

Criminal Defense in Saudi Arabia:
An Empirical Study of the Practice of Criminal Defense in Saudi Arabia

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Abstract

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For the first time in Saudi Arabia's legal history, the Law Reform of 2001 recognized the practice of criminal defense and defendants' right to the assistance of an attorney. Since 2001, the right to legal representation has been enforced, and the practice of criminal defense has been allowed. Nonetheless, the position of the practice of criminal defense within the Saudi legal system remains unclear both in theory and in practice. This study examines the practice of criminal defense in Saudi Arabia. It addresses the situation before and after the emergence of defense lawyers. It presents the history of law practice and the arguments for and against this profession. Equally, it focuses on the defendant's right to legal representation, since it is associated with the practice of criminal defense. For this purpose, I conducted an empirical study, in which I interviewed judges and lawyers who have been involved in the application of the laws relevant to the practice of criminal defense.

The interviews revealed that the practice of criminal defense has had a good start and is heading in the right direction. Based on the results, it is obvious that the majority of interviewed judges are of the view that the practice of criminal defense is in line with Islamic principles of justice. The results also reveal that criminal defense services are much needed in the Saudi justice system. Since engaging in the practice of criminal defense in 2001, criminal defense counsels have made a significant difference in case outcomes and a positive impact on the justice system.

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Chapter One: Introduction

I. Overview

Saudi Arabia strictly adheres to Islamic law in regard to crimes and criminal procedures. The Saudi Basic Law of Governance states that “Government in the Kingdom of Saudi Arabia derives its authority from the Book of God and the *Sunnah* of the Prophet (PBUH), which are the ultimate sources of reference for this Law and the other laws of the State.”¹ Like other religions, Islam appreciates human lives and the right to life without regard to gender, race, age, and other demographic characteristics.² The *Qur’an* explains that God sent the prophets to establish justice among people: “Indeed We sent Our Messengers with clear signs, and sent down with them the Book and the Balance so that people may uphold justice.”³ To that end, Islamic law has recognized a number of guarantees of justice since the early days of Islam.

A defendant’s right to self-representation is one of the most important guarantees of justice in Islam. Defendants have the right to defend themselves during trials. Therefore, if the court issues a judgment regarding a litigant without notifying the litigant of the designated time of the trial, the judgment will then be considered invalid. The court has the duty to notify the litigant of the trial in an appropriate way. On the other hand, the

¹ The Basic Law of Governance, Art. 7, Royal Order No. A/90, (27/8/1412H, Mar. 1, 1992).

² The *Qur’an* states: “O you mankind, surely We created you of a male and a female, and We have made you races and tribes that you may get mutually acquainted. Surely the most honorable among you in the Providence of Allah are the most pious; surely Allah is Ever-Knowing, Ever-Cognizant.” The *Qur’an* 49:13.

³ The *Qur’an* 57:25.

defendant must appear before the judge.⁴ If a litigant refuses to appear before the judge, the court may apply force to bring him. Imaam Al-Shafi'i⁵ has clearly explained this, stating:

If [the defendant's] location is known, the order is issued to break into his hiding place. Children who have not reached puberty, trustworthy women and just men are sent to bring him. The children and women enter first; if they find him inside the house, the men follow them in. Children carry out the search, and women search only for women. Once they arrest him, they bring him before the court.⁶

Muslim jurists, however, disagree about the defendant's right to delegate a lawyer to represent him or her in the *Shari'ah* criminal court. For a long time, Saudi Arabia adopted an interpretation that prohibited the defendant from hiring a representative. However, Saudi Arabia recently enacted several laws, among which are the law of criminal procedures and the Code of Law Practice,⁷ which provided defendants with the right to a counsel and provided lawyers with the right to practice law. However, judges have been accused of not acknowledging or following these two laws consistently.⁸ For example, Saudi judges are accused of ignoring defendants' right to lawyers in criminal

⁴ Mahir Abdulmajeed Abbood, *Some Guarantees of Justice in The Islamic Judiciary*, Al Adl Journal Issue No. 35 105, 146-147 (2007).

⁵ Muhammad ibn Idris al-Shafi'i (767 - 820), also known as Imam al-Shafi'i, is the founder of Islamic jurisprudence and the Shafi'i school of fiqh.

⁶ Mahir Abdulmajeed Abbood, *supra* note 4, at 147.

⁷ The Law of Criminal Procedure, Royal Decree No. (M/39), (Oct. 16, 2001); The Code of Law Practice, Royal Decree No. (M/38), (28/7/1422H, Oct. 1, 2001).

⁸ ROBERT W. HEFNER, *SHARI'A POLITICS: ISLAMIC LAW AND SOCIETY IN THE MODERN WORLD* 73 (2011).

proceedings and refusing to accept lawyers in the court room.⁹ Also, the U.N. Special Rapporteur on Independence of Judges and Lawyers, upon visiting Saudi Arabia in 2002, noted that he had “learnt that there is some resistance on the part of some judges to the presence of lawyers in their courts due to a perception that they interfere with the ability of the judge to ensure that justice is done in a particular case.”¹⁰

This study examines the practice of criminal defense lawyers in Saudi Arabia and shows that the claim that the practice of criminal defense is not implemented is not totally accurate. Specifically, it shows that judges are appreciative of the role played by the defense lawyers in criminal cases and presents empirical evidence that show that lawyers play an effective role in the Saudi criminal court. To that end, the study addresses topics including the history and significance of legal representation in criminal cases in Saudi Arabia, the 2001 reform, the role of lawyers in criminal cases, the impact of lawyers in criminal cases, the application of the right to an attorney in criminal cases, the compatibility of practice of criminal defense and Islamic law, and obstacles to the application of the right to a lawyer in criminal cases.

This chapter, which introduces the study of the practice of criminal defense in Saudi Arabia, is divided into six parts. Part I is the introduction. Part II presents the objective and the research questions of the study. Part III emphasizes the importance of conducting the study. Part IV explains the methodology used in conducting and writing this research used in the study. Part V sheds some light on the Saudi laws that are

⁹ MARK WESTON, *PROPHETS AND PRINCES: SAUDI ARABIA FROM MUHAMMAD TO THE PRESENT* 384 (2008).

¹⁰ Mashood A. Baderin, *Effective Legal Representation in “Shari’ah” Courts as a Means of Addressing Human Rights Concerns in the Islamic Criminal Justice System of Muslim States*, 11 *Y. B. Islamic & Middle E. L.* 135, 157 (2005).

relevant to the topic of criminal defense in Saudi Arabia. Finally, Part VI concludes the chapter.

II. Research Questions and Objective

The purpose and objective of this project is to describe the theory and the practice of criminal defense in Saudi Arabia. To define the theoretical conception of the criminal practice, I reviewed the existing studies that are relevant to the practice of criminal defense. I then conducted an empirical study to describe the practice of criminal defense in reality. The ultimate goal of the empirical part is to produce significant information and to answer a number of central questions about the Saudi criminal defense process and criminal legal system, which is a very important part of the Saudi legal system. In addition, this study aims to lay a good foundation for further research, since the Saudi library does not currently contain research on this subject.

To achieve its objective, the study aims to answer the following questions:

- What is the role of defense lawyers in Saudi Arabia? Is there a gap between the written law and the law in action in this regard?
- Is the practice of criminal defense compatible with the Islamic law as applied in Saudi Arabia?
- What perceptions do lawyers and judges have of the role of defense lawyers in criminal cases?
- What features of the Saudi legal profession today create opportunities for and barriers to the enforcement of the right to effective legal representation?

- What impact does the newly implemented recognition of criminal defense lawyers in Saudi Arabia have on the adjudication process and the case outcome?

III. Significance

The Saudi court system is different from the common law and civil law systems; it follows a third model of legal system “for which the most characteristic form of law is neither judicial precedent (common law) nor national code (civil law), but the opinions of scholars (jurists’ law).”¹¹ A judge in Saudi court rules “according to what his own conscience indicates is closest to God’s own ruling for the case, disregarding other influence.”¹² The Islamic system of Saudi Arabia has adopted many rules from other systems to fill the gap when needed; however, these laws are not strictly binding on judges but rather are presumptive.¹³ In other words, while judges have the duty to apply the adopted laws, their duty to implement and enforce the *Shari’ah* represents their ultimate goal, which supersedes all other obligations. Thus, judges deviate from national laws if they believe that those laws contradict the *Shari’ah*.

Moreover, Muslim jurists agree on the concept of “No obedience to a creature in disobedience to the Creator.”¹⁴ Thus, they explain that national laws are binding only if they do not contradict the *Qur’an* and the *Sunnah*. If such laws are unfair, or if they violate the provisions of the *Qur’an* and the *Sunnah*, then they should be rejected by the

¹¹ ROBERT W. HEFNER, *supra* note 8, at 72.

¹² *Id.*

¹³ *Id.*

¹⁴ Saudi Council of Senior Scholars website available at: <http://www.alifta.net/Fatawa/fatawaChapters.aspx?View=Page&PageID=625&PageNo=1&BookID=1&language=> (last visited June 5, 2014); MUHAMMAD HAMIDULLAH, *THE MUSLIM CONDUCT OF STATE* 197 (2012).

judge.¹⁵ This view is also confirmed by Article 48 of the Saudi Basic Law, which states that “The courts shall apply to cases before them the provisions of *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.”¹⁶ Therefore, to apply the defendant’s right to be represented by a lawyer in a criminal case, a judge must believe that the right is compatible with the Islamic law. Interviewing judges and lawyers is among the most feasible ways to find out what judges believe about the issue. Talking to judges helps one to determine whether they believe that the right to a lawyer in a criminal case is compatible with Islamic law. In addition, talking to judges and lawyers helps one to understand the status quo of the criminal defense practice.

However, there is not any study that addresses the perception of judges and lawyers on the notion of criminal defense practice, even though they come first in the practice of criminal defense. On the one hand, judges are responsible for enforcing a defendant’s right to a lawyer in a criminal case. Lawyers, on the other hand, constitute the most important element of the practice of criminal defense. They also can identify the strengths and weaknesses of the profession and can give practical suggestions on how to improve their role. Therefore, visiting the criminal defense arena and talking to both judges and lawyers will help to explain the status of criminal practice and identify obstacles and the methods to tackle them.

¹⁵ Saudi Council of Senior Scholars available at: <http://www.alifta.net/Fatawa/fatawaChapters.aspx?View=Page&PageID=625&PageNo=1&BookID=1&language=> (last visited June 5, 2014).

¹⁶ The Basic Law, *supra* note 1, Art. 48.

Moreover, while a few studies have addressed the right to a lawyer in criminal cases in Saudi Arabia, to the best of my knowledge, none have presented the views of judges and lawyers and studied the application of the defendant's right to be represented by a lawyer in criminal cases. Unlike previous studies, this study presents uniquely reliable findings that will ultimately help to resolve the existing problems faced by lawyers when dealing with criminal cases. More importantly, the study includes suggestions and recommendations that will benefit legal consumers by advancing the role of criminal defense lawyers and helping lawyers to provide better services. This project also serves both lawmakers and the citizens of other Muslim countries, as the Saudi legal system is a highly valued model for the legal systems of surrounding nations. Thus, this study may be the first of its kind, as well as the first to evaluate this new approach in Saudi Arabia.

Finally, the empirical research method has some significant implications. For example, the outcome is more credible compared to outcomes derived from theoretical studies. The perspectives of lawyers and judges are likely to be viewed more seriously than the perspectives of those who do not work in the criminal justice arena. In addition, this study has adopted an empirical method that is alien to *Shari'ah* and to law schools in Saudi Arabia. It is my hope that this method will encourage students of *Shari'ah* and the law to employ an empirical study approach and to conduct significant law-in-action research.

IV. Methodology

The study begins by explaining the evolution of legal representation in criminal cases and the theoretical conception of the practice of criminal defense based on the available

literature. The source materials utilized for this purpose include, but are not limited to, books, national laws, law journals, newspaper articles, magazines, and encyclopedias. The examination of such sources helps to provide a good understanding of the overall picture of the practice of criminal defense in Saudi Arabia.

This analysis is followed by an empirical study, for which the data are derived from in-depth, semi-structured interviews with 60 individuals.

Before each interview, I gave the participants my business card, introduced the study, and informed the participants that neither their names nor their workplaces would be revealed in the study. This level of anonymity seemed to increase the responsiveness level of the participants. Each interview lasted between one and two hours. The interview questions were aimed at understanding the perceptions of lawyers and judges of the importance, impact and role of lawyers in criminal cases, as well as identifying and trying to tackle any hurdle that they face. For example, the study sought to assess when lawyers get involved in criminal cases and whether or not the authorities, law enforcement and court cooperate with lawyers.

1-Sample Interview Questions

Some of the questions that were asked during the interviews are as follows:

1. What is the significance of defense counsel representation during trial and pre-trial phases?
2. What actual roles do defense lawyers play in court and in the pre-trial phase?
3. How do you rate or assess the role of criminal defense lawyers in Saudi courts?
4. To what extent do Saudi courts enforce a defendant's rights to assistance of counsel?

5. In your opinion, how much difference does it make for an accused individual to have a defense lawyer?
6. Based on your experience, what kind of legal assistance does a defense lawyer provide to a defendant?
7. Are there any obstacles that prevent defense counsel from providing effective legal services to law consumers?
8. In your view, is there any gap between legal education in *Shari'ah* schools and actual law practice in Saudi Arabia?
9. Based on your experience, what makes a good defense lawyer in Saudi Arabia?
10. In your view, what are the strengths and weaknesses of the law practice in Saudi Arabia?

I concluded each interview by thanking the participants for their answers and asking for any recommendations that may help in advancing the law practice in general and criminal defense in particular.

2. Population

As explained earlier, all participants were judges and lawyers. They were generally identified with the help of “snowball sampling,” which involves reaching a participant by means of referrals. In snowball sampling, an identified research subject “gives the researcher the name of another subject, who in turn provides the name of a third, and so on.”¹⁷ This technique helped me to reach more participants, especially judges, since the

¹⁷ JOHN BREWER, THE A-Z OF SOCIAL RESEARCH: A DICTIONARY OF KEY SOCIAL SCIENCE RESEARCH CONCEPTS 275 (2003).

technique “offers real benefits for studies which seek to access difficult to reach or hidden populations.”¹⁸

3. Participants’ Criteria

A. Judges

The judges in this study are all *shari’ah* court judges who hold a degree from *shari’ah* schools in Saudi Arabia. The Saudi Law of the Judiciary provides certain conditions that a judge must meet. The first chapter of section four of this law explains the method for the appointment and promotion of judges. Article 31 explains that a candidate must meet the following conditions before he is appointed as a judge:¹⁹

1-He should be of Saudi nationality.

2-He should be of good conduct and behavior.

3-He should be fully qualified to hold the position of judge in accordance with the provisions of *Shari’ah*.

4-He should be not less than forty years of age if he is to be appointed to the rank of an appellate judge, and not less than twenty-two if he is to be appointed to any other rank in the judiciary.

5-He should not have been sentenced to a *hudud* (*Qur’anic* prescribed punishment) or a *ta’zir* (discretionary punishment), sentenced for a crime affecting honor, or punished by disciplinary action dismissing him from a public office, even though he may have been rehabilitated.

¹⁸ *Id.*

¹⁹ The Law of the Judiciary, Royal Decree No. M/78, Art. 31, (19/9/1428H, Oct. 1, 2007).

6-He should hold a degree from one of the *Shari'ah* colleges in the Kingdom of Saudi Arabia; alternatively, he may hold any equivalent certificate, provided that he shall pass a special examination to be prepared by the Ministry of Justice.

Judges' Education

In general, judges attend one of the seven faculties of *Shari'ah* that exist in Saudi Arabia at the following universities: University of Um Alqura,²⁰ Imam Muhammad Ibn Saudi University,²¹ Islamic University of Madinah,²² Qassim University,²³ King Khalid University,²⁴ Najran University,²⁵ and Taif University.²⁶ *Shari'ah* colleges teach two different types of Islamic practice, *ibadat* and *muamalat*. *Ibadat* refers to “acts of ritual worship such as prayer or fasting,” while *Muamalat* refers to “commercial and civil acts or dealings under Islamic law.”²⁷ In other words, the curricula of *Shari'ah* colleges mainly cover four different areas of Islamic knowledge: *Qur'anic* interpretation, Prophet tradition, Islamic jurisprudence, and theology.

In order to graduate from a *Shari'ah* college, the student has to pass eight levels, each of which lasts for one semester. Table A below shows an example of the courses that students undertake in *Shari'ah* faculties.²⁸

²⁰ The first faculty of *Shari'ah* in Saudi Arabia, at the University of Um Alqura, was founded in 1949. University of Um Alqura: <https://uqu.edu.sa>

²¹ Imam Muhammad Ibn Saudi University: www.imamu.edu.sa

²² Islamic University of Madinah: www.iu.edu.sa

²³ Qassim University: www.qu.edu.sa

²⁴ King Khalid University: www.kku.edu.sa

²⁵ Najran University: www.nu.edu.sa

²⁶ Taif University: www.tu.edu.sa

²⁷ JOHN L. ESPOSITO, THE OXFORD DICTIONARY OF ISLAM 208 (2003).

²⁸ This example is from Imam Muhammad Ibn Saudi University.

Table A: Bachelor of *Shari'ah* Courses

Level 1		Level 2	
Course Name	Credits	Course Name	Credits
Arabic Grammar	3	Arabic Grammar	3
<i>Qur'anic</i> Exegesis	3	Research Methodology	2
The Holy <i>Qur'an</i> I	1	Prophetic Tradition	3
Islamic Jurisprudence	5	Rules of Jurisprudence	2
Principles in Islamic Jurisprudence	4	Principles in Islamic Jurisprudence	4
Islamic Legal System	2	Islamic Jurisprudence	5
Prophetic Tradition	3	<i>Qur'anic</i> Exegesis	3
Monotheism	4	The Holy <i>Qur'an</i> II	1
Total	25	History of Islamic Jurisprudence	2
		Total	25
Level 3		Level 4	
Course Name	Credits	Course Name	Credits
Arabic Grammar	3	History of Islamic Jurisprudence	2
Islamic Jurisprudence	5	Educational Psychology	2
Prophetic Tradition	3	Rules of Jurisprudence	2
Principles in Islamic Jurisprudence	4	Empirical Methods	1
Orientalism and Christianization	2	Scientific Research	1
Monotheism	4	Empirical Research	1
<i>Qur'anic</i> Exegesis	3	Principles in Islamic Jurisprudence	4
The Holy <i>Qur'an</i> III	1	<i>Qur'anic</i> Exegesis	3
Total	25	The Holy <i>Qur'an</i> IV	1
		Prophetic Tradition	3
		Islamic Jurisprudence	5
		Arabic Grammar	3
		Total	26

Level 5	
Course Name	Credits
Arabic Grammar	3
Islamic Jurisprudence	5
Law of Inheritance	2
Prophetic Tradition	2
Principles in Islamic Jurisprudence	4
Monotheism	4
<i>Qur'anic</i> Exegesis	4
The Holy <i>Qur'an</i> V	1
Total	25

Level 6	
Course Name	Credits
Subsistence of Islamic Thought	2
Arabic Grammar	3
Empirical Methods	1
Scientific Research	1
Empirical Research	1
Principles in Islamic Jurisprudence	4
Law of Inheritance	2
Prophetic Tradition	4
Curricula and Teaching Methods	2
Fundamentals of Islamic Education	2
Islamic Jurisprudence	5
The Holy <i>Qur'an</i> VI	1
Total	28

Level 7	
Course Name	Credits
Arabic Grammar	3
Islamic Jurisprudence	5
Prophetic Tradition	4
Principles in Islamic Jurisprudence	4
Reformative Call in The Arabian Peninsula	2
Law of Inheritance	2
<i>Qur'anic</i> Exegesis	4
The Holy <i>Qur'an</i> VII	1
Total	25

Level 8	
Course Name	Credits
Arabic Grammar	2
Law of Inheritance	2
Prophetic Tradition	2
Educational Management	2
Empirical Methods	1
Scientific Research	1
Empirical Research	1
Principles in Islamic Jurisprudence	4
Methods of Teaching	2
Special Education	2
Monotheism	4
The Holy <i>Qur'an</i> VII	1
Islamic Jurisprudence	5
Total	25

The number of graduates from *Shari'ah* schools is very high in comparison with the rates of graduates from other programs. However, even this high number is not sufficient, as the country needs at least 116,000 *Shari'ah* graduates to meet the demand of its institutions.²⁹ They are often hired to work as school teachers, professors, judges, clerks, prosecutors, investigators, religious police, lawyers, preachers, legal advisers, legal researchers, and editors. However, based on the number of graduates shown in Table B, it seems that faculties of *Shari'ah* schools are not ready to accommodate this need. In addition, some of the newly opened universities do not offer a *Shari'ah* degree.

Table B: Graduates with a Bachelor's Degree in *Shari'ah* in 2012³⁰

Faculty of <i>Shari'ah</i>	Founded	City	No. of Male Graduates 2012	No. of Female Graduates 2012	Total No. of Graduates 2012
University of Um Alqura	1949	Makah	426	269	695
Imam Muhammad Ibn Saudi University	1953	Riyadh	654	378	1032
Islamic University	1961	Madinah	727	0	727
Qassim University	1976	Qassim	463	0	463
King Khalid University	1976	Abha	193	0	193
Imam Muhammad Ibn Saudi University (Ahsa branch)	1981	Ahsa	190	4	194
Taif University	1980	Taif	146	494	640

²⁹ Khaled Almhough, *The Development of the Shari'ah Colleges*, ALWATANNEWAPAPWE, Article No. 2887 (Oct. 10, 2010).

³⁰ Saudi Arabia Ministry of Higher Education Annual Report, 2012.

Judges' Ranking

Judges vary in rank; the Law of the Judiciary provides that ranks in the judiciary consist of many levels, as follows:

1. Assistant Judge: To hold the rank of Assistant Judge, a candidate must hold a bachelor's degree in *Shari'ah* with a GPA of "Good" or above and must pass the courses of Islamic Jurisprudence (Fiqh) and Principles of Islamic Jurisprudence (Usul al-Fiqh) with "Very Good" grade.³¹ An Assistant Judge is initially appointed on probation for a period of two years. Following the end of the probation period, the Supreme Judicial Council issues a decision either confirming or dismissing him.³² Once confirmed as a judge, he is not subject to removal from office; however, he is subject to compulsory retirement at the age of 70.³³
2. Judge "C": In order for a candidate to hold the rank of Judge "C," he must serve three years as an Assistant Judge.³⁴
3. Judge "B": To hold the rank of Judge "B," a candidate must meet one of the following requirements:³⁵
 - a. Serve a minimum of one year as Judge "C."
 - b. Serve in comparable judicial positions for at least four years. (It should be noted that Article 6 of the Law of the Judiciary provides the Supreme Judicial Council with the right to specify what is meant by 'comparable positions.')

³¹ The Law of the Judiciary, *supra* note 19, Art. 33.

³² *Id.* Art. 44.

³³ *Id.* Art. 69.

³⁴ *Id.* Art. 34.

³⁵ *Id.* Art. 35.

- c. Teach the subjects of Islamic Jurisprudence and its Principles in one of the *Shari'ah* colleges in Saudi Arabia for at least four years.
 - d. Obtain a graduate degree from one of the following institutions: a master's degree from the High Judiciary Institute, a master's degree from one of the *Shari'ah* colleges in Saudi Arabia majoring in Islamic Jurisprudence and its Principles, or a diploma of legal studies from the Institute of Public Administration.
4. Judge "A": In order to hold the rank of Judge "A", a candidate must meet one of the following requirements:³⁶
- a. Serve for a minimum of four years as Judge "B".
 - b. Serve in comparable judicial positions for at least eight years.
 - c. Teach the subjects of Islamic Jurisprudence and its Principles in one of the *Shari'ah* colleges in Saudi Arabia for at least eight years.
 - d. Obtain a Ph.D. degree from the High Judiciary Institute or from one of the *Shari'ah* colleges in Saudi Arabia majoring in Islamic Jurisprudence and its Principles.
5. Deputy Chief of a Court "B": In order for a candidate to hold the rank of Deputy Chief of a Court "B," he must have served at least three years as Judge "A." have worked in comparable judicial positions for at least eleven years, or have taught the subjects of Islamic Jurisprudence and its Principles in one of the *Shari'ah* colleges in Saudi Arabia for at least eleven years.³⁷
6. Deputy Chief of a Court "A": In order to become a Deputy Chief of a Court "A", a candidate has to serve a minimum of two years as Deputy Chief of a Court "B." have worked in comparable judicial positions for at least 13 years, or have taught the subjects

³⁶ *Id.* Art. 36.

³⁷ *Id.* Art. 37.

of Islamic Jurisprudence and its Principles in one of the *Shari'ah* colleges in Saudi Arabia for at least 13 years.³⁸

7. Chief of a Court “B”: To become a chief of a Court “B,” a candidate must first serve at least two years as Deputy Chief of a Court “A,” serve in comparable judicial positions for at least 15 years, or teach the subjects of Islamic Jurisprudence and its Principles in one of the *Shari'ah* colleges in Saudi Arabia for at least 15 years.³⁹

8. Chief of a Court “A”: In order to become a Chief of a Court “A,” a judge has to serve at least two years as Chief of a Court “B,” have worked in comparable judicial positions for at least 17 years, or have taught the subjects of Islamic Jurisprudence and its Principles in one of the *Shari'ah* colleges in Saudi Arabia for at least 17 years.⁴⁰

9. Appellate Judge: Before becoming an Appellate Judge, the judge has to serve at least two years as Chief of a Court “A,” have worked in comparable judicial positions for at least 19 years, or have taught the subjects of Islamic Jurisprudence and its Principles in one of the *Shari'ah* colleges in Saudi Arabia for at least 19 years.⁴¹

10. Chief of Appellate Court: In order to become a Chief of Appellate Court, a judge must serve at least two years as an Appellate Judge.⁴²

10. Chief Justice: The Chief Justice must meet the requirements stipulated for the rank of Chief of Appellate Court. He is appointed by Royal Order and has the rank of a Minister.⁴³

³⁸ *Id.* Art. 38.

