unit with the Supreme Judicial Council and the Supreme Court:** This Unit coordinates and pursues matters with the Supreme Judicial Council and the Supreme Court in their common business with the Ministry of Justice, and as well pursues the implementation of the resolutions of the Supreme Judicial Council and the Supreme Court in order to integrate and coordinate between judicial institutions.

### **Second: Constructions and Development of Courts in a Manner Commensurate with Judicial Environment:**

King Abdulla Project for Reforming the Judiciary has provided much support to developing and modernizing courts premises seeking to create an appropriate working environment that suits modern specifications and criteria. The Project targets to provide approximately 290 premises within a very short time. The Ministry of Justice has conducted many detailed studies and discussed the matter with experts. The modernization of judicial premises has passed through many stages starting from renting premises for courts and notaries and buying land plots to construct

courts premises. Then came the stage of preparing data and information base, and finally came the stage of asking for proposals for construction. These developments have been represented in the following:

1. Constructing premises for courts and notaries;
2. Constructing judicial cities;
3. Constructing complexes for Sharia circuits.

The construction of courts has been made in a modern fashion commensurate with the nature of such courts as to judicial jurisdiction and the services to be provided for citizens. Twenty-two (22) buildings have been constructed for different levels in the districts of the Kingdom of Saudi Arabia with each court comprising fourteen (14) court rooms and some of these premises have been built adjacent to prisons to facilitate movement/ transfer of prisoners.

The table below shows the names of those courts and geographical locations in the Kingdom of Saudi Arabia:

**Table No (1)**  
**New Courts Buildings**  
**(Locations and Number)**

<b>No.</b>	<b>Location</b>	<b>Court</b>	<b>Number of buildings</b>
1	Jeddah (Bremam)	District Court	2
2	Jeddah (Zahban)	Specialized Criminal Court	1
3	Jeddah (Zahban)	Specialized Appeal Court	1
4	Medina	Criminal Court	2
5	Medina	Family Court	1
6	Medina	Enforcement Court	1
7	Dammam	Criminal Court	2
8	Al Khobar	General Court	2
9	Al Hassa	General Court	2
10	Al Hassa	Criminal Court	1
11	Qatif	General Court	1
12	Hail	General Court	2
13	Hail	Criminal Court	1
14	Onaiza	General Court	1
15	Al Rus	General Court	1
16	Rafaha	General Court	1
<b>Total</b>			<b>22</b>

In the context of comprehensive development of judicial premises, it has been decided to build fifty two (52) courts in five different districts in Saudi Arabia as follows: eighteen (18) general courts in Riyadh District, fifteen (15) courts in



Qassim District, nine (9) courts in Medina, nine (9) courts in Jizan and six (6) courts in the Eastern Province. Under King Abdulla Project for Reforming the Judiciary efforts are underway to build specialized different courts in all districts of the Kingdom of Saudi Arabia.

**Notaries Premises:** King Abdulla Project for Reforming the Judiciary approves the construction of new forty two premises for notaries in different district in the Kingdom of Saudi Arabia as follows: fifteen (15) in Riyadh district, ten (10) in Qassim district, seven (7) in the Eastern Province and five (5) in each of Jizan and Medina.

One of the constructive ideas of King Abdulla Project for Reforming the Judiciary is the development of the judiciary in Mecca “The Judicial City” comprising notary premises one and notary premises two and a branch of the Ministry of Justice and courts complex comprising (appeal court, general court, commercial court, labor court and enforcement and attachment court). The complex will comprise one hundred seventy nine (179) judicial councils, a transactions hall and every building shall be composed of a ground floor and ten (10) floors.

**Sharia Circuits Complex:** King Abdulla Project for Reforming the Judiciary plans to set up number of Sharia circuits complexes in Saudi provinces and cities, and the table below shows the executed complexes and those where work in progress:

**Table No (2)**  
**New Sharia Circuits Complexes**  
**(Locations and Number)**

<b>No.</b>	<b>Location</b>	<b>Court</b>	<b>Number of buildings</b>
1	Tabuk	Tabuk	1
2	Sharoura	Najran	1
3	Bisha	Aseer	1
4	Hafr Al Baten	Northern Province	1
5	Al Saliel	Riyadh	1
6	Al Qat	Riyadh	1
7	Yadma	Najran	1
8	Houta Sedair	Riyadh	1
9	Arar	Northern Province	1
10	Dammam	Eastern Province	1
11	Boraidah	Qassim	1
12	Jizan	Jizan	1
13	Jeddah	Mecca	1
14	Baqaa	Hail	1
15	Sakaka	Al Jouf	1
16	Khamis Masheet	Aseer	1
<b>Total</b>			<b>16</b>

### **Third: Employment of Technology to Serve the Judiciary and Other Judicial Bodies:**

King Abdulla Project for Reforming the Judiciary targets employing electronic techniques to modernize the judiciary and the other judicial bodies (the judicial apparatuses, courts

services, notaries) to accelerate litigation procedure and save time for all parties which would result in achieving efficiency and effectiveness. For that reason, the general department for information technology, the body entrusted with responsibility of developing judicial technology programs, rushed to utilize the most software programs.

The new technological developments have been represented in seven phases based on technology, in part or in whole, as follows:

**First:** Information Center: King Abdulla Project for Reforming the Judiciary has set up an information center to provide current and future services to be provided within a comprehensive electronic system employing the most advanced technology trends and according to the best available international specifications and criteria that provide safety and confidentiality of information and data commensurate with international information centers. The Information Centre is better equipped to receive international classification accreditation; it has been transformed from a mere information center to a distinguished electronic gate to provide the Ministry of Justice and all types of courts and notaries with multiple electronic services including:

- 1) Connect and operate the systems of more than 500 bodies adjacent to the Ministry of Justice including courts and notaries to governmental authorities through advanced technology means via intranet network for each building by installations (totaling 32) connecting such courts and notaries.

- 2) Central phone equipment in the Ministry of Justice and adjacent bodies to serve all employees now totaling more than twenty three thousand (23,000) through phone network. This is an advanced system permitting conducting phone calls (audio and video conference) between the employees of the Ministry of Justice.
- 3) Digital cameras equipped with internet protocol technology administered centrally so security men of the Ministry of Justice headquarter are enabled to monitor all cites and trace and check recordings easily.
- 4) Installing building management system (BMS) so engineers can control and maintain mechanical equipment of the Ministry of Justice.
- 5) Activation of the internal electronic gate which provide all services relating to employees; the services provided include the following: enquiries about financial entitlements (salaries, secondments and overtime payment), employment information, leave balances, electronic email services and providing internet services, besides video conferences.
- 6) Electronic communication system to receive calls and information from all bodies of the Ministry of Justice via IVR system so all received calls will be dealt with promptly.
- 7) Indexes for measuring performance in courts and notaries so performance will be checked and resources will be managed and distributed accordingly.
- 8) Litigation and remote simultaneous translation (interpretation) – this is a distinguished service available in the Saudi courts.

- 9) Activation of finger print system so courts and notaries will be able to ascertain the IDs of persons.

**Second:** Provision of Main Servers in the Information Center: this system provided the following to courts: (statement of claim, electronic archiving, reports and indicators of the performance of the Supreme Judicial Council, dates of prisoners' appearances before courts, real estate procedures, title deeds, and enquiries about cases).

**Third:** Protection of information security through employing new technologies to protect data from any suspicious access whether on the level of data base, the network or the electronic gate.

**Fourth:** Provision of network phone system through creation of phone lines/ contact in remote places/ districts via satellites and free calls between the employees of the Ministry of Justice.

**Fifth:** Availing video conference communication by providing big monitors and all relevant facilities to conduct meetings and conferences.

**Sixth:** installation of security systems equipped with video cameras (through 800 cameras equipped with internet protocol technology) and operation of monitor systems in sixty three sites administered centrally.

**Seventh:** provision of buildings security systems by using integrated control centers to monitor the buildings systems and components of the information center to secure smooth operation.

## Section Three

### Development of Human Cadres

#### The Scientific Committee \*

King Abdulla Project for Reforming the Judiciary has taken a set of procedures to retrain and train the human cadres in the judiciary and the other different judicial institutions of the state. These development efforts have concentrated on two main aspects:

**First:** creation of new employment opportunities in judicial institutions,

**Second:** To train employees.

#### **First: Creation of Jobs:**

1. **Increase the Number of Judges:** The Ministry of Justice has taken practical steps to increase the number of judges and their assistants through

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\* The Scientific Committee of the Center for Global Thought on Saudi Arabia has prepared and drafted this article

employing more judges to guarantee the quality of the judicial service provided in a manner commensurate with practical needs and development requirements. More than 700 judges were appointed so the total number of judges has been increased to one thousand seven hundred fifty five (1755) judges with a growth percentage of 54,62% within the past four years.

2. **Increase the Number of Public Notaries:** The Ministry of Justice has increased the jobs to fill shortage believing in the importance of attestation work. Four hundred six (406) notaries were appointed during the past four years satisfying the increased need because of the growing number of transactions and expansion of cities. In addition, two hundred forty eight (248) notaries were promoted increasing the number of notaries to seven hundred seventy five (775) with a growth percentage of 90,88%.
3. **Increase the Number of Support Staff:** The Ministry of Justice has appointed nine thousand five hundred forty two (9542) thus increasing the number of the total support staff to twenty five thousand five hundred ninety nine (25599) with a growth percentage of 59,42%. Two thousand seven hundred sixty seven administrative jobs (grade 2 up to grade 9) have been created including eight hundred ten (810) jobs for the Ministry of Justice Agency for Attachment and Enforcement Affairs. King Abdulla Project for Reforming the Judiciary has demanded



creation of new jobs under designation of “expert”, “reformer” and “enforcement officer”.

## **Second: Training of the Judges:**

### **1. Training of Judges:**

King Abdulla Project for Reforming the Judiciary has paid much attention to training the human cadres in the judiciary and other judicial institutions. Since launching of the Project, the Ministry of Justice has conducted many training programs for judges, notaries, support staff and leading administrative staff. More than two thousand fifty three (2053) of the staff have received training during 1428H – 1429H including two hundred seventy eight (287) judges and one hundred thirty five (135) notaries in the Higher Institute of the Judiciary in Imam Mohammed Ibn Saud Islamic University in Riyadh, Naif Arab University for Security Science and the Institute of Banking of the Saudi Arabian Monetary Agency.

During the period 1430H - 1431H (corresponding to 2009 - 2010), one thousand one hundred seventy four (1174) employees (administrative staff and notaries) received training, and four thousand five hundred fifty one (4551) employees received training during 1432H - 1433H (corresponding to). The training growth percentage of the staff of the Ministry of Justice increased in 1433H - 1434H (corresponding to 2012 - 2013) increasing the number to sixty thousand eight hundred fifty (60850) trainees and some of those programs were outside Saudi Arabia.

The training programs include study inside and outside Saudi Arabia and the number of those who received study outside Saudi Arabia reached seventy two (72) of the staff.

## **2. Developing a Mechanism for Work and a Plan for Training:**

King Abdulla Project for Reforming the Judiciary has adopted many steps for development represented in formulating a strategy for developing the judiciary, setting up a center for judicial training in the Ministry of Justice, forming a committee for conferences, symposiums and workshops, besides preparing a program for job analysis for all administrative jobs to determine the real need, quantitatively and qualitatively, for training and qualification. As well, the Ministry of Justice has developed its relationships with many sectors and educations institutions inside and outside the Kingdom of Saudi Arabia by signing cooperation agreements to train its human cadres. These institutions include: Imam Mohammed Ibn Saud Islamic University, Dammam University, Qassim University and Princess Nora University with respect to presenting Sharia and social studies, legal consultation and training human cadres. The Ministry of Justice has also signed an agreement with King Saud University to provide consultants in judicial, media, engineering and computer fields.

In addition, the Ministry of Justice has signed a memorandum of understanding with Southern Illinois University at Carbondale in social work, filing and support of conciliation offices, and with the Saudi Ministry of Social Affairs in the field of training human cadres and personal development.



## **Chapter Four**

### **International Debates**

- The Relationship Between the Judiciary Power and the Executive Power
- The Judicial Doctrine in Saudi Arabia
- Differences in Judicial Rulings
- The Problems of Codification and Enactment
- Methods of Evidence
- Crime and Punishment in Islam
- Transparency and Publicity of Sessions in Saudi Courts
- The Limited Number of Judges Compared to Population and Number of Legal Cases
- Judges Are Exclusively Appointed from Sharia Schools Graduates
- Women Under Saudi Legal System
- Aspects of Respect of Particularities of Women in the Saudi Legal System
- The Judiciary and the Freedom of Opinion and Expression

## **The Relationship of the Judicial Power with the Executive Power**

**Prof. Abdullah Al Turaiki \***

The purpose of political and administrative (i.e. executive) powers in a Muslim community is to ameliorate peoples' faith (i.e. Muslims) – changing and improving their lives must be through religion, and that was the purpose of sending out messengers and revealing the Books, and as Allah Almighty says, 'Indeed we have sent Our Messengers with clear proofs, and revealed with them the Scripture and the Balance (justice) that mankind may keep up justice. And We brought forth iron wherein is mighty power (in matters of war), as well as many benefits for mankind, that Allah may test who it is that will help Him (His religion) and His Messengers in the unseen. Verily, Allah is All-Strong, All-Mighty' (Surah Al-Hadid, verse (25)).

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The late Ibn Taimiyya (Allah's mercy be upon him) said, 'The aim of sending messengers and revealing of Books is that mankind may keep up justice with respect to Allah Almighty rights and the rights of people, so whoever deviate from the teachings of the Books, shall be put right by force, and in that respect religion shall be put right by the Holy Quran and the sword'<sup>(1)</sup>. The interpretation of this is that rights may be established only by two means: justice and power, and without these means, rights may not be enforced at all. As well, a state lacking these two means will not enjoy respect in the international arena.

Contemporary political scientists and jurists have divided the major/ great powers within a state into three divisions, namely, the legislative (i.e. regulatory) power, the executive power and the judicial power.<sup>(2)</sup>

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(1) See 'Collection of Sheikh Ibn Taimiyya' collected by Sheikh Abdurrahman Ibn Qasim, 28/ 263.

(2) Some jurists, such as Dr. Sulaiman Al Tamawi, believes that developments in modern governance regimes have added other powers and the most important of these is the popular organization which is manifested in the form of political parties (see, Al Tamawi, *The Three Powers*, pp. 315). Under Islamic regime, the general social responsibility referred to in the verse, 'The believers, men and women, are Aulia (helpers, supporters, friends, protectors) of one another, they enjoin (on the people) Al Marouf (Islamic Monotheism and all that Islam orders one to do), and forbid (people) from Al Munkar (i.e. polytheism and disbelief of all kinds, and all that Islam has forbidden)' (Surah At-Taubah, verse (71)), may be considered as third power. In general, Islam message is addressed to Muslims at large, and specifically to those who hold such powers as in the verse, 'Verily, Allah commands that you should render back the trusts to those, to whom they are due; and that when you judge between men, you judge with justice. Verily, how excellent is the teaching which He (Allah) gives you! Truly, Allah is Ever All-Hearer, All Seer' (Surah An-Nisa, verse (58)).

By necessity, these three powers exist in any mature state whatsoever its political system and irrespective of its political philosophy. Within this context, one may raise questions about the nature of these powers? Are the relationships between these powers of separation or integration or something else? Opinions differ in that respect:

The first opinion supports separation of powers; it is claimed that separation constitutes ‘an effective safety for establishing legal (i.e. Rechtsstaat) state in contemporary political systems. This guarantees the creation of an independent organ of each of the functions of the state – an organ for legislation (law-making), an organ for executive power and a third for the judiciary. Once this is achieved, each organ will have specific jurisdiction without overlapping with the other two powers’<sup>(1)</sup>. If these powers are to be combined in one, this will lead to tyranny, a fortiori to injustice and arbitrary rule.

The second opinion supports integration on the basis that, ‘the state is an integrated and inseparable organ’. Powers, the opinion argues, are essentially one integrated power; the legislation, the executive and the judiciary may not be separated, and if they separate, paralysis will occur – it is obvious that the two opinions are divergent.

This divergence gives rise to a third opinion (i.e. theory) based on cooperation between the powers, with no integration, but separation with cooperation. This opinion

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(1) Legal State and Islamic political regime, Dr. Muneer Al Bayatti, p. 229.

may be cheered by many and appears more practical in application. Although western democracies tend to separate powers, nevertheless, ‘they are compelled to entertain some kind of cooperation particularly between the legislative and executive branches’.<sup>(1)</sup>

The judicial power seems to be separate from the other two powers. Though there is cooperation between the three powers, yet the judicial power apparently enjoys ostensible independence in all democracies. It is arguable that this kind of separation may not be obvious with respect to the judicial and executive powers considering that both are executive in nature compared with the legislative power which enacts laws implemented by the other two powers; too, the operation of both overlap in practice.<sup>(2)</sup>

### **Aspects of the Judiciary Independence in Islam:**

Studying the independence of the judicial power within the context of Islam history, one may possibly reach these two important conclusions:

First: the judge office used to be assumed by people not judges in the strict sense of the word, but people of higher ranking, namely, Greater Imam, Caliph, deputy of Great Imam described as wazir [i.e. minister] or sultan or less important offices such as regions governors and commanders of armies if they had the prerequisites needed for assuming

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(1) See, ‘The Three Powers’ by Dr. Sulaiman Al Tamawi, p. 457.

(2) See, ‘the Islamic Regimes Classification’ by Dr. Mustafa Kamal Wasfi, p. 226.



judgeship.<sup>(1)</sup>

Second: the scientific/ technical and intellectual foundation of judges is closely associated with being versed with the teachings of the Holy Quran and Sunnah and interpretations of them as developed by scholars. Second in importance comes other factors such as limitations, circumstances (time and place), conditions, laws etc. which require independence of mind, integrity, judgment etc. of the judge without any social, political or doctrinal pressures; that type of independence prevailed throughout Islam history despite periods of weaknesses and strengths in the history of Muslims nations.

Therefore, independence of the Islamic judiciary may be perceived in two aspects:

**First:** administrative independence, a material independence,

**Second:** voluntary independence, a moral independence.

In this juncture, we would raise the following question: do these two types of independences present in [today's] Islamic judiciary?

The first type of independence i.e. administrative independence means administratively independent judiciary from the other two powers particularly from the executive power represented in the Greater Imam and his deputies,

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(1) That was the case in the era of caliphs (May Allah's mercy be upon them) where most caliphs were knowledgeable though with some variance. However, successors used to act as governors and commanders of armies in most cases, yet they were strong and powerful. In late eras, few of notables/ governors are knowledgeable in Sharia matters.

ministers, representatives etc. – this has many applications. In Prophet Mohammed era, he used to judge between people himself<sup>(1)</sup>. As well, Prophet Mohammed assigned the responsibility for judging between people to Ali Ibn Abe Taleb, Maaz Ibn Jabel and Etab Ibn Aseed<sup>(2)</sup> (may Allah's mercy be upon them). In caliphs' eras, Abu Bakar Al Sidieq (may Allah's mercy be upon him) assigned responsibility for judging between peoples in Medina to Omar Ibn Al Khatab (may Allah's mercy be upon him), and in turn, Omar Ibn Al Khatab (may Allah's mercy be upon him), during the periods of Islam expansion, assigned that responsibility to a judge in each region, so that is why Omar Ibn Al Khatab (may Allah's mercy be upon him) considered the founder of distinguished judiciary in Islam, and as well he was the first to set up divisions/ departments to organize the affairs of people.<sup>(3)</sup> Moreover, Omar Ibn Al Khatab (may Allah's mercy be upon him) was the first to lay down a regime for the judiciary as was mentioned in his lengthy letter to Abu Musa Al Ashaari (may Allah's mercy be upon him).<sup>(4)</sup>

The late Ibn Al Qaim said, 'this is a great book acclaimed by scholars and on which they based principles of making

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(1) Some scholars wrote about judgeship and judgments during the Prophet Mohammed era such as 'Judgeship during Prophet Mohammed' by Ibn Al Talaa, died in 497H, inquired by Dr. Mohammed Dia Al Rahman Al Aazami.

(2) See, 'Three Powers in Islam' by Sheikh Abdel Wahab Khilaf, p. 18 and the following pages, first edition 1400H.

(3) See, 'Three Powers in Islam' by Abdel Wahab Khilaf, p. 32 and the following pages, See also the 'Three Powers' by Al Tamawi, p. 423.

(4) See, 'Aalam Al Muaqien an Rab al Alameen' by Ibn Al Qaim, 1/91, inquired by Abdurrahman Al Wakil.

rulings with respect to matters relating to judging and testimony; governors and muftis need to contemplate and study it'<sup>(1)</sup>

Following the era of caliphs, the judiciary developed laws and procedures resulting in changeable relationships with the executive power; those relationships overlapped to the degree of integration with the executive power, and at times broke to the degree of separation. The title 'the judge of judges' was created during the era of Al Mahdi Al Abbasi or Haroun Al Rasheed meaning in today's parlance the 'minister of justice' or chief justice and the first to occupy that office was the Judge Abu Youssef (died in 182H) the prominent disciple of Imam Abe Hanifa.<sup>(2)</sup>

In Andalusia, the office of Jammaa Judge [i.e. judge of the community] was created which was similar to the office of 'the Judge of Judges' and that office exercised the widest powers as to appointment and dismissal of judges and overruling of rulings/ judgments; in a sense, one may conclude that 'the judiciary became a separate power and judges had a chief from among themselves'<sup>(3)</sup>.

The second type of independence i.e. voluntary independence relates to the freedom of opinion and thought and non-intervention; this is apparent from the Holy Quran, Sunnah and traditions of caliphs as shown in the following

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(1) Ibid, 1/ 92.

(2) See, 'Al Aalam (i.e. Notable People' by Al Zarkali, 8/ 193.

(3) 'The Judiciary Regime in Islam' by counsel Jamal Sadeq Al Mirsafawi, p. 105, Imam University Publication.

examples. Judges were required to judge fairly and equitably and to follow not their desires, but the path of Allah as Allah Almighty says, ‘And so judge (you O Mohammed) among them by what Allah has revealed and follow not their vain desires, but beware of them lest they turn you (O Mohammed) far away from some of that which Allah has sent down to you’ (Surah Al Maidah, verse (49)), and the verse, ‘O Dawud (David)! Verily, We have placed you as a successor on the earth; so judge you between men in truth (and justice) and follow not your desire – for it will mislead from the path of Allah’ (Surah Sad, verse (26)). A judge was required to be knowledgeable and capable of making correct deduction and discretion. Prophet Mohammed (may Allah prayers and peace be upon him) reported to say, ‘Allah never sends a prophet or appoints a caliph but He has two groups of advisers: a group telling Him to do good and another group telling him to do evil and urges Him to do it. And the one who is truly protected is the one who is protected by Allah, the Almighty and Sublime’. No doubt, an independent mind judge is unlikely to follow his own desires, or be responsive to pressure from influential people.