³⁹ *Id.* Art. 39.

⁴⁰ *Id.* Art. 40.

⁴¹ *Id.* Art. 41.

⁴² *Id.* Art. 42.

⁴³ *Id.* Art. 10.

Table C: Judges' Ranking

Article Number	Judicial Rank	Years in Judicial Experience	Comparable Judicial Experience	Teaching Jurisprudence and its Principles
33	Assistant Judge	0	0	0
34	Judge "C"	3 Years Assistant Judge	-	-
35	Judge "B"	1 Year Judge "C"	4	4
36	Judge "A"	4 Years Judge "B"	8	8
37	Court Deputy "B"	Three Years Judge "A"	11	11
38	Court Deputy "A"	2 Years Court Deputy "B"	13	13
39	Chief of a Court "B"	2 Years Court Deputy "A"	15	15
40	Chief of a Court "A"	2 Years Chief of a Court "B"	17	17
41	Appellate Judge	2 Years Chief of a Court "A"	19	19
42	Chief of Appellate Court	2 Years Appellate Judge	-	-
10	Chairman of the Supreme Court	2 Years Chief of Appellate Court	-	-

For the purposes of the present study, all judges who were asked to participate in the interviews were ranked as Judge "B" or above.

B. Lawyers

The lawyers in this study are from two groups, those who hold law degrees from *Shari'ah* colleges and those who hold law degrees from university law departments. The former studied courses similar to those listed in Table A, while the latter studied in one of the departments of law in Saudi Arabia. The criteria for these lawyers are explained in detail in Chapter 3.

-Lawyers' Education

The first department of law was established at King Saud University in Riyadh in 1980. In that year, to help judges understand and apply Saudi codes and regulations, the Saudi Council of Ministers issued a resolution ordering faculties of *Shari'ah* to start teaching Saudi national codes and regulations. At present, even though it has been more than three decades since the issuance of this resolution, nothing has changed; the *Shari'ah* colleges' curriculums remain the same.⁴⁴ The *Shari'ah* faculties' resistance to teach national laws seemed to lead to the establishment of more law departments. Accordingly, the number of law graduates increased. These law departments clearly adopted the French pattern of teaching and aimed at teaching comparative law. Table D gives an example of the courses that are taught in law departments in Saudi Arabia. Nonetheless, although graduates of these departments can become lawyers and prosecutors, are not entitled to become judges, as Saudi law requires that judges hold a degree from a *Shari'ah* college. Most of these graduates work as lawyers, prosecutors, investigators, legal advisors, legal researchers, politicians and professors.

⁴⁴ Saud Al-Ghaith, *Assessment of Legal Education in the Kingdom of Saudi Arabia*, AL-RIYADH NEWSPAPER, Issue No. 15709 (June 28, 2011).

Table D: Bachelor of Law Courses

Law Degree

Level 1		Level 2	
Course Name	Credits	Course Name	Credits
The Principles of Mathematics	2	Introduction to Statistics	2
Computer Skills	3	Writing Skills	2
Communication Skills	2	Learning, Thinking and Research Skills	3
English	8	Health and Fitness	1
Total	15	English	8
		Total	16
Level 3		Level 4	
Course Name	Credits	Course Name	Credits
Principles of Law	3	Expository Writing	2
Introduction to Politics	3	Civil Law (Sources of Obligations) I	3
Language Skills	2	Family Law	3
History of Law	3	Constitutional Law	3
Foundation of Islamic Jurisprudence	3	Administrative Law I	3
Total	14	Total	14
Level 5		Level 6	
Course Name	Credits	Course Name	Credits
Public International Law I	3	Civil Transaction	3
Civil Law (Sources of Obligations) II	3	Commercial Law	3
Civil Procedure	3	Provision of Inheritance, Wills & Endowment	3
Administrative Law II	3	Administrative Judiciary	3
Criminal Law I	3	Public International Law II	3
Total	15	Total	15

Level 7		Level 8	
Course Name	Credits	Course Name	Credits
Labor Law	3	Methods of Proof & Execution	3
Property Law	3	Islamic Jurisprudence	3
Commercial Contracts & Bank Transactions	3	Social Law (Social Security)	3
Maritime Law	3	Companies Law	3
Criminal Law II	3	Negotiable Instruments & Bankruptcy	3
Islamic Jurisprudence	3	Total	15
Total	18		
Level 9		In addition to these courses a student must also take 14 elective credits as follows:	
Course Name	Credits	1- Eight credits in Islamic studies.	
Training & Research	3	2- Three credits in law.	
Rules of Personal & Real Guarantees	3	3. Three credits in any field.	
Private International Law	3		
Business Law & Intellectual Property	3		
Criminal Procedures	3		
Total	15		

Table E shows that the number of law programs is still small in comparison to the number of *Shari'ah* programs. However, this may change in the near future, as about 15 departments in different universities and colleges have started to offer law programs from which the first classes are set to graduate very soon. This is in addition to students who have scholarships to study law overseas. In fact, as of 2013, 1,527 Saudi students (1,250 male and 277 female) are working toward bachelor's degrees in law outside Saudi

Arabia, 1,629 students (1,325 male and 304 female) are working toward master's degrees in law, and 301 students (286 male and 15 female) are studying for doctorates.⁴⁵

Table E: Numbers of Graduates with a Bachelor's Degree in Law in 2012⁴⁶

(Department of Law at) Institution	Founded	City	No. of Male Graduates 2012	No. of Female Graduates 2012	Total No. of Graduates 2012
King Saud University	1980	Riyadh	229	147	376
King Abdulaziz University	1986	Jeddah	169	72	241
Prince Sultan University	2006	Riyadh	0	39	39
Dar Al-Hekma College	1999	Jeddah	0	12	12

4. Recruitment

The interviews took place in 2013 in the following provinces in Saudi Arabia: Riyadh, Qassim, Mecca, Tabuk, Jizan, and Dammam. The interviews initially started in the General Court in Riyadh. I conducted daily visits to the courts for about three weeks, often arriving early in the morning (about 7:30 AM). Once I arrived, I approached each judge's secretary and introduced myself and asked to meet with the judge. In many cases, the judges were busy and it was necessary for me to come back in the afternoon or on another day to meet with them. When I was able to meet with a judge, I introduced myself and asked the judge to participate in my study. Some judges were impressed with the study and consented to participate. In addition, some judges referred me to other

⁴⁵ Saudi Arabia Ministry of Higher Education Annual Report 2012.

⁴⁶ *Id.*

judges in various parts of the country who they believed would be able to assist me.

Accordingly, I made trips to visit those judges and interviewed some of them.

For the lawyers, I obtained a list of lawyers' names from the Ministry of Justice website, and I obtained their phone numbers from the phone directory. I called a number of lawyers, some of whom were willing to participate. Often they would instruct me to come to their offices at a certain time to conduct the interview. In a few cases, lawyers preferred to conduct the interview over the phone. Sometimes, a lawyer would introduce me to his partner or to another lawyer whom I would later interview. In general, lawyers were harder to reach than judges, which could be attributed to number of reasons. First of all, even though there are slightly over 2000 lawyers in the country,⁴⁷ only few of them have worked in criminal cases representing defendants. Second, the "snowball" method, while helpful, was not as effective in identifying and reaching lawyers as it had been with judges. This indicates that the network and relationships among lawyers in the country are not as strong as those among judges. Also, I had to contact lawyers initially by phone, and this method did not receive as favorable response as my in-person introduction of myself and my project to the judges.

Finally, I took the information of each participant and called later to ask for some clarifications and confirmation of the previous answers.

5- Justification of the methods

Certainly, there are many ways to conduct research that examines the practice of criminal defense, such as case studies and interviews with defendants and prisoners. In

⁴⁷ Hazem Al-Mutairi, *The Lack of Qualified Attorneys*, OKAZ NEWSPAPER, Issue No. 4450, (August 23 2013).

fact, given the topic of the research, investigation of the perceptions of prisoners, defendants, and the acquitted would seem to be of particular importance. However, given the status quo, many such approaches are not presently feasible. For example, only a small number of criminal cases are published in Saudi Arabia, which makes it difficult to base a study on criminal cases. Similarly, prisoners are hard to reach, and police officers might not be willing to cooperate due to their lack of concern for academia. As a result, interviewing judges and lawyers is the most feasible method of conducting the present empirical study on the given topic.

Interviewing lawyers and judges is quite feasible, and will result in better and extensive data. Although they share the same cultural background with other Saudis, these professionals are likely to be more willing to participate in such a study; further, based on their experiences with criminal cases, they will likely have useful information to offer regarding the role of criminal defense lawyers. In other words, while the research misses the legal consumers' perceptions, interviewing judges and lawyers will authenticate the empirical study, since they deal with and have direct contact with the same legal consumers on a daily basis. In addition, despite the scarcity and limited available of published work, I studied secondary sources whenever that was possible.

V. Law Relevant to Criminal Defense

The particular Saudi Arabian laws that are relevant to this study are as follows:

1. The Basic Law of Governance⁴⁸

The Basic Law of Governance, which was issued on 1 March, 1992, is the country's first written legal document that amounts to a constitution in the legal sense. It consists of nine chapters. The first chapter contains general principles; for example, it declares that Saudi Arabia is an Islamic and Arab state and confirms that the Holy *Qur'an* and the *Sunnah* represent the constitution of the state. Chapter 2 explains the Law of Governance, declaring that "Monarchy is the system of rule in the Kingdom of Saudi Arabia"⁴⁹ and that the government of the Kingdom of Saudi Arabia derives its authority from the *Qur'an* and the *Sunnah*. It also confirms that the *Qur'an* and the *Sunnah* are the ultimate sources of reference for this Law and the other laws of the State.

Chapter 3 describes the features of the Saudi society, and Chapter 4 is concerned with the country's economic principles. Chapter 5 describes the rights and duties of the state. Chapter 6 explains the authorities of the state. It declares that the authorities of the state consist of, the Judicial Authority, the Executive Authority and the Regulatory Authority. It further declares that "these authorities will cooperate in the performance of their functions, according to this Law or other laws. The King is the ultimate arbiter for these authorities."⁵⁰

The Basic Law of Governance also guarantees the independence of the Judiciary. Article 46 of the law provides: "The Judiciary is an independent authority. The decisions of judges shall not be subject to any authority other than the authority of the *Shari'ah*." Furthermore, the law guarantees access to courts for all people in Saudi Arabia without

⁴⁸ The Basic Law, *supra* note 1.

⁴⁹ *Id.* Art. 5.

⁵⁰ *Id.* Art. 44.

discrimination based on their nationality, religion or any other reason. Article 47 provides: “All people, either citizens or residents in the Kingdom, are entitled to file suit on an equal basis.”⁵¹ The article further requires Saudi authorities to make laws that enforce this right.

Chapter 7 concerns Saudi financial affairs, and Chapter 8 regulates the country’s institutions of audit. Finally, Chapter 9 contains some general principles.

2. The Law of the Judiciary⁵²

The Law of the Judiciary regulates the function of *Shari’ah* courts, which consist of three levels: the Courts of First Instance, the Courts of Appeal, and the Supreme Court. All of these courts function under the supervision of the Saudi Supreme Judicial Council. According to Article 9 of the Law of the Judiciary, the courts of first instance are subdivided into five types of courts: general courts, criminal courts, personal status courts, commercial courts, and labor courts. The second level of the *Shari’ah* courts is the Court of Appeal. Article 15 of the Law of the Judiciary provides that each province will have at least one Court of Appeal. Finally, the Law of the Judiciary establishes the authority of the Supreme Court, which is located in the city of Riyadh, the capital of Saudi Arabia.

3. Code of Law Practice⁵³

The Code of Law Practice was issued on October 15, 2001, officially recognizing law practice in Saudi Arabia. Article 1 of the code provides that:

⁵¹ *Id.* Art. 47.

⁵² The Law of the Judiciary, *supra* note 19, Art. 5.

⁵³ The Code of Law Practice, *supra* note 7.

As herein used, the phrase “law practice” shall mean representation of third parties before courts of law, the Board of Grievances, and other committees as may be set up pursuant to laws, decrees and decisions to consider the cases falling within their respective jurisdictions. It shall also mean rendering consultancy services based on the principles of *Shari’ah* and the rule of law. Whoever practices this profession shall be called a lawyer. Any person shall be entitled to litigate for himself.⁵⁴

The Code of Law Practice further specifies the requirements for licensing attorneys and stipulates their rights and duties. It consists of 43 articles divided into four parts: part one defines the practice of law and its requirements; part two outlines the duties and rights of lawyers; part three deals with disciplinary actions; and part four describes general and transitional provisions.

4. Law of Criminal Procedure⁵⁵

The Law of Criminal Procedure was issued in 2001. It is the country’s first law of criminal procedures. It gives the defendant the right to legal representation during the pre-trial and trial phases of the criminal proceedings. Article 4, for example, states, “Any accused or charged person shall have the right to seek the legal assistance of a lawyer or a representative to defend him during the investigation and trial stages.”⁵⁶

In 2013, the law was modified to give defendants who are accused of major crimes the right to free legal representation. Article 139, states:

⁵⁴ The Code of Law Practice, *supra* note 7, Art. 1.

⁵⁵ The Law of Criminal Procedure, *supra* note 7.

⁵⁶ *Id.* Art. 4.

In major crimes, the accused shall personally appear before the court, without prejudice to his right to seek legal assistance. If the defendant is not financially able to employ counsel, then the defendant has the right to request that the court appoint or furnish counsel for him at the state's expense.⁵⁷

5. Law of the Bureau of Investigation and Public Prosecution⁵⁸

In 1989, the Saudi government promulgated its Law of the Bureau of Investigation and Public Prosecution, which creates the Bureau and regulates its function. According to Article 1 of the law, the Bureau falls under the responsibility of the Minister of the Interior and is funded from the ministry budget. The law consists of 30 articles, which are divided into five parts: Establishment, Composition and Jurisdiction of the Bureau, Bureau Members and Staff, Disciplining of Bureau Members, and General Provisions. By virtue of this law, the bureau is responsible for criminal investigation and public prosecution.

VI. Conclusion

The practice of criminal defense in Saudi Arabia is a topic that needs to be thoroughly investigated. One way to do this, while at the same time advancing the Saudi legal system, is through field research. This study is a step in the evaluation of legal representation in Saudi Arabia in criminal cases. In addition to analyzing previous literature and applied law, this study includes interviews with lawyers and judges. The

⁵⁷ Royal Decree No. M/2 Art. 139 (Nov. 25, 2013).

⁵⁸ The Law of the Bureau of Investigation and Public Prosecution, Royal Decree No. M/56 (29 May 1989).

goal of the study is to explain the status of criminal defense practice in Saudi Arabia. To that end, the study is organized in the following manner:

Chapter one introduces the study and its methodology. Chapter two outlines the history of the Saudi state and provides an overview of the early and modern history of the country up to the modern state. The second part of chapter two focuses on the legal system of Saudi Arabia and explains the three branches of government – judiciary, executive, and legislative – as well as the role of the king. The last part of the chapter addresses the Saudi criminal law and its objectives.

Chapter three examines the origin and development of the legal profession in the Muslim world. It presents a historical background of Islamic courts prior to the emergence of the legal profession. Next, it introduces the Islamic doctrine of adversarial agency, *Wakalah-bil-Khusumah*. It also lists the requirements for agents according to Islamic jurisprudence. In addition, the chapter explains the process that led to the establishment of the legal profession in the Islamic world. The chapter then sheds light on Muslim jurists' views on the legal profession and presents the study's position regarding the arguments both for and against the legal profession.

Chapter four addresses the right to counsel in criminal cases in both Saudi Arabia and the United States. It gives a brief introduction to counsel in the United States and addresses the practice of the right to counsel in both federal and state criminal courts. It then covers the right to defense counsel in Saudi criminal courts. Similar to the discussion of the right in the United States, the chapter gives a historical background to

the right to counsel as well as its application in Saudi Arabia. Finally, the chapter presents a comparative analysis between the United States and Saudi Arabia.

Chapter five presents the interview results. To that end, the chapter divides the findings into eight categories: 1) Significance of Legal Representation in Criminal Cases; 2) Participants' Perception about the 2001 Reform; 3) *Shari'ah* and Legal Representation in Criminal Cases; 4) A Lawyer's Role in Criminal Cases; 5) Lawyers and Effective Legal Assistance; 6) The Impact of Lawyers in Criminal Cases and Defendants; 7) The Application of the Right to Legal Representation in Criminal Cases; and 8) Obstacles Preventing Effective Legal Representation. After presenting the findings, the chapter discusses the raw data collected from the interviews. Finally, Chapter six concludes the study and offers recommendations to improve the role of criminal defense lawyers in Saudi Arabia.

Chapter Two: Saudi Arabia: Its History and Legal System

Introduction

The Kingdom of Saudi Arabia stands unique among Muslim countries in its application of the *Shari'ah*. It strictly adheres to the *Qur'an* and *Sunnah* as the main sources of law, following the practice of the *Salaf*, or the earliest Muslim generations.⁵⁹ Thus, Islamic law in Saudi Arabia today “remains largely unchanged since the time of the Prophet.”⁶⁰ In fact, the country adheres “to the rules of the old Islamic law, probably to a degree greater than many Islamic states of the past.”⁶¹ Therefore, it is worthwhile to start with a brief history of the people of the Arabian Peninsula before addressing any legal matter. In other words, before delving to the Saudi criminal defense system, we must know the circumstances that gave rise to this system.

The strong relationship between history and law is apparent not only in the Saudi legal system but also in all other legal systems in the world. Thus, “it needs no argument to show that in order to know what is the law of to-day one must know the history of the people among whom the law has grown up.”⁶² For this reason, the first part of this chapter provides a historical background of the Saudi state. It gives an overview of the early history of the country up to the development of the modern state. In particular, it addresses life in the peninsula both before and after the emergence of Islam. It then focuses on the Saudi state that was established by Muhammad ibn Saud and Muhammad

⁵⁹ ROBERT GLEAVE, *ISLAM AND LITERALISM: LITERAL MEANING AND INTERPRETATION IN ISLAMIC LEGAL THEORY* 176 (2012).

⁶⁰ ANTHONY HAM, *SAUDI ARABIA* 169 (2004).

⁶¹ FRANK E. VOGEL, *ISLAMIC LAW AND THE LEGAL SYSTEM OF SAUDI: STUDIES OF SAUDI ARABIA* XIV (2000).

⁶² H. H. Wilson., *The Relation of History to the Study and Practice of Law*, page 10 [Read before the society, January 12, 1887].

ibn Abdulwahhab. The second part of the chapter focuses on the legal system of Saudi Arabia and discusses the legal reforms initiated by King Fahd in 1992.⁶³ Furthermore, it discusses the three branches of government – judiciary, executive, and legislative – as well as the role of the king. Finally, the last part of the chapter addresses the Saudi criminal law and its objectives.

I. The Arabian Peninsula before Islam

1. The Arabian Peninsula before Islam

The ancient history of the Arabian Peninsula dates back to 853 B.C.,⁶⁴ when Arabian tribes led a generally nomadic lifestyle in the Arabian Peninsula.⁶⁵ Some were agriculturalists who grew grains, vegetables, and date palms. Most people lived near oases.⁶⁶ The city of Medina, which later became the capital of the Muslim state, was founded on a central oasis north of Mecca, which was the religious center for Muslims both at that time and today.⁶⁷ Different religions, including Judaism and Christianity, were followed in the peninsula. However, most Arabs were animists, who believed that inanimate objects like trees, stones, and animals possess spirits.⁶⁸

⁶³ The Basic Law, *supra* note 1.

⁶⁴ SAAD ABULHAB, DEARABIZING ARABIA: TRACING WESTERN SCHOLARSHIP ON THE HISTORY OF THE ARABS AND ARABIC LANGUAGE AND SCRIPT 68 (2011).

⁶⁵ JIU-HWA UPSHUR, JANICE J. TERRY, JAMES P. HOLOKA, GEORGE H. CASSAR AND RICHARD D. GOFF, WORLD HISTORY: BEFORE 1600: THE DEVELOPMENT OF EARLY CIVILIZATIONS 270 (2011).

⁶⁶ *Id.*

⁶⁷ ANTHONY GORMAN, ENCYCLOPEDIA OF THE PEOPLES OF AFRICA AND THE MIDDLE EAST 35 (Jamie Stokes (ed.), Facts On File Inc., 2008).

⁶⁸ JIU-HWA UPSHUR *supra* note 65, at 270.

The Arabian Peninsula covers approximately 2.7 million square kilometers, about 2 percent of the world's land surface.⁶⁹ This area is equivalent to about half the size of Europe, 8 percent of Asia's surface area,⁷⁰ or the size of the United States east of the Mississippi River. The Arabian Desert is similar in appearance to the deserts of Utah, Nevada, and Arizona in the United States.⁷¹ As described by Head and Gibbard:

[The peninsula is bordered by] Africa, the Levant and the Iranian plateau, [which] places it at a critical position for understanding early human migration patterns. Restricting human movements, the Peninsula is bounded on three sides by the Red Sea, the Arabian Sea, and the Arabian Gulf. In contrast, the northern area is a vast open steppe that unrolls towards the Mediterranean with no major geographical obstructions, likely leading to a free-flow of populations across a wide area.⁷²

2. Emergence of Islam

Early Arabs lived in different regions in the peninsula. Hejaz, where the two cities of Mecca and Medina are located, is the most important region in the peninsula. There, the Prophet Muhammad (PBUH) began publicly preaching Islam in Mecca around the year 613.⁷³ The Prophet was a descendant of a dominant tribe in the Peninsula, Quraysh, and belonged to Banu Hashim, a branch of that tribe. The Prophet was born in about 570, was orphaned at an early age, and died in 632. His early followers included close family

⁶⁹ ANTHONY MILLER, *FLORA OF THE ARABIAN PENINSULA AND SOCOTRA* 1 (1996).

⁷⁰ *Id.*

⁷¹ BYRON EARHART, *RELIGIOUS TRADITIONS OF THE WORLD: A JOURNEY THROUGH AFRICA, MESOAMERICA, NORTH AMERICA, JUDAISM, CHRISTIANITY, ISLAM, HINDUISM, BUDDHISM, CHINA, AND JAPAN* 619 (1992).

⁷² MARTIN HEAD & PHILIP LEONARD GIBBARD, *EARLY-MIDDLE PLEISTOCENE TRANSITIONS: THE LAND-OCEAN EVIDENCE* 306 (2005).

⁷³ FRANCES O'CONNOR, *THE HISTORY OF ISLAM* 10 (2009).

members, a few prominent people of leading tribes, many people of lesser clans, and freed slaves.⁷⁴

Despite the popularity and dominance of his tribe, the Prophet faced great opposition as the number of his followers grew, because the new religion challenged traditional beliefs. For this reason, the Prophet sent a number of his followers to take refuge in Axum in about the year 615.⁷⁵ Four years later, the Prophet lost the two most important people in his life – his wife Khadijah, who was the first person to embrace Islam, and his uncle Abu Talib.⁷⁶ Therefore, many historians believe that the Prophet “had lost his main source of emotional support and his main protector, because Abu Talib, although he had never embraced the Prophet’s message, had nonetheless used the solidarity of the Hashim clan to defend Muhammad.”⁷⁷ Later, the Prophet and his followers were forced out of Mecca and thereafter lived in exile in Medina, the twin city of Mecca, in 622. There, the new religion gained support as more people converted to Islam, and an Islamic army was formed.⁷⁸ As a result, the Muslims were able to return to Mecca.

From a religious perspective, Mecca is the holy and spiritual city to which Muslims migrate on pilgrimages from all over the world. On the other hand, Medina was

⁷⁴ Fred M. Donner, *Muhammad and the Caliphate, Political History of the Islamic Empire Up to the Mongol Conquest*, in THE OXFORD HISTORY OF ISLAM 1, 6-8 (John L Esposito ed., 1999).

⁷⁵ *Id.* at 1, 8.

⁷⁶ FRANCES O’CONNOR, *supra* note 73, at 12.

⁷⁷ Fred M. Donner, *supra* note 74, at 8.

⁷⁸ ABDULRHMAN ALZANAYDI, TATBIQ AL-SHARIAH AL-ISLAMIYAH FI AL-MAMLAKAH AL-ARABIYAH AL-SAUDIYAH WA-ATHARUHU FI AL-HAYAH, [The Application of Islamic Law in the Kingdom of Saudi Arabia and Its Impact on Life] 27 (1999); JAN-ERIK LANE & HAMADI REDISS, RELIGION AND POLITICS (EPUB) ISLAM AND MUSLIM CIVILIZATION 54 (2009).

the administrative and strategic city for the Prophet and the four orthodox Muslim rulers, who later took it as the capital for their governance. After the death of the Prophet, the first Islamic political period in history, the Rashidun Leadership Period, began; this period lasted until the death of Ali, the fourth and last orthodox Muslim ruler, in the year 661.⁷⁹ After that, many dynasties ruled the Arabian Peninsula, including the Umayyad, the Abbasid, the Ottoman, and the Saudi.

II. Saudi Modern History

1. The First Saudi State (1744-1818)

Arabs in the Arabian Peninsula occupies different regions, among which were the *Hejaz* region (in which the cities of Mecca, Medina, Jeddah, Taif, and Yanbu are located) and the *Najd* region (one of the largest regions of the Arabian Peninsula). *Najd* was divided into small districts, each headed by a prince. The most important of these were the Daraiya, Riyadh, Uyayna, and Alkharj districts.⁸⁰ In the early 18th century, these regions were ruled by the Ottoman Empire. However, at that time, the Empire's power was declining, and the Ottoman nation lagged behind other nations. At the time, significant changes and reforms began to emerge in the Middle East. The Ottoman ruler Sultan Selim the Third, observing the decline of his empire, he began a reform process in which he emulated European countries.⁸¹ Muhammad ibn Abdulwahhab (1703-1792), on

⁷⁹ I.M.N. AL-JUBOURI, *HISTORY OF ISLAMIC PHILOSOPHY: WITH VIEW OF GREEK PHILOSOPHY AND EARLY HISTORY OF ISLAM* 163-164 (2004).

⁸⁰ MADIHA A. DIRWEESH, *TARIKH AL-DAWLAH AL-SAUDIYAH HATTA AL-RUB AL-AWWAL MIN AL-QARN AL-ISHRIN* [The History of the Saudi State: Up to the First Quarter of the 20th Century] 12 (1980).

⁸¹ Istiaq Hussain, *The Tanzimat: Secular Reforms in the Ottoman Empire, A Brief Look at the Adoption of Secular Laws in the Ottoman Empire with a Particular Focus on the Tanzimat Reforms* (1839-1876), *Faith Matters* 5 (2011). Available at: <http://faith-matters.org/>

the other hand, preached in the town of Uyayna in an effort to restore Islam in its original form.⁸²

Muhammed bin Abdulwahhab's preaching was initially welcomed by the mayor of Uyayna, Uthman ibn Mu'ammār, who ordered the people of his town to embrace Muhammed bin Abdulwahhab's message. Ibn Mu'ammār also married Muhammed bin Abdulwahhab to his aunt, Jawhara bint Abdullah bin Mu'ammār. Scholars cite this marriage as an indication that the two established a strong relationship.⁸³ However, other mayors in the region opposed the teachings of bin Abdulwahhab. Fearing that his message would spread in the area, they pressured Ibn Mu'ammār to kill bin Abdulwahhab. However, Ibn Mu'ammār chose to expel bin Abdulwahhab rather than to kill him.⁸⁴

The preaching of bin Abdulwahhab appealed to Muhammad bin Saud, the mayor of Daraiya, a small municipality in central Arabia; consequently, he provided refuge to the religious reformer after his expulsion from his home town of Uyayna, where he had first begun teaching.⁸⁵ Both leaders vowed to restore the application of Islam as it had been interpreted and applied by the Prophet and the four orthodox Muslim rulers.⁸⁶ It is worth noting that Wahhabism was not a new Muslim sect; rather, "it was a revival of

⁸² ALAIN GRESH & DOMINIQUE VIDAL, *THE NEW A-Z OF THE MIDDLE EAST* 274 (2004). Muhammad ibn Abdulwahhab is a religious leader and is the founder of what is known by the outside world as the Wahhabi movement. He was born in Al-Uyaynah and studied at different Islamic centers in different cities, such as Medina, Baghdad and Basra. See JOHN PETERSON, *HISTORICAL DICTIONARY OF SAUDI ARABIA* 107-108 (1993).

⁸³ DAVID COMMINS, *THE WAHHABI MISSION AND SAUDI ARABIA* 17 (2006).

⁸⁴ MARK WESTON, *supra* note 9, at 91.

⁸⁵ ABDULRAHMAN ALARINI, *AL-IMAM MUHAMMAD IBN SAUD WA-JUHDUHU FI TASHIS AL-DAWLAH AL-SAUDIYAH AL-WLA* [Imam Muhammad Bin Saud and His Efforts in the Establishment of the First Saudi State] 69 (1999).

⁸⁶ WAYNE H. BOWE, *THE HISTORY OF SAUDI ARABIA* 69 (2008).

orthodox Sunnism based on the teaching of the 14th-century scholar Ibn Taymiyya and the rulings of the *Hanbali* law school, the strictest of the four recognized within the Sunni consensus.”⁸⁷ Others called Abdulwahhab followers *wahhabis*; however, they called themselves “*ahl al-twahid*,” which means people of *twahid* (monotheism).⁸⁸

The state of Saudi Arabia came into being as a result of an alliance between the two leaders, Muhammad bin Saud and Muhammed bin Abdulwahhab, in 1744. By 1788, the Saudis had taken control of the entire *Najd* region in the central peninsula; by the early 19th century, they had annexed Mecca and Medina as well.⁸⁹ Accordingly, Daraiya became the religious, political, and strategic capital of the Saudi state.⁹⁰ However, the success and influence of the Saudis in establishing a powerful state alarmed the dominant political and religious power of the Middle East, the Ottoman Empire. Consequently, the Egyptian ruler, Muhammad Ali Basha, was authorized by the Ottomans to intervene. He subsequently embarked on a series of campaigns led by himself and two of his sons. As a result, the first Saudi state was defeated after a series of fierce battles in 1818,⁹¹ after which the last Saudi ruler of that state, Abdullah Ibn Saud, was deported to Egypt, where he was executed.⁹²

⁸⁷ Denis MacEoin, *Islam in the Middle East*, in *THE WORLD’S RELIGIONS: ISLAM* 150, 152 (Peter Clarke ed., 1990).

⁸⁸ *Id.*

⁸⁹ Saudi Embassy in the United States, <http://www.saudiembassy.net/about/country-information/history.aspx>

⁹⁰ MADIHA A. DIRWEESH, *supra* note 80, at 24.

⁹¹ Denis MacEoin, *supra* note 87, at 153.

⁹² ABDULFATTAH HASAN ABU ALIYAH, *TARIKH AL-DAWLAH AL-SAUDIYAH AL-THANIYAH* [History of the Second Saudi State] 37 (1991).

2. The Second Saudi State (1824-1891)

The second state is considered an extension of the first, as the successors of the Saud's family followed the Muhammed bin Abdulwahhab teachings. In 1824, the Saud family revolted against the Turko-Egyptian occupation of Daraiya.⁹³ The leader of this campaign, Turki Bin Abdullah, succeeded in retaking most of the lands from the Ottomans.⁹⁴ However, the Ottomans did not give up or accept this defeat. Instead, they waged another war against the Saudi state using the Egyptian army, and Prince Faisal, the Saudi ruler at that time, was captured and sent to Egypt. Prince Faisal was succeeded by other Saudi princes. Following the capture of Prince Faisal, a number of tribal wars took place. These tribal wars continued for 30 years, during which period the Ottomans took advantage of this division among the Saudis and supported their rival, Bin Al-rasheed. Consequently, Prince Abdulrahman (1850-1928), the last ruler of the second Saudi state, was defeated in 1891. He fled to a tribal area of Eastern Arabia known as the Empty Quarter,⁹⁵ then later took refuge in Kuwait, where his young son, Abdulaziz (1876-1953), grew up and was groomed to become the leader of the third Saudi state.⁹⁶

3. The Third Saudi State (1932)

The third state began in 1902, when King Abdulaziz Bin Abdulrahman Bin Faisal Al-Saud attacked the city of Riyadh and surrounding cities under the slogan of *twahid*, or belief in one God (i.e., monotheism).⁹⁷ As a result of this campaign, Abdulaziz recaptured

⁹³ *Id.* at 38-39.

⁹⁴ Saudi Embassy in the United States, <http://www.saudiembassy.net/about/country-information/history.aspx>

⁹⁵ MADIHA A. DIRWEESH, *supra* note 80, at 12.

⁹⁶ Saudi Embassy in the United States, <http://www.saudiembassy.net/about/country-information/history.aspx>

⁹⁷ MADIHA A. DIRWEESH, *supra* note 80, at 71.

the city and its surrounding areas.⁹⁸ Realizing that Abdulaziz had power over *Najd*, the regions of Ihssa and Gassim conceded to him and appointed him the ruler of *Najd*. When World War I broke out, the Ottomans started to lose control of the Middle East; however, the northern part of Saudi Arabia was still under control of the Rasheed family, who were supported by the Ottomans. In the meantime, Mecca was ruled by Sherif Hussein, a distant relative of the Prophet Muhammad who was fully backed by the British and whose interests were in conflict with those of the Ottomans in the region.⁹⁹

Because Abdulaziz was politically and militarily strong, the British allied with him. The two allies signed a covenant (1915), according to which the British conceded that Abdulaziz was the Sultan of *Najd* and its surroundings, with his heirs having an absolute right to inherit his authority. Simultaneously, Abdulaziz was bound, by virtue of the agreement, not to support the Ottomans or to attack Sherif Hussein. However, in 1916, Sherif Hussein declared himself to be the king of all Arabs, including Abdulaziz.¹⁰⁰ This act created political tension that escalated into armed conflict. In 1924, Abdulaziz defeated Sherif Hussein and took control of Mecca. Later that same year, King Abdulaziz was declared the King of Hejaz and Sultan of *Najd*. Meanwhile, France, England, and the former Soviet Union conceded that Abdulaziz was the King of Hejaz and Sultan of *Najd*.¹⁰¹ Finally, in 1932, the country was officially named the Kingdom

⁹⁸ FOUAD FARZY, MODERNITY AND TRADITION: THE SAUDI EQUATION 15 (1990).

⁹⁹ MADIHA A. DIRWEESH, *supra* note 80, at 77-84.

¹⁰⁰ *Id.* at 81-84.

¹⁰¹ *Id.* at 127.

of Saudi Arabia, with Arabic as the official language and the *Qur'an* its constitution, and Abdulaziz became the King of the country.¹⁰²

III. Saudi Legal System

1. Background

In 1992, Saudi Arabia undertook a constitutional reform by introducing its Basic Law of Governance. The first article of the Basic Law declares, “The Kingdom of Saudi Arabia is a sovereign Arab Islamic State. Its religion is Islam. Its constitution is Almighty God’s Book, The Holy *Qur’an*, and the *Sunnah* (Traditions) of the Prophet (PBUH).¹⁰³ Arabic is the language of the Kingdom. The City of Riyadh is the capital.”¹⁰⁴ Furthermore, the Basic Law recognizes, for the first time in Saudi legal history, the doctrine of separation of power. Article 44 of the Basic Law states, “The Authorities of the State consist of: The Judicial Authority, The Executive Authority and The Regulatory Authority.”¹⁰⁵ Furthermore, it says that “these Authorities will cooperate in the performance of their functions, according to this Law or other laws. The King is the ultimate arbiter for these Authorities.”¹⁰⁶

Since then, many laws have been introduced. As is the case in other Middle Eastern countries, these Saudi laws were influenced by French laws. Generally, French legal influence in the Middle East goes back to the 16th century, when France, to protect its interests in the Middle East, signed a treaty with the Ottoman Empire. France has also influenced Egypt; although the French left Egypt following their defeat by Muhammad

¹⁰² Royal Decree No. 2716. (17/5/1351 H, Sep.18 1932).

¹⁰³ Peace Be Upon Him.

¹⁰⁴ The Basic Law, *supra* note 1, Art. 1.

¹⁰⁵ The Basic Law, *supra* note 1, Art. 44.

¹⁰⁶ *Id.*

Ali in 1801, the influence of French law continued to grow and spread in the Middle East.¹⁰⁷ In the early 19th century, the Ottoman Empire adopted most of the French legal codes.¹⁰⁸ Saudi Arabia was no exception among the Middle Eastern countries in adopting the French legal system. Most of the kingdom's modern codes, though driven by Islam, are influenced directly by the French system, as well as the Egyptian system and those of other French-influenced neighboring countries.¹⁰⁹ For example, the Saudi company law, enacted in 1965 by Royal Decree No. M-6, was a direct copy of the Egyptian company law, which in turn had been largely copied directly from French law.¹¹⁰ Another example is the Saudi Board of Grievances, first established in 1964; it echoes its Egyptian counterpart; which in turn is similar to the French administrative law organ, the *Conseil d'Etat*.¹¹¹

Despite the issuance of the Basic Law of Governance as the country's first constitution and the adoption of some French laws, *Shari'ah* retained its preeminence over other laws and could not be contradicted by other laws, including the Basic Law. In fact, the Basic Law states that "Government in the Kingdom of Saudi Arabia derives its authority from the Book of God and the *Sunnah* of the Prophet (PBUH), which are the ultimate sources of reference for this Law and the other laws of the State."¹¹² In addition, the following statement by King Fahd, which was made three weeks after the issuance of the Basic Law of Governance, confirms that *Shari'ah* is the highest law in the Kingdom:

¹⁰⁷ Maren Hanson, *The Influence of French Law on the Legal Development of Saudi Arabia*, 2 Arab Law Quarterly 272, 276 (1987).

¹⁰⁸ MUHAMMAD AIZOHEILY, *TARIKH AL-QADA FI AL-ISLAM* [The History of Judiciary in Islam] 451 (1995).

¹⁰⁹ Maren Hanson, *supra* note 107, at 272, 288.

¹¹⁰ *Id.* at 290.

¹¹¹ *Id.* at 286.

¹¹² The Basic Law, *supra* note 1, Art. 7.

The democratic system that is predominant in the world is not a suitable system for the peoples of our region. Our peoples' makeup and unique qualities are different from those of the rest of the world. We cannot import the methods used by people in other countries and apply them to our people. We have our Islamic beliefs that constitute a complete and fully-integrated system. Free elections are not within this Islamic system, which is based on consultation (*shura*) and the openness between the ruler and his subjects before whom he is fully responsible.... The system of free elections is not suitable to our country, the Kingdom of Saudi Arabia, a country that is unique in that it represents the Muslim world in supervising the holy shrines, and unique in other ways as well as I have already pointed out.... In my view, Western democracies may be suitable in their own countries but they do not suit other countries.¹¹³

2. Branches of the Legal System

A. The Judicial Branch

The judicial system of Saudi Arabia is a civil law-based system. Unlike the common law system, it does not formally recognize judicial precedent as a source of law, nor does it acknowledge trial by jury.¹¹⁴ Historically, the Grand *Mufti* (the senior religious leader) was the head of the justice system, and the courts' jurisdiction was divided into domestic law, criminal law, family law, and civil law. In 1970, King Faisal

¹¹³ Abdulaziz H. Al-Fahad, *Ornamental Constitutionalism: The Saudi Basic Law of Governance*, 30 YALE J. INT'L L. 375, 375 (2005).

¹¹⁴ Bryant Seaman, *Islamic Law and Modern Government: Saudi Arabia Supplements the Shari'a to Regulate Development*, 18 COLUM. J. TRANSNAT'L L. 413, 441 (1979).

created the Ministry of Justice;¹¹⁵ and in 1975, he passed a modern judiciary law.¹¹⁶ This led to the establishment of the Supreme Judicial Council to administer all *Shari'ah* courts.¹¹⁷

On October 1, 2007, King Abdullah issued a new judiciary law that replaced the 1975 judiciary law.¹¹⁸ It is clear that both laws recognize the existence of a dual judicial system. Articles 49, 51, and 53 of the Basic Law provide that the Saudi judicial system is divided into two systems, the *Shari'ah* courts and the Board of Grievances (administrative courts).¹¹⁹ The *Shari'ah* courts consist of three levels that function under the supervision of the Saudi Supreme Judicial Council: the Courts of First Instance, the Courts of Appeal, and the Supreme Court.

The new code “seems to resemble [the] judicial system of countries like Egypt and Morocco more than the classical Islamic system, where a single judge pronounced judgment without appeal.”¹²⁰ Based on Article 9 of the new Law of Judiciary Code, the Courts of First Instance are composed of five types of courts: general courts, criminal courts, personal status courts, commercial courts, and labor courts (see figure 1). The second level of the *Shari'ah* courts is the Courts of Appeal, each of which consists of five circuits: civil circuit, criminal circuit, personal status circuit, commercial circuit, and labor circuit. Article (15) of the judiciary law provides that each province should have at

¹¹⁵ Royal Decree No A/126 (13/8/1390H, Oct. 14, 1970).

¹¹⁶ The Law of the Judiciary, Royal Decree No. M/64 (23, 1975), Umm al-Qura No. 2592 (Sep. 5, 1975).

¹¹⁷ Bryant Seamant, *supra* note 114, at 441.

¹¹⁸ The Law of the Judiciary, *supra* note 19.

¹¹⁹ The Basic Law, *supra* note 1, Articles: 49, 51, 53.

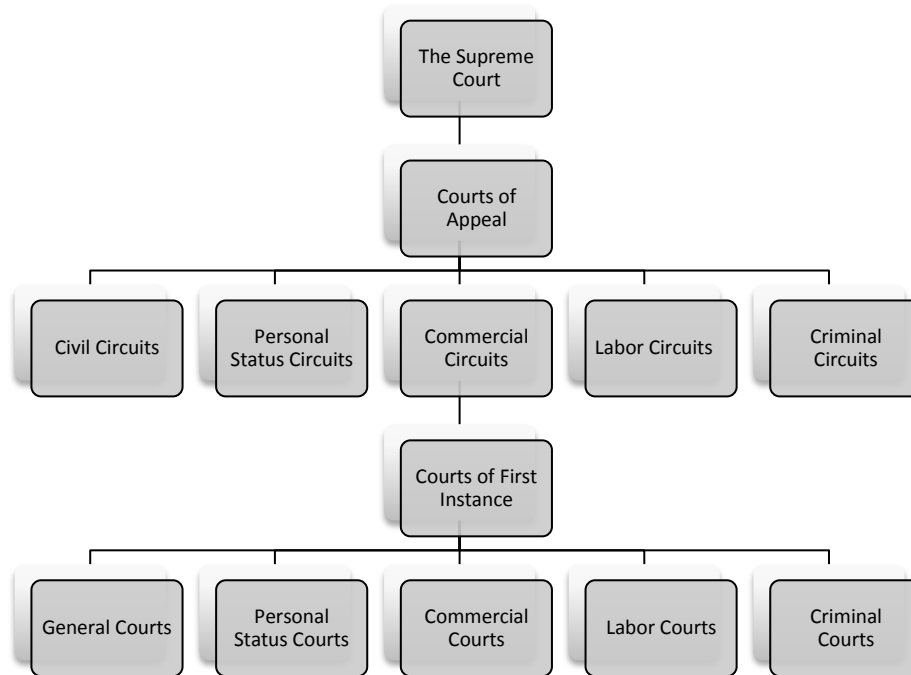
¹²⁰ Esther Van Eijk, *Sharia and National Law in Saudi Arabia*, in INCORPORATED: A COMPARATIVE OVERVIEW OF THE LEGAL SYSTEMS OF TWELVE MUSLIM COUNTRIES IN THE PAST AND PRESENT 139, 160 (Jan Michiel Otto (ed.), 2010).

least one Court of Appeal. (Note that the Saudi Law of the Provinces provides that the country is divided into 13 provinces.¹²¹) The third level of the *Shari'ah* courts is the Supreme Court, which was essentially created by virtue of the new Law of Judiciary. It is located in the city of Riyadh, the capital of Saudi Arabia. According the new Law of Judiciary, the Supreme Court plays the following roles:

1. Overseeing the application of Islamic *Shari'ah* provisions and laws that do not contradict *Shari'ah* and that are within the jurisdiction of the judiciary.
2. Reviewing the judgments and decisions issued or supported by the Courts of Appeal in cases that include a death, amputation, death sentences imposed by stoning, or retribution sentences.
3. Review of judgments and decisions issued or supported by the Courts of Appeal, on issues not listed in number (2), when the subject of objection to the judgment is as follows (the review includes questions of Law but not questions of fact):
 - a. Violation of the provisions of Islamic *Shari'ah* and laws that do not contradict *Shari'ah*.
 - b. Judgment issued by courts that are not constituted according to the Law of Judiciary or other national laws.
 - c. Judgment issued by a court that is not competent.
 - d. Error in the forming of the incident or the description of the case.

¹²¹ Each province has a governor, his deputy, and a provincial council. Law of the Provinces, Royal Order No. A/91 (27/8/1412H, Mar. 1, 1992)

Figure 1: Shari'ah Courts



The Board of Grievances consists of three levels as well: the Administrative Courts, the Administrative Courts of Appeal, and the Administrative Supreme Court. The Board of Grievances was established in 1955; its main task is to receive people's complaints of grievances and injustices. In other words, it investigates allegations of miscarriages of justice, corruption, and other claims raised by individuals against the government. It covers the whole country, even small towns. The flexibility of its jurisdiction and the simplicity of its procedures make the Board of Grievances, with its nationwide courts, an important judicial body in the country.¹²²

Furthermore, the Basic Law preserves the independence and impartiality of judges. Article 46 provides that "[t]he Judiciary is an independent authority. The

¹²² Bryant Seaman, *supra* note 114, at 448.

decisions of judges shall not be subject to any authority other than the authority of the Islamic *Shari'ah*.”¹²³ More importantly, the Basic Law provides for the *Qur'an* and the *Sunnah* to form the constitution of the country. Judges must therefore apply Islamic law and other regulations that are issued by the legislative authorities, as long as they do not contradict the *Shari'ah*. To that end, Article 48 of the Saudi Basic Law states that “[t]he Courts shall apply rules of the Islamic *Shari'ah* in cases that are brought before them, according to the Holy *Qur'an* and the *Sunnah* and according to laws that are decreed by the ruler in agreement with the Holy *Qur'an* and the *Sunnah*.”¹²⁴ This article indicates that the Saudi Basic Law does not prohibit codification so long as the codified laws conform to the *Shari'ah*.

B. The Executive Branch

Initially, King Abdulaziz had administered *Najd* and its provinces while a Council of Ministers governed the Hejaz region.¹²⁵ In 1953, King Abdulaziz issued a royal decree that established a national Council of Ministers.¹²⁶ However, this council had no independent executive authority; its decisions were merely advisory and became effective only with the king's approval. It did not gain executive authority until 1958, when King Saud empowered the Council of Ministers with policymaking power pursuant to Royal Decree No. 38.¹²⁷

¹²³ The Basic Law, *supra* note 1, Art. 46.

¹²⁴ The Basic Law, *supra* note 1, Art. 48.

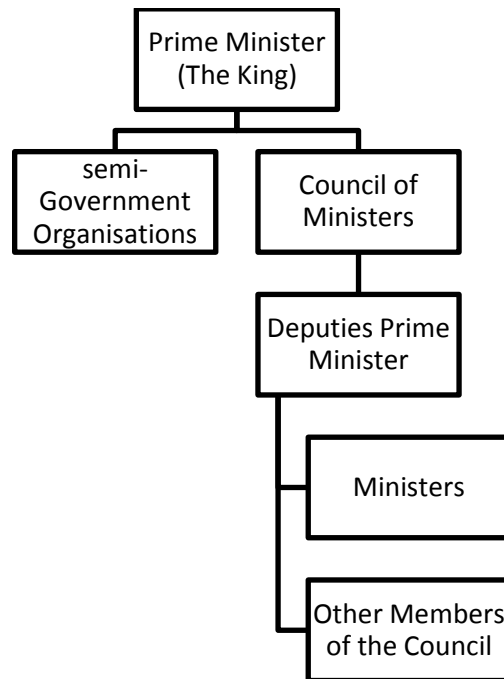
¹²⁵ Bryant Seaman, *supra* note 114, at 427.

¹²⁶ Frederick W. Weston, *Political Legitimacy and National Identity in Saudi Arabia: Competing Allegiances*, 211 *Fletcher Forum* 81, 91 (1987).

¹²⁷ Bryant Seaman, *supra* note 114, at 428.

When the Basic Law of Governance went into effect in 1992, the Saudi Executive branch became institutionalized by a constitutional document.¹²⁸ According to the Basic Law, the Council of Ministers represents the executive branch of government, with the king as prime minister, see figure 2. Article 19 of the Council of Ministers law stipulates that “[t]he Council shall hold the executive power and have the final say in the financial and administrative matters of all ministries and other governmental bodies.”¹²⁹

Figure 2: Executive Branch



The king appoints and relieves ministers and their deputies by royal decree, in accordance with Article 57 of the Basic Law.¹³⁰ He also appoints, by the same mechanism, other members of the Council who are known for their integrity and

¹²⁸ Ali Al-Mehaimeed, *The Constitutional System of Saudi Arabia: A Conspectus*, 8 Arab Law Quarterly 30, 30 (1993).

¹²⁹ The Basic Law, *supra* note 1, Art. 19.