In the famous letter sent by caliph Omar Ibn Al Khatab (may Allah’s mercy be upon him) to Abi Musa Al Ashaari (may Allah’s mercy be upon him) referred to above, Omar Ibn Al Khatab (may Allah’s mercy be upon him) wrote to his appointee in Al Koufa that, ‘you should not refrain from overruling a judgment you passed if compelling reasons

required such overruling because right is enduring and will not be void. You should understand and carefully ponder things that you will not find in the Holy Quran and Sunnah and exert your best discretion'<sup>(1)</sup>; this signifies the importance of an independent judge mind not submissive to political or social pressures.

If we leave aside these theoretical rules and their applications in the eras of caliphs which reflected intellectual, political and social weight and prominence to the judiciary and turn to applications in successive times, we would find different cases including times similar to early days of Islam where judges used to be independent and powerful to the extent of passing rulings against sultans, kings and caliphs without fear or hesitation which is an indication of the independence of the judiciary. You will find many reported accounts in this regard in Islam history books and literature. You will find also humorous accounts about other professions – this is very common in literature books; however, this is the exception not the rule.

### **The Relationship of the Judiciary with the Executive Power in the Laws**

Contemporary laws, particularly in Arab countries, vary with respect to the independence of the judiciary from the executive power. Some believe that the judiciary is part of the executive power because both, they claimed, perform

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(1) See, 'Aalam Al Muaqien an Rab al Alameen' by Ibn Al Qaim, 1 /68.

almost the same type of work – this belief is held by most jurists. Others consider that the judiciary is an independent third power/ branch stands on equal footing with the executive and legislative powers – this belief is prevailing in Arab countries constitutions<sup>(1)</sup>. The majority of the Arab countries' constitutions provide for the independence and supremacy of the judiciary; this provision is obvious in the constitutions of Arab Republic of Egypt, Morocco, Kuwait, Sudan, Mauritania, Bahrain etc.....<sup>(2)</sup>

The Kingdom of Saudi Arabia affirms the independence of the judiciary in the Basic Law of Governance where article forty-four provides that, 'The Authorities of the State consist of: the Judicial Authority, the Executive Authority, the Regulatory Authority'. Article forty-six provides that 'The Judiciary is an independent authority. The decisions of judges shall not be subject to any authority other than the authority of the Islamic Sharia'. In addition, article one of the Judiciary Law provides that, 'Judges are independent and, in the administration of justice, they shall be subject to no authority other than the provisions of Shari'ah and laws in force. No one may interfere with the Judiciary'. In sum, all these laws provide for the independence of the judiciary and no one is permitted to intervene in the affairs of the judiciary. To assert that principle in the country, the Supreme Judicial

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(1) See, 'The Three Powers' by Dr. Sulaiman Al Tamawi, p. 277.

(2) Ibid, pp. 278 – 286; however the author qualified this conclusion by mentioning that such constitutions provide for general principles only, then subordinate that independence to laws and regulations, p. 277.

Council was established and entrusted highly significant powers and authorities including:

1. Consider employment affairs of judges i.e. appointment, promotion, disciplinary actions, secondment, training, vacations, termination of service etc. in accordance with prescribed rules and procedures in a manner guaranteeing the independence of the judiciary.
2. Issuance of the judicial inspection regulations.
3. Supervision over courts, judges and their work as prescribed under law.
4. Issuance of rules determining method of selecting judges, procedures and controls for post-graduate leave. Further, article eight of the Judiciary Law provides that the Supreme Judicial Council shall have its own budget.

The principle of the independence of the judiciary has been reinforced by separating the Ministry of Justice, an executive function, from the judiciary and restricting its business to administrative and financial supervision and notaries so to avoid duality between the judiciary represented in the Supreme Judicial Council and the functioning of the Ministry of Justice represented in the Minister of Justice and his deputies.

It is noteworthy that the Law of Criminal Procedure provides that, ‘representatives of public authorities must execute the instructions of the judicial authorities issued in

accordance with this Law, and may use appropriate means to execute said instructions’. This reinforces and strengthens the integrity of judges. We may also add the stance of the new law with respect to the quasi committees and tribunals as such will be brought under the umbrella of the judiciary thus removing them from the executive power.

This leads to independence of the judiciary and non-intervention of any other power or function in its working – this is a general principle that may involve some exceptions such as:

1. Conflicts between the Supreme Judicial Council and the Ministry of Justice may occur considering the Minister of Justice as a member of the executive branch i.e. the Council of Ministers, and conflict may occur between the Supreme Judicial Council and the Council of Ministers because the latter combines the executive and the legislative powers – this is likely to occur when the Council of Ministers enact a law or a resolution and compels the judiciary to execute it pursuant to article forty-eight of the Basic Law of Governance which provides, ‘The Courts shall apply rules of the Islamic Sharia in cases that are brought before them, according to the Holy Qur’an and the Sunna, and according to laws which are decreed by the ruler in agreement with the Holy Qur’an and the Sunna’. In fact, this is a kind of cooperation between the executive power and the



judicial power; the role of the executive branch is to legislate, and the role of the judiciary is to apply laws and regulations. However, the problem arises when a law conflicts with the Basic Law of Governance or with a Sharia provision with the judiciary having no legislative control, only to apply such laws. Although the term *Wali al Amr* (i.e. ruler) means (the King and his Government) some may extend this to any senior official or prince as ruler. This leaves the door open for wider interpretations and the principle of the ‘independence of the judiciary’ remains a mere slogan.

2. The relationship between the judiciary and the Ministry of the Interior involves some conflict or at least non-clarity with respect to the Bureau of Investigation and Public Prosecution which is a judicial body known in other countries as the examining judge (i.e. inquisitorial system): they are supposed to be part of or attached to the Supreme Judicial Council. However, in reality the Bureau of Investigation and Public Prosecution is attached to the Minister of Interior as provided for in section one of the law of Bureau of Investigation and Public Prosecution this matter weakens the independence of the judiciary and gives the Ministry of Interior judicial tasks.
3. A practice counter to the principle of the ‘independence of the judiciary’ is the delay of enforcing or suspending

the enforcement of some judicial rulings by the executive branch without apparent reasons which is likely to weaken the integrity of the judiciary.

Thus the relationship between the judicial power and the executive power, in the lens of laws, bear a dual nature sometimes clear and in others obscure, sometimes in harmony and in others in conflict; this is unacceptable even from the perspective of the state.

### **The Influence of the Executive Power on the Judicial Power:**

We have already explained the nature of the relationship between the executive power and the judicial power from the Saudi perspective. As well, we have shed light on the reality of some Arab countries and that they theoretically provide in their constitution for the independence of the judiciary however in practice things are conflicting and overlapping. Below, we want to show the extent of the influence the executive power exercises on the judicial power.

We have noticed that in all states, old and modern, the judiciary is attached to the head of the state (whether called president, monarch, sultan or prince etc.) enjoying wide powers with respect to appointment, dismissal, promotion and relocation of judges whether directly or indirectly. For example, selection and appointment of judges by the executive power is the most wide spread and

successful method. In essence, this does not conflict with the independence of the judiciary from the executive power because laws determine the means that the executive power should observe while appointing judges which is the method adopted by Arab countries.<sup>(1)</sup> The Kingdom of Saudi Arabia is no exception as all judges are appointed by royal orders and as well their promotion, relocation and secondment. This type of connection between the judicial power and the executive power is normal and perhaps raises no problems. However, there are problems and types of interventions of the executive power that may raise numerous problems not least restricting the freedom of the judge and fettering his will; this intervention may be divided into two:

### **Direct intervention and this may be in the form of:**

- duality of the judiciary,
- intervention of the Council of Ministers,
- intervention of the Minister of Justice,
- intervention of the Minister of Interior.

### **Indirect intervention and this may be in the form of:**

- constraining enforcement of judicial rulings,
- lack of job security,

As to duality of the judiciary referred to above, it means there are means other than the general courts structure or

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(1) 'The Three Powers' by Dr. Sulaiman Al Tamawi, p. 288.

the Board of Grievances in the forms of committees staffed by unqualified people. This is likely to harm the image of the judiciary. And some, if the right is on their side, may submit to ruling! As Allah says, “And when they are called to Allah (i.e. His Words, the Quran) and His Messenger, to judge between them, a party of them refuses (to come) and turns away. But if the truth on their side, they come to him willingly with submission” (Surah An-Nur, verses (48) and (49)) – if they believe that that the judgment is on their side, they would accept and cheer; otherwise, they will resort to committees and tribunals.

However, interventions from some executive power may also take the following forms:

Intervention in investigations to hide or manipulate facts or deciding not to continue investigating a serious case by keeping it in file.

People find no access to court in conflict with article forty-seven of the Basic Law of Governance which provides for, ‘All people, either citizens or residents in the Kingdom, are entitled to file suit on an equal basis. The Law shall specify procedures for this purpose’. These are instances where the Board of Grievances decides not to accept hearing cases concerning some resolutions and decisions of the executive power based on the grounds that such resolutions and decisions are sovereign acts – this obviously conflict with the above-mentioned article.

Any outside intervention even from the Ministry of

Justice will violate the principle of the ‘independence of the judiciary’ and strikingly conflicts with legal provisions prohibiting intervention in the works of the judiciary including article one of the Judiciary Law, ‘‘Judges are independent and, in the administration of justice, they shall be subject to no authority other than the provisions of Shari’ah and laws in force. No one may interfere with the Judiciary’. And article five of the Council of Ministers Law provides for punishment for any intervention from any minister, the said article provides that, ‘without prejudice of any provision in any other law, an accused person charged under the provisions of this Law shall be subject to imprisonment for a period of 3 – 10 years if committed any of the following offences .... personal intervention in the judicial affairs or the affairs of government departments’.

Indirect interventions have numerous forms and below we will concentrate on two of these forms:

The first form: obstructing enforcement of judicial rulings: a court ruling may be passed, however it may not be enforced either because of the inability of the concerned administrative body to enforce the ruling or because of intervention of influential and powerful people – and in cases, the ruling may be overruled. The defendant may be an expatriate in a criminal case and some authorities may intervene to stop enforcement of the ruling on pardon / amnesty basis from the King. Such situations cause embarrassment to the government because there are numerous authorities engaging

in issuing and enforcing courts' rulings. On the contrary, in advanced countries we find that the power to issue courts' ruling and enforcing them is exclusively the business of the judiciary and heads of states are incapable of making any interventions – so such countries are viewed as respectful and feared.

The second form of indirect intervention is the lack of job security to judges – this is the most serious threat to the principle of the 'independence of the judiciary' and destroys the morale of judges. If the judge is bothered by fears of transfer to a remote area, obstructing his promotion, threatened to be dismissed or any social or psychological pressures that may impair his mental/ intellectual power ... then how such a judge will adjudicate fairly and be faithful to his consciousness?

To sum up, 'independence of the judiciary' may be divided into two: administrative independence and voluntary independence. Administrative independence is a relative matter in the sense that the judiciary may be separate from other powers; however going very far in that direction may paralyze the judiciary considering the overlapping relations between the judiciary power and the executive power. Too, the judiciary power may distance itself from the executive power in matters of interventions while keeping administrative ties so the relationship will be that of cooperation – this is good and preferable and this is remarkable under Saudi laws such as the Basic Law of Governance, the Judiciary Law and the

### Law of Criminal Procedure.

As to voluntary independence i.e. that concerns the will of judges and their freedom and consciousness, we consider it as the most important aspect of the ‘independence of the judiciary, because the judiciary operation needs free will, integrity and discretion, so whenever these factors are available to judges, we expect judges to adjudicate freely and fairly; failing which, bribe, corruption and whims will prevail.

All in all, the principle of the ‘independence of the judiciary’ remains a remarkable mantra advocated, for good or ill, by all countries as it symbolizes justice and integrity. This may appear in the form of general and flexible legal rules with wide interpretations and applications. Nevertheless, a country such as the Kingdom of Saudi Arabia, a pioneering country in applying the principles of Islamic Sharia, remains a focus of the international community. So any flaws or deficiencies, no matter how insignificant or minor, will be significant in the eyes of critics and will have negative effects beyond the discretion of judges in particular and upon the government in general. For that reason, judges must enjoy job security and as well social, political and intellectual freedoms – this is supposed to be provided by the country that lies at the heart of the Arab peninsula and embraces the Two Holy Mosques and as well adopting a moderate intellectual path.

## **Judicial Doctrine in the Kingdom of Saudi Arabia**

**Dr. Qais Al Mubarak \***

Muslim scholars apply provisions of Islamic Fiqh [i.e. jurisprudence] to Sharia law; it is Sharia law to which they succumb and apply its principles to their daily life. Allah Al Mighty does not create Sharia rules to make peoples' lives burdensome; on the contrary, Sharia rules were created to govern day-to-day transactions among people such as sale, purchase, lending, mortgage and other commercial transactions. As well, Sharia rules govern the social and political interactions between people and apply to criminal acts and omissions etc. The judgment of Allah is that application of His Sharia would achieve dignified life for all members of community. As long as a community abides by the teachings of Allah, problems will abate and become less

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harmful thus leading to bliss in this earth before attaining eternal bliss thereafter.

Sharia law is an unqualified good. Narrated Abdullah bin Masoud (may Allah be pleased with him) ([i]f you hear a recital of the verse “O who you believe...” you must listen carefully; it is either a good work you are commended to perform, or a bad work you are advised to avoid”. It is the judgment of Allah that He has created Sharia principles in observance of the nature of human beings, so people will find it easy to follow and apply, and people will eventually feel comfortable. To that end, Sharia principles observe human nature and its intrinsic characteristics. Sharia principles match human nature and are not meant as mere reflection of human whims or capricious desires so it will not lead to ethical, social, economic and criminal corruption.

One of the features of Sharia is that its principles respect customs and traditions of people when conducting their civil transactions such as sale etc. and gives the words and terms generally used by people the connotations their languages and dialects signify, so customs hold high under Sharia.

It is important to note that that Islamic jurisprudence is not ineffectual provisions such as pieces of legislation laid down by human beings. Branches of Islamic jurisprudence can be depicted as similar to high branches of trees that share one root, so regardless of the numerous and diversified branches – they belong to the same root. To that effect, Islamic scholars say, “Islamic jurisprudence is built on five

pillars: first, intention is what matters; second, certainty will not be eliminated by suspicion; third, harm to be eliminated; fourth, difficulty entails facilitation; fifth, custom prevails.

If principles of Sharia were not in response to human nature, people will find it difficult to apply and follow. In this regard, Allah faulted polytheists abandoning natural disposition and following their own lusts. Allah said, “Nay, but those who do wrong follow their own lusts without knowledge. Then who will guide him whom Allah has sent astray? And for such there will be no helpers.” (Surah Ar-Rum, verse (29)). Then Allah invites them to follow the religion corresponding to natural disposition, He said, “So, set you (O Mohammed) your face towards the religion (of pure Islamic Monotheism) Hanif (worship none but Allah Alone). Allah’s natural disposition (Fitrah) (i.e. Allah’s Islamic Monotheism) with which He has created mankind. No change let there be in Khalq-illah (i.e. the religion of Allah – Islamic Monotheism), that is the straight religion, but most of them know not” (Surah Ar-Rum, verse (30)). This discourse was not addressed to Prophet Mohammed (Allah’s blessing and peace be upon him) only, but to all Muslims, and Imam Al Qurtabi said, ‘This discourse was addressed to all Muslim nations by unanimous agreement of all Islamic scholars’.

By Sharia law, as a law of natural disposition, Sharia controls disputes between people with respect to social, economic and political matters which is a matter we note in

that tremendous literature in jurisprudence books, including the revelation, which is an enormous scientific heritage rich of applications through which Islamic scholars deal with people's concerns and conditions. Though Sharia comprises specific texts; however, these texts embody omniscient connotation and controlling rules that govern secondary issues.

Irrespective of the numerousness of facts and renewed events, we find in the Holy Quran, Hadith and in the sources and rules of jurisprudence an answer to each new issue and a response to each new event.

As a general rule, a judge may not pass a ruling unless he is well-versed in the Holy Quran and its interpretations, and be versed in all matters pertaining to Hadith and capable to infer Sharia rules from both the Holy Quran and Hadith. If the judge is not capable to make that inference, as the case among people today, he should be at least knowledgeable in jurisprudence matters – major and minor issues. By jurisprudence, I mean our considerable jurisprudence which Allah's judgment dictated to be collected and assembled in different known jurisprudential doctrines, that is to say, maintaining Sharia jurisprudence in four schools.

These doctrines were codified and scrutinized against the texts of the Holy Quran and Hadith by major Sharia scholars, thus laying down all-inclusive sources and rules under which coverage was established for each new branch. Those major Sharia scholars took great pains to collect these

sources and rules piecemeal and explained how to apply these all-inclusive sources and rules to new facts and events.

Scholars continue to apply the all-inclusive rules to new facts and events thus controlling fatwas during past centuries. This work would not have been completed were such Sharia scholars were not well aware that controlling jurisprudence, i.e. codification, with respect to fatwas and the judiciary was decisive in resolving disputes and barring chaotic fatwas and guarding against lapses. To that effect, scholars classified Fiqh (jurisprudence) including codes/ collections exemplifying says and opinions of the *ulama* of each of the four schools, aspects of differences and agreements, variances as to the strengths and weaknesses, the causes giving strength or impairing any opinion in all walks of life, reflecting the richness of Islamic jurisprudence. Then, scholars pointed out reliable fatwas and suggested matters where fatwa may not apply as to opinions not grounded on sound argument nor supported by any evidence.

Islamic jurisprudence was unwaveringly developing and improving up to the beginning of the twelfth century i.e. approximately two hundred years ago, where Islamic jurisprudence reached a sophisticated degree of mastery and jurisprudential codes reached their best moment and Islamic jurisprudence appeared in new cloth. As a result, fatwas were controlled and the judiciary was balanced by showing reliable sources in each of the four schools such as *Al Sharh Al Saqir* (i.e. Small Explanation) of the Maliki School, *Rad*

*Al Muhtar* (i.e. Guiding the Baffled) of the Hanafi School and as well Al Shafie and Al Hanbali Schools developed their own codes. This exemplified codification of Islamic jurisprudence and thus gave rise to abandoning bizarre fatwas and bizarre court rulings too.

In the Kingdom of Saudi Arabia, a decree of the judiciary was promulgated matching the approach followed by succeeding ulama. The decree No. (3) dated 17/01/1347H (corresponding to 05/07/1928) provides that the judiciary shall apply fatwas of Imam Ahmed Ibn Hanbal. To that effect, Chief of the Judiciary instructed the letter No. (1492) dated 21/09/1380H (corresponding to 08/03/1961) that, “No one to decree a fatwa other than fatwas established in all courts throughout the Kingdom otherwise such will lead to differences which is evil”. Nevertheless, the judiciary in the Kingdom chooses prevailing opinions in many issues other than in accordance of Al Hanbali School as long as such are based on Sharia principle or where such will achieve the interests of the majority of the followers of the Al Hanbali doctrine.

## **State of Variances of Judicial Rulings in Saudi Courts**

**Dr. Fahad Al Majed \***

You may note that the title of this article contains an issue, a subject and a scope. The issue pertains to variances, the subject is the courts' rulings and the scope of research is the Saudi courts. On the whole, the three words represent the problem of the question? Have we had variances in the rulings made by Saudi courts? What are the reasons, if any? Will that create a problem that will require a solution?

One should admit that studies and research in this subject are poor which were merely articles published intermittently in the press about a court ruling used in a general manner in reference to a certain subject. To have a better understanding of the subject, we must have an estimate of the degree and level of those variances, and as well the nature of the disputes/ cases heard and tried by Saudi courts.

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For proper and logical analysis of this issue, we deem it appropriate to examine first cases heard and tried by Saudi courts and to delay for a while the variances and as well the level of these rulings. It is important to note that having a better knowledge of the cases that courts hear and try will limit the scope of variances in a manner far much lesser than the stereotypes of those variances. Courts, in accordance with article (49) of the Basic Law of Governance, hear and try ‘all disputes and offences’ without prejudice to the jurisdiction of the Board of Grievances pursuant to article (53) of the same law. The Regulations of Procedure before Sharia Courts have detailed in numerous sections the jurisdictions of courts as we have mentioned in other paragraphs in this article.

It is noteworthy that this jurisdiction of value achieves unity of cases/ subject in courts, hence achieves a great deal of the judicial perception with respect to presented cases. However, we will not have much confidence of this finding unless we tackle two important points:

**The first point:** the rulings issued by courts when trying presented cases;

**The second point:** the procedure to which courts comply with respect to trying cases.

I believe that clarifying these two points and concentrating on them will clearly demonstrate that there are variances between two courts’ rulings that share the same facts. As to the first point, courts according to article (48) of the Basic

Law of Governance are required to apply principles of Islamic Sharia on all presented cases, 'The courts shall apply to cases before them the provisions of Islamic Shari'ah, as indicated by the Qur'an and the Sunnah, and whatever laws not in conflict with the Qur'an and the Sunnah which the authorities may promulgate. As well, article one of the Regulations of Procedure before Sharia Courts provides for the same. The term 'Islamic Sharia' connotes creed, rituals and legal and judicial laws. The term 'Islamic Sharia' in this article means specifically the judicial regime because it is the subject of our study. And the judicial regime in Islamic Sharia embodies rules and provisions in either field: the field of private rights and the field of public rights.

In all these fields Islamic Sharia has provided for the basic principles leaving details for discretion upon application so taking into account factors of time and place with only certain few provisions such as inheritance and punishments were dealt with in detail. With regard to these legal principles in different fields, Muslims faced old civilized communities, and as result of development of different economic circumstances, a great interpretative and detailed jurisprudence has emerged dealing with the basic texts of Islamic Sharia (i.e. the Holy Quran and Hadith) where learned scholars and judges were engaged in producing the most rich and advanced jurisprudence that have ever been known in the history of mankind.

That development has resulted in the emergence of



numerous legal and jurisprudential doctrines with the most paramount among these are the four Fiqh Schools, namely, The Hanafi School, The Maliki School, The Shafie School and the Hanbali School. The differences between these schools are not religious in nature, but legal and judicial differences resulting in emergence of great legislative treasury in Islamic jurisprudence.<sup>(1)</sup>

The judiciary in Saudi Arabia derives its rulings from the legal/ judicial system of Islamic Sharia which is a group of principles, rules, provisions and texts; they may be divided into two:

**First division:** provisions that do not permit judges to exert any kind of discretion or interpretation – the role of the judge is to apply said provisions to the facts presented.

**Second division:** provisions open to interpretation. This is a fertile land where judges may exert discretion in order to observe interests, avoid harm and attain justice. As well, this is a source for developing and improving judicial reasoning and applies it depending on changing circumstances and times; in addition, these constitute a rich source for creating judicial principles.

What appears at first glance as a variance is attributed to the differences of each case. It is natural that each case differs from another, so reasons for variances of judicial rulings are numerous – some may be attributed to the offender, some

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(1) See, 'The General Fiqh (i.e. Islamic jurisprudence): An Introduction' by Mustafā Al Zarqā, 1 /49.

may be attributed to the victim and some may be attributed to the offence itself. Variances may also be attributed to the circumstances surrounding the commission of the offence and to the evidence presented. Arguably these variances are well known in all judicial systems so rendering it as part of the human nature.