¹³⁰ The Basic Law, *supra* note 1, Art. 57.

efficiency and who have never been convicted of crimes against religion or honor. In discharging his duties under the Basic Law, the king delegates his executive authority to the ministers and their deputies.¹³¹

Ministers are held to high standards. As prerequisites for their appointment, they must be Saudi citizens with no criminal record and must take an oath of allegiance before assuming their posts.¹³² In addition, they are not allowed to engage in activities or conduct that run against the integrity of their position. For example, they cannot hold other public positions, unless deemed necessary and approved by the prime minister. In addition, they are not allowed to engage in any activities that constitute conflicts of interest.¹³³

C. Legislative Branch (The Regulatory Authority)

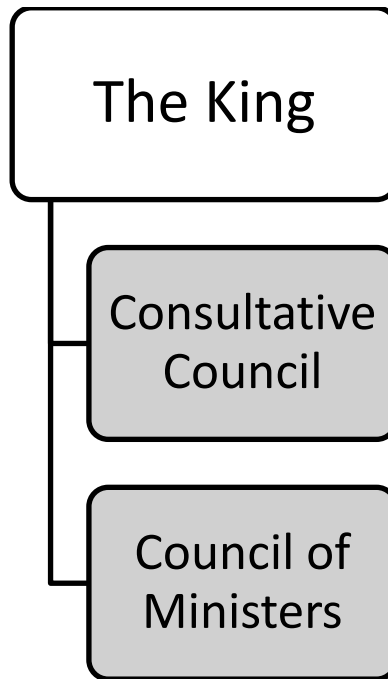
The legislative authorities in Saudi Arabia consist of three bodies: the king, the Council of Ministers, and the Consultative Council (see Figure 3).

¹³¹ Ali Al-Mehaimeed, *supra* note 128, at 33.

¹³² *Id.* at 34.

¹³³ *Id.*

Figure 3: Legislative Branch



1. The Consultative Council

The Basic Law of Governance established the Consultative Council as the country's first legislative authority. The Council possesses "the jurisdiction to propose a draft of a new law or an amendment of an enacted law."¹³⁴ In addition, the Council expresses its opinion on the state's general policies – including revisions to laws and regulations, international treaties and agreements, and concessions – and provides whatever suggestions it deems appropriate. The Consultative Council consists of 150 members¹³⁵ appointed by the king from the elite of the country and from various fields, including religious leaders, scholars, and business owners.¹³⁶ Members must be Saudi nationals of at least 30 years of age and must possess strong character, exemplary ethics,

¹³⁴ The Shura Council Law, Royal Order No. A/91, Art. 23, (27/8/1412H, Mar. 1, 1992).

¹³⁵ *Id.* Art. 3.

¹³⁶ *Id.*

and clean criminal records. Furthermore, the head of the Council, his deputy, and the secretary general are appointed to and relieved of their positions through royal decree.¹³⁷

The required quorum for the Council's meeting is two thirds of its members, and decisions are passed by a simple majority vote of present members.¹³⁸ The decisions of the Council are first submitted to the Council of Ministers for debate and then submitted to the king. If both Councils agree on a resolution, the king will sign it and then it will go into effect. If they disagree, the king will decide on the measure, using his power as the ultimate authority.¹³⁹

2. Council of Ministers

The Council of Ministers has legislative authority. According to the Council of Ministers Law, each minister may introduce a measure to be enacted into law in regard to the function of his ministry.¹⁴⁰ As a procedural matter, a two-thirds majority of present members is required to pass a proposed law.¹⁴¹ Additionally, if a law is initially proposed by the Council of Ministers, that law should then be submitted to the Consultative Council for review. If both councils agree, the proposal will be signed into law by the king. Otherwise, the king must use his power as the ultimate legislative authority to sign the proposal into law in favor of one council or the other. In practice, however, the two councils rarely disagree.¹⁴²

¹³⁷ *Id.* Art. 4.

¹³⁸ *Id.* Art. 16.

¹³⁹ MOHAMED AL-MARZOQI, ALSULTA ALTANTHMAH FI AL-MAMLAKAH AL-ARABIYAH AL-SAUDIYAH [Legislative Authority in the Kingdom of Saudi Arabia] 239 (2004).

¹⁴⁰ The Shura Council Law, *supra* note 134, Art. 22.

¹⁴¹ *Id.* Art. 14.

¹⁴² MOHAMED AL-MARZOQI, *supra* note 139, at 239.

3. The King

The King makes ordinary laws by royal decree. Such laws are first introduced by either the Council of Ministers or the Consultative Council. If both councils agree on a measure, the king signs it as a royal decree and it becomes law. As explained earlier, the king also plays a decisive role if the two councils do not agree on the measure being introduced. In this case, he has the authority to adopt one of the introduced versions and sign it into law. Moreover, the king has the only authority to pass and modify the fundamental laws, such as the Basic Law of Governance, the Council of Ministers Law, and the Consultative Council Law.¹⁴³

IV. Sources of Law in Islam

A. *Qur'an* and the *Sunnah*

The *Qur'an*, which Muslims refer to as “the Holy *Qur'an*” or “the Glorious *Qur'an*,”¹⁴⁴ has been the first source of Islamic law since the time of the prophet. The *Qur'an* is the Muslims’ holy book, which was revealed to the Prophet Muhammad between 610 and 632. It was transmitted to Muslims through continuous testimony, or *tawatur*.¹⁴⁵ The *Qur'an* consists of 114 *surahs* (chapters) with a total of 6,219 verses.¹⁴⁶ All Muslims believe it to be the word of God¹⁴⁷ and therefore to have supremacy over all other Islamic sources of law. While some verses in the *Qur'an* are general, others are

¹⁴³ *Id.* at 362.

¹⁴⁴ Irshad Abdal-Haqq, *Islamic Law: An Overview of Its Origin and Elements*, 1 J. Islamic L. 1, 19 (1996).

¹⁴⁵ MOHAMMAD HASHIM KAMALI, *PRINCIPLES OF ISLAMIC JURISPRUDENCE* 72-73 (1989).

¹⁴⁶ Dahman Ben Abderrahman, *A Contribution to the Study of the Koranic Sources of Saudi Arabian Business Law*, 3 Arab Law Quarterly 132, 133 (1988).

¹⁴⁷ Bryant Seaman, *supra* note 114, at 418.

specific, as in the case of inheritance rights.¹⁴⁸ Additionally, most *Qur'anic* verses concern ethics, while less than 100 address legal issues directly.¹⁴⁹ Some *Qur'anic* verses are very straightforward and not open to interpretation, whereas other verses may have more than one interpretation.

The *Sunnah* is the second primary source of Islamic law as followed from the time of the prophet until today. *Sunnah* literally means a path or a way of conduct, which could be a good or a bad way. Legally, the *Sunnah*, also known as *Sunnah Rasul Allah*, refers to the teachings of the Prophet Muhammad (PBUH) and a record of his way of life, which encompasses his statements, actions, and his tacit approval of the statements and actions of others.¹⁵⁰ To preserve the *Qur'an* and prevent it from being confused with the *Sunnah*, the Prophet discouraged people from recording the *Sunnah* in writing. Therefore, unlike the *Qur'an*, the *Sunnah* was not written down until the end of the first century of the Islamic calendar; before that, the Prophet's followers memorized it.¹⁵¹ Moreover, unlike the *Qur'an*, which was transmitted to Muslims en masse, the *Sunnah* was generally narrated in *ahad* (solitary) form, and only a small portion of it has been mass transmitted to Muslims.¹⁵²

¹⁴⁸ *Id.*

¹⁴⁹ Maren Hanson, *supra* note 107, at 272-273.

¹⁵⁰ Aron Zysow, *Shari'a*, in ISLAM: A SHORT GUIDE TO THE FAITH 43, 44 (Roger Allen & Shawkat Toorawa ed., 2011).

¹⁵¹ MOHAMMAD HASHIM KAMALI, *supra* note 145, at 57-73.

¹⁵² *Id.* at 73.

It is worth noting that the *Sunnah* contains four different types of rulings, as follows:¹⁵³

I. Rulings that describe and clarify the commands of the *Qur'an*; for example, the *Qur'an* commands Muslims to pay the *zakat* (tax), but it does not clarify the amount of the *zakat*. However, the clarification of the amount of *zakat* can be found in the *Sunnah*.

II. Rulings that emphasize the commands of the *Qur'an*; for example, the *Qur'an* states: “O ye who believe! Squander not your wealth among yourselves in vanity, except it be a trade by mutual consent.” The Prophet underlines this rule in his *Sunnah*, where he states: “The wealth of a Muslim is not permissible to another except with his agreement and permission.”

III. Rulings that specify or restrict general commands of the *Qur'an*; for example, the *Qur'an* forbids Muslims to eat carrion. It states: “Forbidden to you (for food) are: dead meat, blood, the flesh of swine, and that on which hath been invoked the name of other than Allah.” However, the *Sunnah* exempts seafood. The Prophet stated that “Two types of blood and two types of dead meat have been permissible for us: of the dead meat, fish and locusts, and of the blood, liver and spleen.”

IV. Rulings that are not mentioned in the *Qur'an* as *Sunnah* is also considered independent sources of law in Islam. For example, the *Sunnah* forbids

¹⁵³The General Presidency of Scholarly Research and *Ifta'* Saudi Arabia:
<http://www.alifta.net/Fatawa/fatawaDetails.aspx?BookID=2&View=Page&PageNo=1&PageID=2910&language=>

Muslims from eating donkeys and fanged predators, whereas this ruling is not mentioned in the *Qur'an*.¹⁵⁴

B. Secondary Sources of Islamic Law

Apart from the *Qur'an* and the *Sunnah*, Muslim jurists have agreed on other sources of law in Islam; namely, consensus (*ijmah*), analogical reasoning (*qiyas*), opinion of the Prophet *Sahabah*, legislation preceding the beginning of Islam, jurist preferences (*isthasan*), presumption of continuity (*istishab*), and consideration.

1. *Ijmah* (Consensus)

Ijmah is the third source of law in Islam. It is generally defined as the consensus among Muslim scholars at a specific time about a certain matter, and it serves to resolve any situation for which there are no rules in the *Qur'an* or *Sunnah*.¹⁵⁵ However, some prominent Muslim jurists have raised doubts about the possibility of finding consensus by its terms in modern life. For example, Ibn Taymiyya, a well-known Muslim scholar, has indicated that *ijmah* could never be reached after the era of the Prophet's companions. Similarly, Ibn Hanbal, the founder of the *Hanbali* School followed by Saudi Arabia, stated that: "One who claims *ijmah* is a liar."¹⁵⁶ However, some Muslim jurists argue that, with the advancement of communication technology, *ijmah* can be reached.¹⁵⁷

¹⁵⁴ *Id.*

¹⁵⁵ Maren Hanson, *supra* note 107, at 272-273.

¹⁵⁶ FRANK VOGEL, *supra* note 61, at 49.

¹⁵⁷ Irshad Abdal-Haqq, *supra* note 144, at 32.

2. *Qiyas* (Analogy)

Qiyas is the fourth source of Islamic law. It is defined as the “comparison between two things with the view of evaluating one in the light of the other.”¹⁵⁸ When the other three sources of Islamic law do not provide rules regarding a specific issue, Muslim scholars use *qiyas* to make Islamic rules from their original sources, the *Qur’an* and *Sunnah*. In such cases, scholars aim to derive “an appropriate rule by logical inference and analogy.”¹⁵⁹ *Qiyas* was first introduced and used by Abu Hanifa (700-767), a founder of a leading Islamic jurisprudence school, and was later recognized as a legitimate source of Islamic law in all other Muslim schools.¹⁶⁰

3. Opinion of the *Sahabah*¹⁶¹

Muslim jurists consider the consensus of the *Sahabah* (companions) to be binding; however, they disagree regarding the opinion of a single *Sahabi* (companion). The majority of jurists argue that the opinion of a single companion is binding and must be followed.¹⁶² They reason that, after the death of the Prophet, the guidance of the Muslim community fell on the shoulders of the companions, who, with deep knowledge of the *Qur’an* and the traditions of the Prophet, were able to verbalize opinions and make decisions regarding different types of issues.¹⁶³ They further argue that companions were capable of exerting *ijtihad* (logical and independent reasoning) and formulating a legal opinion on any matter that came before them due to their close relation with the Prophet

¹⁵⁸ JAMILA HUSSAIN, ISLAM: ITS LAW AND SOCIETY 44 (2004)

¹⁵⁹ CORINNA STANDKE, SHARIA: THE ISLAMIC LAW 5 (2008).

¹⁶⁰ Irshad Abdal-Haqq, *supra* note 144, at 33.

¹⁶¹ Those who became Muslims during the prophet’s time and saw or met him are called *Sahabah* (the companions).

¹⁶² MOHAMMAD HASHIM KAMALI, *supra* note 145, at 297.

¹⁶³ *Id.*

during his life, as well as their understanding of the issues and conditions surrounding the revelation of the verses of the *Qur'an*.¹⁶⁴

4. Legislation Preceding the Beginning of Islam

The majority of Muslim jurists consider the legislation of monotheistic religions – namely, Judaism and Christianity – to be binding. They cite many verses of the *Qur'an* to support this position. For example, they cite the following verses: “He has decreed for you the same system He ordained for Noah, and what We inspired to you, and what We ordained for Abraham, Moses, and Jesus: You shall uphold this system, and do not divide in it.”¹⁶⁵ However, three conditions must be met before applying the legislation preceding the beginning of Islam:¹⁶⁶

- The legislation must be transmitted by the *Qur'an* or the *Sunnah*.
- There is no mention of the issue in the Islamic law.
- The legislation does not contradict the Islamic law.

An example of considering the legislation of people before Islam as a source of law is the story of the Prophet Moses. The *Qur'an* provides that the Prophet Moses asked God to send Aaron, his brother, to assist him before the Egyptian authorities, since Aaron was more eloquent and articulate than Moses. In the *Qur'an*, Moses states: “My brother Aaron is more eloquent in speech than I: so send him with me as a helper to confirm my

¹⁶⁴ *Id.*

¹⁶⁵ The *Qur'an*, 42:13.

¹⁶⁶ IAD ALSULAMI, *USUUL AL-FIQH ALLADHĪ LA YASAU AL-FAQIH JAHLAH* [Principles of jurisprudence that a Jurist Must Know] 189-191 (2005).

truthfulness for I fear that they will reject me as a liar.”¹⁶⁷ This practice of the Prophet Moses shows that it is permissible to use somebody else as a representative in disputes. Therefore, the jurists argue that, since Moses used somebody else to represent him, others can lawfully do so as well; therefore, they argue that it is permissible for a defendant to hire a lawyer.¹⁶⁸ Although this story concerns the Prophet Moses, it continues to represent a good law for Muslims, since it is not contradicted by the *Qur’an* or the *Sunnah*.

5. *Isthasan* (Jurist Preferences)

Muslim jurists do not agree on one definition of *isthasan*; however, most jurists define it as evidence triggered in the mind of a Muslim jurist who is unable to explain its source.¹⁶⁹ It can be said that *isthasan* allows Muslim jurists to look for a fair solution in the event that strict analogy compromises the ideal of justice and fairness.¹⁷⁰ There is a disagreement among Muslim jurists in regards to using *isthasan* as a source of law. The opponents of *isthasan* argue that it is nothing but a guess or an arbitrary judgment that has no foundation; therefore, they reject *isthasan* and deny that it is an independent source of Islamic law. The proponents of *isthasan*, on the other hand, argue that *isthasan* should be used as an independent source of Islamic law.¹⁷¹ “To them *istihsan* is a means

¹⁶⁷ The *Qur’an* 28:34

¹⁶⁸ DEMBA GLO, AL-MUHAMAHA FI AL-FIHAH AL-ISLAMIA WA-AL-QANUN [Legal Profession in the Islamic Jurisprudence and Law] 174 (2003).

¹⁶⁹ IAD ALSULAMI, *supra* note 166, at 194.

¹⁷⁰ Mohammad Hashim Jamali, *Law and Society, the Interplay of Revelation and Reason in the Shariah*, in THE OXFORD HISTORY OF ISLAM, 122 (John L Esposito ed., 1999).

¹⁷¹ YUSHAU SODIQ, AN INSIDER'S GUIDE TO ISLAM 194 (2010).

of correcting mistakes of the law, especially when its application fails to achieve its objective or contradicts the spirit of Islam.”¹⁷²

6. *Istishab* (Presumption of Continuity)

Istishab literally means “companionship”; legally, it is used to indicate that facts that have existed in the past should be presumed to have remained as such for lack of evidence to establish any change.¹⁷³ One law drawn by scholars from the doctrine of *Istishab* as a source of law is the rule of presumption of innocence, as every person born is innocent. Thus, “[c]ertainty, may not, for example, be overruled by doubt, and an unproven claim should not affect the basic presumption of innocence and continuity of the existing right of the people under the *Shari’ah*.”¹⁷⁴

7. *Sadd Al-Dharai* (Blocking the Means)

This source of law is used to block any means that may result in evil. Specifically, it “implies blocking the means to an expected end that is likely to materialism if the means towards it is not obstructed.”¹⁷⁵ This particular source of law has added some flexibility to the Islamic law, as it allows the legislation branch to promulgate laws to prohibit certain acts that may lead to injustice.¹⁷⁶ According to the Muslim jurists, the words and deeds that lead to evil are of three types:

¹⁷² *Id.*

¹⁷³ MOHAMMAD HASHIM KAMALI, *supra* note 145, at 377.

¹⁷⁴ MOHAMMAD HASHIM KAMALI, *SHARI’AH LAW: AN INTRODUCTION* 168 (2008).

¹⁷⁵ MOHAMMAD HASHIM KAMALI, *supra* note 145, at 393.

¹⁷⁶ ANN BLACK, HOSSEIN ESMAEILI, NADIRSYAH HOSEN, *MODERN PERSPECTIVES ON ISLAMIC LAW* 16 (2013).

1. Means that inevitably lead to an evil, such as drinking alcohol, which will eventually lead to intoxication. Muslim jurists have agreed on blocking these types of means.¹⁷⁷

2. Means that are permissible but may be used to achieve an evil end; for example, marriage with the intention of divorce. Jurists are in dispute in regards to such means. While one group of jurists argues that they must be blocked, others disagree.¹⁷⁸

3. Means that serve an interest but could potentially lead to an evil. For example, even though accepting a gift is permissible and could serve an interest, some jurists argue that judges should not be allowed to accept gifts as they may be intended as bribes. Here, the evil should be blocked if it is greater than the interest, but it should not be blocked if the interest is greater than the evil.¹⁷⁹

8. *Istislah* (Public Interest)

Istislah allows the Muslim state to issue laws based on public benefits. According to Muslim jurists, benefits have three types.¹⁸⁰ The first type is *masalih muotabarah*, or accredited benefits. These benefits are “regulated by the lawgiver in the sense that a textual authority from the divine law could be found to prove their validity.”¹⁸¹ The second type of benefit is the nullified benefit, which is rejected by Islamic law because it

¹⁷⁷ IAD ALSULAMI, *supra* note 166, at 211-213.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 205.

¹⁸¹ MASHHAD AL-ALLAF, *MIRROR OF REALIZATION: GOD IS A PERCEPT, THE UNIVERSE IS A CONCEPT* 83 (2003).

could lead to a greater harm, such as stealing.¹⁸² While the thief can benefit from what he stole, the consequences of the stealing are greater than his benefit; therefore stealing should be prohibited. The third and final type of benefit is the unregulated benefit (*al-masalih al-mursalah*). This type of benefit is not directly regulated by the Islamic law but is generally considered to fall under the Islamic law. For example, placing a traffic light to facilitate traffic and prevent accidents, though not regulated by Islamic law, is a benefit that is considered to fall under Islamic law since it protects the lives of people, which are generally protected under Islamic law as one of the five necessities (discussed later in this chapter).¹⁸³

9. *Urf* (Custom)

Urf, which means custom, is considered to be source of law in Islam. That is, the customs of a group of people in a given society are given due recognition under the law.¹⁸⁴ *Urf* today is considered to be “a proof of Shari’ah and valid basis of judicial decision, especially in the area of *mu’amalat* [transactions].”¹⁸⁵ However, Muslim jurists have set four conditions in order for *urf* to be valid:¹⁸⁶

1. It must not contradict the *Qur’an* or the *Sunnah* of the Prophet.
2. It must be continual and dominant (that is, a few individual customs will not constitute *urf*).
3. It must exist at the time of the transaction.
4. It must not breach the clear requirement of the agreement.

¹⁸² *Id.* at 84.

¹⁸³ IAD ALSULAMI, *supra* note 166, at 206.

¹⁸⁴ ABDULLAH SAEED, ISLAMIC THOUGHT: AN INTRODUCTION 50 (2006).

¹⁸⁵ MOHAMMAD HASHIM KAMALI, SHARI’AH LAW: AN INTRODUCTION 54 (2008).

¹⁸⁶ SAIM KAYADIBI, ISTIHSAN: THE DOCTRINE OF JURISTIC PREFERENCE IN ISLAMIC LAW 39 (2010).

V. Saudi Criminal Law

A. Principles of Islamic Criminal Law

Islamic criminal law acknowledges some of the basic principles of criminal justice applied in secular countries. The principles applied in Islamic criminal law constitute what in the Western legal system is referred to as “due process of law,” regarding which most Muslim scholars are in agreement.¹⁸⁷ One of the fundamental principles in Islamic criminal justice is that no crime may exist or be punished in the absence of a law outlawing the relevant act as criminal.¹⁸⁸ For emphasis, this was repeated many times in the *Qur’an*, which states: “And We never punish until We have sent a Messenger [to give warning].”¹⁸⁹ This principle can be seen as the equivalent of the well-established rule of criminal justice: “no punishment without law.”¹⁹⁰ Another verse states, “[We sent] messengers as the givers of good news and as warners, so that people should not have a plea against Allah after the [coming of] messengers; and Allah is Mighty and Wise.”¹⁹¹ The principle is emphasized in some other chapters of the *Qur’an*

¹⁸⁷ M. Cherif Bassiouni, *Crimes and the Criminal Process*, 12 Arab Law Quarterly 269, 274 (1997).

¹⁸⁸ MUHAMMAD TAHIR-UL-QADRI, ISLAMIC CONCEPT OF CRIME 14 (2005).

¹⁸⁹ The *Qur’an* 17:15.

¹⁹⁰ This principle is known as the “principle of legality.” It was recognized in the United States in 1791 by the enactment of the Fifth Amendment to the U.S. Constitution, which states: “No person shall be ... deprived of life, liberty, or property without due process of law.” THOMAS GARDNER, TERRY ANDERSON, CRIMINAL LAW 13 (2008).

¹⁹¹ The *Qur’an* 4:165.

as well.¹⁹² Accordingly, as is the case with secular laws, Muslims are free to practice their freedoms in any manner they choose unless they are otherwise restricted.¹⁹³

Similarly, Islamic criminal law does not punish for crimes committed in the past, before the issuance of the laws. A verse in the chapter of al-Maeda states: “God forgives what is past.”¹⁹⁴ The Prophet himself applied this rule in what is known as the “Final Pilgrimage,” in which he made it clear that there would be no punishments for crimes committed before the advent of Islam, nor would acts of vengeance be allowed for those crimes. In other words, Islam did not punish people for what would later become criminal acts if they were committed during pre-Islam society.¹⁹⁵

Another important principle is the presumption of innocence, which may be considered to fall under the rule of evidence in Islamic law and which is applied to all categories of crimes. As a result, the burden of proof lies upon the accuser or prosecuting authority, who are “required to convince the court that the accused is guilty beyond reasonable doubt.”¹⁹⁶ This rule is based on the Prophet’s (PBUH) statement that “the burden of proof is upon the claimant and the taking of an oath is upon the one who denies [the allegation].”¹⁹⁷ Omar ibn Al-khattaab also addressed one of the judges of his time, saying that “the onus of proof is upon the plaintiff, and the taking of an oath is upon the one who denies [the allegation] ... If a person claims a missing right or asserts that he is

¹⁹² The *Qur’an* 28:59 states: “Nor was thy Lord the one to destroy a population until He had sent to its centre a messenger, rehearsing to them Our Signs; nor are We going to destroy a population except when its members practise iniquity.”

¹⁹³ ABD AL-QADIR AWDAH, *AL-TASHRI‘ AL-JINA’I AL-ISLAMI MUQARANAN BI-AL-QANUN AL-WAD’I* [Islamic and Comparative Criminal Law] 115 (1960).

¹⁹⁴ The *Qur’an* 5:95.

¹⁹⁵ M. Cherif Bassiouni, *supra* note 187, at 272.

¹⁹⁶ Mahir Abdulmajeed Abbood, *supra* note 4, at 131-132.

¹⁹⁷ *Id.*

in possession of evidence, appoint a time-limit for him to reach. If he presents evidence, give him his right; otherwise, decide against him, for this is most conducive to the dispelling of doubt and the providing sufficient excuse.”¹⁹⁸ In addition, any doubt in the case should be used in favor of the defendant or the accused. In other words, in the event that doubt exists, the prescribed penalty should not be applied. For example, a judge has to accept circumstantial evidence if it is favorable to a defendant but to give such evidence no weight if it is unfavorable to the defendant.¹⁹⁹

B. Categories of Crimes in Islam

Crimes in Islam are classified into three categories: *hudud*, *qesas* and *ta'zir*. *Hudud* crimes are “God’s crimes” (crimes against God), which means the judge and the state do not have the right to alter the punishment, nor do the victims have the right to forgive the offender. On the other hand, *qesas* crimes are committed against individuals. Though a *qesas* crime has a specific punishment, the victim or the victim’s family can elect to forgive the offender. The last category is *ta'zir* crimes. In these crimes, the judge has the discretion to name the punishment on a case-by-case basis. These types of crimes will be discussed in detail in the following sections.²⁰⁰

1. Hudud Crimes and Their Penalties

“Hudud crimes are defined as offences with fixed, mandatory punishments (*ugubat muqaddra*) that are based on the Koran or the Sunna.”²⁰¹ The punishments prescribed for *hudud* crimes are consistent at all times once the standard of proof is met;

¹⁹⁸ *Id.*

¹⁹⁹ M. Cherif Bassiouni, *supra* note 187, at 272.

²⁰⁰ ABD AL-QADIR AWDAH, *supra* note 193, at 78-80.

²⁰¹ RUDOLPH PETERS, CRIME AND PUNISHMENT IN ISLAMIC LAW: THEORY AND PRACTICE FROM THE SIXTEENTH TO THE TWENTY-FIRST CENTURY 53 (2005).

they may not be varied, increased, waived or negotiated by the victim or the victim's family, since they are characterized as offences against God and the public at large. For the same reason, the judge cannot use his discretion to vary the punishment.²⁰² There are seven *hudud* crimes in Islam: *Zina* (adultery), *Sariga* (theft); *Gazhf* (slander) *Shorb al-Khamr* (drinking alcohol); *Haraba* (highway robbery); *Baghi* (transgression), and *Ridda* (apostasy).

Zina (Adultery)

Zina is defined as “the crime of sexual relationship between persons of the opposite sex who are not married to one another.”²⁰³ It is worth noting that the crime of *zina* is different from the crime of rape. In the crime of *zina*, consent is presupposed on the part of both parties; conversely, some jurists argue that, in the case of rape, where “sexual intercourse is consensual for one party and non-consensual for the other” the court then will exonerate the non-consenting party and punish the perpetrator.²⁰⁴ The aim of this rule is to prevent criminals from avoiding the *hudud* punishment in rape cases. If this rule is not applied, the perpetrator may get away with the crime of rape despite the fact that his partner may have not consented to the sexual intercourse.

To prove a *zina* offense, four witnesses must testify to the act of sexual intercourse between the perpetrators. All witnesses must be Muslim; must be mature (as defined by Islamic law); and must be of good character, justice and reason.²⁰⁵

Alternatively, the offenders may confess to committing the crime. However, the

202 MOHAMED AL AWABDEH, HISTORY AND PROSPECT OF ISLAMIC CRIMINAL LAW WITH RESPECT TO THE HUMAN RIGHTS 27-29 (2005).

²⁰³ M. Cherif Bassiouni, *supra* note 187, at 280.

²⁰⁴ Tarek Badawy, *Towards a Contemporary View of Islamic Criminal Procedures: A Focus on the Testimony of Witnesses*, 23 Arab L.Q. 269, 283 (2009).

²⁰⁵ *Id.* at 293.

confession must be given four times before a judge on four different days.²⁰⁶ Notably, as a result of these requirements, it is hard to prove the crime of *zina* unless “the act is performed openly and publicly.”²⁰⁷

If the evidence meets these requirements, a *zina* punishment must be warranted. The punishment is based on the marital status of the offenders.²⁰⁸ If the offenders are unmarried, the punishment is a hundred lashes. This flogging must be witnessed by a large number of people in the Muslim community, pursuant to the chapter of *al-Nour*, which states: “The woman and the man guilty of adultery or fornication flog each of them with a hundred stripes. Let not compassion move you in their case; in a matter prescribed by God, if ye believe in God and the last day, and let a party of the believers witness their punishment.”²⁰⁹ In addition to flogging, an unmarried offender is to be exiled from his community for one year. For a married offender, the punishment is flogging with a hundred lashes and stoning to death.²¹⁰

The punishment of exiling an unmarried offender and stoning a married one are based on the *Sunnah*, which states: “Take from me as regard to fornication. Flog both of them with 100 lashes and keep them away from Muslim society for a year. As for a married woman and a man guilty of adultery, flog them with 100 stripes and stone them.”²¹¹ It is worth noting that the Prophet applied the stoning penalty to a man and a

²⁰⁶ M. Cherif Bassiouni, *supra* note 187, at 281.

²⁰⁷ *Id.*

²⁰⁸ TERANCE D. MIETHE AND HONG LU, PUNISHMENT: A COMPARATIVE HISTORICAL PERSPECTIVE 168 (2005).

²⁰⁹ The *Qur'an* 24:4.

²¹⁰ MATTHEW ROSS LIPPMAN, SEAN MCCONVILLE AND MORDECHAI YERUSHALMI, ISLAMIC CRIMINAL LAW AND PROCEDURE: AN INTRODUCTION 42 (1988).

²¹¹ M. Cherif Bassiouni, *supra* note 187, at 280.

woman who willingly plead guilty to their crimes. On many occasions, however, the Prophet tried to find areas of doubt to avoid the stoning penalty. In one incident, he refused to apply the *hudud* to a woman who confessed to committing adultery while her husband was away, even though she provided her pregnancy as proof. Initially, the Prophet refused to stone her because of her pregnancy. When she returned after delivering the baby, the Prophet also refused to apply the *hudud* for the interest of the infant.²¹² Though the woman was finally executed,²¹³ the underlying message here was that had the woman never come back, the Prophet might never have sought to execute her. Her failure to return would have been regarded as doubt or a withdrawal of her guilty plea, as a result of which a *zina hudud* would not be applied.

Sariqa (Theft)

Sariqa, or theft, can be defined as “the taking of property belonging to another.” Such property must be of a certain value.²¹⁴ The *Qur’an* establishes punishment for *sariqa* as follows: “As to the thief, male or female, cut off his or her hands, a punishment by way of example, from God for their crimes.”²¹⁵ For this punishment to be used, the criminal act must have been committed with the premeditated intent to deprive another person of his property without his approval.²¹⁶ However, the elements of the crime and its required evidence are not specified in the *Qur’an*; thus, Muslim jurists disagree as to what qualifies as a *sariqa* crime for which a *hudud* punishment is warranted. For example, some jurists require that “the taking be by virtue of breaking into a house or a

²¹² *Id.*

²¹³ *Id.*

²¹⁴ MATTHEW ROSS LIPPMAN, SEAN MCCONVILLE AND MORDECHAI YERUSHALMI, *supra* note 210, at 45.

²¹⁵ The *Qur’an* 5:38.

²¹⁶ ABDELWAHAB BOUHDIBA AND MUHAMMAD MA'RUF DAWALIBI, THE INDIVIDUAL AND SOCIETY IN ISLAM 309 (1998).

safe place or a container to remove the object.”²¹⁷ Nonetheless, it is agreed upon that a *hudud* punishment would not apply to a hungry person who steals to feed oneself. As with other *hududs*, the penalty will not apply if the crime is not proven beyond a reasonable doubt in accordance with the Islamic rules of evidence. If reasonable doubt is established, the punishment will be avoided or a lesser punishment will apply the punishment of *ta 'zir*.²¹⁸

Gadzhf (Slander)

Gazhf (slander) is defined as “the allegation that someone has had unlawful intercourse of whatever kind.”²¹⁹ In other words, it is the false accusation of adultery. *Gazhf* was established to protect the integrity and good reputation of various individuals and to prevent baseless allegations of adultery against all persons.²²⁰ “The protection of the family and the whole of society is yet another intended objective.”²²¹ The authorizing verse states: “Indeed, those who [falsely] accuse chaste, unaware and believing women are cursed in this world and the Hereafter; and they will have a great punishment.” The punishment for this crime is 80 lashes; in addition, the convict will lose his capacity to testify as a credible witness for the rest of his or her life, as the *Qur'an* also states: “And those who accuse chaste women and then do not produce four witnesses – lash them with eighty lashes and do not accept from them testimony ever after. And those are the defiantly disobedient.”²²²

²¹⁷ *Id.*

²¹⁸ M. Cherif Bassiouni, *supra* note 187, at 279.

²¹⁹ RUDOLPH PETERS, *supra* note 201, at 63.

²²⁰ M. ABDEL HALEEM, ADEL OMAR SHARIF, KATE DANIELS, *CRIMINAL JUSTICE IN ISLAM: JUDICIAL PROCEDURE IN THE SHARI'AH* 39 (2003).

²²¹ *Id.*

²²² The *Qur'an* 24:4.

Shorb al-Khamr (Drinking Alcohol)

Shorb al-Khamr (the consumption of alcoholic beverages) is not allowed in Islam, as it is prohibited by the following verse:

O you who have believed, indeed, intoxicants, gambling, [sacrificing on] stone alters [to other than Allah], and divining arrows are but defilement from the work of Satan, so avoid it that you may be successful.²²³

This verse does not specify a punishment for drinking alcohol; rather, the punishment was later established by the Prophet in the following Hadith: “He who drinks wine, whip him.” As the Prophet did not specify the number of lashes for this punishment, the specific penalty was determined as 80 lashes during the rule of Omer bin al-Khatab, the Second Muslim orthodox ruler. However, Imam al-Shafie, a leading Muslim jurist, argued that the *hudud* punishment for drinking alcohol should be 40 lashes, as this was the penalty applied by the Prophet.²²⁴

Haraba (Highway Robbery)

The majority of Islamic jurists equate the crime of *haraba* with highway robbery. It is associated with a premeditated criminal intent of endangering people’s lives and is normally committed by a number of perpetrators taking advantage of civilian people are on the road.²²⁵ Therefore, it is considered a heinous crime. The *Qur’an* defines the crime and its punishment in verse 33 of Surat al-Ma’eda: “The punishment of those who wage war against God and his Apostle, and strive with might and main for mischief through the

²²³ The *Qur’an* 5:90.

²²⁴ ABD AL-QADIR AWDAAH, *supra* note 193, at 649.

²²⁵ M. Cherif Bassiouni, *supra* note 187, at 279-280.

Land is execution, or crucifixion, or the cutting off of hands and feet from opposite sides or exile from the Land.”²²⁶

Thus, *haraba* has four kinds of penalties: execution, execution with crucifixion, cutting off of hands and feet, and exile.²²⁷ Execution applies when the *haraba* results in the killing of a victim, in which case *hudud* punishment must be applied. Execution and crucifixion as a combined punishment applies when the offender both kills and steals. The third penalty is cutting off hands and feet from opposite sides; this punishment applies when the offender takes money (usually at gunpoint) and does not kill. The punishment is more stringent than that for regular theft because it is usually committed on the highway, where travelers are most vulnerable and thus the crime is easier to commit than a regular theft. The final punishment is the exile of the perpetrator. This punishment applies when the highway perpetrator does not steal or kill but does frighten the victims by committing an act of terror. Since no loss has resulted, the offender is sent away, for a limited period of time, from the community in which he or she committed the crime.²²⁸

Baghi (transgression)

The crime of *baghi* is defined as “the intentional, forceful overthrow or attempted overthrow of the legitimate leader (*imam*) of the Islamic state.”²²⁹ This definition echoes the language of the authorizing verse of *Surat al Hujrat*, which states: “If two parties among the believers fall into a quarrel, make ye peace between them, but if one of them transgresses beyond bonds against the other, then fight ye all against him who

²²⁶ *Id.* at 280.

²²⁷ ABD AL-QADIR AWDAH, *supra* note 193, at 656.

²²⁸ *Id.* at 656-661.

²²⁹ MATTHEW ROSS LIPPMAN, SEAN MCCONVILLE AND MORDECHAI YERUSHALMI, *supra* note 210, at 49.

transgresses until he complies, then make peace between them with justice.” However, application of the crime has proven difficult in real life since “Muslims are entitled to rebel against unjust rulers.”²³⁰

The penalty for *baghi*, according to the previous verse of *Surat al-Hujrat*, is death in terms of war against the transgressor. However, Muslims are required to attempt to resolve the dispute peacefully between the parties to the conflict before waging a war against the transgressors. If the peace efforts fail and one party continues to transgress against the other, then Muslims must ally with those transgressed against until the transgressors are defeated or surrender and recognize their wrongdoing against not only their fellow Muslims but God as well. In this case, transgressors who have been killed as a result of the war are considered to have been punished by *hudud*, and those who are captured during the war are executed.²³¹ However, if the transgressors are arrested or if they surrender, a lesser punishment will be applied at the judges’ discretions.²³²

Ridda (Apostasy)

The crime of *ridda* takes place “when a Muslim rejects Islam by word or deed or turns against Islam by word or deed,” such as denying “the existence of God, or the Prophets, or the sanctity of the *Qur’an* and its mandates.”²³³ The *Qur’an* stipulates: “And whoever of you turns from his religion and dies disbelieving, their works have failed in this world and the next. Those are the inhabitants of fire: therein they shall dwell forever.” This verse of the *Qur’an* does not directly prohibit Muslims from changing

²³⁰ M. Cherif Bassiouni, *supra* note 187, at 278.

²³¹ MATTHEW ROSS LIPPMAN, SEAN MCCONVILLE AND MORDECHAI YERUSHALMI, *supra* note 210, at 49.

²³² *Id.*

²³³ M. Cherif Bassiouni, *supra* note 187, at 277.

their religion, but it does describe the consequences of doing so in both this life and the next. The act of *ridda* was later outlawed by the *Sunnah*, in which the Prophet established the death penalty as the *hudud* punishment for this crime.²³⁴

The death penalty was prescribed for the crime of *ridda* because the abandonment of the Islamic religion was viewed as high treason. However, before the sentence is imposed for such crime, the convicted person will be given a “grace period” of several days to rethink his position, during which officials visit the apostate and encourage him to return to the tenets of Islam. Following this period, “if these efforts fail, he is then executed.”²³⁵

The application of this punishment is controversial, as some contemporary Muslim jurists argue that, during the time of the Prophet, the punishment of apostasy was applied only to those who abandoned their religion and at the same time participated in an existing armed conflict between Muslims and their enemies.²³⁶ Thus, they argue that Muslims should be allowed to kill the apostate only during war and only to defend themselves. They further argue that people are free to change their religion in accordance with the *Qur’anic* verse that states: “There is no compulsion in religion.”²³⁷

2. *Qesas* Crimes

The second category of crimes in the Islamic criminal jurisprudence is *qesas*, which means equivalence or equality and “implies that a person who has committed a given violation will be punished in the same way and by the same means that he used in

²³⁴ *Id.*

²³⁵ TERANCE D. MIETHE AND HONG LU, *supra* note 208, at 166.

²³⁶ MUHAMMAD SALIM ‘AWWA, *FI USUL AL-NIZAM AL-JINA’I AL-ISLAMI* [Fundamentals of Islamic Criminal Law] 159 (1979).

²³⁷ The *Qur’an* 2:256.

harming another person.”²³⁸ By its definition, *qesas* punishment resembles the biblical principle of “eye for eye, tooth for tooth.”²³⁹ There are five *qesas* crimes identified by the majority of Muslim jurists: murder, voluntary homicide (manslaughter), involuntary homicide, intentional crimes against persons, and unintentional crimes against persons.²⁴⁰

Unlike *hudud* crimes, the wishes or requests of the victims or their families in *qesas* offenses are honored. For example, in a premeditated murder, if the defendant has been found guilty, the victim’s family can ask for the death penalty or for *diya* (monetary damages) to be paid to the victim’s family. Though *qesas* punishment is based on retribution and monetary damages, pardon is highly preferred as an option to be pursued by Muslims, pursuant to the Islamic teaching of forgiveness. Another difference between these crimes and *hudud* crimes is that the judge has to inform the victim’s family of their right to choose between punishments, such as execution or *diya*. If they ask for execution, the judge must honor their request. Conversely, if they elect to forgive, the judge has to yield to their request, and the death penalty cannot then be imposed. Giving a victim’s family this right acknowledges the fact that they are those most directly affected by the loss of their loved one.²⁴¹

3. *Ta’zir*

Ta’zir crimes are defined as all forbidden or sinful acts that do not have fixed punishments (like *hudud* crimes) and do not amount to *qesas* crimes. In other words,

²³⁸ ABDELWAHAB BOUHDIBA, MUHAMMAD MA‘RUF DAWALIBI, *supra* note 216, at 309.

²³⁹ Tarek Badawy, *supra* note 204, at 279.

²⁴⁰ Obi N. I. Ebbe and Jonathan Odo, *The Islamic Criminal System, in* COMPARATIVE AND INTERNATIONAL CRIMINAL JUSTICE SYSTEMS: POLICING, JUDICIARY, AND CORRECTIONS 217, 221 (Obi N. I. Ebbe (ed.), 2013).

²⁴¹ ABDELWAHAB BOUHDIBA, MUHAMMAD MA‘RUF DAWALIBI, *supra* note 216, at 665-670.

ta'zir crimes are not prescribed in the *Qur'an* or the *Sunnah*; rather, they are crimes with discretionary punishments defined by the Muslim ruler to meet the emerging needs of the people.²⁴² Muslim judges also have “the authority to derive a list of activities to be defined as *ta'zir* crimes through *ijtihad* (logical and independent reasoning).”²⁴³ The ruler and judges define these crimes and punishments to protect “the five essential guarantees of Islam”: religion, life, intellect, procreation and property.²⁴⁴ The following section will explain these five guarantees in more detail. *Ta'zir* punishments often consist of reprimand, threats, imprisonment, exile, boycott, public disclosure of the offense, flogging, and execution.²⁴⁵

C. Legislative Goals of Criminal Punishment in Islam

Islamic criminal law aims at conserving the interest of people. Muslim jurists divide the interest of people into five interests (necessities); list in order from most to least important, these interests are: religion, life, intellect, procreation and property. Because these necessities are deemed important for human beings' lives, Muslims are required to maintain them through laws and to avoid violating them through acts that could amount to crimes. To achieve these goals, Islam uses the penalties of *hudud*, *qesas* and *ta'zir* to punish, deter and rehabilitate perpetrators.²⁴⁶

²⁴² Obi N. I. Ebbe and Jonathan Odo, *supra* note 240, at 221.

²⁴³ SHAHID M. SHAHIDULLAH, *COMPARATIVE CRIMINAL JUSTICE SYSTEMS: GLOBAL AND LOCAL PERSPECTIVES* 372 (2012).

²⁴⁴ MATTHEW ROSS LIPPMAN, SEAN MCCONVILLE AND MORDECHAI YERUSHALMI, *supra* note 210, at 52.

²⁴⁵ *Id.* at 49.

²⁴⁶ Taha Mohamed Farris, *Legitimate Purposes of the Criminal System in Islam*, 13 (2008).

1. Preservation of Religion

The religion to be conserved here is Islam. In Verse 19 of *Surat Ali Imran*, the *Qur'an* stipulates: “Indeed, the religion in the sight of Allah is Islam.”²⁴⁷ Accordingly, Muslims are required to maintain the religion of Islam. To that end, the *Qur'an* prescribes the punishment of *hudud* to the crime of apostasy (*ridda*). This crime and its punishment were established against some individuals who tried to mock the religion by declaring their conversion to Islam, only to return to their previous religions declaring that Islam was not a good religion to follow. In so doing, *shari'ah* tries to maintain new Muslim converts and those who were contemplating the idea of converting to Islam.²⁴⁸

2. Preservation of Life

Preservation of life ranks second as the most important priority to be preserved after religion. To preserve human life, God has forbidden the killing of another human being unless it is legally justified. The *Qur'an* states: “And do not kill the soul which Allah has forbidden, except by right. And whoever is killed unjustly – We have given his heir authority, but let him not exceed limits in [the matter of] taking life. Indeed, he has been supported [by the law].”²⁴⁹ To enforce this prohibition, penalties were set for crimes committed against human beings' lives and bodies, which are called *qesas* crimes. The penalties range from the death penalty or monetary damages to a discretionary penalty that may be imposed by the judge whenever is needed for determent purposes.²⁵⁰

²⁴⁷ The *Qur'an* 3:19: “And whoever desires other than Islam as religion - never will it be accepted from him, and he, in the Hereafter, will be among the losers.” The *Qur'an* 3:85.

²⁴⁸ Ali bin Abdelrahman, *Legislative Goals for Criminal Punishments in Islam*, 8 (2007).

²⁴⁹ The *Qur'an* 17:33.

²⁵⁰ Taha Mohamed Farris, *supra* note 246, at 16-17.

3. Preservation of Intellect

The mind comes after religion and life in importance. To conserve the mind from damage and injury, God has prohibited the consumption of any substance that could affect the mental capacity of human beings. Specifically, the consumption of alcohol is a crime against God that is known as a *hudud* crime. Being of that nature, the penalty for drinking alcohol is prescribed in the *Qur'an* and must be strictly applied once approved. The rationale for prohibiting the consumption of alcohol is that alcohol causes people to lose control of their behavior and thus makes them more likely to commit offensive act against others, which is also damaging to themselves and to society.²⁵¹

4. Preservation of Procreation

This interest is concerned with the existence of human beings and their familial relationships. To maintain this interest, the *Qur'an* instructs Muslims to marry and also prohibits sexual relationship between unmarried people. Further, it prescribes punishments for committing the act of *zina* (adultery). The rationale for incriminating *zina* is that non-marital sexual relationships will produce children, whose paternity could be hard to determine.²⁵²

5. Preservation of Property

Preservation of wealth ranks last in the theory of necessity (public interests). Therefore, it can be trumped by any of the previous four interests. The wealth to be preserved is that which is legally earned in accordance with the principles of *Shari'ah*.²⁵³ In other words, Muslims are not allowed to receive money or wealth for which they do

²⁵¹ Ali bin Abdelrahman, *supra* note 248, at 9.

²⁵² Taha Mohamed Farris, *supra* note 246, at 16-17.

²⁵³ MASHHAD AL-ALLAF, *supra* note 181, at 88.

not work, with the exception of legitimate gifts and estate heritage.²⁵⁴ The *Qur'an* states: “And do not consume one another’s wealth unjustly or send it [in bribery] to the rulers in order that [they might aid] you [to] consume a portion of the wealth of the people in sin, while you know [it is unlawful].”²⁵⁵

²⁵⁴ Taha Mohamed Farris, *supra* note 246, at 18.

²⁵⁵ The *Qur'an* 2:188.

Conclusion

The history of the people who lived in what would become Saudi Arabia dates back to 853 B.C.,²⁵⁶ when Arabian tribes led a nomadic life in the Arabian Peninsula and followed different religions, including Judaism and Christianity. With the emergence of Islam, the Arabian Peninsula entered a new phase of history. Islam dominated the lives of Muslims; it changed their social behavior and the norms of life in the peninsula. Saudi Arabia's history began in 1744 as a coalition between Muhammad ibn Saud and Muhammad ibn Abdulwahhab.²⁵⁷ The former was the ruler of a district in the central peninsula, while the latter was a religious thinker who preached for strict adherence to Islam following the teaching of *Hanbali's* school. According to their agreement, Saud's family was to govern according to the teachings of Abdulwahhab. After Saud's death, his heirs established the second and third Saudi states, following in the steps of the two founders. In 1932, the third Saudi state was named the Kingdom of Saudi Arabia.

For a long time, Saudi Arabia applied classical Islamic law. In a new development, however, the country has instituted legal reform. Consequently, the country now has its first constitutional document, which recognizes three branches of government. Furthermore, the country has gradually introduced judicial codes, which has led to the dual system in Saudi Arabia. This chapter focused on Saudi Arabia's history and legal system, which, as previous researchers have noted, "has not received as much scholarly attention as deserves."²⁵⁸ The chapter provided an overview of the history of Saudi Arabia, focusing on the Saudi state that was established by Muhammad ibn Saud

²⁵⁶ SAAD ABULHAB, *supra* note 64, at 68.

²⁵⁷ Saudi Embassy in the United States: <http://www.saudiembassy.net/about/country-information/history.aspx>

²⁵⁸ ANDREW MARCH, *SHARI'A (ISLAMIC LAW)* 21 (2010).

and Shaykh Muhammad ibn Abdulwahhab. The second part of the chapter focused on the legal system of Saudi Arabia and discussed the legal reforms initiated by King Fahd in 1992.²⁵⁹ Finally it explained the Saudi criminal law.

²⁵⁹ The Basic Law, *supra* note 1.

Chapter Three: Origin and Development of the Legal Profession in Islam

Introduction

The legal profession in the modern era initially emerged in Europe around the 13th century.²⁶⁰ However, the profession did not emerge in the Muslim world until the late 19th century. Trials in Muslim courts prior to that time were simple and straightforward.²⁶¹ Judges were responsible for applying Islamic law to the cases that came before them. Thus, some Muslims argue that the practice of law was adopted from the West and that it contradicts Islamic traditions. They further call for abolishing the legal profession so as to restore the Islamic judicial system. On the other hand, some jurists argue that even though the practice of law evolved in the West, it was practiced in the Islamic legal system as well, just under a different name: adversarial agency, or *Wakalah-bil-Khusumah*.²⁶²

This chapter examines the origin and development of the legal profession in the Muslim world. Part I of the chapter presents a historical background of Islamic courts prior to the emergence of the legal profession. Part II introduces the Islamic doctrine of adversarial agency, *Wakalah-bil-Khusumah*. Part III lists the requirements for agents according to Islamic jurisprudence. Part IV explains the process that led to the establishment of the legal profession in the Islamic world. Part V sheds light on Muslim

²⁶⁰ JAMES A. BRUNDAGE, *THE MEDIEVAL ORIGINS OF THE LEGAL PROFESSION: CANONISTS, CIVILIANS, AND COURTS* 1 (2008).

²⁶¹ ABDULRAHMAN AL-HUMAIDI, *AL-QADA WA-NIDAMH FI AL-KITAB WA-AL-SUNNAH* [The Judiciary and its System in the *Qur'an* and *Sunnah*] 298 (1984).

²⁶² *Wakalah-bil-Khusumah*, is defined as: “a delegation of one’s rights to legal representation to someone who has knowledge and expertise in legal affairs to represent him/her in a dispute before a court of law.” Salih Bin Ghanim Alsaldan, *Adversarial Agency from Islamic and Legal Perspectives* 14. Accessed Dec 12, 2012, from http://www.alsadlan.net/publish/cat_index_21.shtml

jurists' views on the legal profession and presents the study's position regarding the arguments against and for the legal profession.