This division attracts the questions of variances of judicial rulings. The answer requires drawing on the procedure to which courts abide when making rulings/ decisions. These procedures guide and direct issuing of judicial rulings. These measures relate to the policy regarding to legislation more than relating to principles and rules. They can be traced to Islamic jurisprudence taking into account that all provisions or laws in all countries may be categorized as follows:

**First: provisions** - these set the likely result/ ruling for each act/ omission or say (i.e. substantive law);

**Second: procedures:** we refer to these above as guiding or directing the methods to be followed.

Islamic legislation does not provide for original procedure save for matters such as witnesses to marriage contracts, general guidance to evidencing contracts by writing, witnesses or mortgage, and fundamental of judgeship such as hearing cases, questioning of parties/ disputants, oath etc. This indicates flexibility of Islamic legislation which extends means/ procedures making them subject to change depending on changes in circumstances, time and place as interest requires. As to provisions, they tend to be stable and

a bit static, 'Islamic legislation is self-sufficient and requires no borrowing from any other nation/ culture. Islamic legislation, when reasonably and broadly interpreted and applied, reinforces justice, disallows injustice, avoids harm, brings and protects interest, respects wills and contracts, gives priority to necessary matters, holds people accountable for the wrong/s they do, diversifies and distributes guarantees equitably, considers customs and traditions in matters relate to contracts, businesses and obligations etc. and all other numerous fundamental principles of Islamic legislation and jurisprudence'<sup>(1)</sup>. The procedures to which courts shall comply with include procedures for trials and decrees. In that respect, the Kingdom of Saudi Arabia issued the Regulations of Procedure before Sharia Courts and the Law of Criminal Procedure. Hence, the procedures control judicial operation/ functioning in general and control in particular the provisions stated in the second division.

Besides the fact that procedural laws/ regulations guarantee proper justice as to summons of parties, hearing of claims, replies of parties, evidence, pleas, properly reasoned rulings and protecting rights of parties/ disputants, yet, they prevent variances of judicial rulings in similar cases through two ways:

- 1) creation of a three- tier/ steps litigation (courts of first instance, appeal courts and the Supreme Court) as provided for in article (9) of the Judiciary Law. All

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(1) Ibid, 1 /231.

judicial rulings issued by courts of first instance are subject to appeal except minor cases as identified and determined by the Supreme Judicial Council. Subjecting the rulings of the first instance courts to appeal before the appeal courts will no doubt control rulings under one umbrella with stable and consistent guiding principles, so if things occur to the contrary, such rulings will be overruled in whole or in part. The third step of litigation i.e. the Supreme Court is the basic pillar that achieves unity of rulings and non-variances when facts of respective cases are similar. The aggrieved party may apply for overruling a ruling before the Supreme Court whenever the reasons for appeal are:

- a) conflicting the provisions of Sharia or laws issued by competent authorities not in conflict with Sharia;
- b) rulings issued by courts not properly formed as prescribed by law;
- c) rulings issued by incompetent court or circuit;
- d) mistakes in framing issues of the dispute or improperly describing those issues.

According to this article, the Supreme Court shall ascertain proper making of rulings by ensuring proper framing of issues/ facts and none is in conflict with the established judicial principles and rules. This method guarantees consistency of rulings, so if there are any variances in any step of litigation such will be redressed at the appeal stage, and if need requires, this will be rectified at the Supreme Court.

Fortunately the Law allows the appeal courts and circuits of the Supreme Court, if they deem appropriate to re-visit/change a principle established by any of the circuits of the Supreme Court in an earlier cases, to submit the same to the Supreme Court Chief to refer it to the Supreme Court for determination. This indicated keenness that ruling should be made on the basis of established principles that guarantee the integrity and stability of rulings.


- 2) The other means through which the judicial system in Saudi Arabia achieves the integrity and stability of rulings and avoiding variances upon judging similar cases, the Supreme Court, sitting with all members present, have the jurisdiction to determine general principles in matters relating to the judiciary. Determining general principles in matters relating to the judiciary will guarantee similar rulings for similar facts, and as well achieving stability of rulings.

It is noted that all these prescriptive and cautious procedures guarantee integrity of rulings and make them not in conflict of established judicial principles and will achieve, as well, non-variances of rulings when facts are the same. Based on the foregoing, we may conclude the followings:

- 1) The judicial system in the Kingdom of Saudi Arabia is an established regime of stable principles based on Sharia. Numerous rulings were issued by the Supreme Court and others will be published to form a judicial code to serve as reference to the judiciary in Saudi Arabia and to all those who have interest in the Saudi judicial system.

- 2) In accordance with those principles, judicial rulings in the Kingdom of Saudi Arabia will sustain no variances. As evidence to that fact, a ruling in conflict with an established principle needs to be issued from the Supreme Court with all its members sitting in the session.
- 3) The previous exposition dealing with describing the judicial procedures to which Saudi courts abide to as provided for under the Judiciary Law and the Regulations of Procedure before Sharia Courts and the Law of Criminal Procedures in the re-enacted versions and the contribution of the King Abdulla Project for Reforming the Judiciary as quantitative development of the judicial system in Saudi Arabia.

In conclusion, the subject deserves much research because of its importance; however, we believe that quantitative jurisdiction of courts reduces the size of variances because claims of similar facts are heard and tried by the same hierarchy of courts. In addition, Sharia, in its widest sense which is the law applicable in Saudi Arabia, comprises definite and clear - cut provisions not subject to change so here no variances will be tolerated, and as to flexible and open provisions that are left to discretion of judges depending on circumstances, these are susceptible to variances. However, this may be limited by drawing lines of substantive provisions and stating the procedures to be followed in trying disputes. Besides, the existence of three steps of litigation reduces the level of variances because of



## **Judicial System in Saudi Arabia**

the existence of established principles made by the appeal courts and the Supreme Court which will create consistency as to the rulings made. At the same time, the laws empower the Supreme Court to establish judicial principles and make it flexible to overrule/ change an established principle whenever necessity warrants that overruling/ change.

## **Problems of Codification and Recording in Saudi Arabia**

**Dr. Mohamed El- Saeedi \***

Many people wonder why rules are not codified in the Kingdom of Saudi Arabia, and why leave that matter open to judges to make rulings through Ijtihad [i.e. discretion] that vary greatly? Is there any prohibition to codify rules?

The answer to that question is from multi-facets and will be considered below.

It became famous with regard to codification the story of Imam Malik (Allah's mercy be upon him) with Abu Jaafar Al-Mansour, when Imam Malik (Allah's mercy be upon him) wrote his book 'Al Muwatta', and the Caliph wanted to compel people to follow its rules; however Imam Malik (Allah's mercy be upon him) prohibited him from doing that. The text of the story as told by the Judge Ayaad was as follow:

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‘That Abu Jaafar said to Imam Malik (Allah’s mercy be upon him), ‘I intend to make versions of each of your books, and then send a version to each of the Muslims states, ordering them to follow and abide by the rules therein contained, and not to rely on any other book of jurisprudence, because yours is the origin of jurisprudence – it is the jurisprudence of the people of Al Medina. I said: O Caliph do not do that: people heard many sayings and stories, and each people followed what they received from elder generations of followers of the Messenger of Allah (may Allah’s peace and prayer be upon him); it will not be easy to make them abandon their beliefs, so let people follow what they believe is right. Abu Jaafar said to him, ‘if you agree, I would order them to follow only your books.’<sup>(1)</sup>

### **Codification in Saudi Arabia:**

At the beginning of the Saudi state, the general orientation was not to adhere to one of the Four Schools; this was stated in the speech of King Abdul Aziz, the founder of the Saudi state, in a general assembly in 1346H, saying, ‘We will not adhere to a certain doctrine, but we would judge by adhering to the best principles in each of the Four Schools; we have no preference to a certain school of jurisprudence’<sup>(2)</sup>. Also, King Abdul Aziz said, ‘we will not adhere to a certain school of jurisprudence, and when we found strong evidence/

(1) See, ‘Tarteeb Al Madarik’ by Judge Ayaad 1/191.

(2) See, ‘The Judicial Regulation in the Kingdom of Saudi Arabia’ by Saud Al Dareeb, p. 284 – 285.

argument in any of the Four Schools, we will follow it and hold on, if not, we would follow the teachings of Imam Ahmed'.<sup>(1)</sup>

However, afterward, the state chose to instruct judges to follow a certain school of jurisprudence i.e. the Hanbali School, so judicial rulings in different districts will not differ in a manner that would jeopardize justice. Since there was no judicial code suiting the situation in Saudi Arabia, the judicial authority issued the decision No. (...) <sup>(2)</sup> dated 17/01/1347H decreeing to follow certain books of Imam Ahmad Ibn Hanbal (may Allah's mercy be upon him) - the decision reads as follow, 'the judicial authority makes its decision No. (...) <sup>(3)</sup> dated 17/01/1347H which received the Monarch assent on 24/03/1347H:

- a) Courts throughout the Kingdom shall apply fatwas of Imam Ahmed Ibn Hanbal for ease of reference and because all disciples of Imam Ahmed Ibn Hanbal were committed to mentioning evidence with respect to each single ruling/ provision;
- b) Although courts are bound to apply fatwas of Imam Ahmed Ibn Hanbal; nevertheless, if judges find it difficult to apply the teachings of Imam Ahmed such as being contrary to public interest, then judges may search for other provisions in the other schools of jurisprudence.<sup>(2)</sup>

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(1) Ibid, p. 285.

(2) Tadween Al Rajih research, Research Journal, issue (33), p. (29)

Judges generally adhere to the teachings of the Hanbali School with rare deviations, and the Cassation Court used to overrule judgments on grounds of conflict with the Hanbali School<sup>(1)</sup>. It seems that the vague wording of the resolution as to the binding nature, lack of support to the resolution in Saudi judicial laws and incessant change of circumstances and customs led judges to rely less on the books/ authorities cited in the referred to resolution and tended to rely on their discretion when making rulings - this resulted in differences / variances with respect to in rulings relating to similar cases.

From a different perspective, it is not true to say that Saudi Arabia lacks codified laws, as there are many substantive and procedural laws such the Bribery Law, the Anti-Counterfeiting Criminal Law, the Anti-Money Laundry Law, the Employees Disciplinary Law, the Civil Service Law, the Military Service Law, the Sharia Procedure Law, the Criminal Procedural Law, the Law Profession Practice Law, the Banking control Law, the Combating Commercial Fraud Law etc.

All the same, much needs to be codified particularly in the areas of civil law and criminal law; however, the case here may be similar to common law countries where there are many legal principles not codified, and judges rely on judicial precedents. Judicial precedents differ from one state to another even within the same county as in the United

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(1) Essay on Codification of Jurisprudence of Rulings by Sheikh Abdul Muhsen Al Obeikan, published in Riyadh paper on Friday 20 Rabi 1, 1426H corresponding to April 29, 2005, issue 13458.

States of America. For example, the same legal case may be adjudicated in New York state in a manner quite different from California.

### **What are the Reasons for Non-Codification? Is Codification Possible?**

Is codification possible? Would it be possible to obligate judges to apply codified laws? The answer largely depends on differentiation between codification and recording.

Codification in this context means writing Fiqh (i.e. Islamic jurisprudence) in the same way you draft laws clauses/ sections – there is a wide difference between drafting laws and writing Fiqh rules. The Fiqh that we want to write down is composed of real and hypothetical issues and each issue is different from the other with respect to its evidence in the Holy Quran, Sunnah, *Ijmaa*, *Qiyas*, *Istishab* and custom or any of the other sources. All these issues are of descriptive nature. The relationship between these issues and Fiqh rule i.e. Fiqh issues precede in existence Fiqh rules, and most minor Fiqh rules have no independent evidence; their value is predicated on the issue they tackle, so Fiqh rules are not general in nature, but bear particular features that assist scholars to apply them to single issues; however, they may not apply to new problems only through *Qiyas* with another settled issue/ problem. This method in formulating provisions of Fiqh makes it responsive to peoples' needs and problems.

If we want to write down a code incorporating Fiqh rules that bind judges; then these rules must expound issues, make detailed descriptions in order to truly reflect and signify reality, and relate each issue to pertinent evidence. In addition, it is important that Fiqh rules should not be mandatorily in nature, nor referred to as sources of any of these issues.

However, legal rules are drafted in general and abstract manner with a view to apply them to the public at large which is contrary to Fiqh rules which are descriptive.

The generality and abstractness of legal rules make them applicable to all people. This general and abstract nature causes lawyers to differ as to interpretation of legal rules, and make judges differ as to proper understanding, and lead judges sometimes to prove their correctness in a manner that suit their leanings. We want a different approach for writing down Sharia jurisprudential rules that bind judges when they make their courts' rulings.

Following statement of the distinction between codification and recording, we want to put forward the following question: is it permitted to collect Sharia jurisprudential rules in a code and then obligate judges to adhere to the rules embodied in that code?

Contemporary researchers do not differ with respect to the first part of that question. As all people believe that codification of rules achieves a public good; however the controversy centers around the binding nature of such codes!

Those who support allowing judges the power to exercise jurisdiction oppose codifying Sharia jurisprudential rules<sup>(1)</sup>, however those who support the other side of the argument agree to codify Sharia jurisprudential rules.<sup>(2)</sup>

The strongest arguments put forward by those opposing codification of Sharia jurisprudential rules are based on the Holy Quran verses and Hadith requiring judges to exercise discretion when make their rulings, so no certain rules/ provisions should be imposed on him. The same group believes that codification will weaken Ijtihad, and as well will bar judges from taking into account the special circumstances surrounding each case.

We may contest that argument by saying that applying rules codified in proposed codes is not doctrinaire, because such codes will be written down and overseen by specialists who will also be opened to receive remarks and comments from scholars, judges, lawyers and disputants, and they will study and analyse these codes periodically based on that study and analysis. In addition, the idea of these codes constitutes revival and reinforces the finest kind of Ijtihad (i.e. discretion); no doubt, engagement of prominent scholars in preparing these codes is far much better than sole Ijtihad by judges.

As to the assumption that the binding nature of these codes will avert judges from taking into account the circumstances

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(1) Journal of Islamic Researches, issue No. (31), p. 65, and issue No. (33) p. 52.

(2) Tadween Al Rajih, Journal of Researches, issue (33), p. (50).

surrounding each single case is completely untrue, as circumstances do not affect each single case but only some rulings such as expenses, estimates, punishments etc. and for these codes may provide for maximum and minimum limits to be left to discretion of judges. As to contracts, marriage contracts, divorce, custody of children, we see that customs play a minor role in this respect.

An argument put forward by those opposing codification of Sharia jurisprudential rules is that codification will not put an end to controversy, because in countries where codified legal rules prevail, controversy is still there. This may be contested as follows: lawyers may differ as to application of legal rules; however whenever they agree on the application of a certain rule, they will not differ as to the appropriate ruling/ judgment. For example, if a father asks for custody of his daughter and is entitled to that in accordance with the respective legal rule, judges will not differ as to the appropriate ruling/ judgment. On the other hand, when Sharia judges exert discretion, they agree on the description of the facts presented before them, and then their rulings/ judgments would differ according to their jurisprudential dispositions.

Examples of the jurisprudential differences between judges in Saudi Arabia the following:

- Judges differ as to inclusion of the owner of an animal that causes a traffic accident as liable for that accident; some think to include that owner, others do not.

- If disputants to money claim differ as whether to consider it as a gift or a loan? Judges differed: some supported the account of the receiver while others supported that of the giver/ grantor.
- In cases of moral offences: in cases that there is only one witness, will the accused be punished or not? Judges differ.
- In cases of moral damage: judges of the Board of Grievances try cases of moral damage; however most judges in general courts do not try such cases.
- Is it permissible to establish endowment in favor of issues/ offspring? Judges differ: some agree, others disagree.
- Will a creditor demand payment from debtor or guarantor?
- May a ruling be passed placing a girl above seven under the custody of her father? or the girl may be given the option to choose? Judges differ in that.
- Judges differ whether an Ijarh Muntahia Betamleek (i.e. a lease contract that ends in transferring ownership to the lessee) is valid or voidable?
- Judges largely differ when making punishment sentences though underlying criminal offences are the same.

I would judge that justice, in its widest sense, may not be achieved by allowing judges to exert Ijtihad in our age, because the wide sense of justice embraces equality of all



people with respect to application of legal rules – this may be accepted by judges and refused by others. Justice shall be pervasive! Allah Almighty says, ‘O you who believe! Stand out firmly for justice, as witnesses to Allah, even though it be against yourselves, or your parents, or your kin, be he rich or poor, Allah is a Better Protector to both (than you). So follow not the lusts (of your hearts), lest you avoid justice; and if you distort your witness or refuse to give it, verily, Allah is Ever Well-Acquainted with what you do’ (Surah An-Nisa, verse (135)). Allah Almighty says, ‘Say (O Mohammed): My Lord has commanded justice and (said) that you should face (Him) only (i.e. worship none but Allah and face the Qibla, i.e. the Ka’bah at Mecca during prayers) in every place of worship, in prayers (and not to face other false deities and idols), and invoke Him only making your religion sincere to Him (by not joining in worship any partner with Him and with intention that you are doing your deeds for Allah’s sake only) (Surah Al-Araf, verse (29)).

Conclusion: we mean by codification the process of collecting Sharia jurisprudential rules relating to the judiciary in a code, and then obligate judges to apply such rules. We do not mean to lay down Sharia jurisprudential rules in the form of legal rules – this is really difficult because of the difference of the nature of Islamic jurisprudence. Nevertheless, there is no Sharia obstacle in codifying Sharia jurisprudential rules – this is nearer to justice.

## Evidence Before Courts

Prof. Abdurrahman Al Sanad \*

Judicial system under Islamic jurisprudence has been compatible with justice and inclusive justice since early times. The most important element of that system relates to evidence. Evidence as defined by positivist laws: establishing proof before courts by all means prescribed by law for the validity of certain facts alleged by a disputant and denied by the other; this is known by Sharia scholars as *tarariq al qadaa* [i.e. evidence].

The importance of evidence stems from being the necessary tool on which judges rely to ascertain the facts presented in a claim and the scientific mean on which parties depend on protecting their rights. It is fair to say that each legal regime requires the existence of evidence law. In fact, the majority of judicial systems have evidence law.

Below is a brief statement of evidence on which judges rely:  
If a claimant brought a case before a court, the judge will

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ask him / her to state his/ her case, then the judge will ask the defendant to respond, and if the latter admits the case presented by the former, the judge will make his judgment. If the defendant denies the claim of the claimant, the judge will ask the latter to provide evidence proofing his case, and according to submittal and other means of proof, the judge will be able to make his decision. We will deal with each of these means of proof separately:

**First: Admission:** in jurisprudential parlance, an admission is to admit the right of a claimant in a certain thing/ matter.<sup>(1)</sup> The reason and wisdom behind admission is to find/ ascertain rights and judge in favor of those who are entitled and eligible to such rights in the shortest and easiest way. Admission is conclusive in disputes; so if a person claims against another and that other admits such claim, this shall be conclusive with respect to the dispute presented to court – it is a means of evidence, and the whole nation [i.e. Islamic nation] recognizes the validity of admission. Despite that standing, however, admission applies to the person who makes the admission without transcending to any other person.<sup>(2)</sup> All that being said, admission shall be valid only upon satisfying certain conditions, namely, reason, adulthood, free will, being unfettered admission as in the case where the person makes admission in order to inflict damage on a third party, the person making admission

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(1) See, Statement of Facts 5/ 2, Fath Al Qadeer 6/ 279.

(2) See, Al Mabsoot: 184/17, Takmilat Fath Al Qadeer 279/6, Al Dur Al Mukhtar: 203/4, 467, Al Libab: 76/ 2, Muqni Al Muhtaj: 238 /2; Al Mohazab: 343/2; 137/5; Al Muqni: 1 37/5.

being aware of the admission made; it is also required that the person making the admission is capable of ownership and the things/ matters admitted should not be unattainable/ impossible together with other conditions.<sup>(1)</sup>

**Admission in Saudi Judicial System:** The Regulations of Procedure before Sharia Courts deals with this method of proof, and states that acceptable admission shall only be before courts. Admission applies to the person making admission and shall not go beyond the person making it. As well, the Regulations of Procedure before Sharia Courts provide that for an admission to be valid, the admitter shall be an adult, of free will, his liberty to act is not restrained; however, an admission made by a person whose liberty to act is restrained will be acceptable only for matters he/ she is not restrained under Sharia. Besides, a person charged in criminal *Hudud* cases may retract admission according to some Sharia scholars.

**Second: Testimony:** making a true statement in court usually beginning by ‘I swear’ to prove a right against another; it is called evidence because it reveals the inner side of a person and discloses fact/s about a controversy. Testimony as Sharia concept differs from other legal systems; a claimant or defendant will not be considered witnesses contrary to some legal systems which consider the statement made by a claimant or a defendant as testimony. Under Sharia, testimony is stronger to the extent that it may

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(1) See, Muqni Al Muhtaj: 148/2, 172; Al Badaie: 223/7; Al Mabsoot: 169/ 17; Fath al Qadeer: 304/6; Tabeen Al Haqayiq: 11/5; Al Dur al Mukhtar: 474 /4.

lead to judging in favor of the claimant party even if there is no additional evidence. This is also contrary to other legal systems which consider testimony as a mere evidence of a collection of other evidences that may not be conclusive. For testimony to be admissible in court, it must satisfy the following conditions:

1. a witness must be an adult, Muslim, *Adl* [i.e. fair], unbiased because of animosity or kinship and well aware of the things he is making testimony for. A testimony from non-Muslim is acceptable with respect to non-Muslims, and shall not be accepted against a Muslim only in very limited instances because one of the most important conditions of testimony is fairness so testimony shall not be accepted even from unfair Muslim, then, a fortiori, it should not be accepted from a non-Muslim against a Muslim;
2. the defendant should ask the witness and the testimony shall be upon request of the claimant;
3. the judge shall permit the witness to make his statement;
4. the witness shall use the words 'I swear' at the beginning of his statement; other words such as 'I know' or 'I ascertain' are not acceptable;
5. the witness shall restrict his statement to what claimed by the claimant;
6. the witness's statement shall be true; it is not acceptable for a witness to state for example that 'I swear to what have been stated by that witness' – the witness must state his statement on his/ her own words;
7. the witness must express/ communicate the facts he

heard or saw to the judge, and not his conclusions of what he heard or saw, because framing of facts and any relevant inferences and ramifications are subject to the discretion of the judge;

8. if the judge doubts the testimonies made by witnesses, he may ask each witness to give testimony separately away from others, and if their testimonies conflict/differ, their testimonies will be excluded, and if they agree and witnesses are known to be fair, the judge will rely on their testimonies;
9. the number of witnesses shall form the prescribed quorum according to the matter put to testimony – this differs according to the matter presented. In case of criminal matters such as adultery, the testimonies of four Muslims males will be required, and in other offences, the testimonies of two fair witnesses may be adequate. In that respect and as a general rule, the testimonies of two males or a male and two females will be adequate. In matters relating to women such as giving birth, breast feeding etc. testimonies of women only will be accepted without any need of a male testimony. In addition, there are other conditions mentioned by scholars which need not be detailed here.<sup>(1)</sup>

There is much literature regarding the quorum required for testimony depending on the jurisdiction hosting scholars. For example, some require the testimony of two males, some require the testimony of one male and two females, others

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(1) See: Al Muwataa 449; Badaie Al Sanaie 6/271; Al Muqni 10/178; Hashiat Al Disoogi 4/173.

require four witnesses while some require one witness and an oath. Some matters may require the testimonies of women separately in certain cases mentioned by scholars to be referred to in respective jurists' books.<sup>(1)</sup>

**Testimony in the Saudi Judicial System:** The Regulations of Procedure before Sharia Courts have dedicated a separate chapter for testimony as a method for ascertaining rights. The claimant usually requests, whether in writing or verbally, the facts that he wants to prove. If the court opines that such facts may be proved, it will decide allowing testimony and fixes a date for the party to bring witnesses. If the witness may not be able to appear before court, the judge will move to the place of the witness or assigns another judge to see the witness. If the witness resides outside the local jurisdiction of the court, the court may ask the relevant court in the respective local jurisdiction of such witness to hear his testimony.