I. Historical Background

Historically, the term “practice of law” has not been recognized in Islamic jurisprudence. The term and the concept of “practice of law” was transplanted to the Islamic legal culture from the Western legal system in 1876.²⁶³ Judges in Muslim courts were fully responsible for interpreting and applying the rules of *Shari'ah* to any dispute that came before them. In a typical case, the role of parties to a dispute would be limited to the telling of facts. Thus, each party represented him- or herself. After hearing the facts and the evidence (if any), the judge would interpret and apply the rule of *Shari'ah* to the facts without the help of a lawyer or someone knowledgeable in *Shari'ah*.²⁶⁴

In the earliest days of Islam, the Muslim ruler himself was the judge. During the time of Prophecy, the Prophet was the judge, as ordered by God. The *Qur'an* states: “And so judge (you, O Muhammad) between them by what Allah has revealed.”²⁶⁵ The *Qur'an*, on the other hand, instructs people to refer to the Prophet in the case of disputes and obey his rulings. The *Qur'an* states:

They will not [truly] believe until they make you [O Muhammad] judge concerning that over which they dispute among themselves and then find within themselves no discomfort from what you have judged and accept in [full, willing] submission.²⁶⁶

²⁶³ AHMED FATHY ZAGHLOUL, AL-MUHAMAHAH [The Legal Profession] 64 (1900).

²⁶⁴ ABDULRAHMAN AL-HUMAIDI, *supra* note 261, at 298.

²⁶⁵ The *Qur'an* 5:48.

²⁶⁶ The *Qur'an* 4:65.

Nonetheless, due to the expansion of the Islamic state, Muslim rulers nominated deputies to represent them in other parts of their states. For example, the Prophet sent Muadh ibn Jabal to Yemen to judge among the people of Yemen.²⁶⁷ It seems, however, that the deputies were not just judges; since they represented the Prophet or other rulers, they were governors as well.²⁶⁸ In fact, in many cases, “their functions involved far more provincial administration as military commanders than anything having to do with law.”²⁶⁹

The Prophet died in 632 C.E. and was succeeded by four orthodox Muslim rulers (Abu Bakr, Umar, Uthman, and Ali) in what is known as the *Rashidun* era (632-661).²⁷⁰ The four orthodox Muslim rulers “inherited the judicial powers exercised by the Prophet during his lifetime and served as arbitrators of disputes.”²⁷¹ The judicial procedures during the era of the Prophet Muhammad and those of his companions were simple and straightforward.²⁷² Litigants, therefore, did not need too much help to articulate their claims or defend themselves. This system continued through the governing of Umayyad (661-750 C.E.).²⁷³

As noted above, during these three eras (Prophecy, *Rashidun*, and Umayyad), the ruler himself was the judge.²⁷⁴ Muslims were instructed to obey the ruler-judge. The

²⁶⁷ MUHAMMAD AIZOHEILY, *supra* note 108, at 66.

²⁶⁸ WAEL B. HALLAQ, THE ORIGINS AND EVOLUTION OF ISLAMIC LAW 34-40 (2005).

²⁶⁹ *Id.* at 31.

²⁷⁰ SAMI ZUBAIDA, LAW AND POWER IN THE ISLAMIC WORLD 6 (2003).

²⁷¹ MUHAMMAD KHALID MASUD, RUDOLPH PETERS DAVID & STEPHEN POWERS, *Qadis and Their Courts: An Historical Survey*, in DISPENSING JUSTICE IN ISLAM: QADIS AND THEIR JUDGEMENTS 1, 8 (2006).

²⁷² ABDULRAHMAN AL-HUMAIDI, *supra* note 261, at 236.

²⁷³ MUHAMMAD AIZOHEILY, *supra* note 108, at 213.

²⁷⁴ SAUD AL-DREEB, AL-TANZIM AL-QADAI FI AL-MAMLAKAH AL-ARABIYAH AL-SAUDIYAH FI SAW AL-SARIAH AL-ISLAMIYAH [Organization of the Judiciary in the

Qur'an states: "O you who believe! Obey Allah, and obey the Messenger, and those in command among you."²⁷⁵ The Prophet also instructs Muslims to obey the ruler even if they are not comfortable with his ruling: "It is obligatory upon you to listen and obey the orders of the ruler in prosperity and adversity, whether you are willing or unwilling, or when someone is given undue preference over you."²⁷⁶ He further urged Muslims to be patient when their rulers do things they dislike: "Whoever notices something which he dislikes done by his ruler, then he should be patient, for whoever becomes separate from the company of the Muslims even for a span and then dies will die as those who died in the pre-Islamic period of ignorance (as rebellious sinners)."²⁷⁷

For these reasons, Islamic jurisprudence did not initially recognize the term "practice of law," and Muslim jurists do not agree on a universal definition of the term.²⁷⁸ Nonetheless, for clarity, this study adopts the following definition of the practice of law:

The professional work of a duly licensed lawyer, encompassing a broad range of services such as conducting cases in court, preparing papers necessary to bring about various transactions from conveying land to effecting corporate mergers, preparing legal opinions on various points of law, drafting wills and other estate planning documents, and advising

Kingdom of Saudi Arabia in the Light of Islamic *Shari'ah* Law and the Judiciary System] 167 (1999).

²⁷⁵ The *Qur'an* 4:59.

²⁷⁶ The Book of Miscellany, Hadith 667, available at <http://sunnah.com/riyadussaliheen/1/667>

²⁷⁷ Sahih al-Bukhari, Hadith 7054, available at <http://sunnah.com/bukhari/92/7>

²⁷⁸ Article 1 of the Saudi Code of Law Practice defines the practice of law as the "representation of third parties before courts of law, the Board of Grievances, and other committees as may be set up pursuant to laws, decrees and decisions to consider the cases falling within their respective jurisdictions. It shall also mean rendering consultancy services based on the principles of *Shari'ah* and the rule of law." Code of Law Practice, *supra* note 7, Art. 1.

clients on countless types of legal questions. The term also includes activities that comparatively few lawyers engage in but that require legal expertise, such as drafting legislation and court rules.²⁷⁹

II. Adversarial Agency in Islam

As a rule, “[c]lassical fiqh [Islamic jurisprudence] prefers that litigants appear in person to present their cases to the judge.”²⁸⁰ However, this does not mean that a litigant is not allowed to hire another person to represent him or her in court. In fact, precedents exist in early Islamic history in cases in which Muslims appointed another person to represent them in front of a judge under what is known as the doctrine of *Wakalah-bil-Khusumah*, or adversarial agency. The word *Wakalah* means to guard; legally, *Wakalah* is “a contract of agency,” where an agent, known as *Wakal*, agrees to represent another person, known as *Muwakil*.²⁸¹ According to the majority of Muslim jurists, *Wakalah* is permissible in many different matters, including but not limited to *Khusumah*. *Kusumah* means adversarial; legally, it refers to a discussion between two different parties regarding a manner of contention or disagreement.²⁸² It is worth noting that Muslim jurists and scholars used the term *Wakalah-bil-Khusumah*, adversarial agency, instead of the term *Muhamah*, or lawyering, in the early history of Islamic jurisprudence.²⁸³ Therefore, some Islamic jurists have argued that the term “adversarial agency” is the

²⁷⁹ BLACK’S LAW DICTIONARY 1191-92 (7th ed. 1999).

²⁸⁰ Liaquat Ali Khan, *Advocacy Under Islam and Common Law*, 45 San Diego L. Rev. 547, 578 (2008).

²⁸¹ SHAHZAD ABID BAIG, WAKIL-E-SHARA’O AND THE LEGAL PRACTITIONERS IN PAKISTAN 31 (2004).

²⁸² ALI BURHAN-AD-DIN, THE HIDAYAH OR GUIDE: A COMMENTARY ON THE MUSSULMAN LAWS 44 (1791).

²⁸³ HAMID AL-HAMMAD, AL-MUHAMAHI FI AL-NIZAM AL-SAUDI [Lawyering in the Saudi System] 63 (2010).

same as the “practice of law” in its modern and Western sense. This debate will be discussed later in more detail.

The first appearance of *Wakalah-bil-Khusumah* in Islam occurred during the time of the third orthodox Muslim ruler, Othman bin Afan (644-656 A.C.), who acted as a judge as well. Although Muslims did not have a formal legal profession at the time, in a dispute between a group of people and one of the Prophet’s companions, Hassan bin Thabit, Abdullah bin Masud represented Hassan bin Thabit to revoke the judgment.²⁸⁴ However, a significant change in the Islamic court system occurred during the rule of the Abbasid (750-1258). By this time, the four Sunni schools of law had all been established,²⁸⁵ Resulting in huge changes in the judicial structure and procedures. According to Wael Hallaq:

The period between the third and eighth decades of the second century (ca. 740-800 A.D.) witnessed the maturation of both the judiciary and the legal doctrine, as all essential features of these two spheres acquired a final shape, only to be refined during the succeeding century or two.²⁸⁶

The maturation of the Islamic legal doctrines during the Abbasid era, and particularly the emergence of the four Sunni schools, weakened the role of the judges. Judges at that time based their judgments on one of the four Sunni schools rather than exerting *Ijtihad* (logical and independent reasoning),²⁸⁷ which judges prior to that time were expected to use to form their judgments.²⁸⁸ This is clearly evidenced in the story of

²⁸⁴ AHMED FATHY ZAGHLOUL, *supra* note 263, at 64.

²⁸⁵ ABDULRAHMAN AL-HUMAIDI, *supra* note 261, at 282.

²⁸⁶ WAEL B. HALLAQ, *supra* note 268, at 79.

²⁸⁷ ABDULRAHMAN AL-HUMAIDI, *supra* note 261, at 283.

²⁸⁸ *Id.* at 288.

an occasion when the Prophet (PBUH) sent Muadh ibn Jabal to Yemen. The Prophet asked Muadh, “How will you render a judgment or settle a dispute?” Muadh answered, “According to the Book of God.” The Prophet then asked him, “What if you do not find there what you need?” Muadh answered, “Then according to the *Sunnah* of the Prophet of God.” The Prophet repeated, “What if you do not find there what you need?” Muadh answered, “I will judge by resorting to *Ijtihad* to the best of my power.” The Prophet then thanked God for guiding the Messenger of Gods Messenger to judge according to that which God’s Messenger approves.²⁸⁹

Another noticeable change that occurred during the Abbasid period was the creation of the position of the *qadi alqudah*, or chief justice,²⁹⁰ whose duties were similar to those of today’s ministers of justice.²⁹¹ Thus, responsibility for the judiciary shifted from the ruler to the chief justice; as a result, Muslim rulers gave up some of their judicial power.²⁹² For example, by establishing the *qadi alqudah* position, the Abbasid ruler delegated to the *qadi alqudah* the right to appoint judges.²⁹³

It seems that this remarkable development in both judicial and legal doctrine, in addition to the expansion of the Muslim state, led to more sophisticated procedures and disputes, which in turn led some men, known as agents, to offer legal assistance. For example, Ali bin Qudam was known as an agent, and Othman bin Ali was known for

²⁸⁹ Sunan Abi Dawud, Hadith 3592, available at <http://sunnah.com/abudawud/25/22>.

²⁹⁰ MATTHEW S. GORDON, THE RISE OF ISLAM 94 (2005).

²⁹¹ DEMBA GLO, *supra* note 168, at 91.

²⁹² Abu Yousf was the first appointed chief justice. He was appointed by Harun Al-Rashid. Although he was known as Abu Yusuf, his real name was Yaqub Ibin Ibrahim Al-Ansari. He was a student of Abu Hanifa, founder of the Hanafi school. JOHN L. ESPOSITO, *supra* note 27, at 5-6.

²⁹³ MUHAMMAD AIZOHEILY, *supra* note 108, at 231-232.

providing legal aid by offering his services at the court doors.²⁹⁴ However, their practice took place without official recognition from authorities, and sources are not clear on the exact status and role of these agents.

III. Criteria for Agents under Islamic Law

As a result of the evolution of adversarial agency in the Muslim state, Muslim jurists initially restricted agency in general, including adversarial agency. One of the most important restrictions on agency was that not just anyone could become an agent; instead, jurists listed specific criteria and requirements that agents had to meet in order to be permitted to represent others. Muslim jurists agree on two criteria: an agent must be both sane and appointed. Opinions vary regarding other criteria, such as whether the agent has to be of the Islamic faith, male, or at least a certain minimum age.

1. Agreed-upon Criteria

A. Sanity

The first and most important criterion is sanity. Muslim jurists agree that sanity is a condition that every agent must meet in order to represent another person.²⁹⁵ According to Islamic law, an insane person is not responsible for his actions; thus, it is assumed that a person who is insane or mentally incompetent cannot represent others because he does not have the capacity to distinguish right from wrong. According to Aa'isah, the Prophet's wife, the Prophet said: "There are three persons whose actions are not recorded: a lunatic whose mind is deranged till he is restored to consciousness, a sleeper

²⁹⁴ HAMID AL-HAMMAD, *supra* note 283, at 63.

²⁹⁵ TALB MUQBL, AL-WAKALAH FI AL-FIGH AL-ISLAMI [Agency in Islamic Jurisprudence] AGENCY IN ISLAMIC JURISPRUDENCE 118 (1983).

till he is awake and a boy till he reaches puberty.”²⁹⁶ However, there is no clear measurement to determine who has adequate sanity to be an agent or representative. Nevertheless, Muslim jurists have always required that when people deal with one another in the legal sense they “must be in full possession of their rational power.”²⁹⁷ The determination of adequate sanity is to be determined by the court.

B. Appointed

Muslim jurists have clearly provided that an agent must be appointed in order for his representation to be valid. Agency is considered to be an agreement in which the agent agrees to represent another person.²⁹⁸ Therefore, there must be an offer and an acceptance of representation, and the agent must be appointed. This requires that the agent’s name or other identifier be clearly stated. In other words, the agency will not be formed, for example, if a man states that he has hired as his agent anyone willing to sell his house for him. *Hanbali* jurists impose further restrictions, requiring that an agent be appointed and that his first and last name be stated in the agreement. In addition, they require that the client personally know the agent; for example, if the client states that he has hired X as his agent but the client does not know X, then this agency would not be valid.²⁹⁹

²⁹⁶ Sunan Abu-Dawud Book 38, Number 4348.

²⁹⁷ BERNARD WEISS, *THE SPIRIT OF ISLAMIC LAW* 163 (1998).

²⁹⁸ SHAHZAD ABID BAIG, *supra* note 281, at 31.

²⁹⁹ HAMID AL-HAMMAD, *supra* note 283, at 167.

2. Controversial Criteria

A. Islam

According to *Maliki* jurists, a non-Muslim cannot represent a Muslim in any case, because a non-Muslim would not avoid what is forbidden under Islam (because he is not obligated to do so).³⁰⁰ *Shafis* jurists agree with *Maliki* jurists but only with regard to marriage cases. In some Muslim countries, marriage takes place in front of a judge.³⁰¹ However, the parties can hire someone to manage the process on their behalf.³⁰² *Shafis* jurists argue that a non-Muslim male cannot represent a client regarding his marriage to a Muslim woman. They further explain that if a person cannot do something for himself, he cannot do it for others. Imam Nawawi explained that if a Muslim appoints a non-Muslim to represent him in a marriage case with a Muslim woman, then the agency would not be valid.³⁰³ This is because a non-Muslim cannot marry a Muslim woman; thus, he cannot represent others in this regard.

Most Muslim jurists, however, do not require that an agent be a Muslim in most cases, as they argue that there is no text or precedent in Islam that prevents a non-Muslim from representing a Muslim. In fact, they cite cases in which a non-Muslim agent has

³⁰⁰ TALB MUQBL, *supra* note 295, at 127-128.

³⁰¹ HAMID AL-HAMMAD, *supra* note 283, at 183.

³⁰² “Marriage has to take place before a civil register according to the national laws of Turkey, Egypt, Algeria, and Pakistan; before a notary public in Tunisia, Morocco, and Iran; before the Imam in Jordan, or before the Kadi [judge] in Saudi Arabia, Yemen, Afghanistan, Iran, Syria and Lebanon.” Clemens Amelunxen, *Marriage and Women in Islamic Countries*, in 2 CASE STUDIES ON HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS, A WORLD SURVEY 85, 90 (Willem A. Veenhoven ed., 1975).

³⁰³ HAMID AL-HAMMAD, *supra* note 283, at 183.

represented a Muslim; for example, Abdurrahman Ibn Awf, one of the Prophet's companions, hired a non-Muslim as his agent to represent his family.³⁰⁴

B. Male Gender

Some Muslim jurists believe that adversarial agency is a man's job only. They argue that throughout Islamic history, Muslim women have never worked as agents.³⁰⁵ They further believe that it is a woman's role to stay at home and avoid mingling with men they do not know.³⁰⁶ They cite the following verse from the *Qur'an* to support their reasoning:

And stay quietly in your houses, and make not a dazzling display, like that of the former Times of Ignorance; and establish regular Prayer, and give regular Charity; and obey Allah and His Messenger. And Allah wishes only to remove all abomination from you, ye members of the Family, and to make you pure and spotless.³⁰⁷

However, some Muslim jurists argue against this position, pointing out that, since the early days of Islam, women have been essential partners in men's lives. In addition, they argue that no specific law exists to prevent women from working as agents.³⁰⁸ They further base their believe in the right of women to represent others on women's right to sue in Islam, which is supported by multiple precedents. For example, there are many cases of women suing their husbands after they have been abused or unfairly treated.

³⁰⁴ HAMID AL-HAMMAD, *supra* note 283, at 184.

³⁰⁵ Mohamed Alsayegh, *Women's Right to Litigate*, Ministry of Justice 5, 24 (2009). Available at: http://adl.moj.gov.sa/active_information_d.aspx?id=29

³⁰⁶ Wafa Abdulaziz Alsolam, *Women in the Legal Profession: A Comparative Study*, 55 *Journal of Justice* 28, 60 (2012).

³⁰⁷ The *Qur'an* 33:33.

³⁰⁸ Asmaa Al-Ghanim, *Nothing in the Code of Law Practice Prevents a Woman from Practicing Law*, Alriyadh (May 25, 2009).

Many authorities in Islam provide women with the right to sue.³⁰⁹ This argument will be discussed in more detail later in this chapter.

C. Adulthood

Muslim jurists disagree about the agency of minors. Although jurists have not agreed upon a specific minimum age requirement in order for a person to act as an agent, in general they have agreed that a person must have reached puberty to perform this role.³¹⁰ Most Muslim schools consider the age of puberty to be fifteen, while others place it as late as eighteen.³¹¹ The majority of Muslims agree that a person who works as an agent must at least have reached the age of puberty. They base this decision on the Prophet's hadith mentioned earlier, which provides that the actions of "a boy till he reaches puberty" should not be recorded.³¹² However, some Muslim jurists consider representation by a minor to be valid if it is approved by his guardian, although they require that the minor be aware of his actions and of the aim of the representation.³¹³

IV. Establishment of the Legal Profession in Islam

1. Emergence of the Legal Profession in Islamic Tradition

The Ottoman Empire was established in 1299 and reached its peak in the 16th century.³¹⁴ During the latter part of this period, some people started to work as adversarial agents. Such agents often sat in front of the courts and offered their help in civil – though not criminal – cases. At first, they faced doubt and hostility from the Ottoman

³⁰⁹ Mohamed Alsayegh, *supra* note 305.

³¹⁰ TALB MUQBL, *supra* note 295, at 122.

³¹¹ *Id.* at 80.

³¹² Sunan Abu-Dawud Book 38, Number 4348.

³¹³ TALB MUQBL, *supra* note 295, at 123.

³¹⁴ Istiaq Hussain, *supra* note 81, at 5.

authorities. Judges were likewise unsupportive of the practice and often requested that these agents be sent away from the courtroom doors and punished for their misbehavior. Consequently, *Hanafi* jurists restricted adversarial agency. For example, a party was required to obtain the opposing party's consent before appointing an agent.³¹⁵

The Ottoman Empire generally adhered to Islamic law, and the Ottoman courts applied Islamic law in accordance with the *Hanafi* school of Islamic jurisprudence. However, the Ottoman Empire was ethnically and culturally very diverse; its citizens included Christians, Jews, Bahais, Animists, and members of many other religions. As a result, non-Muslims who were citizens of the Empire were allowed to have their own courts and legislate according to their own religions. Nonetheless, some restrictions were imposed on non-Muslims.³¹⁶ For example, they had to “wear dress that distinguished them from Muslims.”³¹⁷ They also were not allowed to “work in State service, nor could they perform military service.”³¹⁸

By the end of the 18th century, circumstances began to change as the Empire began to decline. It was defeated in wars and lost parts of its territories at the same time that the Industrial Revolution was emerging in Europe. As a result, Europe was developing and shifting “from an economy based on agriculture and handicrafts to an economy based on manufacturing by machines and automated factories.”³¹⁹ In addition,

³¹⁵ FAYEZ HUSSEIN, *AL-USUL AL-TARIKHIYAH WA-ALSARIYADH FI NIZAM ALMUHAMAH* [Historical and Legal Origins of the Legal Profession] 127-128 (2011).

³¹⁶ Culnihal Bozkurt, *The Reception of Western European Law in Turkey* (From the Tanzimat to the Turkish Republic, 1839-1939), Walter de Gruyter 284, 284 (1998).

³¹⁷ *Id.*

³¹⁸ *Id.*

³¹⁹ WILLIAM DUIKER & JACKSON SPIELVOGEL, *THE ESSENTIAL WORLD HISTORY* 549 (2008).

the Europeans pressured the Ottomans by attracting minorities in the Ottoman lands to join and become citizens of their society.³²⁰

The Ottoman rulers were threatened by the economic prosperity and military superiority of Europe. Consequently, the Ottoman ruler Selim the Third started a reformation process by emulating the European system.³²¹ Apparently, the reform was rejected on the basis that it was *bidah*, or not Islamic. Later, a group from the Ottoman army, with the support of *Shaykh ul Islam* (the highest official of religious authority) killed Selim. Mustafa, Selim's brother, was appointed after him. However, it seems that Mustafa was not as popular as his brother; as a result, his brother's supporters confronted him and later removed him from office, and his nephew Mahum the Second took over.³²² Mahum, like Selim, felt the need for reform to overcome the challenges that his empire faced. To pave the way for the modernization of his nation, Mahum started modernizing the military. It seems that the Ottomans were also afraid of losing their non-Muslim citizens. Thus, in 1839, the Ottoman ruler issued an order promising to do the following: 1) protect the lives and properties of all citizens; 2) introduce a new law of justice asserting the equal status of Muslims, Jews, and Christians before the law; 3) create a new system for collecting taxes; and 4) create a fair system of recruiting people for service in a modernized military.³²³

Moreover, the Ottoman rulers translated and adopted Western laws continuously. For example, in 1858, the Ottomans adopted the French Penal Code of 1810, thus

³²⁰ Culnihal Bozkurt, *supra* note 316, at 284.

³²¹ Istiaq Hussain, *supra* note 81, at 5.

³²² *Id.*

³²³ *Id.* at 7.

abandoning Islamic punishment.³²⁴ Similarly, in 1850, the Ottomans adopted the Commerce and Trade Code, which was virtually identical to the French Commercial Code. Other Napoleonic codes were also adopted, such as the land code (1858) and the maritime trade code (1863).³²⁵ Furthermore, the Ottoman Empire adopted the French judicial system, which has three levels of courts (trial court, appeals court, and Supreme Court). By the late 19th century, “modern Western legal ideas were exerting considerable influence” on the Ottoman Empire.³²⁶

Some leading Ottoman jurists also felt the need to create an Islamic civil code to maintain the Islamic principles. Thus, the adoption of French law was followed by the publication of the *Mejelle* in 1876, which codified the law according to the *Hanafi* school of Islamic jurisprudence. In a striking departure from past practice, which did not recognize the practice of law, the Ottoman Empire organized legal representation under chapter five of the *Mejelle*. In the same year, the Ottomans, influenced by the French, realized the importance of the legal profession. Thus, they established an office in their capital to organize the legal profession.³²⁷ It is worth noting that Muslims were not acquainted with the notion of a “formal” legal profession based on Western models prior to 1876, although they were familiar with the Islamic notion of an “informal” legal profession based on adversarial advocacy. At that time, Muslims began to use the word *Muhami*, or lawyer – a word that had not previously been known in the Muslim world. After World War I, the Ottomans lost control of the Arab world.³²⁸ In 1924, Ottoman

³²⁴ *Id.* at 9.

³²⁵ MUHAMMAD AIZOHEILY, *supra* note 108, at 451.

³²⁶ David A Funk, Traditional Islamic Jurisprudence: Justifying Islamic Law and Government, 20 S.U. L. Rev. 214 (1993)

³²⁷ FAYEZ HUSSEIN, *supra* note 315, at 131.

³²⁸ MUHAMMAD AIZOHEILY, *supra* note 108, at 432.

rule ended. As one scholar put it, “On the ruins of the Ottoman Empire, the Republic of Turkey was founded.”³²⁹

During the disintegration of the Ottoman Empire, some Islamic countries adopted what can be described as “practice of law” along the lines of the Western model. The first ordinance on the practice of law was issued in Egypt in 1916; this led to the appearance of lawyers for the first time in Egypt.³³⁰ More Islamic countries then began to enact codes for the practice of law; most recently, Saudi Arabia codified the profession of legal practice in 2001.³³¹

2. Legal Profession in Saudi Arabia

Courts in the Arab world functioned in accordance with Ottoman laws; the courts in what is now known as Saudi Arabia were no exception, especially in the two holy cities of Mecca and Medina. In fact, when King Abdulaziz took over Saudi Arabia in 1925, he issued a royal order stating that the Ottoman laws would remain effective unless they were replaced or canceled.³³² The rules governing the practice of law and legal representation remained the same until 1927, when King Abdulaziz issued royal decrees that unified and organized the court system. These decrees prohibited legal representation in all criminal and civil cases, with two exceptions that applied only in civil cases; representation was permissible 1) if the litigant had a valid excuse not to appear or 2) if the litigant was a woman or a minor who was represented by a family member.³³³ Four

³²⁹ Culnihal Bozkurt, *supra* note 316, at 294.

³³⁰ Moslem Al-Yousif, *History of the Legal Profession: Some Islamic Countries* 21 (2005). Available at: <http://www.saaaid.net/>

³³¹ Code of Law Practice, *supra* note 7.

³³² Ayoub Al-Jarbou: *The Role of Traditionalists and Modernists in the Development of the Saudi Legal System*, 21 Arab Law Quarterly 191, 200-201 (2007).

³³³ SAUD AL-DREEB, *supra* note 274, at 334.

years later, in 1931, the king issued a new code to better organize the trial process. This new code consisted of 36 articles and expanded the right to legal representation in civil cases to include employees who could not leave work, persons who were not present in the area, and persons who were represented by family members.³³⁴ It is worth noting that the new code required the representing agent to be well-educated, unless the represented party was a family member.

In 1936, the country introduced its first Law of Procedure before *Shari'ah* courts.³³⁵ The new law, which consisted of 142 articles and was very detailed in comparison with the previous law, gave any party in a civil case the right to be represented by any agent. Agents, meanwhile, were not allowed to represent more than three different people at once. The legal reform process continued throughout the last century. Lawyers in the Western sense first appeared in Saudi Arabia in 2001, when for the first time the country recognized “practice of law” as a profession in all cases, including criminal as well as civil cases.³³⁶ This was when the country promulgated its first Code of Law Practice. The following chapter will address the establishment of the right of legal counsel in criminal cases in Saudi Arabia in more detail.

A. The Saudi Code of Law Practice

The Code of Law Practice consists of 43 articles divided into four parts. Part one (articles 1-10) defines the practice of law and its requirements. Article 1 defines the practice of law as the “representation of third parties before courts of law, the Board of Grievances, and other committees as may be set up pursuant to laws, decrees and

³³⁴ *Id.* at 336.

³³⁵ The Law of Procedure Royal Order No. 2/1 (5/2/1936)

³³⁶ Code of Law Practice, *supra* note 7.

decisions to consider the cases falling within their respective jurisdictions. It shall also mean rendering consultancy services based on the principles of *Shari'ah* and the rule of law.”³³⁷ The code further provides that “[w]hoever practices this profession shall be called a lawyer.”³³⁸ Articles 2 to 10 set criteria and conditions for qualification as a lawyer, which are outlined in the following paragraphs.

In 2002, in an effort to organize the legal profession, the Saudi government established a committee at the Ministry of Justice called the Lawyers’ Registration and Admission Committee to take applications and issue licenses for those who meet the requirements to practice law.³³⁹ The committee consists of three members: a chairman, who is the deputy of the Ministry of Justice; a representative of the Board of Grievances; and a lawyer appointed by the minister of justice.³⁴⁰ Any applicant must meet certain criteria and requirements to become a lawyer. In most cases, the applicant must be a Saudi;³⁴¹ however, a non-Saudi national may be entitled to practice law in the case of an agreement between the kingdom and other countries.³⁴²

Applicants must also satisfy educational requirements. One of the following three law degrees is required for practicing law in Saudi Arabia: (1) a bachelor’s degree in

³³⁷ *Id.* Art. 1.

³³⁸ *Id.*

³³⁹ MOHAMMED BIN BARRAK AL FAWZAN, AL-TALIQ ALA NIZAM AL-MUHAMAHA AL-SAUDI [Comments on the Saudi Code of Law Practice] 75 (2008).

³⁴⁰ The Code of Law Practice, *supra* note 7, Art. 5.

³⁴¹ According to the Code of Saudi Arabian Citizenship, Saudis are of four types: (1) those who acquired Ottoman nationality in the year 1332 A.H. (1914 A.D.) as original inhabitants of Saudi Arabian lands, (2) Ottoman citizens born on Saudi Arabian land or residents of the kingdom between 1332 A.H. (1914 A.D.) and 22/3/1345 A.H. (1927 A.D.) who did not acquire foreign citizenship prior to this date, (3) non-Ottoman citizens who resided on Saudi Arabian land between 1332 A.H. (1914 A.D.) and 22/3/1345 A.H. (1927 A.D.) and did not acquire foreign citizenship prior to this date, and (4) Saudis by naturalization who acquired Saudi Arabian citizenship according to Saudi regulations.

³⁴² The Code of Law Practice, *supra* note 7, Art. 3.

Shari'ah, (2) a bachelor of law degree, or (3) a post-graduate diploma in legal studies, offered only by the Institute of Public Administration. Alternatively, any equivalent of any of these degrees may be obtained from abroad. In addition, an applicant must have at least three years of practical legal experience to practice law. However, this requirement is reduced to one year if the applicant holds a master's degree in law and is waived if the applicant holds a PhD in law.³⁴³

It is worth noting that the Saudi Code of Law Practice does not define legal experience. This term is broadly interpreted by the Ministry of Justice to include serving as a judge, prosecutor, clerk, or notary; officially working as a religious scholar; working in the legal field in the public or private sector; working as an agent for others in the courts; or teaching *Shari'ah* or law in any academic institution within the kingdom.³⁴⁴ Finally, to practice law, an applicant must be of good conduct and must not have been found guilty of a hudud crime or other crime that impugns integrity, unless a minimum period of five years has expired since the execution of the sentence for that crime.³⁴⁵

B. Duties and Right of Lawyers

Articles 11 through 28 outline the duties and rights of lawyers. By virtue of the Code of Law Practice, lawyers have the right to represent others before *Shari'ah* courts, the Board of Grievances, and the judicial committees. To that end, lawyers have the right to choose the path they consider beneficial in defending their clients, and they are not subject to sanctions for the content of their written or oral submissions as long as the content is consistent with the right of defense. The Code of Law Practice further provides

³⁴³ *Id.*

³⁴⁴ MOHAMMED BIN BARRAK AL FAWZAN, *supra* note 339, at 65.

³⁴⁵ The Code of Law Practice, *supra* note 7, Art. 3.

that “Courts, the Board of Grievances, the committees . . . , official circles and investigation authorities shall extend to the advocate the facilities that are required for him to carry out his duty, and to enable him to review papers and be present at investigations, and his request may not be turned down without a legitimate excuse.”³⁴⁶

On the other hand, the Code of Law Practice also adds duties that lawyers must fulfill. It provides that “a lawyer shall practice the profession in accordance with the *Shari’ah* and laws in force.”³⁴⁷ Simply put, all lawyers in Saudi Arabia must comply with Islamic law and Saudi regulations, as long as the latter do not contradict or conflict with Islamic principles.³⁴⁸ Saudi jurists restrict legal representation to real claims that have merit. Therefore, they argue that a Muslim lawyer cannot represent a defendant if he knows that the client has no valid argument and is only trying to buy time or obstruct justice. Salah Alfwzan, a well-known Saudi jurist, further explained that, according to Islamic jurisprudence, it is not permissible to speak on behalf of any person at fault. He referred to a verse from the *Qur’an* that reads, “And do not be for the deceitful an advocate.”³⁴⁹ In addition, the implementing regulation that supplements the Code of Law Practice explains that a lawyer must not represent a client if he knows the client to be unjust or dishonest.

Generally, a lawyer cannot withdraw from defending a client. Article 23 of the Code of Law Practice provides that a lawyer “shall not, without a legitimate cause,

³⁴⁶ The Code of Law Practice, *supra* note 7, Art. 19.

³⁴⁷ The Code of Law Practice, *supra* note 7, Art. 11.

³⁴⁸ The Saudi Basic Law makes it clear that in any case of contradiction or conflict, *Shari’ah* will prevail over other laws. Article 48 of the Saudi Basic Law provides that judges should apply only Saudi laws that “do not contradict the Book or the Sunnah.”

³⁴⁹ For information on whether it is permissible to work as a lawyer in Islam, see: www.islamqa.info/ar/ref/75613

decline to represent his client before the case has been concluded.” However, the law does not specify what can be considered a “legitimate cause.” The only legitimate cause specified by Saudi regulations is if a lawyer clearly finds that such representation is in support of a person who has violated the law. The implementing regulation, as mentioned earlier, requires any lawyer to discontinue representing a client upon learning that the client is unjust or dishonest.

The recent case of Ahmad Al-Jizawi, an Egyptian lawyer who was accused of smuggling narcotic pills into the kingdom, is one example of a case in which lawyers withdrew based on later knowledge of the case. Three lawyers, separately and at different times, took the responsibility of defending Al-Jizawi, but all three ultimately withdrew before the case concluded, claiming they had learned that Al-Jizawi was guilty.³⁵⁰ One of these lawyers mentioned in an interview that he had been hired by Al-Jizawi’s wife to take his case but withdrew because he did not believe in the client’s innocence after meeting with Al-Jizawi himself. The lawyer further stated that Al-Jizawi later admitted to him that he was indeed guilty.³⁵¹

Saudi law also requires lawyers to refrain from addressing any personal matter concerning their clients’ opponents or opponents’ lawyers. The Code of Law Practice provides that “a lawyer shall not refer to personal matters concerning his client’s adversary or representative, and shall refrain from any offensive language or accusation, as may have a negative impact on integrity.”³⁵² Saudi lawyers are also obligated to avoid

³⁵⁰ TV interview with Al-Jizawi’s former lawyer on Gulf TV, 1/15/2013.

³⁵¹ Interview with Al-Jizawi’s former lawyer on Alarabiya News, 4/30/2012; also, Interview with Al-Jizawi’s former lawyer on 4Shabab TV, 4/29/2012.

³⁵² The Code of Law Practice, *supra* note 7, Art. 12.

representing or providing assistance, including any form of opinion, to their clients' opponents, either personally or through another lawyer. Additionally, the Code of Law Practice requires lawyers to avoid other conflicts of interest; for example, a lawyer cannot take any case against a former employer with whom the lawyer was employed less than five years earlier. Article 14 of the Code of Law Practice states that "a lawyer shall not personally, or through another lawyer, accept any case or render any advice against his present or former employer except after the expiry of a minimum period of five years from the date of termination of his relation with that employer." However, this period of time is reduced to three years if the lawyer worked only part-time for the employer, as article 14 further provides that "[a] lawyer who acts for a client on a part-time basis pursuant to a contract shall not accept any case or render any advice against that client before the expiry of three years following." Likewise, the Code also prohibits lawyers from working with other lawyers who represent their clients' opponent.

Finally, to avoid conflicts of interest, the Code of Law Practice also requires any person who has worked as a judge to refrain from working as or with a lawyer in any case that has previously come before him as a judge.³⁵³ Likewise, the law prohibits those who have formerly provided legal assistance in connection with a certain case (e.g., public officials, arbitrators, experts) from working on that case as lawyers or supporting another lawyer on the case.³⁵⁴

³⁵³ *Id.* Art. 16.

³⁵⁴ *Id.* Art. 17.

C. Disciplinary Action Against Lawyers

Part three (Articles 29 through 37) deals with disciplinary actions. According to these articles, a lawyer will lose his license if he is found guilty of a *hudud* crime or any other crime that impugns integrity. In addition, Articles 2 through 37 of the Code of Law Practice provide that the lawyer can be subject to different sanctions for violations of the Code of Law Practice if he breaches his professional responsibilities or acts in a manner that is incompatible with professional standards. If convicted, a lawyer will be subject to one of the following sanctions: warning, reprimand, suspension of practice for no more than three years, or revocation of license. By virtue of Article 31, the Minister of Justice is entitled to create disciplinary boards to consider the imposition of disciplinary sanctions. Each disciplinary board consists of a judge, who also acts as the head of the board; a lawyer; and an expert. The Code further provides that only the following five types of parties can initiate a disciplinary proceeding against a lawyer:³⁵⁵ 1) the Minister of Justice, 2) members of any *Shari'ah* court, 3) members of the Board of Grievance; 4) members of the judicial committees; and 5) head of the Bureau of Investigation and Prosecution or his deputy.

The last part (Articles 38 through 43) includes general provisions requiring a lawyer to attend his office regularly. If he is not able to appear, the lawyer must appoint someone to work on his behalf.³⁵⁶ However, in any case, the lawyer must not consult or seek help from a non-Saudi lawyer or firm.³⁵⁷

³⁵⁵ *Id.* Art. 30.

³⁵⁶ *Id.* Art. 41.

³⁵⁷ *Id.* Art. 40.

3. Women in the Legal Profession

The law profession is governed by the Code of Law Practice, which is written in gender-neutral terms; that is, it does not discriminate against women and contains no provision that prevents women from working in the legal field as lawyers.³⁵⁸ However, Saudi Arabia did not allow women to work as lawyers until late 2013; before that time, in practice, women were not allowed to appear before a judge representing others. This practice is based on the interpretation of the *Shari'ah* law applied in Saudi Arabia.³⁵⁹ However, some Muslim jurists argue against this interpretation. This part of the chapter presents the arguments for and against women's right to work as lawyers under the Islamic law.

A. Argument for Women's Right to Work as Lawyers

The proponents of women's right to practice law argue that, since the early days of Islam, women have been essential partners in men's lives. In addition, they argue that there is no law that prevents women from working as lawyers.³⁶⁰ They base the right of women to practice law on their right to sue, which is provided by many authorities in Islam. For example, the wife of one of the Prophet's companions sought divorce before the prophet, though she had no complaint of abuse or bad treatment against her husband, and her request was granted.³⁶¹

Also, the Prophet's wife, Aa'isah, told the story of a young woman who came to the Prophet and told him that her father had forced her to marry a cousin in order to

³⁵⁸ *Id.*

³⁵⁹ Jurist: Legal News and Research, *Saudi Arabia Minister to Propose Bill Allowing Female Lawyers in Court*, 2/21/2010, <http://jurist.law.pitt.edu/paperchase/2010/01>

³⁶⁰ Asmaa Al-Ghanim, *supra* note 308; also, JAWDAT ALMDILOM, THE RIGHT OF WOMEN IN HIGH POSITIONS IN THE LIGHT OF ISLAMIC LAW 92 (2006).

³⁶¹ Mohamed Alsayegh, *supra* note 305.

maintain some tribal values. The Prophet gave her the option of divorcing the husband or staying with him. While the young woman chose to stay with the husband, she declared that she wanted the case to go on record to make it clear that parents could not compel their daughters to marry.³⁶²

In addition, the *Qur'an* acknowledges women's right to sue by stating:

If ye fear a breach between them twain, appoint (two) arbiters, one from his family and the other from hers; if they wish for peace, Allah will cause their reconciliation: For Allah hath full knowledge, and is acquainted with all things.³⁶³

According to this verse, women have the right to seek justice if they have not been able to settle their differences with their husbands. The procedures to be followed are clear: the governor is instructed to appoint a mediator for each side to mediate and arbitrate between them. This confirms the fact that a woman has the right to sue her husband. The implication suggested by proponents of women's right to practice law is that the right to sue includes the right to represent oneself as well as to represent others.

B. Argument Against Women's Right to Work as Lawyers

Some Muslim jurists argue that that Islamic law does not consider women's right to practice law. For example, in April 2009, the Head of Courts in the Eastern Province, Sheikh Abdulrahman Al-Rageeb, was quoted in the Riyadh Newspaper saying that "there is no need for women to work in courts, noting that the courts serve all people, men and

³⁶² *Id.*

³⁶³ The *Qur'an* 4:35.

women alike.”³⁶⁴ He further stated that legal procedures requiring women’s involvement will be taken into account in accordance with the regulations and instructions of the *Shari’ah*, for the purpose of serving women litigants.³⁶⁵ Clearly, this statement denies the right of women to work as lawyers. This further shows the strength of the status quo that calls for literal interpretation and application of the *Shari’ah*.

Jurists who oppose women’s right to work as lawyers often based their legal opinion on the interpretation of the following verses. First, the *Qur’an* states:

And stay quietly in your houses, and make not a dazzling display, like that of the former Times of Ignorance; and establish regular Prayer, and give regular Charity; and obey Allah and His Messenger. And Allah only wishes to remove all abomination from you, ye members of the Family, and to make you pure and spotless.³⁶⁶

Although the message in this verse specifically instructed the Prophet’s wives to stay in their homes, the opponents of women’s right to practice law argue that the meaning is general and should be interpreted to include all women by way of interpretation and extraction of the Islamic rules. In other words, because the Prophet was the Messenger sent to explain God’s will and words through the religion of Islam, his teachings were intended to demonstrate to the nations how Muslims (both men and women) should behave and carry themselves. In this case, the demonstration was

³⁶⁴ Mohammed Alghamdi, *No Need for Women to Work in Courts*, Alriyadh, Issue no. 14894 (Apr. 4, 2009).

³⁶⁵ *Id.*

³⁶⁶ The *Qur’an* 33:33.

through his wives. The implication here is that Muslim women should follow the example set by the Prophet's wives. Further, the verse instructs Muslim women not to imitate women in the pre-Islam era. Thus, Muslim women today are also required to follow their Islamic traditions and avoid imitating other women in the West, such as through the practice of law.

Muslim Al-Yousif, who opposes women's right to work in the legal profession, argues that women's employment in the West has proven to be counter-productive and to have inevitable negative impacts, such as weakening the marital relationship and undermining a woman's role as a mother. Al-Yousif further indicates that a woman cannot be both a good mother who takes care of her children and a successful lawyer who meets her client's expectations. Therefore, a married woman with a full-time job may not be willing to have children because doing so may affect her ability to earn. Similarly, if she has children, she may give up her marital responsibility by delegating her role as a mother to a babysitter. He further argues that a working woman may more easily willing to leave her husband because she is more financially capable in comparison to a non-working wife.³⁶⁷

The application and implication of this point of view is that women cannot work in the legal field to represent themselves or others, even women. This argument also addresses the point that men and women are not allowed to mingle with each other in a Muslim society. Since men are the ones who assume the duties of the legal profession in the public, women cannot work as lawyers, because the profession requires their

³⁶⁷ Moslem Al-Yousif, *Women Working as Lawyers* (Nov. 20, 2013), <http://www.saaaid.net/Doat/moslem/index.htm>

appearance before men who may be strangers to them. This would violate some of the core values of Islamic teachings that prevent interaction between men and women outside marriage or the immediate family.

C. Rise of Women in the Legal Profession in Saudi Arabia

Notwithstanding the traditional Saudi position on women's rights to work as lawyers, many activists and jurists have called for the acknowledgement of women's right to represent others in the court of law. For example, Mohamed Alsayegh, a Saudi judge, argued that women should be allowed to represent themselves and their female relatives. Although Alsayegh's argument does not extend to women obtaining careers in the legal field as professional lawyers, he does call for more involvement of women to help their female relatives.³⁶⁸

The call continues with another female Saudi legal expert, Asma Al Ghanim. In a paper delivered at the symposium of *The Rights of Saudi Women in the Legal Field*, at the School of Law and Political Sciences, King Saud University, Al-Ghanim argues that neither the Code of Law Practice nor the Procedural Law nor other regulations issued by highly technical committees prohibit women from practicing law in Saudi Arabia. She argues that the language of all relevant regulations does not discriminate against women, nor does it make any specific or exclusive reference to men in regard to law practice.³⁶⁹

Moreover, other activists have written in newspapers calling for women to be allowed to work as lawyers. For example, Saad Bin Gonaiem, a legal consultant and

³⁶⁸ Mohamed Alsayegh, *supra* note 305.

³⁶⁹ Asmaa Al-Ghanim, *supra* note 308.

owner of Al-Ghoneim's Group for Lawyers and Legal Services, claims that women have been representing themselves since the era of the Prophet Muhammad. Further, he argues that there is not any Islamic text that prevents them from representing themselves or others in a court of law. He goes on to say that the applicable law does not prohibit women from being lawyers. Instead, he argues that the problem seems to be in the structure of the court and legal system as a whole, noting that courts are not technically prepared to welcome Muslim women to work as lawyers in a manner that preserves their identities as both lawyers and females.³⁷⁰

In February 2010, Mohammed al-Eissa, the Saudi Minister of Justice, declared that a new law had been proposed to allow female lawyers to represent clients and argue family law cases. The proposed law would also allow female lawyers to perform some "preliminary procedures with notaries, authorizing corporate contracts, registering companies and mortgaging real estate."³⁷¹ Three years after this announcement, the Ministry of Justice started to issue licenses for women female applicants who met the requirements.³⁷² Bayan Zahran, the first female lawyer in Saudi Arabia, was issued a license to practice law on August 24, 2013.³⁷³

³⁷⁰ Sarefih Asmari, *Organizational and Social Obstacles Prevent a Female Lawyer from Playing Her Role*, Alriyadh (Mar. 23, 2007).

³⁷¹ Jurist: Legal News and Research, *Saudi Arabia Minister to Propose Bill Allowing Female Lawyers in Court*, 2/21/2010, <http://jurist.law.pitt.edu/paperchase/2010/01>

³⁷² Abeer Mishkhas, *Saudi Female Lawyers Enter the Courtroom*, Asharq Al-Awsat (Oct. 10, 2013).

³⁷³ Bayan Zahran, *The First Female Lawyer in Saudi Arabia* (Nov. 23, 2013, 9:07 A.M), <http://sabq.org/EkFfde>

D. Response to the Argument Regarding Women’s Right to Work as Lawyers

The statement of the Head of Courts in the Eastern Province that “there is no need for women to work in courts” is self-contradicting and actually makes the case for allowing women to work in the Saudi courts. By the official’s own account, women are used whenever needed to help in courtroom proceedings; specifically, he points out the need for women to bodily search women in the courtroom, as this procedure could not be carried out by males.³⁷⁴ Representation of women in a religious country, such as Saudi Arabia, where women do not have direct contact with men, would also be improved by allowing women to practice law. Since women are not allowed to associate with strange males, they may not be comfortable talking to them even via veil or curtain about some sensitive matters. Consequently, allowing women to practice law is necessary for better and fair service of justice.

Also, the interpreters of the *Qur’anic* verse seem to ignore other factors that took place during the lifetime of the Prophet (PBUH) and today. For example, despite the clear instruction to the Prophet’s wives to stay in their houses, Islamic history teaches us that women participated in public life. For example, women participated along with men in some Muslim battles against their enemies. Moreover, the Prophet’s daughter, Asha, is known to have taken a leading role in the Battle of the Camel.³⁷⁵

Likewise, the opponents’ theory fails to explain how Muslim women made their cases before the Prophet. It is true that Islam orders women to stay home; however, it does not deny them the right to seek justice or to help others to articulate their cases.

³⁷⁴ Mohammed Alghamdi, *supra* note 364.

³⁷⁵ *Battle of the Camel*, Islamweb, <http://www.islamweb.net/fatwa/10605>

Common sense suggests that there was a mechanism that women used to argue their cases. If this is logical, the same logic necessitates the right of women to represent others in the same manner, especially those who cannot represent themselves. Further, the logic followed by this theory leads to denying women's appearance before the court, which would contradict strong evidence from the Prophet's era, in which women were allowed to bring complaints to ask for relief.

Further, Al-Yousif's criticisms of women's work in the West seem to be unsubstantiated. Al-Yousif has not shown any evidence of empirical, comparative studies conducted in either Western or Eastern countries that allow him to reach his conclusions;³⁷⁶ that is, there is no evidence to show that housewives maintain good marriage relationships while the marriages of working women suffer as a result of their work. Also, there is no evidence to suggest that children of non-working women, whether in the West or the East, are more well-nurtured and successful than working women's children. In addition, Al-Yousif has cited only the negative impacts on women's work in the West and ignored the positive ones, which may outweigh them.³⁷⁷

After reviewing the data in regard to women lawyers in Saudi Arabia, my study concurs with the proponents of Muslim women's right to work as lawyers. While the study acknowledges the concern and strength of the evidence of the traditional position of Saudi Arabia on this subject, it equally recognizes that the latter argument discounts women's right to sue and the representation by women that took place during the Prophet

³⁷⁶ Moslem Al-Yousif, *supra* note 367.

³⁷⁷ *Id.*

era and, thus, fails to acknowledge the authentication of the practice in early days of Islam.

The study also endorses the recent reform regarding women's legal practice for the following reasons. First, this practice has been successful in other Muslim countries, where women's participation in the legal field has served the cause of justice. Female lawyers in UAE are a good example of this. Aisha Rashid, a member of the Administration Council, and Head of Lawyers Committee in UAE, notes that:

A national female lawyer has succeeded in couple of years to gain high seats in the field of lawyering. She gained the trust of litigants through her good reputation by winning numerous family and criminal law cases as well as other important cases. Some female lawyers are mentioned by name, and litigants seek them out based on their good reputation, which inspires confidence that these lawyers are able to defend them and serve justice.³⁷⁸

Second, women's contribution to the cause of justice could be justified under the Islamic theory of *Istislah*, or public interest. Thus, the issue may come down to comparing and contrasting two interests – the obligation upon Muslim women to stay home and not to interact with strangers and the interest of serving the cause of justice, as female lawyers in other Muslim countries have done. Moreover, Muslim women may be better served by female lawyers, as they may not feel comfortable talking to male lawyers

³⁷⁸ Ahmed Aabid, *100% Increase in the Number of National Female Lawyers*, UAE Today (Feb. 20, 2010).

about sensitive issues. The two interests mentioned above have to be weighed against each other in accordance with the Islamic principles, and whichever outweighs the other should prevail and be applied, for it accomplishes greater good.