The Regulations of Procedure before Sharia Courts allow the court to separately hear testimony and ask questions in the presence of the parties. It is important to note that the authority of directing/ asking questions to witnesses is solely reserved to judges contrary to other legal systems where advocates have that right to direct examination and cross examination.

**Third: Oath:** a pronouncement swearing the truth/ denial of a statement before a judge by an appeal to Allah or any of

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(1) See: Badaie Al Sanaie 6/286, 268, 270 and 271; Tuhfat Al Mushtaq 10/211 and 212; Hashiat Al Disoogi 5/167 and 165; Al Muqni 10/170 and 171.

His names.<sup>(1)</sup>

The legitimacy of oath as a method of proof stems from the Hadith, The Prophet said: “If people were given whatever they claimed (in disputes), some people would claim the lives and wealth of others; but the oath (of denial) must be taken by the defendant”<sup>(2)</sup>, and in another narration by al-Baihaqi reported with a Sahih (i.e. authentic) chain of narrators: “But the proof lies on the one who is making the claim, and the other Yamin (i.e. oath) must be taken by the one who rejects the claim”<sup>(3)</sup> all Muslim scholars testify to the legitimacy of oath. The word to be used in making oath includes ‘Allah’, ‘Lord of Al Alamin (i.e. mankind)’ etc. no one will represent another in making oath, and if the defendant is minor or an insane, no one would represent him, and the minor’s oath to be delayed up to adulthood.<sup>(4)</sup> Oath must be conclusive not giving way to hesitation, suspicion or speculation. And judicial oath directed by the judge to settle a dispute is a subject of agreement among scholars<sup>(5)</sup> requiring the intention of the judge so it should be subject to equivocation in line with Prophet Mohammed (may peace and prayer be upon him), ‘Your oath will be about that matter which your adversary has required you to swear about so that he will believe you’<sup>(6)</sup>

(1) See Tabeen Al Haqaiq: 107/3; Al Sharh Al Kabeer with Al Disoogi: 126/2; Hashiat Al Qalubi ala Sharh Al Mahali liminhag: 270/4; Kashaf Al Qinaa: 236/6.

(2) Narrated by al-Bukhari in the interpretation No. (4552), and Muslim in al-Aqdiyya No. (1711).

(3) Narrated by al-Bahaqi 10/252 with trusted reference.

(4) See: al-Muqni 234/9 and al-Muhazab: 302/2.

(5) See: Muqni al-Muhtaj: 475/4; Kashaf Al Qinaa: 242/6.

(6) Reported by Muslim in Al-Eman (i.e. Faith), chapter: Oath of the person making it to the intention of the one who requested it No (1653).



**The conditions agreed upon by scholars are:**

1. the person administering oath shall be an adult (a sane adult) of free will: thus an oath by a youth and an insane will not be accepted and neither will be accepted of a person coerced to administer oath;
2. the defendant must deny the claim made by the claimant; so if he is admitting the claim there will be no need for oath;
3. a disputant must ask the judge to apply oath, and the judge must ask the party to administer oath;
4. oath is personal: no one will represent another to administer oath because it relates to religion of the one who administers oath, so an attorney or a guardian of a minor will not be allowed to administer oath, and for the youth it will be delayed up to reaching adulthood;
5. oath shall not be administered with respect to *Hudud* and punishments;
6. oath shall be administered with respect to rights that may be admitted/ acknowledged; oath may not be administered with respect to rights not subject to admission – an attorney, a guardian or custodian may not administer oath as they must not represent others in such matters.<sup>(1)</sup>

**There are many types of oath:**

First: oath by the defendant: this is called ‘detering oath’ which the judge addresses to the defendant pursuant to the request/ demand of the claimant and it is agreed upon among

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(1) See: Al Bahr Al Rayiq: 202/7; Al Badaie: 226/6; Bidayat Al Mujtahid: 455/2; Al Sharh Al Kabeer with Al Disoogi: 145/4; Al Qawaneen Al Fiqhia: 206, Fas edition; Muqni Al Muhtaj: 475/4; Kashaf Al Qinaa: 232/6; Al Muqni: 234/9.

jurists of the Four Fiqh Schools.

**Second:** oath by the claimant – these are many types:

- Leading oath: to be administered by the claimant for a reason such as the availability of a single witness, the defendant repudiation of his oath or rejection of oath.
- Absolving oath: this is advocated by Maliki School and called the judicial oath which is administered by the defendant pursuant to the demand of the judge.

**Third:** oath of the witness: this is the oath administered by the witness before making his testimony for comfort that he is telling the truth. Many laws have provided for this oath instead of recommending the witness; however, this oath has been prohibited by many scholars and sanctioned by some.<sup>(1)</sup>

**Recoiling from oath:** if the judge asks the defendant to administer oath, or the latter abstains from appearing before judge, scholars opine that the judge shall warn the defendant three times, however if he insists on not appearing, scholars are divided. Some believe that he must be recoiled so the judge should rule in favor of the claimant, and some opine that an oath should be administered by the claimant and if he administers oath, then a ruling shall be made in his favor<sup>(2)</sup> while others, mainly Hanbili School, opines that if the case relates to pecuniary matters then the recoiling shall

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(1) See: Al Ashbah wa Al Nazier by Inb Najeem: p. 92, edition 1322; Fath Al Ali Al Malik by Sheikh Eleish: 311/2; Al Turuq Al Hakeema by Ibn Al Qaiyim: p. 142; Al Bahr Al Zakhir: 18/5; Al Mahali: 462/9; Muqni Al Muhtaj: 476/4.

(2) See: Al Badaie: 225/6, 230; Takmilat Fath al Qadeer: 155/6; Al Turuq Al Hukmia: p. 116; Al Muqni: 235/9.

be restricted to that pecuniary matter otherwise he should be set free.<sup>(1)</sup>

**Oath in Saudi Judicial System:** The Regulations of Procedure before Sharia Courts provide for oath; they provide that an oath must be requested by a disputant (party to the claim) and to be requested after taking the permission of the judge in a court, or in the place where the judge moves in case that the person to administer oath is unable to appear before court, or by another judge if such person is residing in a different local jurisdiction. As well, a judge may demand administering absolving oath if such is necessary. The Regulations of Procedure before Sharia Courts provide for the presence of the person who will administer oath whenever such is asked by the defendant, and shall be considered as recoiled if he abstains from appearing after being warned for three times, and as well a defendant may refuse to administer oath and ask the claimant instead to administer oath.

**Fourth:** evidence by writing: In earlier times writing was not common as it is today. People used to rely on oral transmission, so testimony was given a paramount importance contrary to writing. As it was difficult to ascertain writing at those times, scholars differed as to conclusiveness of writing; some considered it as evidence, others did consider it as reliable evidence. However, papers issued by judges are considered reliable by scholars after ascertaining its validity by appropriate means.

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(1) See: Al Turuq Al Hukmia 110; Kashaf Al Qinaa: 4/287

**Writing in the Saudi Judicial System:** The Regulations of Procedure before Sharia Courts deal with the issue of the conclusiveness of writing - it states that writing as in official papers/ documents issued by public officers or authorized persons are considered as proof as prescribed by laws and regulations within the scope of authority and mandate of such officials unless such papers were challenged on the basis of counterfeit or conflict with Sharia principles. As to other papers/ documents issued by claimants or the defendant bearing his/ their signature, stamp or finger print shall be considered as reliable provided that they are attributed to the issuer.

**Fifth:** circumstantial evidence: this is a manifest sign compared to a hidden thing thus proving it<sup>(1)</sup> [i.e. evidence that may infer existence of a fact in issue however not proving the fact directly] such as ruling in favor of the person who holds a disputed thing considering that possession is a circumstantial evidence prima facie for ownership. Muslim scholars differ as to reliance on circumstantial evidence including Ibn Taimiyya and Ibn al Qayim; however the majority opines that circumstantial evidence is a means of evidence – it varies according to custom, habit and time (era). Generally speaking, circumstantial evidence may be depicted or defined as anything that may demonstrate rights without restricting it to a specific mean. The late prominent scholar Ibn al Qayim stated that, ‘whoever overlooks signs

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(1) See: Islamic Jurisprudence and its Evidence 8/258.

[i.e. circumstantial signs] in Sharia matters, will suspend many provisions and will create many rights<sup>(1)</sup>

It is noteworthy that judges resort to circumstantial evidence in short of conclusive evidence and arguments, so they will be compelled to seek other means of evidence for ascertaining rights - for that reason they try to infer and deduce. For example, if someone commits an offence, and the judge finds himself in a situation without witnesses or confession by the charged, then he will resort to circumstantial evidence such as pictures, finger prints, DNA, recordings etc. the reasons for calling it circumstantial evidence and not outright evidence is that it is not fully agreed upon among Muslim scholars. Yet, this does not mean weakness as circumstantial evidence sometime is more conclusive than evidence themselves. For example, the judge disregarded the confession of a party to a dispute that there was a sale contract of a farm to another party because confession was invalid because of collusion between the parties. Another judge considered non-receipt of money and not claiming it despite the lapse of a long time of the sale transaction as a circumstantial evidence for non-existence of the sale contract and that the transaction was fictitious.

**Circumstantial evidence in Saudi Judicial system:** The Regulations of Procedure before Sharia Courts provide for circumstantial evidence as a means of evidence, and gives the judge discretion in inferring and deducting circumstantial

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(1) See: Al Turuq Al Hukmiyya: p. 100

evidence and other signs that may help him to ascertain rights provided that such must be clear to rely on in reasoning his rulings, or to complement a deficient evidence so together they will form his opinion with respect to issuing his ruling.

**Sixth:** Judicial cognizance: Scholars agree that a judge must not act on the information he has even if proved in evidence; so if he has information of a divorce or debt and a proof was established contrary to his information, he definitely must not act on the evidence he personally had. Some scholars opined that the judge must abstain/ step aside and act as witness.<sup>(1)</sup> However, scholars differ as to the information a judge has, other than in court, whether he should act on such information, and the majority opined that he should not act on such information – he would be considered as involved in the matter.

**Judicial Cognizance under the Saudi Judicial System:** The Saudi law under the Criminal Procedure Regulation did not recognize judicial cognizance, and as well prohibited judges from acting against the information they have.

**Seventh:** Examination and expertise: this means that the judge by himself or through an expert examine the place of dispute to know the truth. Examination may be in court, so the information he will have will tantamount to evidence, confession and oath; this will not be considered as acting on his information, but as acting on facts proved in court.

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(1) See: Muqni Al Muhtaj 4/398; Kashaf Al Qinaa 4/197; Al Taj wa Al Ikliel 6/140.

**Examination and expertise under the Saudi Judicial System:** The Regulations of Procedure before Sharia Courts provide that examination of things shall be by bringing that disputed thing to court, if possible, to moving to examine it, if not possible to bring it to court, to delegate one of its members, or to delegate a court in the local jurisdiction of the disputed thing. As well, the Regulations of Procedure before Sharia Courts provide that a court may delegate an expert in matters requiring expert opinion. In case of multiple experts with differences, then they should submit a single report comprising the opinion of each expert and the reasons behind his opinion. This may differ from the procedure adopted by other jurisdictions, as an expert may be called and his opinion may be challenged by another expert if the parties to a dispute decide to do so (expert witness). As to technical opinion, discretion shall be left to court.

Based on the foregoing, it is obvious that means of evidence are derived from Islamic jurisprudence; however this should be interpreted broadly because it is not restricted to certain methods, but includes all means that may uncover and bring right to surface such as confession, the most important means of evidence, testimony, all types of oath, recoiling oath, evidence by means of writing, circumstantial evidence, judicial cognizance and examination and expertise.

## Crime and Punishment in Islam

**Shaikh Abdulla Al Khunain \***

Islam has revealed Sharia provisions for all human needs either in plain texts or by inference from said texts; indeed the source of each is the revelation from the Holy Scripture – The Holy Quran. Allah Almighty says, ‘Should not He Who has created know? And He is the Most kind and courteous (to his slaves) All aware (of everything)’ (Surah Almulk, Verse 14). This characteristic of Sharia provisions achieves balance and equality of people and as well tempts them to conviction and satisfaction of Sharia provisions. Sharia provisions include rules of criminalization and punishment.

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Under Islam, crime may be defined as disobedience and defiance of the provisions of Sharia that results in inflicting punishment on those who disobeyed or defied (offenders) the rules provided for under Sharia. Some scholars included under the concept of crime any act or omission that entails *hudud* (i.e. strictly crimes against Allah Almighty), chastisement (corporal punishment), *qasas* (i.e. parity of punishment) or *dia* (i.e. money blood). Under Islam, punishment may be defined as the pain to be inflicted by the ruler/ competent authority on the offender for their acts or omissions.

As to the penalty to be attached to the crime, crimes may be divided into two: a penalty to be imposed in this world by the judiciary on the one hand, and the penalty to be inflicted on the Day of Resurrection on the other. This latter type is something which may not be proved. Islam protects human beings and a person is presumed innocent unless proved otherwise – no crime will occur and no penalty will be imposed unless there is a proof of a commission of an act/ omission prohibited by Sharia provision or law.

Crimes are provided for under the Holy Quran and Sunnah with attached punishments: *hudud* crimes are apostasy for conversion of religion, adultery, defamation, armed robbery, theft, drinking alcohol. Crimes may be described as *taazir* i.e. chastisement (corporal punishment) for which an offender will not be punished under *hudud*; they have been provided for to protect the community and they are generally intended to protect the public interests of both communities and individuals.

Sharia provides for certain punishment (*hudud*) for certain crimes; and judges are required to exert discretion and prudence to pass proper sentences (punishments) for crimes not provided for under Sharia whether the intention is the protection of religion (Islam), humans, mind (reason), honor or property. For example, for crimes less than defamation, *taazir* shall apply and not *hudud*.

In short, an act will be considered as a crime if constitutes an assault on any of the five major elements of life, namely, religion, the human being, the mind (reason), honor and property – this means the essential elements of criminalization and punishment in a manner that achieves the interests of both communities and individuals.

Islam considers crime as an epidemic that must be eradicated. It fights crime by all means. Whoever is well-versed with Islam and its provisions will note that reflected and manifest in pronouncements of preventive means or remedies meant to prevent occurrence of crime; this includes the followings:

1. Statement and Declaration of Sharia Provisions: The Holy Quran and Sunnah have clearly stated what is prohibited and what is permitted. Whoever reigns over people or exerts and have control over them shall have the duty to make Sharia provisions known to all people and people shall have the duty to observe and conform to those provisions. This is the best way to prevent and fight crime. Education is very important for spreading knowledge of Sharia and as well all

other types of knowledge.

2. Courts to Decide Rights: Islam has prevented people from taking or enforce rights in their own and instead provides that courts must enforce rights. People have to resort to courts to claim rights. If people are left to take and enforce rights in their own, this will definitely lead to chaos and turbulence. It is important to note that all Islamic scholars agree unanimously on that matter.
3. Instilling Virtue and Protecting Morals: Islam seeks to instill virtue and protect morals. Islam, in quest to reasonably harness human emotions and instincts in the right direction, has enclosed these emotions and instincts with strong fences of morals. Indecent acts are categorically prohibited by Islam. In order to protect morals either sex/ gender is required to cast down one's eyes because looking at each other is likely to tempt one another to commit prohibited act/s. Women are required to wear veil and not to meet/ sit with men who are not relatives (not *mahram*).
4. Pedagogy of Conscience: In order to prevent crime, Islam calls for a conscience that fears Allah Almighty and conform to the provisions of Sharia. Fear of Allah Almighty will distance pious people from committing indecent acts in secret and in public, as Allah Almighty knows everything. Even if an individual escapes penalty in this world, he/ she will not escape penalty on the Day of Resurrection.

5. Promotion of Virtue and Prevention of Vice: Muslims in Muslim communities are demanded to follow the Book of Allah and His Messenger (Allah peace and prayers be upon him). Nevertheless, there may still be somebody who neglects to do so, and some may overlook or might be ignorant of the right path. People promoting virtue and preventing vice may be called to guide those who went astray. Communities should take the lead in encouraging institutions and people promoting virtue and preventing vice to perform their duties towards society, so Muslims collectively need to be engaged in promotion of virtue and prevention of vice.
6. Education and Souls Refining: In its quest to prevent crime, Islam calls for education and souls refining. This is a key element in crime prevention. Education and souls refining have a great impact in directing Muslims souls to the right path. Islam urges male Muslims to take pious women as wives as they would tend to bring up their kids according to Islam teachings. Islam pays much attention to education of children. Guardians are required to instill Islamic values on those who they guard. This signifies the importance that Islam places on education in making good Muslims.
7. Eschatological Penalty: The promise of reward and intimidation of punishment in the afterlife would awaken the conscience of Muslims and prevent them

from committing crimes. Allah Almighty has ordered people to do certain things, and prohibited them from doing certain acts. This is an effective way for crime prevention. A Muslim will be aware that if he/ she acts well and refrain from doing things that Allah Almighty ordered not to do, then he/ she will be rewarded.

8. Repentance for Sins: Islam has provided for remedies for those who commit acts and/ or omits, so Muslims will not continue commission of crimes. Repentance is a cessation of committing sins in order to be forgiven; it constitutes awakening of the conscience and protection of society.
9. Punishment for Sins: To penalize for crimes and inflict punishment is an effective preventive means; it deters a sinner as well as potential wrongdoers. Punishment also aims at reforming wrongdoers with ultimate result in making them good people. In addition, punishment tends to remove the moral burden on wrongdoers as suffering under serving imprisonment sentences will make them experience the hard feeling of guiltiness towards innocent people suffering as a result of their acts and/ or omission. This will likely lead to spread of peace, security and tranquility in society.

Sharia has fixed *hudud* crimes but not *taazir* crimes, as Sharia aims at creating a cohesive and fair society where goodness is common and prevailing and evil eliminated. Under Sharia, crimes may be divided into two divisions: fixed described

crimes for which punishments are specifically determined; these are crimes that are not subject to change due to change of time and place – *hudud* crimes. On the other hand, there are *taazir* crimes which are subject to change due to change of time and place. In *taazir* crimes, judges are permitted to exert discretion as to determination of punishment. According to the circumstances surrounding a certain crime, a judge may aggravate or reduce punishment – to aggravate punishment where circumstances permit, and reduce it where there are reasons for mitigation.

When a judge inflicts punishment in *taazir* crimes, he must weigh the grievousness of the crime, the community rights and the individual rights. It must be borne in mind that punishment for *taazir* crimes should take into account the motives and circumstances of the crime committed/ omitted which will reflect as to the attitude in relation to aggravating or reducing underlying punishment. Other factors that may come into play with respect to aggravating or reducing punishment are the relationship between the offender and the aggrieved/ victim, whether the aggrieved is performing his/ her duty as public officer etc.

Mercy on the offender in *hudud* or *taazir* crimes can hardly benefit the offender without taking into account the ramifications occurred to the aggrieved/ victim. Adultery for example has a fair punishment compared to the ramification occurred to the hurt people – the damage to kinship, fate of newly born infants, disintegration of family etc.

And defamation likely to tarnish the reputation of an

honorable person with all the disastrous consequences that may result. If the defamed person is a lady, she would lose her reputation and the reputation of her family, immediate and extended, in a very conservative society!

The punishment for theft is not a punishment of theft of an amount of money or any equivalent, but in the first place a punishment for breaking security of safe people and endangering their lives and the security of society at large. Spread of crime will terrify society and cause panic.

The punishments provided for the crimes mentioned above are commensurate with their seriousness – it should be noted that said crimes are punished under *hudud*. And likewise the armed robbery crime which is very serious by endangering people lives and loss of their property.

The penalty for drinking alcohol is an assault on the mind which is the gift of Allah Almighty for human beings with all the ensuing disastrous consequences resulting from the damage caused by drinking alcohol.

The punishment for apostasy, a conversion from Islam to another religion or to be non-believer is a major crime and high treason. This crime disaffects the unity of the community/ nation and dismembers it, so it must receive firm penalty. As a general rule, Islam does not compel people to take it as a faith; however, it does not accept conversion to any other religion.

And thus *qasas* is predicated on respect of maintaining life of the human beings to continue building society. *Qasas* prevents revenge and vendetta and ultimately chaos in

society.

That being said, you would wonder why people want to make laws for other people and nations. They claim that they are infallible, and they want to induce and compel people to follow their cultures and norms though indifferent to the particularities of other societies and nations – the Muslim society/ nation will not accept to be governed but under the Holy Quran and Sunnah.

Moreover, these Sharia punishments are based on natural disposition and reason. Putting the matter differently, some people feel kindness towards the offender to extent of calling for justification of the crime itself – this is a fake kindness. The heart of the matter is that we want to protect and secure Muslims lives and further make sure that peace and safety shall be brought about at all times or in all places.

I do admit that the provisions derived from Islam in the field of punishment differ from the provisions derived from man-made laws. Punishment under Islamic law is predicated on the basis of equality between crime and punishment. Punishment must commensurate with crime, and this element has been largely overlooked by man-made laws. In general terms, punishment under man-made laws tends to take into consideration the right of the community at large though generally disregards the right of the individual to satisfy his graving for seeing his offender suffering.

Finally, punishment under man-made laws tends to focus on imprisonment as an original penalty though this will prevent the offender/ prisoner from work and taking



responsibility over his family. On the contrary, punishment under Sharia tends to open new horizons to inflict pain on the offender with avoidance of imprisonment whenever such is possible.

Conclusion: Sharia criminalizes certain acts in protection of the five major elements of life, namely, religion, the human being, the mind (reason), honor and property for the better interests of individuals and communities, and sets punishments for that as well as preventive measures to prevent crime. These include statement and declaration of Sharia provisions, courts to decide rights, instilling virtue and protecting morals, pedagogy of conscience, promotion of virtue and prevention of vice, education and souls refining, eschatological penalty, repentance for sins and punishment for sins.

Sharia has set controls over punishment that differentiate between certain/ fixed crimes for which certain punishments have been provided and variable/ changing situations where judges have been given room to exert discretion as to the appropriate punishment to be applied; so to speak, there is proportionality between each crime and the nature of the attached punishment.

## **Transparency and Publicity of Sessions in Saudi Courts**

**Dr. Khalid Al Muzaini \***

### **Introduction:**

Transparency is a modern concept in the arena of administration and politics; it means bolstering of clarity and disclosure and as well limiting the ambiguity with respect to information concerning people and creation of an environment that permits easy transmission of information at the appropriate time/s. The term transparency is derived from a physical phenomenon - a substance that transpires such as 'glass'.

In the last decades the concept of transparency has become very common as a principle of rational administration and political correctness. The wide use of the term by some states and different international organizations has sometimes led to color it ideologically in a manner tending to impose certain visions on other communities/ societies, and to exert

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paramount and continuous pressure on cultures communities and systems opposing to the interests of those states and organizations.

In administrative and political areas transparency denotes: disclosure of policies and information pertain to the public by official authorities and devising mechanisms and procedures by which resolutions and projects are approved. Thus, transparency requires reducing the margin of confidentiality/ secrecy in public and private sectors to the minimum thus restricting the extent of confidentiality/ secrecy to information relating to the personal level or to matters where disclosure may harm the national security of states.

No doubt, transparency is one of the most important values in the administrative and political areas. If people obtain the information they need at the appropriate time/s, they will be able to take decisions that are suitable to them in their present and future lives. As well, people will be able to hold executive authorities and decision makers accountable.

### **Limited and Unlimited Transparency:**

International organizations have concerned themselves with supporting transparency and the right of citizens to access information on grounds that transparency tends to end corruption which usually flourishes under secrecy and covering information concerning the public. Transparency is one of the human rights as declared by many international

declarations and conventions. The Universal Declaration on Human Rights provides for the right of people to obtain and permeate information by all means. The special rapporteur of the United Nations Human Rights Council has declared that human beings shall have the right to obtain, access and permeate information, and hence this right obliges states to secure access to information in due course of time. Despite the importance of this principle, however these general principles must be restricted in a manner commensurate with the other principles and rules that regulate human beings lives thus that principle will not be in conflict with the cultures of other people and groups and their social and national interests. In conservative societies, disclosure of information about the family, family disputes and national security matters may not be favorable, so international organizations must observe particularities of different nations and cultures; otherwise, declarations of western organizations must not be considered as global standards or super - constitutional conventions, but as something that is subject to qualification/ limitation pursuant to each society's culture. Mankind will definitely benefit from exchange of administrative, judicial and political experiences; yet no certain nation/s should unilaterally set standards for other nations to follow – this is likely to constitute a poor and trivial setting of standards and will not be accepted by other nations particularly when it comes from those who claim to defend the values of equality, fraternity and justice.

### **Exaggerated Transparency Will not Necessarily Achieve Safeguards for Justice:**

Although transparency may support and reinforce safeguards for justice; yet it cannot create safeguards for justice in the judicial field. An appropriate degree of transparency is required to give members of a community a better illustration of the judicial process, so it is not always reasonable to disclose all data and information for very objective reasons. Lawsuits pending before courts differ as to facts and the surrounding circumstances. In many times, the data and information disclosed to the public may lead the public to believe that the ruling is too stringent or too lenient though the opinion of an expert who is aware of the detail of the case will be reasonable and convinced of the fairness of the ruling.

International judicial systems, though with some variations, allow judges some flexibility in exerting discretion in a manner that permit them perfecting their rulings. From that perspective, flexibility in exerting that discretion may lead judges to bias, so Sharia has set objective rules prohibiting that bias. The judiciary in the Kingdom of Saudi Arabia is generally predicated on Sharia. Sharia rules are absolute; they do not relate to specifically certain person or sect, and do not discriminate between people on basis of color, race or religion, but apply to all people on basis of justice and equality. The generality of Sharia rules and principles has been emphasized by Imam Al Shafie (died

204H corresponding to 819) in his treatise on Assol Al Fiqh (i.e. Fundamentals of Jurisprudence) citing the verse, ‘O mankind! We have created you from a male and a female, and made you into nations and tribes that you may know one another. Verily, the most honorable of you with Allah is that (believer) who has At-Taqla [i.e. he is one of the Muttaqin (the pious). Verily, Allah is All-Knowing, Well-Acquainted (with all things)’ (Surah Al- Hujrat, verse 13). Imam Al Shafie said, ‘this message is addressed to every man – in Prophet Mohammed time, before that time and following it – that every man is created from a male and a female; all nations and all tribes’<sup>(1)</sup>. All following scholars asserted one fact – that all rules of Sharia are general and abstract in nature and are not biased to any color, race or religion. Judges’ familiarity with Sharia rules will make them exert discretion properly.

Despite generality, objectivity and impartiality of Sharia rules, there may be exceptional cases to which an individual and a community may be exposed. This may resonate the old saying of the Romans, ‘ultimate justice is ultimate injustice’. Islamic scholars agreed that when things get to their extreme, they turn into their opposite, so Islamic scholars laid down jurisprudential mechanisms to void stern enforcement of rulings/ rules. One of these mechanisms is the rule of necessity etc. with rich applications in Islamic jurisprudence that assist judges to judge fairly – the objective of Sharia

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(1) The Treatise, by Imam Al Shafie, p. 56.

is to fulfill human beings well-being, evade corruption and harm.

The late Al Dahlawi (1176H corresponding to 1763) said, ‘let it be known that in case of conflict of interests/ causes on which judgment is to be made and that all facts pertaining to the case are there – it would be wise to make a ruling that is nearer to absolute good’<sup>(1)</sup>. A judge must explore the best conciliation/ settlement terms for disputants/ parties, and in case he fails, he must apply a Sharia principle or a legal provision – this exploration is not unrestrained, it should be governed by Sharia rules and principles.

This confirms that Islamic jurisprudence is far much better than other legal traditions. It is well known that the Court of Chancery (the court of equity) in England followed general principles to avoid the possible harshness under common law courts, thus to protect rights not recognized by common law courts.

The praetor in ancient Rome developed the civil law through equity principles, and each praetor used to develop rules and principles inherited from his earlier predecessors which ultimately led to the creation of Praetorium. As well, judicial precedents have played a prominent role in the history of English law. Throughout history, judges’ exertion of discretion has made substantial contribution to the development of law.

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(1) ‘Hujat Allah Al Baliqa’ by Al Dahlawi, 1/50.

With respect to Islamic jurisprudence, the matter is somewhat different as judgeship is closely attached to religion, morals and transactions - all enshrined in the Holy Quran and Sunnah. The association between justice and kindness is one of the most important reasons that keep a fine balance between peoples' rights on the one hand and mitigating the harshness of general rules on the other.

### **Transparency in Judicial Matters:**

We have seen some achievements in the judicial arena in Saudi Arabia during the last few years. Many judicial laws have been issued followed by their implementing regulations - these include the Judiciary Law, the Regulations of Procedure before Sharia Courts, the Criminal Procedure Regulations, the Enforcement Law and many other laws. There were turfs overlapping between the Higher Judicial Council (later to be called the Supreme Judicial Council) and the Ministry of Justice. To deal with that overlapping, the government sought to strengthen the relative separation between the judicial, executive and the legislative (regulatory) powers and to draw relationships between these powers. The Higher Judicial Council acted as a supreme court in the past beside its administrative powers in appointment of judges, relocation of judges, inspection of judges' work and taking disciplinary actions against judges. Thereafter, an independent Supreme Court was formed and the Higher Judicial Council was renamed the Supreme Judicial Council



restricting its functions to administrative matters only. A separate budget was allocated to the Supreme Judicial Council; however, such budget remains part of the budget of the Ministry of Justice which is an executive/ administrative body and not a judicial organ.

A regulation for the relationship between the Supreme Judicial Council and the Ministry of Justice was issued. The Ministry of Justice, in its website, publishes information about procedure and filing of actions before courts. Periodically, it publishes a real estate index which reports the number of properties sale transactions across the Kingdom of Saudi Arabia pursuant to provinces, cities and suburbs thus achieving a high degree of transparency in this field. The Ministry of Justice announced the suspension of a number of illegal title deeds. As well, the Ministry of Justice usually announces indicators with respect to the lawsuits presented to courts as per courts, lawsuits and cities.

In addition, the Ministry of Justice issues two judicial journals to publish researches, studies in substantive and procedural law in the judicial arena which contribute to the judicial culture in society and provide information to all those interested in judicial development.

### **Transparency in Judicial Substantive Law:**

There are significant criticisms leveled against the Judiciary in Saudi Arabia and particularly with respect to rulings made by judges. These criticisms describe rulings as

obscure, unpredictable and conflicting with cases with similar facts. Although these criticisms are usually exaggerated by the media; however much of that exaggeration is based on misinformation and not necessarily based on bias on the part of judges but on substantial differences with respect to compared cases. In most cases, the public is usually not acquainted with the details of rulings and not aware of the circumstances that may lead to strict or lenient sentencing regarding this case and that one, so they tend to blame judges.

If we consider other criticized rulings, we may attribute that to the extension of the discretionary power of Saudi judges as a result of non-codification of rulings inflicting punishments, rulings relating to family matters and offences. And sometimes, judges may rely on untested precedents. To mitigate that phenomenon, the Supreme Court of the Kingdom of Saudi Arabia issued a number of judicial principles in different matters – this good step is a way to reinforce the principle of stability of rulings/ judgments and judicial transparency.

The Senior Scholars Panel decided two years ago on the issue of codification of judicial rulings which was subject to heated controversy for decades as some Sharia scholars opposed codification. Following the publication of the codified judicial rulings, it is expected that such will strengthen transparency relating to rulings and will lead towards stability of judicial rulings though this is unlikely to put an end to conflict of judicial rulings. Conflict and

variances relating to rulings is a characteristic of any judicial system in all countries, as the discretionary power of judges should be retained in order to make judges observe the objective differences and circumstances surrounding each facts/ case. Many laws have been enacted providing for certain sentences/ punishments; these include Combating Narcotics Law, Anti-Bribery Law and Counterfeiting Offences Penal Law.

As to codification of laws, it is important to note that this matter has not yet been resolved in international judicial systems. With respect to codification of laws in Rome, the Justinian Code stated that, ‘our law is of two types: a written and unwritten law as the case with the Greeks’. The same apply to the common law system as much of the law is not codified (written) and the judiciary relies on sources including judicial precedents (case law).

A matter that concerns judicial transparency is the debate among the legal community in Saudi Arabia about ‘specialized criminal courts’ which is a special criminal court for suspects of terrorism offences in the Kingdom of Saudi Arabia. It is not clear what is the exact jurisdiction of this court. Official announcements state that this court has jurisdiction over security matters or state’s security – a very broad and undefined jurisdiction, however considering the types of the offences usually referred to this court, one may conclude that this court have jurisdiction to hear and try cases which the government consider as threat to the state, and

this may include insults to rulers and criticism of political positions. In accordance with that description, political opponents may also be referred to that court. This court has been formed by a resolution of the Minister of Justice (though the power of formation of courts is vested with the Supreme Judicial Council provided that the assent of the monarch is obtained) on Safar 02, 1430H corresponding to January 27, 2009. On 02 Jumada 1, 1432H a specialized appeal court was formed. As a general rule, criminal offences are usually referred to general courts.

I want to emphasize the importance of strengthening confidence and trust in the general criminal courts and the necessity to lay down controls to limit the scope of secrecy in courts' sessions. The provisions relating to limitation of publicity under the Criminal Procedural Regulations need to be more precise as most of the courts' hearings have become secret, and public hearings have become the exception with limited presence of lawyers and limited number of the public. The discretionary power vested with judges in estimating the degree of publicity and secrecy in courts' sessions is excessive, and we fear it may tarnish the transparency of administration of justice.

### **Transparency relating to Employment of Judges:**

The issue of transparency regarding appointment of judges in Saudi Arabia is usually raised by commentators. It is well known that there are no agreed upon international standards

with respect to appointment of judges. Nevertheless, there are admirable experiences here and there that are beneficial to us, so we must emphasize clarity and transparency in this specific area as this is extremely important matter in relation to independence of the judicial power and people's trust on the judiciary.

The criteria of the Consultative Council of European Judges indicate the importance of transparency and partiality with respect to appointment of judges and determining their future. Any decisions in that area must rely on objective criteria and must be issued from independent authority/body. European countries differ as to the controls relating to appointment of judges – some countries conduct competition exams for candidates and some select judges based on experience in different judicial practice areas while others combine the two methods for selection.

Some of the recognized criteria in many countries for selection of judges include: legal professional skills such as the ability to analyze and to critique besides personal qualities such as moderation, partiality and integrity, respect for justice, listening to others and the ability to understand different views.

The Basic Law of Governance in Saudi Arabia provides that judges are appointed and dismissed by a royal order pursuant to the recommendation of the Supreme Judicial Council. The Judiciary Law provides that candidates to the judiciary must enjoy good behavior and conduct, must be

competent, and must have a university degree in Sharia from a Sharia school in Saudi Arabia or an equivalent degree. It is obvious that these criteria/ qualifications are relative and may widely vary in a manner that might have negative result with respect to better selection of judges.

The selection process in the past was dependent on the evaluation of selection committees of the Higher Judicial Institute and Sharia schools. There were no clear and known selection criteria with the possibility that selection is not always fair and straightforward. On 17/04/1433H, the Supreme Judicial Council issued a circular comprising the rules for selection of judges; it was a good and important step. However, such rules/ criteria were short and precise and not forthcoming. Better selection of judges requires more detailed criteria and more scrutiny of personal qualities of candidates to ascertain their suitability and fitness to the positions to be assumed. For example, the rules provide that the candidate must have, ‘moderate personality and of good conduct’; though important, such is quite relative and vary from one person to another – so there must be indicators by which one can measure and gauge these important qualities.

As to inspection of judges’ work and measuring their performance, the Supreme Judicial Council has issued a judicial inspection regulation on 02/11/1430H which comprises criteria for inspection including conduct of inspection and objection to inspection. It is important to note that this is a step forward in achieving transparency;

however, conduct of inspection must be strict and must apply to all judges on equal footing as this is not less important than announcement of the inspection criteria themselves.

### **Transparency concerning Publication of Rulings and Administration of the Judicial Institution:**

The Ministry of Justice continues publication of codified rulings, and now three editions were published. These include decisions/ rulings issued by the former Higher Judicial Council in addition to selected final rulings by a committee of the Ministry of Justice after being classified and after deletion of the names of parties to preserve privacy. This is a great achievement that helps in strengthening publicity and spread of judicial culture in society. It is required that all rulings should be published save for rulings that are inappropriate to publish. These are few compared to the aggregate number of rulings issued by the Saudi courts. Publications of rulings will permit specialists and other interested parties access to read the reasoning of rulings which is very important in achieving credibility of the judicial institutions and strengthening awareness and observation by society.

However, as to financial policies in the judicial system, budgets for projects, plans for expanding and developing judicial institutions of the Ministry of Justice and the different judicial institutions, it seems that these matters lack clarity. Despite the criticisms leveled against the Ministry of Justice

with respect to delay of construction of high standards judicial institutions matching the stature of the judicial power, however such criticisms are dismissed by the Ministry of Justice and attributed such delays to reasons beyond its control and to the need for fulfilling quality and safety criteria. Anyhow, any development must be based on clear vision for expanding buildings and apparatuses and the announcement of programs and projects with clear and measurable standards.

One of the criticisms leveled against the judicial system is the continuity of the overlapping between the executive power and the judicial power. Some commentators attribute this overlapping to the delay in appointing a president to the Supreme Judicial Council and the continuity of the Minister of Justice filling that position on acting capacity since 07/05/1433H. The official authorities justified that matter as temporary and it will help in bridging the gap between the Minister of Justice and the Supreme Judicial Council. Anyhow, this objective may be achieved by choosing the appropriate man for presiding over the Supreme Judicial Council and formation of a high level coordination committee between the Ministry of Justice, the Supreme Judicial Council and the Supreme Court.

### **Transparency regarding technical and procedural matters:**

An objective of technology in the judicial arena, besides providing easy access to judicial services, is to



achieve supervision and transparency on numerous levels. Technology enables officers to trace business in their departments and enables the public to benefit from services to follow progress of their transactions besides the possibility to obtain statistics and data of the flow of work and measure achievements made.

An observer can easily notice the progress made in the judicial process, the documentation and administration in the judicial system in Saudi Arabia such as extending operation through electronic *Shamel* system in courts, the notaries and the branches of the Ministry of Justice. Now it is possible to follow the electronic link courts, the notaries and the branches of the Ministry of Justice and to provide numerous electronic services by making available templates through the website of the Ministry of Justice, engineering many procedures and providing monitors showing minutes of hearings in courts.

Yet, these developments may be seen as very modest if compared with the announced support given to the judiciary reforming project. There is a lot to be done to link the judiciary with the electronic government, activating the online services to function efficiently and effectively, qualifying the judicial bodies to attract the public to attend courts' sessions, providing suitable services whether in major cities or in small cities, villages and remote areas, and completing the engineering and mechanization of the other procedures.

## **Publicity of Courts' Hearings in Saudi Arabia:**

### **Publicity of Trial under Islamic Jurisprudence:**

As a general rule, trial under Islamic jurisprudence is public to be witnessed/ attended by scholars and the public. The Prophet Mohammed (Allah's peace and prayers be upon him) used to judge between people at his house, in mosque or in streets. There was no independent court as disputes were rare and society was less complicated. The four caliphs and their followers were used to adjudicate between people in mosques where it was opened for everyone to attend. Imam Abu Hanifa (150H corresponding to 767G) and Imam Malik (179H corresponding to 795G) preferred adjudicating between people in open areas such as mosques<sup>(1)</sup>. Imam Malik said, 'judging between people shall be in mosques, this is an old practice'<sup>(2)</sup>. This was based on three elements, 'because the judge will be satisfied with those who were present, and the weak and women will have the chance to make their complaints to judges' – so in a sense litigation charges/ fees will be reduced and publicity of trials and access to justice will be achieved - these are the most sought objectives for developing any judicial system in modern states.

In this context, scholars disfavored adjudicating between people in judges' houses as this will likely prejudice justice and publicity of trial and to that effect they said, 'if he i.e. the judge sits alone at his house he will be overwhelmed

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(1) Al Tarabulsi Al Hanafi, 'Muein Al Hukum', p. 18; Ibn Farhoun, 'Tabsirat Al Hukum' 1/32.

(2) 'Al Mudawana' 4/13.

by impartiality'<sup>(1)</sup> that is to say, injustice. They also said, 'this will prohibit witnesses from coming to courts places (trial)'<sup>(2)</sup>. It was reported that Caliph Omar Ibn Khatab (may Allah mercy be upon him) disfavored and rebuked the governor Abu Musa Al Asharie adjudicating between people at his house.<sup>(3)</sup> Some scholars sanctioned judges to take their houses as place of trial when necessary provided that the judge opens his house doors for people without prohibition'<sup>(4)</sup>

The Maliki scholar Ibn Farhoun noted that a safeguard for achieving justice is that trial should be held in an accessible place namely in the major mosque. However, if some disputants feel this embarrassing, trial may be held in a less opened area in the mosque<sup>(5)</sup>. As a general rule, disputants are much interested to be heard and tried in a place away from noise so disputants can make their statements/ arguments and a judge will be able to listen to them properly. Some scholars advised that a judge must have a private place in the mosque, and Sahnoun Al Maliki used to take a room in the mosque as a trial place.<sup>(6)</sup> Islamic scholars expressed that attendance of trials is a right of everybody and there should not be a guard only for keeping order<sup>(7)</sup> - this may be considered as an early application of the principle of publicity of hearings,

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(1) Al Tarabulsi Al Hanafi, 'Muein Al Hukam', p. 18.

(2) Ibn Farhoun, 'Tabsirat Al Hukam' 1/32.

(3) Ibn Farhoun, 'Tabsirat Al Hukam' 1/32.

(4) Ibn Farhoun, 'Tabsirat Al Hukam' 1/32.

(5) Ibn Farhoun, 'Tabsirat Al Hukam' 1/32.

(6) Ibn Farhoun, 'Tabsirat Al Hukam' 1/32.

(7) Ibn Nujaim, 'Al Bahr Al Raiq' 6/302; Al Balakhi, 'Indian Fatwas' 3/320; Ali Hayder, 'Durar Al Hukam' 4/623.

and nowadays this is considered one of the human rights. However, the Hanafi scholar Al Samnani expressed that whenever the dispute in question did arise between a husband and a wife then hearing should not be public.

It is noteworthy to mention that scholars used to attend judges' courts as this is likely to lead to sharpening of rulings, and if the judge needs to consult them, so they would be available. In contemporary terms this may be called as 'knowledgeable supervision' vis-à-vis the supervision by ordinary people and no doubt knowledgeable supervision is much useful and effective.

The Journal of Judicial Rulings, a codifying journal during the Ottoman Empire, provided in section (1815) that, 'a judge should conduct trial in public, however he should not disclose elements of his ruling prior the date specified for announcing the ruling'.<sup>(1)</sup>

### **The Concept of Publicity of Courts' Sessions in Modern Age:**

In our age, publicity of courts' hearings mean that courts' rooms are open to the public and the media, announcement of rulings shall be in a public hearing and as well publication of sessions' minutes, pleading and questioning of witnesses shall be in public hearings and finally publication of announced rulings.<sup>(2)</sup>

The objective is to entrench the confidence and trust of the

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(1) Ali Hayder, 'Durar Al Hukam' 4/623.

(2) Hamed Abu Taleb, 'Islamic Judicial Organization', p. 49; 'Fundamentals of Sharia Criminal Trials', p. 403.

public in the judicial system – this is absolutely an important objective for achieving stability in the state.

### **Publicity of Courts' Hearings in International Literature:**

It was told that Mirabeau, the orator of the French Revolution, once said, 'bring me a judge as you like irrespective of whether such a judge is impartial, would receive bribe or aggressive as far as he will adjudicate before the public'. It has been reported that Jeremy Bentham, the British philosopher, said that, 'publicity is an essential element of justice – its soul'.

As we have mentioned earlier that publicity of trial is a right under Islamic jurisprudence, and it is the same under modern foreign laws. In the present time, it has become a common element in all judicial systems and provided for under human rights declarations. Article (11) (1) of the International Declaration on Human Rights provides that, 'Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defense'. This right has been provided for in article (14) of the International Convention on Civil and Political Rights. And article (1/18) of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families provides that, 'Migrant workers and members of their families shall have the right to equality with nationals of the State concerned before the courts and

tribunals. In the determination of any criminal charge against them or of their rights and obligations in a suit of law, they shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law'. This has also been provided for in article (6) of the European Convention on Human Rights. One of the international experiences is that of Judicial Distinction Foundation in the Philippine which adopts a project for "supervising courts" sending two monitors, usually law students, to courts rooms for a specific period of time.

Monitors used to evaluate performance of judges after each visit pursuant to direct notes, questionnaire made by lawyer and prosecutors. It is a comprehensive evaluation of the judges' knowledge of laws and regulations, promptness, competency and method of handling the case. After a short time of commencement of the program, the media reported that the attitude of judges has changed and their competence improved.

### **Publicity of Courts' Hearings in Saudi Arabia:**

Saudi law provides for publicity of courts' hearings as prescribed under Islamic jurisprudence and in comparative laws. The Regulations of Procedure before Sharia Courts provide for the publicity of courts' hearing; this is a mandatory provision that must not be contravened. The Regulations of Procedure before Sharia Courts provide for exception to that rule where the judge deems that appropriate, upon request

of either of the parties to a dispute in maintaining public order. However, in all cases rulings shall be announced in a public hearing. In addition, the Regulations of Procedure before Sharia Courts provide that all judges participating in deliberation and decision making shall be present on announcing the ruling.

The Criminal Procedural Regulations provide for the publicity of courts' hearings save for certain cases where the court may hear the entire case or part of it in private (non-public) sessions because of security considerations or for respect of public moral. Publicity is the norm unless secrecy/confidentiality is justified.

The provisions cited above provide that a court must declare publicity of trial and open the court's room for the public and the media, and no one is to be prohibited from attending a court's session as long as that such person is complying with the court's order and discipline. The discretion as to weighing whether publicity or secrecy/confidentiality is better serving the interests of justice and the interests of the parties is a matter to be decided by the judge.

It is a practice in Saudi Arabia that courts' sessions are held at open judges' offices. The Minister of Justice confirmed on April 27, 2012 that Saudi courts are committed to publicity of hearings and transparency of pleading so all means of media, domestic and foreign, may attend any sessions save for certain cases where confidentiality is

involved as the case with family matters. He emphasized that Saudi courts' sessions are opened for all including criminal cases and particularly terrorist cases in accordance with the Publication Law so it will not affect administration of justice. The Minister of Justice also confirmed that, 'we have balanced criteria to regulate publicity of courts' hearings and respect of law as to publication matters'.

That being said, still publicity is not properly achieved in most courts' sessions as most courts' sessions are not public for a number of reasons. These reasons include: those relate to the design of the courts' rooms, judges are preoccupied most times by office and administrative matters that fall outside adjudicating business such as writing of letters, signing transactions and fixing of sessions' dates. These matters distract the attention of judges in a manner not beneficial to the interests of conducting proper courts' hearing.

The method adopted in distributing cases to judges, timing of judges to deal with cases (usually half an hour to each case) and preoccupation of judges with administrative matters hardly give judges the chance and time to prepare for sessions that would attract audience.

One of the important reasons that encourage confidential/secret conduct of sessions is that most cases presented to Saudi courts relate to family matters. According to a statistical study the percentage of family cases is approximately (60%) of the cases brought before Saudi general courts. These



types of cases are usually not heard and tried publicly, and Saudi laws provide that such cases must be heard and tried in closed hearings.

### **Philosophical Differences of Transparency and Publicity in the Judicial Arena:**

All civilizations, though from different perspectives, agree on the importance of providing safeguards for administration of justice in the judicial arena; however, they differ as to the types of these safeguards. Some western countries developed the jury regime through which citizens participate in determining matters of facts in criminal and civil cases. In some countries, judges are elected. Western jurists doubt that this method may serve justice as it is impossible to alienate impartiality sentiments deep inherent in the human nature particularly that members of juries are not trained as to the mechanisms of decision making and they lack knowledge of the simple legal principles and rules.

Judicial systems across the world agree on limiting judges' appearance before the media, and prohibit judges from commenting on cases pending before courts, and as well prohibit the media from discussing cases pending before courts to avoid exerting any type of undue influence or pressure on judges.

We believe that transparency is an important requirement; however, this requirement is restricted because of public interest as information relating to state's security and privacy

of individuals must be respected and treated as confidential.

Commentators from outside Saudi Arabia may see conflict in judicial rulings; however, such is not accurate. There are differences between rulings similar to that exist in all countries. For that reason, the Supreme Court in the Kingdom of Saudi Arabia seeks to find judicial principles to be applied to cases. This is likely to mitigate variances between judicial rulings.

It is worth to mention that there is a degree of blurriness as to the position of the specialized criminal court – it is supposed to be within the hierarchy of the criminal courts. Trust in the judicial system necessitates that importance. As well, publicity is important to guarantee fair trial.

It is important to create an accurate mechanism for selection of judges, inspecting their work and evaluate their performance. Although there is a system in place, however, it needs improvement and development. Publication of rulings is also very important. The Ministry of Justice starts to publish judicial rulings, but such efforts must be sustained.

Despite the achievements of the Ministry of Justice and the disclosure of information with respect to many important projects, still there is a lack of transparency regarding financial matters, projects budgets and expansion and developments plans.

One of the most important criticisms leveled against the judiciary is the continuity of the overlapping between the executive power and the judicial power by delaying

appointment of a president to the Supreme Judicial Council and the continuity of the Minister of Justice filling that position on acting capacity.

A matter that has close relation to transparency is the publicity of courts' sessions. This principle is well known under Islamic jurisprudence long time ago, and Saudi law has provided for publicity however in reality the picture is not bright.

## **Inadequacy of Judges Compared to Population and Volume of Cases**

### **The Scientific Committee \***

Delayed justice represented in postponing deciding cases, without justifiable reasons, is considered injustice. For example, cases that usually require days to decide usually take months to settle, and cases that usually require months to decide, usually delayed for years which results in blights and loss of rights. The late Sheikh Mohammed Al Taher Ibn Ashour said, ‘prompt deciding of cases is a noble objective. Delay in giving rights to those who are entitled to is a bad thing indeed and creates much harm including, without limitation, depriving a deserving party from benefit from his right so inflicting harm on him. It gives a person not entitled to that right the benefit from such right; this is detrimental to that deserving party. It results in continuity of disputes between those who are entitled to rights and those who

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\* The Scientific Committee of the Center for Global Thought on Saudi Arabia has prepared and drafted this article.

are not and as well results in turbulence among Muslims. If there is suspicion as to who is entitled to a disputed right, this will result in hesitation and inability to decide the dispute and continuity of that dispute – this is likely to endanger ties between brother Muslims. Further, sustaining of that situation may get the hurt party abandon his case thus allowing the other party the benefit from a right to which he is not entitled. This would badly impact the judiciary and the people trust in the judiciary<sup>(1)</sup>. Delay in deciding cases will harm both parties – and conflicts with the principle of Sharia that there is no injury and no return of injury.

The Government of Saudi Arabia has paid much attention and care to the judiciary. It has set criteria and controls to select judges from those satisfying the requirements for assuming that important office. In most cases, the authorities concentrate on students in their final year of their university study to better know their academic standard, intellectual leaning and behavior. Those who satisfy the conditions and criteria set will be selected by specialized committee. However, few are selected by the committee compared to the international percentage prevailing across the globe. An observer will no doubt concludes that delay in deciding disputes is attributed to inadequate number of judges compared to the number of cases and population. There is a great gap between the percentage of serving judges and the number of population which definitely results in delaying deciding disputes.

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(1) See < Objectives of Islamic Sharia> by Mohammed Al Taher Ibn Ashour, p. 119.

For that reason, the United Nations has set numerous standards for different issues including the number of judges compared to the number of the population. The United Nations has set the ratio of one judge against three thousand. If we apply that ratio to Saudi Arabia, we will find a wide gap between the number of judges in Saudi Arabia and the international ratio set by the United Nations. Thus, the short in the number of judges and the increase in the number of cases have great effect in the performance of judges and deciding disputes. This is accompanied by the few number of law clerks, legal advisors/ lawyers and researchers in the proper sense of the word as to practice. In addition to inadequacy of judges, we find that judges are involved in administrative and other similar tasks which lead to negative effects on their performance.

The Supreme Judicial Council was aware of this problem specially the current and the former one, and as well the Ministry of Justice so they worked together to fill and rectify that gap by increasing appointment of law clerks and qualifying them to fill judges positions, and to select qualified and competent personnel from notaries hierarchy where five hundred were eligible to fill judgeship positions. His Highness the Minister of Justice issued law clerks regulations organizing the work of clerks, register-keepers, process-servers, translators, experts, secretaries which are likely to lessen the burden/ overload of judges and help them in doing their jobs.

Many laws and regulations were issued regulating judicial work, courts and specialized circuits were launched in many courts premises which contributed to prompt deciding of disputes. The Supreme Judicial Council tried to mitigate the damage caused by shortage of judges by approving the “weighting of cases” project which is an international standard adopted by many advanced countries. The project was approved following the comprehensive survey of the operation of the first instance courts made by the General Administration of the Courts Affairs and prepared an integrated data base of the size of work in each court with respect to number of cases, number of judicial offices, whether vacant or occupied, to consider requests/ applications for increasing the number of offices in a practical and proper way in a manner that observe the number of cases referred to each court and to each circuit, and as well observing the types of these cases; this will have a huge effect in determining these steps and procedures.

**The idea of this project and its main objective is** to list the types of cases/ disputes brought before courts, classifying them and determining the average time for considering them in order to determine an accurate criteria specifying the number of judges needed for each court pursuant to that criteria and according to the works of each court to achieve fairness and balance throughout the Kingdom based on the decided cases in quality and quantity and the time normally required, and as well this will serve making an estimate of

the requirements of specialized courts with respect to judges and circuits.

An observer and commentator on the judicial system in Saudi Arabia will find that there are many quasi-judicial committees and tribunals independent of both the general courts structure and the administrative courts despite that they are carrying on judicial business. These quasi-judicial committees are numerous having jurisdiction over more than seventy four law practices and were set up to meet pressing needs and continue to carry on that type of business. The new Judicial Law provides that the judiciary shall have general jurisdiction over all types of disputes irrespective of whether disputants are individuals or corporate bodies. The Supreme Judicial Council has set a date to integrate the jurisdictions of these quasi-judicial committees, such as the labor disputes committees, into the general courts structure by 1437H – other quasi-judicial committees and tribunals are under study and consideration. If we take into account the operation of these numerous quasi-judicial committees and the number of judges operating within the administrative courts structure (the Board of Grievances), we may conclude that applying international standards with respect to the number of judges in the general courts may be unfair; nevertheless, we admit the shortage of the number of judges and the measures taken to tackle that deficit as mentioned earlier.

It is important to emphasize that there are certain factors and elements that help in resolving/ settling disputes before bringing them before courts, or trying to reach settlement/



conciliation before being decided by courts; these include:

1. large number of people enjoy religious restrain which lead them to refrain from doing injustice and behave equitably;
2. deep-rooted traditions and customs which often lead people to abandon or relinquish disputing for consideration of kinship, and as well in some family matters in order to maintain marital relationship even in cases of divorce and separation;
3. conciliation councils among tribes and families to prevent revenges and feuds and encourage conciliation whether with or without price, division of land and farms and estates. There are also conciliation centers in cities and neighborhoods playing the role of social reformer, and as well as institutions for family guidance and education which are staffed by specialists, social workers and researchers doing their best in solving peoples social problems fairly, scientifically and practically;
4. verbal deliberation before courts in the presence of disputants by hearing the claims and answers to said claims directly by concerned parties where judges will be able to find facts and apply law. This is usually accompanied by judges playing active role in urging parties to observe the teachings of Allah – this usually have a positive influence on disputants and ultimately end in conciliation of the parties. It is important to

note that most cases end in the first session/ hearing although submittal of claims in writing is a prerequisite for accepting claims;

5. the comprehensive electronic system installed by the Ministry of Justice in collaboration with the King Abdulla Project for Reforming the Judiciary through which courts operate. The said system is known as accurate, efficient, fast, comprehensive, remotely controlled and assists in evaluating judges' and law clerks performance. A remarkable achievement is that procedures are very swift to the extent that a judgment may be issued in the same hearing and may be rendered as enforceable if it is not subject to appeal. The system permits a claimant to file his claim on line and follow up the matter until a date is fixed for hearing – some courts require filing lawsuits on line/ electronically. In cases relating to agencies, sales etc. an applicant may apply from his house, through the internet/ on line and follow up the matter through the number given/ assigned to him where all pertinent information go directly to the judge/ the notary – this advanced application of technology places the Kingdom of Saudi Arabia in a leading position even compared with advanced countries; in fact, the kingdom of Saudi Arabia takes precedence in ownership transfer. Most transactions end in less than one hour while they take days and weeks in some countries.

To sum up, no doubt that there is a shortage in the number

of serving judges; however, when considering that matter we have to take into account the number of judges serving in the administrative courts structure and quasi-judicial committees and tribunals as they constitute large number of the aggregate number of judges. Despite that shortage, competent authorities sparing no effort in tacking that gap by increasing the number of assistant judges and training them, and transfer qualified and competent notaries to the hierarchy of the judiciary. This is made easier by the technological transformation of businesses, notarization, filing of claims etc. which largely lessen the load of courts.

## **Appointment to the Judiciary is Restricted to Sharia Graduates**

**Prof. Ibrahim Al Hamoud \***

### **Introduction:**

The judiciary branch is very important institution in Saudi Arabia – it is vital and necessary which serves people and indispensable to them. This requires establishing justice and equality in society and achieving security and civil stability and resolution of disputes.

This development comes parallel to the cultural shift the Kingdom currently witnesses in all aspects of life aiming at entrenching the principles of the new judicial regime in the Saudi society – namely, enacting procedural laws and regulations, reinforcing its organizational structure and highlighting its objectives. The Saudi judiciary has acquired a prominent standing because it is an extension of the judicial

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system in Islam which aimed at achieving judicial objectives through courts and entrenching the equality principle.

The budget allocated to the judiciary will contribute to qualifying the new cadres, creating jobs, making available facilities and all requirements necessary to operating commercial, labor, penal and family specialized courts. No doubt this will support the specialty element, accelerate the litigation process and put an end to conflict of jurisdiction between courts.

An objective of the project for reforming the judiciary is to develop a mechanism for dealing with different cases particularly with matters relating to place and type. The intention is that development includes all parts of the Kingdom of Saudi Arabia in a manner that helps in achieving efficiency and accelerates processing of cases and resolving them. In this way, the judiciary will remain a pillar of political and social stability, and thus rights will be preserved.

### **Criteria for Selection of Judges:**

Judgeship differs from all other types of jobs with respect to selection criteria. This is because judges are example setters in performance of work – they must be religious and hold high standards of ethics besides the other qualities judges usually possess.

A criterion means the sum of capabilities and qualities that qualify a person to assume a judge office and helps him in properly performing his job.

The criteria for selection of judges match the time where nomination/ selection are made. There are certain criteria agreed upon, in old times and now, with respect to selection of judges – these are simply the principles of justice, equality, piety, straightforwardness and integrity. It is important to note that said criteria were adhered to during caliphate eras throughout Islamic history.

The importance and high standards of selection of judges and the fear of not being able to adhere to these principles had led many scholars to abstain from assuming that office, as they saw themselves as unable to undertake that responsibility.

In conformity with new circumstances in this age bringing types of lawsuits and cases not known before, the Supreme Judicial Council in Saudi Arabia, has paid much attention to this matter and held many sessions/ meetings to discuss criteria for selection of judges taking into account the practice and traditions adopted by the Saudi judiciary since foundation of the Kingdom of Saudi Arabia by the late King Abdul Aziz Ibn Abdurrahman Al Saud, may mercy be upon him. Selection criteria for judges, ever since, have taken into account changes of times and circumstances.

Under the reign of the founding king, may mercy be upon him, selection was based on personality of the person assumed to be fit of occupying that office; so a person known to be straightforward and pious among his folk will likely be appointed as a judge in a village or town where he resided.

No doubt, expansion of scientific knowledge and especially in Sharia field has an important impact with respect to selection of judges following opening of scientific institutes and Sharia colleges in the Kingdom, so selection came to be made through a committee assigned the job to meet final year students in Sharia colleges. Names of students believed to be straightforward, pious and capable of assuming the judge office will be reported to the competent authorities for appointment as judges. This practice continued for a time until issuance of the Saudi Judiciary Law which provides for criteria of selection of judges as follow<sup>(1)</sup>:

1. To be a Saudi national;
2. To enjoy good behavior and conduct;
3. To enjoy full capacity of assuming judgeship in accordance with Sharia;
4. To be holder of a certificate from a local Sharia schools or another equivalent certificate, provided that, in the latter case, he must pass/ succeed the test prepared by the Supreme Judicial Council;
5. To be of age not less than forty years old if appointment is as appeal judge, and not less than twenty two years if appointment to the other hierarchy ranks;
6. He must not be indicted of any religious or moral turpitude offences, or a disciplinary action dismissing him from a public office, or and indictment was issued against him even if he was rehabilitated.

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(1) The Judiciary Law, article 31.

It is agreed within the Saudi judiciary that a judge must be an adult and of age, so a youth, an insane or an imbecile will not be eligible to assume that office. Judging requires intelligence and recognition of all matters that assist a judge in reaching the proper ruling, and a youth, an insane or an imbecile lack proper awareness.

Saudi Arabia sets the age of twenty five to assume judge office, i.e. following the minority age where maturity and intelligence are attained; this is what is meant by full capacity provided for under the Judiciary Law in Saudi Arabia.

In addition to those criteria, there are other criteria that must be fulfilled and the most important of these are:

### **First: Impartiality:**

This is required for testimony and best represented in honesty, virtuousness and virility; people who enjoy these qualities are unlikely to commit dishonorable acts. A liar and evil person will not be eligible to be a judge as Allah Almighty says, ‘O you who believe! If a Fasiq (liar – evil person) comes to you with any news, verify it, lest you should harm people in ignorance, and afterwards you become regretful for what you have done’ (Surah Al-Hujurat, verse (6)), a piece of news brought by a liar should not be believed, nor his testimony to be accepted, a fortiori, he should not assume the judge office. As to acceptance of a liar testimony Allah Almighty says, ‘... and reject their testimony forever. They indeed are the Fasiquin (liars, rebellious disobedient o



Allah)' (Surah An-Nur, verse 4)).

Impartiality is an important criterion with respect to selection of judges particularly in this age, and in this regard manifest impartiality may be sufficient. To that effect, the Saudi Judiciary Law provides that a judge must enjoy good behavior and conduct in a clear indication to impartiality criterion with respect to selection of judges.

No doubt that impartiality is a prime quality as no proper ruling may be reached with a partial judge; as well it is a sign of piety as Allah Almighty says, 'be just: that is nearer to piety' (Surah Al-Ma'idah, verse (8)). A judge in a sense is a ruler, a ruling shall be made impartially - a just and impartial ruler is one of seven people who will be shaded by Allah under His shade on the day when there will be no shade except His as narrated by Prophet Mohammed may peace and prayer be upon him.

Whenever the judge is impartial this will facilitate acceptance of his ruling by disputants, so he will not be bias against a party, will hear both parties fairly. Under Sharia, when a judge shows a bias this will constitute a ground for dismissing him.

### **Second: Discretion:**

This means having the ability to reach a ruling based on Sharia in absence of a clear text – this is a process of exercising mind in recognizing Sharia rules from main Sharia

sources such as the Holy Quran, Sunnah, Unanimity etc.; in other words, exerting effort to deduce secondary Sharia rules from detailed evidence. It is important to note that discretion is not permitted in presence of clear cut texts/ provisions - this responds to the verse saying, ‘And so judge (you O Mohammed) among them by what Allah has revealed and follow not their vain desires’ (Surah Al-Ma’ida, (verse (49))).

Proper provision can be reached only by proper discretion - this means better knowledge of the Holy Quran and Sunnah and competence to weigh evidence in case of differences; this may be reached by discussing candidates to judgeship to know their ability to deal with Sharia texts. On balance is the process to know those who can exercise genuine discretion and those who cannot to exclude the latter; this corresponds to Allah Almighty saying, ‘And allow not (O man, i.e. say not or do not or witness not) that of which you have no knowledge’ (Surah Al-Isra, verse (63)).

Thus the quality and ability to exercise discretion is an important element with respect to selection of judges – it is an evidence of the judge ability to research and weigh regarding controversial issues. In these times where knowledge is accessible thanks to advanced technology, it becomes easier for judges to access that knowledge by searching scholars’ opinions and rely on appropriate and sound opinions. In these times, we are in bad need to exert original discretion; these changing times, witnessing tremendous developments,

mixing the particular with the general - in essence, discretion has become a religious necessity.

- a) Whoever exerts discretion must be well-acquainted with the Holy Quran because it is the main source of all other sources. It is not enough to know the language and meaning of the Holy Quran, but there must be genuine and true knowledge of it enabling him to memorize the verses embodying these provisions.
- b) As well, whoever exerts discretion shall be well-acquainted with Sunnah, and in this case one need to be familiar with the prominent scholars. Those who want to excel in this field must have a thorough knowledge of the entire Sunnah because some provisions might be found in some texts while not in others. In particular, the following points must be known with respect to Sunnah:

### **Correct and Weak Hadith:**

One must differentiate between correct and weak Hadith as to the source of narration/ reporting, so the correct shall have precedence.

### **History and Men:**

History is very important when exerting discretion with respect to better knowledge of strong and weak narration/ reporting of Hadith; the strength of narration/reporting is affected by trust in those who made the narration/ reporting.

### **Reasons for Questioning Defective Narration/ Reporting and Amendment:**

The reasons for questioning weak/ defective narration/ reporting must be known and weigh when amendment is required, and as well better knowledge of the necessary controls to know the correct and acceptable Hadith.

#### **c) Knowledge of *Ijmaa*:**

A judge exercising discretion must be familiar with *Ijmaa* issues so as not to make/ reach contrary provisions to what have been unanimously agreed upon by Sharia scholars rendering himself as violator of that *Ijmaa*. *Ijmaa* is an authoritative source of Sharia provisions as agreed upon between the Four Fiqh Schools (Traditions) – judges are not allowed to deviate from provisions agreed upon by Muslim major scholars/ Imams; however, for new facts judges are allowed to exert that discretion in accordance with principles set by Muslim major scholars/ Imams.

#### **d) Knowledge of Asool Al Fiqh (i.e. Islamic jurisprudence):**

Judges must be well-acquainted with the principles of Asool Al Fiqh (i.e. Islamic jurisprudence) because it is the foundation and support for exercising discretion and without it scholars would not have known to establish evidences nor able to deduce provisions therefrom. Meanings and connotations of Arabic terms shall be given paramount attention, and as well special attention shall be paid to *Qiyas*

(i.e. juristic reasoning by analogy) with respect to attached conditions, causes etc.

### **e) Knowledge of Arabic Language:**

Judges exerting discretion must be well-versed in Arabic language as to grammar, semantics and style because Sharia sources are all in Arabic language.

### **Third: Academic Certificate:**

The Judiciary Law in Saudi Arabia provides that whoever holds the job of law clerk shall hold a Sharia certificate with grade not less than (good) and a grade of (very good) with respect to Islamic jurisprudence as this discipline develops a judge capability in matters relating to deduction and weighing of evidence.

Students best qualified and suited to judgeship are graduates of the Higher Judicial Institute who obtain master degree in Islamic jurisprudence or Policy based on Sharia. And those are usually selected to serve in the judiciary and the Board of Grievances in Saudi Arabia, provided that other criteria mentioned earlier are met.

In selecting and appointing judges in the present time, a candidate shall be well-versed in laws applicable in Saudi Arabia because hearing specialized matters with respect to such commercial law, for example, requires knowledge of the laws applicable in Saudi Arabia in that practice and as

well knowledge of the contemporary financial transactions.

No doubt candidacy to appointment as judge is usually preceded by making a personal interview by specialized committee, scientifically and administratively, considering the qualification and competence of candidates. Upon conducting personal interviews, the committees observe the following:

- Qualification of the candidate particularly his academic record;
- Physical fitness;
- Appropriateness as to assuming judgeship by reviewing his academic reports prepared by his teachers in his final year;
- Being moderate and of appropriate intelligence.

Matters that to be observed with respect to selecting judges in this time is the ability of the candidate to deal with information technology and devices such as computers which are now widely used in Sharia courts which facilitate performance of work in a record time and controls title deeds and documents, causes of actions and requirements in a quick and safe way that can be referred to easily. Those who do not know how to deal with computers and information technology or have no knowledge about laws and regulations will be required to join scientific courses conducted by specialized centers, as it becomes necessary to deal with these matters.

#### **Fourth: Personal Characteristics:**

Of the criteria to be observed even if not provided for in the Judiciary Law is the personal characteristics of the candidate that pertain to his appearance, personal integrity and being religious as judgeship in Saudi Arabia is a Sharia domain so those assuming that office must be religious people – it is inappropriate to assume judgeship by someone who is indifferent to the teachings of his religion even if he is knowledgeable and erudite.

It is possible to say that criteria for selecting judges in Saudi Arabia observe personal, scientific, ethical and behavioral characteristics; this will have positive effect in the way judges conduct their work with respect to trial procedures and dealings with disputants. It is important to ascertain that candidates to judicial posts enjoy characteristics; it is not enough to believe that such characteristics are there, they must be there.

It is a mistake to believe that form is more important than content with respect to selection criteria; both must be adhered to. Good manner, decency and good-looking are important traits; this was the norm in earlier times, however some countries do not give much attention to these matters, but in Saudi Arabia is always very necessary in selection of judges.

Even after appointment, if a judge misses any of these traits, such may constitute a valid cause for dismissal as selection criteria are perpetual even with respect to scientific

capabilities. If it is proved that a judge is incompetent or incapable to exert discretion, he may be dismissed from office and public interest necessitates that if a judge proved incapable to assume the duties of office, he should be dismissed and this is the task of the judicial inspection authorities.

**Fifth: Experience:**

This criterion is not always adhered to, only in cases involving nomination to sensitive positions in the judiciary which requires possession of expertise in judgeship, arbitration or advocacy. These experienced people will be given priority as to fresh graduates because they will be required for immediate appointment without the need for training. As well, experience will be required for judges according to the type of the respective case, so whoever lack that experience must be appointed as law clerk to be trained and prepared to assume the role of a fledged judge.

**Why Appointment to the Judiciary is Restricted to Sharia Graduates?**

It is well-known that the judiciary in the Kingdom of Saudi Arabia is based on Sharia derived from the Holy Quran and Sunnah. Judging in this sense is divine based on the revelation enshrined in the Holy Quran and as dictated by the prophet Mohammed (may prayers and peace be upon him). Allah Almighty has warned people to follow, but



His teachings and so He recommends to Mohammed (may prayers and peace be upon him) that, ‘And so judge (you O Mohammed) among them by what Allah has revealed and follow not their vain desires, but beware of them lest they turn you (O Mohammed) far away from some of that which Allah has sent down to you. And if they turn away, then know that Allah’s Will is to punish them for some sins of theirs. And truly, most of men are Fasiquin (rebellious and disobedient to Allah). Do they then seek the judgment of (the days of) Ignorance? And who is better in judgment than Allah for a people who have firm Faith’. (Surah Al-Maidah, verses (49) and (50)).

Appointment to the ranks of the Saudi judiciary is from graduates form Sharia colleges and not law schools, because specialization in Sharia is nearer to a judiciary based on the Holy Quran and Sunnah. Students in Sharia schools intensively study Fiqh (i.e. Islamic jurisprudence) contrary to students of law schools; however, this does not mean overlooking this type of specialization as it is badly required in fields of investigation, advocacy, legal consultation etc.

As Sharia principles are not codified, so there is no need for lawyers in Sharia courts; in fact, Sharia judges are capable to exert discretion and refer to Fiqh books to search Sharia issues to make their judgments. This does not mean excluding lawyers generally from the judiciary hierarchy, but the term ‘law’ in the present time has attracted the interest of numerous specialized people who tend to see it as a way to

find/ reach judgments concerning people rights. Most laws currently prevailing in many countries are derived from the Continental Tradition which is largely influenced by the Maliki School.

The gap between Sharia studies and legal studies is wide because of absence of law subjects from Sharia schools and similarly the absence of Fiqh (i.e. Islamic jurisprudence) from legal courses in law schools. Convergence between the two traditions requires merging Sharia programs with those of law as the case in some universities in Islamic states.

Rules of law that correspond with the principles of Sharia and proper outlook may not be dispensed with; however, most laws, being man-made, are far away from natural disposition and reason, so these types of laws may not be accepted nor constitute basis for adjudication.

It is essential for Sharia judges to be well-versed with drafting of laws and regulations under the umbrella of Sharia; thus, this gives rise to study laws in Sharia schools and higher institutes – these laws include, for example, administrative law, financial laws, commercial laws, public and private international law, agreements and international conventions and treaties.

Arguably, one cannot reject the term ‘law’ categorically; however, specialized people shall study it so any laws match natural disposition and reason, a fortiori, corresponds to Sharia.

Based on the foregoing exposition explaining the

relationship between law and Sharia and the stance of Sharia scholars as to study of judicial laws on which the state is found, we may summarize the reasons for restricting appointment to the judiciary in Saudi Arabia to graduates of Sharia schools as follows:

**First:** The Judiciary Law provides expressly to restrict appointment to general courts hierarchy and administrative law courts to graduates from Sharia schools or their equivalents; this is mandatory provision – so whenever there are available Sharia schools graduates, there will be no need to look elsewhere. No doubt people versed with Sharia shall take precedence over any other graduates particularly graduates of Sharia schools are numerous. Graduates from law schools may fill other jobs relate to law such as legal advisors in corporates and in private and public sectors.

**Second:** The Judiciary Law provides expressly for the requirement of full competence from Sharia perspective for those who assume judgeship. It is well known that being well-versed with Sharia is a condition stipulated by Sharia scholars in selection of judges, because judges, under Sharia, pronounce Sharia principles as to the cases presented to them for adjudication. Graduates from law schools may fill other jobs relate to law such as legal advisors in corporates and in private and public sectors.

**Third:** inadequate and incomplete legal studies in Saudi Arabia regarding peoples' needs and issues in accordance with the principles of Sharia as Sharia is comprehensive and

all-inclusive in content so it satisfies needs and requirements of people.

To sum up, restricting appointment to the judiciary hierarchy in Saudi Arabia to graduates of Sharia schools is attributable to the fact that such graduates satisfy the conditions/ requirements for Sharia judges, and that the graduates from law schools do not fulfill such conditions/ requirements.

All in all, this is not an underestimate of graduates from law schools as they may excel in other disciplines of law such as investigation and prosecution, legal advice and advocacy in both the public and the private sectors.

## Women under Saudi Legal System

**Prof. Rawya Al Zahhar \***

Islam honors women, values them highly and gives them full rights. Islam does not differentiate between men and women; however such equality is not absolute. Islam equals between men and women where equality is appropriate, and differentiates between them where there are reasons for such differentiation. One aspect of equality between men and women is that both are human beings. In this respect, Allah Almighty says, “O mankind! Be dutiful to your Lord, Who created you from a single person (Adam), He created his wife [Hawaa] [Eve], and from them both He created many men

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and women” (Surah An-Nisa, verse (1)). Man and women are equal in having the right to life. Sharia gives the life of both the man and the woman the same importance. Intentional killing of innocent human beings requires punishment whether the killed is a man or woman. Sharia treats man and woman equally in all religious matters and punishment at the Judgment Day. Women are required to have faith and so men; women have to believe in the pillars of Islam and so men; and women and men are susceptible to punishment at the Judgment Day; Allah Almighty says, “Whoever works righteousness, whether male or female, while he (or she) is a true believer (of Islamic Monotheism) verily, to him We will give a good life (in this world with respect, contentment and lawful provision) and We shall pay them certainly a reward in proportion to the best of what they used to do”. (Surah An-Nahl, verse (97)). Sharia treats women and men equally with respect to political, intellectual and religious freedoms, and the freedom to learn and work. Each adult, whether a man or woman, may participate in running the affairs of the state and monitor its affairs, perform his/ her duties. This is only qualified by safeguarding women dignity, protecting her from indecency, keeping her away from disrepute, preventing her from performing duties towards her husband, children and house and burdening her beyond her ability. Sharia treats men and women equally with respect to capacity i.e. exercise of civil acts such as making of contracts, revoke of contracts, entering business partnership (forming companies), doing

trade, making delegation, filing lawsuits etc.

Whereas laws in Saudi Arabia are deprived from the Holy Quran, Sunnah and Islamic jurisprudence as provided for under article seven of the Basic Law of Governance, “Governance in the Kingdom of Saudi Arabia derives its authority from the Book of God Most High and the Sunnah of his Messenger, both of which govern this Law and all the laws of the State”. Saudi laws observe women status within the Saudi legal system; to mention some examples:

### **Status of Woman as Litigant:**

Under Sharia law, women have the right to litigate, file complaints and sue either as claimant or defendant, seller or purchaser, mortgagor or mortgagee, testator, guardian etc. There are numerous principles in Sharia that teach women how to claim their rights if they encounter arbitrary injustice or discrimination, and to file their claim requesting justice. One of the provisions witnessing for the right of women to litigate is what was reported from Aisha (may Allah be pleased with her) saying, “my father married me to his brother’s son so that he might raise his status thereby.’ The Prophet gave her the choice, and she said: ‘I approve of what my father did, but I wanted to know that their fathers have no right to do that “.(<sup>1</sup>) In a Hadith reported by Hind (may Allah be pleased with her), I said to the Messenger of Allah that Abu Sufian is a mean man, should I take from his money in

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(1) Masnad Imam Ahmed, Sunan Al Nisaie and Sunan Al Dar Qutni.

secret? The Prophet replied, “Take an adequate amount for you and your children”<sup>(1)</sup>.

The Saudi legal system empowers women the right to sue with respect to all cases either as claimant or defendant; she has the right to plead either by herself or through an attorney. Most women cases before courts relate to family matters, namely, claim for maintenance, a dowry, divorce, revoke of marriage contract, custody of children, visits of children, guardianship toward minor children and other relevant claims.

Besides granting women the right to litigate, laws facilitate litigation procedures; follow up with courts and other justice institutions. The laws observe the nature of women and give advantage over men such as giving her the option to choose the place of filing her case in personal lawsuits as exception to the rule which makes the domicile of the defendant as the place of filing lawsuits.

### **Woman as a lawyer/ attorney**

Practicing law in Saudi Arabia means pleading on behalf of third parties before Saudi courts and the Board of Grievances and other tribunals established under laws, orders and resolutions to try disputes assigned to such courts and tribunals; the same apply to providing legal consultation to clients. Representation of third parties with respect to legal matters is recognized and sanctioned by Islamic scholars, as

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(1) Sahih Al Bukhari.



scholars sanction appointment of attorneys for representing and standing up for people.

Practicing law has two aspects: as to the first aspect, providing consultation i.e. provision of legal advice for clients which women are permitted to carry out. It is reported that Prophet Mohammed (Allah's blessing and peace be upon him) asked Um Salama (may Allah be pleased with her) for advice during Al Hudabiyya and accepted the advice she rendered. In Saudi Arabia, there are many law firms appointing female lawyers to provide legal advice on all areas of practice by creating an appropriate place setting for practicing separate from male lawyers. The second aspect is appearing and defending before law courts and judicial tribunals. There is no Sharia obstacle for women to represent third parties before courts and judicial tribunals; as women can plead and defend with respect to their own interest and family matters, then, a fortiori, they can represent others. Sharia history provides numerous instances to the effect that women represented others as narrated by Anas bin Malik that, "sister of Anas bin Al Nadeer Al Rabie, Um Haritha, injured a man and went to the Messenger of Allah to settle the problem. The Prophet Mohammed (Allah's blessing and peace be upon him) said, "Punishment! Punishment!" Um Al Rabiea, "to punish a woman? Allah Almighty does not punish women". The Prophet Mohammed (Allah's blessing and peace be upon him) said, "O Um Al Rabiea, punishment as dictated in the Holy Quoran". She said, "I swear she will not be punished". She

insisted on her stance till she accepted to pay a compensation, then the Prophet Mohammed (Allah's blessing and peace be upon him) said, "some of the people when swear, Allah accepts their swear". The Hadith demonstrates that the mother of the defendant acted on behalf of her daughter which is clear evidence that a woman can act on behalf of others. Scholars did not stipulate that an appointed attorney need to be a male, as the rule is that who acts in proper manner shall have the right to delegate and being delegated. As woman can stand up for herself, then she may represent others.

This issue is sanctioned from jurisprudential perspective, and well-established under Saudi courts. Judges hear cases filed by women representing men and women. In addition, the Legal Profession Practice Law does not make any differentiation based on gender; therefore, nothing, from Sharia and legal perspectives, bars women from practicing law.

The Ministry of Justice officially permits women to practice law and grant them the right to appear and plead before courts. Many women who meet the necessary requirements under the Legal Profession Practice Law were licensed to practice law by the relevant authorities of the Ministry of Justice – they received practice licenses. According to said license, women were permitted to practice law as from the date of issuing the license including the right to plead with respect to all types of lawsuits. Women are well respected by judges – this is the testimony of female practicing lawyers.

## Woman as a Judge

Judgeship is the practice of rendering rulings and settlement of disputes. Muslim scholars differ as to permitting women assuming judgeship; there are three opinions on that respect as follow:

The first opinion – the majority opinion: they opine that women are not permitted to act as judges; if appointed, a ruling made by a female judge must not be enforced. They build their opinion on a body of Sharia texts and rational analysis such as the claim that Sharia prohibits women from assuming grand *imama*, and non-acceptance of her testimony with respect to *hudud* and punishment, prohibition to act as imam for men etc. Prohibition of women to act as judges from the perspective of this opinion does not lower women's status or deprives her capacity; nonetheless this is out of respect and compatible to her nature and femininity. Then the cause for prohibition is femininity, however not in a manner matching femininity to lack of knowledge or ignorance nor less intelligence as reality proves that many women exceeds men as to knowledge, intelligence and the ability to understand – based on that, there must be something different. The nature of the make-up of women makes her susceptible to her instincts in a manner commensurate with the mission to which she is born, only next to worshipping Allah; so to speak, maternity and bringing up children. This mission makes women largely sentimental with recurring changes that occur on her monthly and through years which

weaken her moral strength and this fact admitted by women. It is characteristic that women, throughout different stages of age, are emotional and sentimental – there are real instances proving that fact. It is important that said characteristics are incompatible with the qualities of judges. Based on that difference scholars permit women to act as a mufti, but not as a judge – a judge is required to inform of Sharia rulings and enforcement of said rulings, where a mufti is required to just inform of Sharia ruling without any obligation as to enforcement.

The second opinion – it is valid for women to act as judges in matters where their testimony is valid: as a woman testimony is permitted in all matters except those pertain to *hudud* and punishment, then her judgment is valid with respect to all matters save those pertain to *hudud*. In general, this opinion does support appointment of women as judges, however, and considers the rulings passed by female judges as valid and enforceable. According to this view, rulings made by female judges in issues pertaining to personal and financial matters and chastisement (i.e. other than *hudud* punishments) shall be valid and enforceable; however, her rulings in matters of *hudud* and punishment shall not be enforceable.

The third opinion – it is valid for women act as judges: this opinion, a minority, permits women to act as judges in equality with men, and that her rulings shall be enforceable similar to those made by men.

The Saudi legal system follows the first opinion so the post of a judge is restricted to men only. The Saudi law stipulates whoever assumes the office of a judge must enjoy full capacity as dictated by Sharia; that is, the majority opinion prohibiting women from assuming the judge office. This in a sense commensurate with principles of Sharia and it was the case in the era of Prophet Mohammed [Allah's blessing and peace be upon him], companions of the prophet and his followers. These eras were near in time to the era of revelation – contemporaries to such eras had the knowledge of the secrets of revelation and intention of the sacred text the Holy Quran.

Conclusion: women under Saudi legal system have the right to litigate either as claimant or defendant in all types of lawsuits whether acting on herself or representing third parties. As well, women are permitted to practice law according to Sharia controls; however, women are not permitted to assume the office of the judge according to the predominant current of Muslim scholars adopted under the Saudi legal system.

## **Aspects of Respect of Particularities of Women in the Saudi Legal System**

**Dr. Mariam Al Tamimi \***

Allah Al Mighty has created man and woman and has assigned to each certain tasks. As Allah has made common and shared characteristics between man and woman, He has ascribed to each qualities not shared by the other that are closely commensurate with his/ her duties and responsibilities. A woman has a role and a mission that may not be performed by a man, and a man has a role that is difficult to be performed by a woman.

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The Kingdom of Saudi Arabia conceives that women have certain particularities not shared by men, a perception that has led to enacting certain laws and regulations respecting that particularity.

This particularity may be attributed to two aspects: a Sharia aspect as Islam has ascribed certain characteristics to each gender, and a societal aspect as there are societal norms that should be respected. The understanding that all barriers between men and women to be lifted altogether within a community irrespective of the differences between genders is an intransigent and arbitrary view, and at the same time rejects the particularities, the cultures and the values attached to a certain religion or community.

Woman in the Kingdom of Saudi Arabia has particularities recognized by religion, reason and society, especially with respect to rights owed to her by man; so in cases of not honouring or malfeasance as to respecting such rights, this would give rise to problems and antagonisms.

The Saudi legal system observes such particularities, hence, certain rights were embodied in laws and regulations enacted to provide for respecting woman and her place in Saudi society; these rights include:

### **First: The Right to have Separate Waiting Areas:**

as a general rule, all courts have rooms, places and halls reserved as waiting areas for women. These waiting areas are well protected, cared for and looked after. This

has been provided for in the Circular No. 13/t/2574 dated 24/01/1426H and confirmed by the Circular No. 13 t/2844 dated 02/02/1427H.

The objective of setting up these waiting areas for women in Saudi court premises is to respect privacy of women, as women need places where they feel comfortable and not seen by men for religious or other reasons.

### **Second: The Right not to Appear Before Courts:**

It is an established procedure before Saudi courts that a woman, who rarely goes out, should not be obliged to appear before official bodies. It is adequate to have an acknowledgment to be made by a woman in the presence of two witnesses who know her, and a notary public is usually required to visit her house and have any required acknowledgment; however, such will not be extended to matters relating to penal issues.

### **Third: Woman are Permitted to File Legal Actions in their Domicile:**

As a general rule in all jurisdictions, an action is filed where a defendant is domiciled as his innocence is presumed. However, the Saudi Pleading Regulations permit women to file actions against a husband or a guardian with respect to family matters in her domicile because it is difficult for a woman to travel and file an action against a husband or a guardian in the place where they domicile taking into



consideration that Saudi Arabia is a large country where places in some instances are remote from one another by hundreds of kilometres. This exception to the rule is meant to protect women from an intransigent husband or guardian who may move from one place to another thus making it difficult for her to pursue her action. But this should not be interpreted as discrimination against men, as a defendant male may submit his reply to the action in his domicile by way of ‘judicial substitute’ – so whenever an action is filed against a husband, the husband will be obliged to appear before the court where the action was filed, if it is not filed against the husband per se, the judge will dismiss the action without obliging the male to appear.

### **Fourth: Women are Given Priority as to Determining Hearing Dates:**

Whenever a woman is a party to a legal dispute, courts will bring forward the dates for hearings as a matter of practice, however, no mandatory rule governing this matter; the reasons for the creation of that practice are:

- a. Accelerate deciding legal rights whether the right is pecuniary as maintenance, hence a woman will not be humiliated to ask for charity or ask for loans if she lacks money, or if the contested right is not pecuniary such as child custody or child visit, given that most cases where either party is a woman, it usually relates to her rights as wife or mother or both.

- b. Observance of the special nature of women as they are known, in most cases, as less patient and not strong enough compared to man especially when it comes to fighting for their rights in courts – many women may abandon their rights if they believe such will need long time, incessant follow-ups and extended court hearings.
- c. On the other hand, a man, although long time, incessant follow-ups and extended court hearings may annoy him; nevertheless, he will not abandon his case.

If there is a man who abandons his rights because of long time, incessant follow-ups and extended court hearings, or if there is a woman bears long time, incessant follow-ups and extended court hearings to get her rights, such is not the rule/norm, it is the exception.

#### **Fifth: Observance of Privacy and Confidentiality:**

privacy and confidentiality is maintained in court sessions in cases filed by women or against women in matters concerning marital and family affairs; no party other than the parties to the action will be permitted to attend in case that a party to the case is a woman.

#### **Sixth: Privacy in Search:**

under the Saudi legal system observing Sharia principles and social norms, a woman accused or involved in a crime will

be searched by a woman whether the search relates to her body or belongings. The same applies to houses where residents were females only, so search will be conducted by a search team in the presence of a woman. A woman, not charged, will be allowed time to dress well and put the veil or to leave the house, if she wants, and facilitation shall be made to that effect.

### **Seventh: Privacy in Investigation:**

in case of subjecting a woman to investigation, a male relative of such woman must be present, and if she is imprisoned, then a female guard must be present during investigation. This procedure satisfies two concerns: maintaining privacy and dignity of women thus prevents abuse and makes them comfortable on the one hand, and preventing a man and a woman being together which is prohibited under Islam.

### **Eighth: Consideration in Inflicting Punishments:**

the Enforcement Law provides that an indebted woman shall not be subject to imprisonment if she is pregnant or have a child below two years old. This is meant to safeguard the good health of the woman and maintain the health of the child and his physical and psychological integrity on the other. As well, corporeal punishments shall not be inflicted in public contrary to men, taking into account her nature and feelings, and instead such penalties shall be inflicted inside prison. In addition, corporeal punishments shall be delayed

if the woman is pregnant or has an infant to maintain her rights and those of her infant.

**Ninth: Priority to Repay Women's Debts:**

when the state (the Government) assumes responsibility for repaying debts of insolvent people, women enjoy special position; as priority for repaying debts will be given to women in debt. In effect, debt ensuing from consideration for divorce (by wife) for consideration, divorce, and revoke of marriage contract or payment of rent will have priority even in cases where a woman was not in prison. This evades imprisoning a woman for any of these debts, and if she is in prison, then debt will be repaid and she will be set free.

**Tenth: Compulsory Execution:**

in some cases it is urgent to compel the debtor to execute the judgment passed; however, in marital cases a woman will not be compelled to return to her husband house if she is not willing to do so – such a judgment is not subject to compulsory execution. This exception obviously shows respect for the will of women.

**Eleventh: Enforcement of Judgments in the Woman Domicile:**

the Enforcement Law provides that in marital cases enforcement shall be in the domicile of the wife irrespective of the place of residence of the husband; this is really lenient and kind to women.

### **Twelfth: Expeditious Enforcement:**

if the judgment passed relates to maintenance, wet-nursing payment, rent payment, visit a child or handing him to his guardian or hand a woman to her *muhrām* or separate a couple then such judgements shall have expeditious nature. The Enforcement Law provides that judgments concerning certain rights of women shall be expeditious to prevent procrastination in enforcing such rights. These rights take precedence over others so they have expeditious nature.

The Implementing Regulations of the Enforcement Law set certain rules in that respect. For example, if the judgment provides for regular payment of money, such as maintenance, and the person against whom a judgment is being enforced has a bank account, the enforcement judge shall instruct the bank to deduct the payable amount and transfer the same to the account of the beneficiary. If such person has no bank account, however, s/he has funds with another entity or person, then the enforcement judge will instruct that entity or person to seize such funds as adequate to the payable amount and credit it to the account of the beneficiary; this guarantees direct payment of maintenance to the beneficiary.

The Saudi legal system comprises provisions that safeguard women's rights and observing their particularities. These provisions require expeditious of enforcing court rulings in marital and family matters; lay down detailed arrangements to secure prompt enforcement of rights so women may not be compelled to follow-up with authorities; giving banks instructions as to payment of maintenance

etc.... thus saving time and effort and preventing abuse by the other party.

Women need not file a case against a father refusing to return the child to his mother following a visit to that child, but the police is empowered to return the child to his mother in her house or the house of one of her relatives, and not in the police station; however, if such proved difficult then in Government social organizations or charitable foundations and organizations licensed to carry out such type of business.

Conclusion: the previous overview of the laws and procedures followed by the Saudi judiciary and courts, it is obvious that the Saudi legal system respects women as demonstrated in numerous aspects including: reserving separate waiting areas for women; in legal cases other than criminal, women will not be compelled to appear before courts in case they are not willing to do so; giving women priority with respect to determining venue of filing legal cases in marital and personal matters and as well giving her priority in determining dates of courts hearings as such cases are given expeditious track in enforcement; observing privacy and confidentiality; privacy in search and investigation with respect to criminal matters; observing the nature of women when inflicting corporeal punishments in cases of pregnancy and breast-feeding; enabling women to enforce favouring judgments in her domicile and provision of expeditious enforcement of such judgments. The Saudi judicial system gives women priority in repaying debts ensuing from marital and family legal cases when the state repays such debts.

## **The Judiciary and the Freedom of Opinion and Expression**

**Dr. Mufleh Al Qahtani \***

Human rights have acquired paramount importance stemming from the nature of such rights and the bearing on protection of human dignity. Holy Quran provides for honoring human beings in the verse, “And indeed We have honored the Children of Adam” (Surah Al-Isra, verse (70)). This divine honoring requires protecting these rights and prohibiting any violations of them.

Debate on freedom of opinion and expression have preoccupied and continues to preoccupy the rulers and the ruled including writers, thinkers, journalists, judges, practicing lawyers and the legal profession. Freedom is an attractive word that is capable to appeal to all people.

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People debating freedom of opinion and expression may be categorized into two groups: the first group believes that freedom shall be without limits, so humans will be able to perform acts and make statement willingly and voluntarily without obtaining any permission, without fear or prosecution. The second group believes that freedom of opinion and expression shall be controlled without infringing others' rights or violating public morality, public order, values and prominent Islamic symbols.

**The Concept of the Freedom of Expression:** there is no definite definition of freedom, but numerous definitions of this concept revolves around the human right to choose whatever type of behavior, act and beliefs without fear or pressure as long as his/ her choice does not constitute a breach of the customs and laws of the state where they live. Freedom of opinion and expression are best defined as the freedom to express ideas and views in speech or in writing without censorship or governmental limits provided that the form and content of such ideas will not be interpreted as breach of laws, regulations or public morality.

**The Concept of the Freedom of Expression in Islamic Opinion:** Freedom of opinion and expression in Islamic conception is what distinguishes a human being from others and enable him to exercise acts and dispositions willingly and voluntarily without repression or coercion according to



certain controls; and of paramount importance of these is to achieve public good, avoiding corruption and not inflicting harm on others. Freedom of opinion is endorsed by the Holy Quran in the verse, “Let there arise out of you a group of people inviting to all that is good (Islam), enjoining Al-Marouf (i.e. Islamic Monotheism and all that Islam orders one to do) and forbidding Ak-Munkar (polytheism and disbelief and all that Islam has forbidden)” (Surah Al Imran). As well, freedom of expression in Islam is a right and duty according to the verse, “The believers, men and women, are Auliya (helpers, supporters, friends, protectors) of one another; they enjoin Al-Marouf (i.e. Islamic Monotheism and all that Islam orders one to do) and forbidding Ak-Munkar (polytheism and disbelief and all that Islam has forbidden)” (Surah At-Taubah). And enjoining what is right and prevention of what is wrong in society is not restricted to religious and ritual matters, but extends to include other human and worldly matters. Islam has given paramount importance to freedom of opinion because it is a fundamental pillar of numerous Sharia rules. Prophet Mohammed (Allah’s blessing and peace be upon him) used to urge his followers to express their opinions and used to accept these views in public and private matters. Caliph to Prophet Mohammed (Allah’s blessing and peace be upon him) followed suit in encouraging others’ opinions and embrace advice and reconsiders their positions whenever they believed others’ opinions were correct. It has been reported that First Caliph Abu Bakar (may Allah

be pleased with her) stated, immediately upon election as caliph, “if I deliver well, help me, and if not, correct me”. As well, it has been reported that second Caliph Omar ibn Al Khatab (may Allah be pleased with her) stated immediately upon assuming caliphate, “If you see me going astray, correct me”.

**The Concept of Freedom of Opinion in Legal Context:**  
it means the ability to perform any act or say any word not harming to others. Everyone has the right to freedom of opinion and expression. This right includes the right to adopt opinions and ideas without any intervention, investigation, receipt and transmission of the same without limitation as to geographical borders.

It is known that freedom of opinion and expression is one of the most important forms of freedoms; it means allowing everyone the right to think freely and choose whatever methods or manner that suit his life, then allowing him the right to express his views by all means of expression, whether verbal or in writing, whether in personal matters or in public issues to achieve what he believes is beneficial or of interest to people.

It is apparent that both Islamic and legal concepts of freedom place some restrictions and exemptions as to exercise of freedom in a manner meant to control that exercise. This control may be exercised a prior by the requirement to attain a protective objective by seeking permission from the state

in exercising that freedom. As well, that control may come later by in order to achieve remedial or penal objectives by imposing civil and criminal punishments on whoever crosses the limits of exercising personal freedom and thus inflict harm on others or the interest of the community at large. It is to be noted that the reasons for limiting freedom of expression are the same under both Sharia law and law, namely, maintaining order and preserving moral principles and observing highest interests, achieving equality, truth and justice in exercising freedom for all people, even if peoples' concepts with respect to these limits differ due to their differences as to cultures and traditions. Yet, it is important to note that defining public order, moral principles and public interest within Islamic context are attached to the provisions under sources of Sharia and were not left to be determined by peoples' changing tastes and whims.

**Limits of Freedom of Opinion and Expression:** it is well known that all human rights must be respected and protected by the authorities of the country where an individual lives, however his right to express his views has become the most important right that fosters and protects, in general, human rights, and such right may not be restricted except for limits set by law for purposes of protecting public order, public morals and national security. Nonetheless, the limits of freedom of opinion and expression are considered complicated and sensitive issues as the limits set/ drawn

by a country laws may change according to security circumstances in such countries, or by changes to culture, customs and tradition norms, and sometimes conditions outside countries may play role in limiting or expanding this freedom. As a result, freedom of expression is still subject to controversy in many countries and communities including developed countries with respect to protection of human rights in a manner driving some of these countries to set certain standards representing a general framework for a possible room for human rights protection.

Despite the fact that constitutions texts of most of the countries comprise provisions guaranteeing freedom of opinion and expression; however these texts remain formal provisions and barely adhered to in practice. Although domestic laws of some states differ / vary as to permission to disparage or critique of religions or others' beliefs, nevertheless the UN urges states to adopt laws that protect respect of religions and prohibit blasphemies against others' beliefs because faith is the first influence on human sentiments, so blasphemies are likely to raise uncalculated response/ reaction from believers; yet, some states still believe that such is tantamount to limiting freedom of opinion and expression though such is not based on sensible strong arguments. If freedom of expression is a right of the individual, then disparaging beliefs of others or be disrespectful to Allah Al Mighty, prophets or messengers is a violation of the rights of those believers and it cannot

be justified on the argument that an individual must always maintain his right to express his views.

Freedom of Opinion and Expression in International Conventions: numerous international and regional conventions relating to human rights provide for the individual's right of expression; in addition most constitutions and domestic legislation have dealt with human rights.

**a) Freedom of Opinion and Expression on the International Level:**

The provision for the freedom of expression and expressing one's views have been enshrined in numerous international conventions and declarations including the Universal Declaration on Human Rights as article (19) provides that, *[Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers]*. As well, article (19) of the International Convention on Civil and Political Rights provides that,

1. "Everyone shall have the right to hold opinions without interference;
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."

This Convention permits subjecting the exercise of the

rights provided for in section (b) above to certain limits provided that such limits shall be according to law and must be necessary in order to respect others and their rights, or to protect national security, public order, public health or public morals. This is validation that exercise of freedom of opinion and expression may be subject to certain limitations that relate to others' interests or the interest of community at large; however, such limitations must not infringe the content of the right itself.

Numerous international declarations and other conventions provide for the importance of the independence, plurality and freedom of the media.

#### **b) Freedom of Opinion and Expressions on the Regional Level:**

Freedom of opinion and expression has been enshrined in numerous regional conventions and treaties, namely, article (22) of Cairo Declaration on Human Rights in Islam which provides that:

1. "Everyone shall have the right to express his opinion freely in such a manner as would not be contrary to the principles of the Sharia.
2. Everyone shall have the right to advocate what is right, and propagate what is good, and warn against what is wrong and evil according to the norms of Islamic Sharia.
3. Information is vital necessity to society. It may not be exploited or misused in such a way as may violate sanctities and the dignity of Prophets, undermine moral

and ethical values or disintegrate, corrupt or harm society or weaken its faith.

4. It is not permitted to arouse nationalistic or doctrinal hatred or to do anything that may be an incitement to any form or racial discrimination”.

Freedom of opinion and expression is also enshrined in article (10) of the European Convention on Human Rights and article (19) of African Charter on Human and Peoples’ Rights and article (27) of the Arab Charter on Human Rights.

It should be noted that the provisions of the European Convention on Human Rights, particularly those rights relating to freedom of opinion and expression, have been practically applied through the rulings of the European Court of Human Rights which confirmed the individual’s right to express his opinion freely. However, it should also be noted that some cases, where a party was a Muslim, advocating personal freedom i.e. wearing a veil have not received proper justice.

#### **c) Freedom of Opinion and Expression on the National Level:**

It is supposed that this right is assured to everyone in the Kingdom of Saudi Arabia without discrimination; the right to freedom of opinion and expression is one of the most important civil and political rights – absence or limitation of the freedom of opinion and expression causes violation of other rights, whereas inability of individuals to express their views in public matters will not help in safeguarding

the human dignity and safeguard the rights enshrined in laws. Article (39) of the Basic Law in Saudi Arabia provides that, “means of media, publication and all other means of expression shall be obliged to distribute and circulate good words and shall abide by the laws of the state; they shall contribute to educating the nation and supporting integrity of its territory; any act that may lead to sedition or split or violate the national security and its relationships or derogate the human dignity and human rights shall be prohibited; and laws will regulate that matter.....”. The Printed Matter and Publication Law provides in article (8) that, “freedom of expression shall be guaranteed in all means of publication within the scope of Sharia principles and laws”. Article (9) of the same law set eight controls for exercising that freedom including those provided for in paragraph (8) as, “means of media shall be obliged to level constructive criticism aiming at public interest and based on correct facts and evidence”. This gives the chance to exercise expression of opinion to the extent permitted under Sharia law and applicable laws in implementation of article (24) which provides, “local papers shall not be subject to censorship unless under exceptional circumstances sanctioned by the Council of Ministers”. It is to be noted that the laws of Saudi Arabia do not differ from the prevailing rule in international and regional conventions as they embraced freedom of opinion and expression in spirit and content. Saudi law raise freedom of opinion and expression to a level tantamount to constitutional rights,



however, certain controls were set in order to protect national security, public order and morals and respect of values and beliefs prevailing in society. This will lead us to discuss the right of the media to discuss and debate public issue.

**Media Limits in Discussing Matters Pending before Courts and Comment on Rulings of Courts:** Under international conventions and local laws, the media has the right to express opinion on society's matters and issues. In the kingdom of Saudi Arabia, media debates public issues in transparent manner including matters pending before courts. As to limits of freedom of opinion and expression on matters pending before Saudi courts or for which rulings have been issued, this is extremely sensitive and complex, as the limits drawn by the state and society may change according to changes in circumstances. Exercise of that right is restricted in a manner serving the respect and reputation of others, protecting national security, public order and public moral and not to discredit the values and beliefs prevailing in society; thus respecting the judiciary and maintaining its integrity.

The freedom to opine / comment on matters pending before courts or those on which judgments have already been issued is not an individualistic and isolated right, but relate to other matters that must be taken into consideration. The media must operate within permissible boundaries and restrictions to reach sound judgment. Media is required to be balanced, objective and honest in presenting materials

relating to cases and courts rulings and respect the truth and refrain from publishing materials that conflict with principles of freedom, national responsibility, human rights and values of society.

If freedom of opinion and expression underlies social, economic and political interests, then restrictions to this freedom shall be within controllable limits and, as well, based on objective criteria; if it is difficult to achieve that because of such too general concepts such as public order and public moral, then judges will bear great responsibility because they are the natural guardian of rights and freedoms and guarantor of freedom and independence of the media. The matter becomes more difficult when disputes or differences arise between the judiciary and the media – the partners in defending values of justice and freedom of expression. Exercising the freedom of opinion and expressions shall not disparage the standing of the judiciary, weaken its credibility or question its integrity for non-objective reasons. In contrast, development of the role of the media throughout the globe and the expansion of its influence in monitoring and combating corruption creates an obligation to enable the media people to access information easily, and allow them to discuss matters relating to public interest including cases pending before courts. For that reason, many states urge on respect of the independence and freedom of the media and keen to enable it functions in harmony with the judiciary.

However in cases of conflict or differences between the

judiciary and the media with respect to matters pending before courts and the way to tackle that – this really seems problematic. The judiciary tends to conceive the media approach as intervention and disparaging of its standing and independence. In addition, the judiciary conceives the media approach as individualistic and lacking legal experience which leads, in most cases, to incorrect conclusions. In parallel, judges believe they have knowledge and legal expertise and that their rulings are based on legislation / laws and established precedents through accurate and impartial procedures.

On the other hand, the media conceives itself as entitled to monitor the judiciary business and makes comments when such is deemed necessary as investigating facts lies at the heart of its business without taking into account that determining or deciding on such facts is the sole responsibility of the judiciary; besides, the media believes that any pressure exercised should not affect the judiciary rulings.

There might be discussion and debates on certain matters pending before courts or with respect to certain rulings – commentators or critics may have personal interests or intellectual or cultural leanings or may base their comments on legal reasons.

Freedom of opinion and expression on judicial rulings is a subject of controversy among judges, lawyers, the media and law organizations. As a general rule, the media discussing

or commenting on matters pending before courts may not be permissible if such will affect justice and disparage the standing and integrity of the judiciary, and such is an offence punishable under law for the effects it entails, for example, the public disrespect of the judiciary and may encourage disobeying judicial rulings which would lead to chaos and social security disruption.

As well, the media freedom may not be restricted because in reality it is proved that the community will feel comfortable and secured when public matters are freely discussed and debated, even if such involve constructive criticism to certain authorities including the judiciary. It follows that the relationship between the media and the judiciary is an integrative one. It is the duty of the media to publish information about the judicial authorities in a partial manner not affecting its independence. And it is the duty of the judicial authorities not to withhold facts and get disturbed by constructive criticism. However, no reliance should be based on freedom of opinion and expression to justify affecting proper justice and affecting the judiciary by publishing facts presented to courts whether before or during court proceeding.

This gives rise in many instances to conflict between the media and the judiciary. On the one hand, the media tends to excitement and pursue of news; and on the other, the judiciary duty is to ascertain all news items relating to pending matters are accurate and true. For that reason, laws

of many countries, including the Saudi law, try to strike a balance between the freedom of the media in publishing news on legal cases and the requirements for controlling justice procedure.

To that effect, section (154) of the Saudi Criminal Procedure Law provides that court hearing must be public; however, courts, in exceptional instances, may hold secret sessions or prohibit certain category of people from attending certain sessions because of security considerations or for maintaining public moral, or if the court considers such secrecy will serve the truth. Besides, section (164) of the Saudi Criminal Procedure Law provides that announcement of rulings must be in a public session with citation of reasoning. Section nine of the Printed Matter and Publication Law prohibits publication of facts pertaining to investigation and trials without obtaining permission of the relevant authority. Although one might notice some contradiction between publicity of court sessions and prohibition of publication of trial facts; however, these may be reconcilable. It is also important to note that the section prohibiting publication does not cite commenting on rulings.

This raises an important question: When comment is lawful and useful exercise taking into account freedom of opinion and expression, and when it becomes a violation to law? The truth is that this matter is subject to differences among the legal profession as well as between lawyers on the one hand, and the media people and people concerned

about public issues on the other.

There is a trend believes that the media should not comment, discuss, oppose or critique courts' rulings and not get involved with respect to proved facts or judge's opinions, because this will suggest questioning the integrity and independence of the judiciary. This will affect, as the argument asserts, justice as it is possible that judges will be affected by media pressure so it will be wise to prohibit commenting on matters pending before courts as such will throw doubt and suspicion on these rulings and will lead to disrespect them and question their validity. Accordingly, this trend permits opposing or criticizing judicial rulings through the following methods:

- **First:** appeal against preliminary rulings before higher courts by interested parties; consequently, when the law specifies certain methods for contesting rulings such as appealing re-trial or permitted recusation of judges, then the media must respect that;
- **Second:** scientific commentary by specialists after issuing final decisions, and commentary shall be for the purposes of study, education and research by researchers, scholars, lawyers and teachers through respected publications that would generate erudite and rich contributions for developing the law;
- **Third:** the media may publish news items of the rulings and all relevant information of the ruling without critique or showing any defects.

There is another trend believing that any limitation or incrimination of the freedom of expression, including commenting on the courts' rulings or on matters pending before courts, shall only be according to law. If the constitution or laws do not limit or incriminate that, then freedom of opinion or expression should not be limited. Commenting on courts' rulings or on matters pending before courts is legitimate right and an integral part of the freedom of opinion and expression. The business of judging is not infallible and shall be subject to discussion and critique because it is a human labor. This trend does not stipulate that commentary should be made solely by specialists, it is sufficient that commentators be well-aware of the ruling or the judgment they are commenting on; yet, they assert that correct legal reasoning of the facts of the case is required to be made by specialist lawyer.

Advocates of this trend see no grounds to stipulate that commentary to be made in law specialized publication; what matters, they believe, is the content of the comment. It is familiar that legal scholars publish their opinions in books, specialized bulletins, in opinion articles in the press, in public speeches or in conversations with the media. Yet, advocates of this trend stipulate to publish comments on courts' rulings that such comments should not involve contempt of courts or disparaging the judiciary standing or integrity. The relationship between the judiciary and the media shall integrative so the media can publish correct information

of the activities of the judiciary thus contributing to the transparency of the business of judging without influencing it. This trend believes, as well, that discussing opinions of judges with concerned judges by the concerned people is permissible. In addition, this trend does not prohibit that laws should prohibit certain persons, because of the posts they hold such as judges and prosecutors, from making any speeches to the different means of media including opposing opinions on matters before courts or commenting on rulings whether before or following issuance of rulings, or the investigation carried out by the prosecution or participate in any broadcasting or television programs that discredit the integrity of the judiciary. It is also possible that such prohibition to include prohibiting the media from making any comments on matters where tackling requires non-publication, however, prohibition must not be extended to better serve freedom of opinion and expression without affecting others' rights and prevailing judicial traditions.

Even within the judiciary there are different opinions as to permission of commentary on courts' rulings and matters pending before courts. Some judges in the United States of America oppose issuing a court order prohibiting publication based on that fair trial will be secured through other measures as secrecy may cause harm more than publicity. On the other, some judges permit non-publication of factual matters before trial if publicity will cause potential national damage. Nevertheless, the Supreme Court decides that non-



publication may be allowed to protect the parties against abuse of discovered factual materials, and that publicity may be curbed to achieve higher value. The Supreme Court of Canada decides that an order for non-publication may be permissible if necessary to exclude an imminent danger to do justice, and that resulting effects of such prohibition are more beneficial to those affecting freedom of expression. The European Court of Human Rights decides that if the means of media are required not to infringe the limits set for administration of justice, then it shall have the right to inform the public of information known to all courts, including those relating to the case before the court. In France, the court of Cassation (*cour de cassation*) which is the highest level of appeal in France, decided that the offence of influencing the judiciary will not be established merely for a publication of a commentary before issuing of a final ruling by the court, as long as the comment does not intend to exert pressure on witnesses' statements or the decision of the prosecution or the ruling itself.

In fact, a journalist or anyone of the media is not entitled to play the role of a judge to influence administration of justice, and may not play with the presumption of innocence relying on freedom of opinion to prohibit publication of any views on the indictment of a person in criminal or civil trial. A journalist or any of the media people who publishes a report/ article to the effect of indicting a person on trial as such will affect the presumption of innocence guaranteed to

the charged. The commentator shall be keen to state the facts and reasoning of the ruling without distortion, as balanced comment will enrich legal dialogue on the basis on which judicial rulings are made contrary to unbalanced comment which would lead to discredit the judiciary. Striking balance between freedom of the media to comment and critique on the one hand, and guaranteeing rights relating to administration of justice grounded on the right to sue and being sued, the right to fair trial, the right of independent and partial judiciary and the charged is presumed innocent are vital matters to make people secured, comfortable and stable. Publication of objective criticism to courts' rulings is a monitor of the judiciary before the public opinion – monitoring in this sense will not affect the independence of the judiciary, but contributes to administration of justice and supporting it.

Some have criticized this trend because it presupposes that the judiciary will not be affected by the media, however advocates of this trend replies that judges should have knowledge and experience placing them in position not susceptible to the media as to rulings to be issued otherwise they will lack the requirements for assuming responsibility of office. Further, a judge will only pass judgments based on documents submitted, and he is not permitted to rely on his personal knowledge and this approach is adopted by Saudi law. Section one hundred seventy nine of the Saudi Criminal Procedure Law asserts that a judge is not permitted, in

passing his judgments, to rely neither on his own personal knowledge nor on assumptions contrary to his personal knowledge.

In Saudi Arabia, there is no obstacle as to enacting a law setting conditions for commenting on judicial rulings in accordance with objective, scientific and legal controls maintaining standing and independence of the judiciary, and at the same time respecting freedom of opinion and expression. This shall not be considered as tantamount to restricting freedom of opinion and expression if meant to preserve public interest. Otherwise, the judiciary or public prosecution shall be given the right to prohibit publication with respect to certain cases or rulings where public interest requires that – this is the case in most countries.

In light of the foregoing, it is obvious the weakness of the legal grounds of absolute prohibition of publication of commentary on courts' rulings or on matters pending before courts, and generally speaking, permission is the norm while prohibition or incrimination is permitted upon deviation from exercising the freedom of opinion and expression and constructive criticism and where commentary comprises blaspheming, defamation, insult or libel.

**Freedom of religion and freedom of opinion:** Article (18) of the Universal Declaration of Human Rights provides that, “everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community

with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance”. And article (18) of the International Convention on Civil and Political Rights provides that, “(1) everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching”.