If women are not allowed to practice law and are kept away from the courtroom, the result will be poor service of justice, which is harmful not only to women but to society at large. It may result in severe damages and injustice, which is contrary to the objectives of Islamic law. Thus, in weighing the two interests, the interest of serving justice outweighs the interest of preventing women from working as lawyers. Thus, women should be allowed to practice law with the Islamic principles being maintained. Therefore, the reform was necessary for the service of justice.

V. Muslim Jurists and the Practice of Law

Opinions among Islamic jurists with regard to the legitimacy of the practice of law as a profession in its new form of *Muhama*, or lawyering, have been split into two opposing views. The first view rejects the practice of law and calls for its abolition in Islamic countries so as to restore the Islamic court system, arguing that the practice of law contradicts the teachings of Islam. The second view supports the practice of law and claims that it is permitted under the rules of *Shari'ah*, arguing that the practice of law in today's world is adversarial agency. The basic ideas of the two opposing views are summarized below, followed by a critical perspective on both.

1. Argument Against the Practice of Law

Some Islamic jurists argue against the profession of law practice and call for a restoration of the Islamic court system to its earlier form. The core of their argument is

that the practice of law is not permissible in Islam. They further argue that the practice of law has been misused by lawyers. Therefore, they call for its abolition in Islamic countries. Among the Muslim jurists who have strongly rejected the notion of the practice of law is Abulala Almaududi. He argued that the court system must be reformed to pave the way to apply Islamic law and that the first step that must be taken is the abandonment of the practice of law.³⁷⁹ He stated that the “practice of law is one of the largest disgraces in our judicial system today; it might be the largest and worst of all.”³⁸⁰ He further argued that “Islam strongly denies the existence of such a profession.”³⁸¹ He explained that the practice of law is contrary to the Islamic spirit and traditions; thus, it will always be impossible to maintain Islamic law if this profession remains in the court. Therefore, he stated, “I find it to be very important to gradually abolish the legal profession and cleanse the courts of its ugly impact.”³⁸² He argued that there are ways to assist people with matters of law other than through the legal profession; for example, if someone needs legal assistance, he can seek help of a *mufti*, or Muslim jurist, for free.³⁸³ Almaududi also accused lawyers of obstructing and misleading the courts to make a profit.³⁸⁴

Opponents of the legal profession cite the story of a woman from the Makhzoom tribe, a very reputable Arabian tribe, who was convicted of theft. The whole tribe was worried about her and chose Usama Bin Zaid, who was beloved by the Prophet, as the best person to intercede on her behalf before the Prophet. When Usama tried to

³⁷⁹ ABULALA ALMAUDUDI, *AL-NIZAM AL-ASLAMI WA-TATBIQATIHI* [Islamic Law and its Implementation Methods], *ISLAMIC LAW AND ITS IMPLEMENTATION METHODS* 70-76 (1975).

³⁸⁰ *Id.* at 71.

³⁸¹ *Id.*

³⁸² *Id.*

³⁸³ *Id.* at 74.

³⁸⁴ *Id.* at 73.

intervene, the Prophet said “O Usama, do you mean to come to me and intercede against the Law of God?” Then the Prophet (PBUH) said, “Nations which have preceded you have been wiped off the face of the earth, for the one reason only, that they imposed punishment on the poor and relaxed the law in favor of the rich. I swear by God that if Fatima, my daughter, were to be found guilty of theft, then I would have her hand cut off.” Opponents of the law practice view it as nothing but an act of intercession; therefore, they believe it should not be allowed in Islam.³⁸⁵

Among current jurists who support this view and strongly argue against the practice of law is Khadem Hussain, Professor of *Shari'ah* at Taif University in Saudi Arabia. He argues that the practice of law in its modern sense is non-Islamic, as it was brought to Islamic society during the European colonization era and enforced under its influence; therefore, he believes it should be rejected and abolished.³⁸⁶ In addition, he argues that the first generation of lawyers was not equipped with the required knowledge to represent others since they started out as interpreters for European judges during European colonization. Later, when the docket was overloaded, these interpreters were allowed to represent others before judges. This had a negative impact on the cause of justice because these interpreters/lawyers were not competent to represent others.³⁸⁷

Hussain's argument is summarized in the following points:

1. The money that lawyers receive for representing others may not be worth the representation. Such a case may be interpreted as the lawyer deceiving the client, which is prohibited in Islam.

³⁸⁵ HAMID AL-HAMMAD, *supra* note 283, at 107.

³⁸⁶ Khadem Hussain, *Lawyering in Islamic Law*, available at: <http://lojainiat.com/main/Author/425>

³⁸⁷ *Id.*

2. The legal profession was not known in Islam but instead was introduced by Europeans when they colonized Muslim countries.
3. Law practice is nothing but an “intercession” in which the lawyer is the intercessor, and “intercession” is not allowed in Islam.
4. Islam traditionally allowed for adversarial agency only in a limited number of cases in which the litigants had compelling excuses not to represent themselves.
5. Law practice is parallel to non-Islamic professions not allowed under Islam, such as making wine and selling ham.

The opponents’ assertion that Islamic law strongly prohibits the practice of law has aroused the ire of many people, especially many of those who work in the legal profession.³⁸⁸ The following section will present the opposite view.

2. Argument for the Practice of Law

In contrast, other Muslim jurists argue that the idea that the practice of law is a non-Islamic tradition is untrue. They argue that the legal profession has its roots in the Islamic legal system under the name of adversarial agency.³⁸⁹ Their argument is based on a set of rules from the *Qur’an*, *Sunnah*, and other Islamic sources. These jurists claim that law was practiced in the early Islamic state in the form of adversarial agency. The proponents further draw on the story of the Prophet Moses to support their argument for the practice of law.³⁹⁰ In the *Qur’an*, the Prophet Moses was afraid to meet with the

³⁸⁸ MOSLEM AL-YOUSIF, AL-MUHAMAHI FI DAW AL-SARI’AH AL-SLAMIYAH WA-AL-QAWANIN AL-ARABIYAH [Legal Profession in the Light of Islamic Law and Arab Laws] 81-85 (2001).

³⁸⁹ HAMID AL-HAMMAD, *supra* note 283, at 103.

³⁹⁰ DEMBA GLO, *supra* note 168, at 174.

Egyptian authorities because he killed one of their people before leaving Egypt and feared that he would not be able to defend himself and that he, in turn, would be killed: “My Lord, I have killed one person from among them, and I fear that they will kill me.”³⁹¹ According to the *Qur’an*, the Prophet Moses asked God to send Aaron, his brother, to assist him before the Egyptian authorities, since Aaron was more eloquent and articulate than Moses: “My brother Aaron is more eloquent in speech than I: so send him with me as a helper to confirm my truthfulness for I fear that they will reject me as a liar.”³⁹²

According to the *Qur’an*, the Prophet Moses’ request was granted, as God replied to him, “We shall strengthen your arm with your brother, and give you power with Our signs and give you authority, so that they will not be able to harm you. Both you and your followers will be victorious.”³⁹³ These Islamic jurists reason that the Prophet Moses was the defendant for whom his brother was playing the role of advocate, similar to the role of lawyers today. Therefore, the jurists argue that this *Qur’anic* verse clearly indicates that there is a place in Islam for lawyering and advocacy; since the Prophet Moses had someone else represent him, others can do so as well.

They further argue that the *Qur’an* orders Muslims to cooperate in promoting the common good of their society and to avoid engaging in any sinful actions or aggression.³⁹⁴ The *Qur’an* states:

³⁹¹ The *Qur’an* 28:33.

³⁹² The *Qur’an* 28:34.

³⁹³ The *Qur’an* 28:35.

³⁹⁴ MUHAMMAD ALI AISABHAN, *AL-WAKALAH FI AL-FIGH AL-ISLAMI* [Agency in the Islamic Jurisprudence] 11 (1973).

And do not let the hatred of a people for having obstructed you from al-Masjid al-Haram lead you to transgress. And cooperate in righteousness and piety, but do not cooperate in sin and aggression. And fear Allah; indeed, Allah is severe in penalty.³⁹⁵

The views of supporters of the practice of law, therefore, believe that the practice of law is designed to serve the common good by advancing and serving the cause of justice. They also consider representation a protection against sin and injustice. Thus, since lawyers help others through their representation, their job is permitted under Islamic principles.³⁹⁶ Although this verse does not directly address legal representation, it gives authority to the practice of law. However, the verse also implies that lawyers should not defend clients who engage in wrongdoing, such as criminals.

It is also well documented that “the Prophet Muhammad acknowledged the articulation and eloquence of some people over others. For this reason, he warned Muslim litigants that if he, the Prophet, was swayed by strong arguments that are based on articulation and eloquence, not merit, the winner should not accept the ruling.”³⁹⁷ Supporters of the legal profession also use this hadith to argue in favor of the practice of law.

Likewise, supporters of the profession argue that some of the Prophet Muhammad’s companions had others represent them in their disputes. For example, Hassan bin Thabit, who was also known as the Prophet’s poet, lost in a dispute before the third orthodox Muslim ruler, Othman bin Afan, who also acted as judge. Hassan bin

³⁹⁵ The *Qur’an* 5:2.

³⁹⁶ MUHAMMAD ALI ALSABHAN, *supra* note 394, at 11.

³⁹⁷ DEMBA GLO, *supra* note 168, at 178.

Thabit told his story to another companion, Abdullah bin Abbas, who was known to be an expert in legal matters. This companion told Hassan bin Thabit that he had a good case but had not made a strong argument. Therefore, the companion helped him to appeal the decision before the ruler and argued on his behalf. Consequently, the judgment was reversed in favor of the appellant.³⁹⁸

In the view of proponents of the practice of law, this precedent is one of the strongest in favor of law practice, as the parties in this precedent were two of the Prophet's companions and the presiding judge was the third orthodox Muslim ruler.³⁹⁹ The core of this argument is that the Appellant, who was a poet and highly knowledgeable of the Arabic language, was one of the most articulate people in the early history of Islam. Nonetheless, he lost because, in a court of law, he was not able to make a sound legal argument to support his allegation. Obviously, arguing before a judge, whether representing himself or on another person's behalf, was not Hassan bin Thabit's area of expertise; thus, he needed Abdullah bin Abbas, an expert in Islamic jurisprudence and interpretation of *Shari'ah* law who was known as the interpreter of the *Qur'an*, to represent him.

3. Responses to Jurists' Argument Regarding the Practice of Law

As mentioned earlier, there has been significant debate about whether adversarial agency is the same as the practice of law in its Western sense. Some Muslim jurists and scholars argue that the idea, role, and significance of the practice of law, in its Western sense, are similar to adversarial agency in Islamic law, which is designed to serve justice

³⁹⁸ *Id.* at 180.

³⁹⁹ *Id.*

within a society. They further argue that both the practice of law in the West and adversarial agency in Islam require official appointment and delegation of one's right to legal representation to another who may have the subject-matter expertise to provide representation in front of a judge, law enforcement official, or other judiciary institution. Therefore, they argue that adversarial agency in Islam is the same as the practice of law in its modern and Western sense. However, after comparing and contrasting the practice of law and adversarial agency, some striking differences between the two systems were identified. Below are some of the main differences:

1. The right to a lawyer is addressed in the constitutional law of some countries with regard to criminal courts,⁴⁰⁰ while the general rule in Islam is that people defend themselves and an agent is appointed only at the discretion of the individual parties.
2. The practice of law is a legal profession organized or recognized by the government of a country, while adversarial agency is mostly governed by social and moral rules.
3. Since the organization of the practice of law is itself based on law, lawyers must be licensed to practice law and they must have known law offices for practicing law, whereas adversarial agents can represent others without having a law education or license to practice law.
4. While lawyers provide a range of legal services, such as providing legal advice, drafting contracts, and performing negotiations, adversarial agents are limited to

⁴⁰⁰ The Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

the lawsuit in which they act as representatives for others (often family members or friends, as evidenced in the stories above).

5. Though lawyers take pro bono cases, they practice law for profit. In contrast, adversarial agents traditionally provide services as a means of helping others and do not receive payment.⁴⁰¹

6. The litigant has the right to always have his lawyer present, whereas a judge may exclude an agent from the court if he feels the agent is not being candid or may not be candid.

7. Although there is widespread consensus in Saudi Arabia that the litigant has the ultimate right to appoint a lawyer, some Muslims would make this right conditional upon the consent of the other party.⁴⁰²

Based on the above list, it is clear that there are significant differences between the practice of law as applied in the West and adversarial agency in Islamic jurisprudence. Thus, the legal profession in the Muslim world today has been adopted from the West to catch up to the development in those countries. Nonetheless, the claim that the practice of law contradicts the Islamic system also appears to be too broad, as this argument fails to acknowledge basic facts about life and Islam. The interests of people within a society evolve over time, and the judiciary system, as part of the society, evolves as well. However, Islam as practiced in Saudi Arabia has not abolished some of the traditions that were practiced before the modernization of Saudi society began in the 20th

⁴⁰¹ RAJIH BIN BAKHIT ALSANANI, *AL-MUHAMUN FI AL-SHARIAH WA-AL-QANUN* [Lawyers and Ethics in the Islamic *Shari'ah* and Law] 30 (2009).

⁴⁰² MUHAMMAD KHALID MASUD, RUDOLPH PETERS DAVID AND STEPHEN POWERS, *supra* note 271, at 23.

century, when many laws that did not exist in the early days of Islam (or even under the Ottoman Empire) were adopted. The opponents of law practice do not consider these laws to be non-Islamic, nor do they call for their abolition in Islamic countries, despite the fact that these laws (e.g., the system of appeals modeled after the French judicial system) lack Islamic origins.

As a matter of basic fairness, because people's level of sophistication differs, unsophisticated parties should be allowed legal representation by someone who can at least rebut a meritless claim made by an eloquent litigant. If only eloquent litigants can win in a court of law, justice may be in jeopardy. When applying this argument to criminal cases, it follows that criminal defendants should be allowed legal representation, because the representative of the Saudi government – that is, the prosecutor – is always sophisticated and an expert in criminal law. Thus, criminal defendants should be allowed and afforded effective legal representation by a legal expert of their choosing or assigned such a representative if they cannot afford to pay for legal services.

Moreover, the practice of law is not forbidden, as its opponents claim. The story of the woman from the Makhzoom tribe that they cite does not really apply to prohibit the development of the practice of law; rather, the practice that is forbidden is petitioning on behalf of the convict in a criminal case when the crime has been proven beyond a reasonable doubt and the ruling has become final in accordance with Islamic rules of evidence. In other words, a lawyer in an Islamic country can defend an accused person in a criminal trial and at the appellate level; however, when the judgment becomes final after exhausting all appeals, he cannot ask the governor or the president of the state to

pardon the convict in a *hudud* crime. The woman from the Makhzoom tribe had already been found guilty, and the ruling had already become final.

Likewise, as the Islamic rules of evidence provide, a criminal defendant must be convicted with evidence beyond a reasonable doubt. Since a defendant, as a layperson, likely does not understand the law and its procedures, he needs the help of a lawyer to contest a criminal charge. For this reason, legal representation should be allowed in all cases, including criminal cases, as a matter of basic fairness. In other words, lawyers should be allowed to represent criminal defendants until they are proven guilty in a court of law in accordance with the rules of evidence. This notion that defendants are innocent until proven guilty conforms to the Islamic legal principle that a hudud punishment should be relaxed if there is reasonable doubt regarding guilt.

Contrary to the views of those who oppose the practice of law, it is more relevant and important today than ever before. The volume of formal laws and regulations in Saudi Arabia is increasing rapidly, and the rate of expansion is unlikely to decrease in the future. Many more issues and relationships in Saudi Arabia are now organized by law, and these laws are applied to regular people who do not have any specialty in law or knowledge of the legal system, even though they may be well educated and articulate. This was the case for Hassan bin Thabit, as noted above, and it continues to be true to this day.⁴⁰³ Furthermore, legal disputes and judicial procedures are time consuming. They require parties to give up some of their time to follow the procedures in a court of law or government agency. In the meantime, the parties are likely committed to work during the

⁴⁰³ DEMBA GLO, *supra* note 168, at 180.

daytime and a good part of the evening. Therefore, using a lawyer's services is appropriate and convenient for handling the duties of life.

In addition, the allegation that lawyers are only driven by profit-making goals rather than the service of justice is also untrue. The practice of law is part of the judicial process, and it is mostly organized under the supervision of the judiciary branch. In fact, lawyers play an important role in helping the court to interpret and apply the law to the presented facts. Their presence may even contribute to the cooperation of the accused at trial and the implementation of sentencing. In other words, representation by a competent person in a criminal trial contributes to the service of justice as long as the defendant is satisfied with the legal representation, regardless of the outcome.

Conclusion

Lawyers in the Western sense first appeared in Saudi Arabia in 2001, when, for the first time, the country recognized the "practice of law" as a profession. This occurred when the country promulgated its first Code of Law Practice. The Code is neutrally written and does not discriminate against women; in other words, it contains no provision that prevents women from working in the legal field as lawyers. However, until the second half of 2013, the country did not allow women to work as lawyers. Before that time, the country applied an interpretation of Islamic law that prevented Muslim women from working as lawyers.

The emergence of the practice of law in the Muslim world has generated heated debate among Muslim jurists. While some jurists praise the legal profession and claim that it has its roots within Islamic traditions, others strongly reject it and call for its abolition from Islamic systems, claiming that it was adopted from the West and violates

Shari'ah. This chapter has provided a brief overview of the history of the legal profession in Saudi Arabia. Although the modern notion of the practice of law has been imported to the Islamic system from the West, upon careful examination it is clear that it does not contradict Islamic law. One group of jurists argues that, since the modern legal profession in Saudi Arabia is building incrementally on the traditional Islamic practice of adversarial agency, it is not a wholly foreign institution. Many strong arguments under Islamic law support the practice of law. Thus, because “[t]he origin of a business transaction is permissibility” according to Islamic doctrine, the notion of the practice of law should be seen as permissible.

Chapter Four: The Right to Defense Counsel in Criminal Cases in the United States and Saudi Arabia

Introduction

The defendant's right to a lawyer in a criminal case was not initially granted in the legal systems of either Saudi Arabia or the United States (U.S.). While it did not take long for this right to be invoked in the U.S., the Kingdom of Saudi Arabia only recently recognized the right to defense counsel in criminal cases. The U.S. officially recognized this right with the ratification of the Sixth Amendment in 1791. Saudi Arabia, on the other hand, did not recognize this right to counsel until 2001, after the Saudi Law of Criminal Procedures and the Code of Law Practice were issued.

When analyzing the history of criminal defense in Saudi Arabia and the U.S., remarkable differences are apparent. In general, issues regarding the adequacy of criminal defense in the U.S. are procedural, while in Saudi Arabia they are substantive. For example, critics of the American criminal defense system voice concern about inadequate funds, case loads, and incompetence of appointed counsel.⁴⁰⁴ In Saudi Arabia, however, criminal defense lacks both the fundamentals and constitutional grounds. In addition to the lack of constitutional grounds, criminal defense in Saudi Arabia is a new notion that lacks public awareness.⁴⁰⁵

This chapter addresses the right to counsel in criminal cases in Saudi Arabia and the U.S. The first part of the chapter introduces the concept of counsel in the U.S. In

⁴⁰⁴ National Right to Counsel Commission, *Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel* (2009).

⁴⁰⁵ Rakan Al-Dosari, *People Need to Be More Aware of Their Right to Legal Counsel: The Forgotten Right During Detention*, Alriyadh, Issue no. 15707 (June 26, 2011).

addition, it addresses the practice of the right to counsel in federal and state courts hearing criminal cases. The second part covers the right to defense counsel in Saudi criminal courts. It provides an historical background and an analysis of the application of the right in Saudi Arabia. The final part offers a comparative analysis between the U.S. and Saudi Arabia.

1. The Right to Counsel in the U.S.

I. Introduction

To start, this part provides an introduction to the right to counsel under British common law, from which most American colonies departed in the late 17th century. Then, it traces the right as it was introduced into the American Constitution. Specifically, it discusses American courts' initial interpretation of the right and the development of such interpretation through the years. Next, it highlights the significance of the right to counsel and the application of this right in the U.S.

II. Historical Background

At the outset, the American criminal defense system grew out of British common law.⁴⁰⁶ In colonial America, however, many of the American colonies departed from the British rule of denying defendants the assistance of counsel. In England, defendants accused of serious crimes such as “murder, manslaughter, larceny, robbery, or rape” were denied assistance of counsel.⁴⁰⁷ The British common law’s prohibition of the assistance of counsel was used as a means to strengthen the government and to preserve national

⁴⁰⁶ DAVID FELLMAN, DEFENDANT'S RIGHTS TODAY 209 (1977).

⁴⁰⁷ JAMES J. TOMKOVICZ, THE RIGHT TO THE ASSISTANCE OF COUNSEL: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION 3 (2002).

security and peace.⁴⁰⁸ Another rationale for the prohibition was that the court was thought capable of safeguarding the interests of both defendants and victims at the same time.⁴⁰⁹ In addition, the general understanding was that both parties had the same footing, since both were untrained in the practice of law.⁴¹⁰

The prohibition continued in England until the 19th century, when defendants officially obtained the right to counsel by virtue of the Prisoners' Counsel Act (1836).⁴¹¹ However, this was not the case in colonial America. As early as the 17th century, most American colonies had abandoned the British common law rule of prohibiting counsel to defendants. Before the Sixth Amendment was adopted, seven American states, Delaware, Pennsylvania, New Jersey, Maryland, Massachusetts, New Hampshire, and New York, adopted constitutional provisions that provided defendants in criminal cases the right to representation by defense counsel.⁴¹² The practice in these states must have encouraged the ratification of the Sixth Amendment and Fourteenth Amendment to the U.S. Constitution. Today, the two amendments form the constitutional grounds for the right to counsel in the American criminal system. The interpretation of these amendments will be covered in detail in the next paragraphs.

The Sixth Amendment states that, “[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defense.”⁴¹³ The Fourteenth Amendment further states, “... nor shall any State deprive any person of life,

⁴⁰⁸ *Id.*

⁴⁰⁹ *Id.* at 5.

⁴¹⁰ *Id.*

⁴¹¹ HARRY DAMMER AND JAY ALBANESE, *COMPARATIVE CRIMINAL JUSTICE SYSTEMS* 132 (2013).

⁴¹² JAMES J. TOMKOVICZ, *supra* note 407, at 11.

⁴¹³ U.S. CONST. Amend. VI.

liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”⁴¹⁴ The Sixth Amendment was ratified in 1791 and the Fourteenth in 1868. Nonetheless, American criminal courts did not initially interpret the right to counsel in criminal courts to mean the effective assistance of counsel, without which justice may be denied to criminal defendants, which will be further discussed below.

It was not until the 1930s that the U.S. Supreme Court began to apply the right to counsel in criminal cases for indigent people.⁴¹⁵ In *Powell v. Alabama*, 287 U.S. 45, 1932), the Court decided that any person accused of a capital crime had to be provided with legal counsel pursuant to the due process clause of the Fourteenth Amendment if she or he could not afford counsel. In that case, the defendants, a group of African American youth, were on a freight train in Alabama. A group of seven white boys and two white girls were also on the train. The defendants had a fight with the white boys. As a result, all of the white boys except one, Gilley, were thrown off the train. Consequently, a message was sent ahead requesting the removal of the black youths from the train. The train was stopped before the defendants’ last destination, and a sheriff seized them. The two girls claimed that the defendants had raped them. The defendants were brought to trial with no prior assistance from counsel; rather, the court appointed “all the members of the bar” to assist the defendants during the arraignment with the anticipation that “the members of the bar” would assist the defendants “if no counsel appeared in their behalf.”⁴¹⁶ The defendants were convicted of rape and sentenced to death. The judgment

⁴¹⁴ U.S. CONST. Amend. IV.

⁴¹⁵ *Powell v. Alabama*, 287 U.S. 45 (1932).

⁴¹⁶ *Powell v. Alabama*, 287 U.S. 45, 60-66 (1932).

was later affirmed by the state supreme court. However, the U.S. Supreme Court granted certiorari and decided that appointing all of the members of the bar “was little more than an expansive gesture, imposing no substantial or definite obligation upon anyone.”⁴¹⁷ In addition, the Court decided:

In any event, the circumstance lends emphasis to the conclusion that, during perhaps the most critical period of the proceedings against these defendants, that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thoroughgoing investigation and preparation were vitally important, the defendants did not have the aid of counsel in any real sense.⁴¹⁸

The Court further held that, “in a capital case, where the defendant is unable to employ counsel and is incapable adequately of making his own defense because of ignorance, feeble-mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law.”⁴¹⁹ However, in this important landmark case, and despite its advanced interpretation of the Sixth Amendment, the Court applied the right to counsel only to crimes punishable by the death penalty.⁴²⁰

In 1938, in *Johnson v. Zerbst*, 304 U.S. 458 (1938), the Court held that the Sixth Amendment requires that counsel be appointed for an indigent defendant accused of a

⁴¹⁷ *Id.*

⁴¹⁸ *Id.*

⁴¹⁹ *Id.*

⁴²⁰ *Powell v. Alabama*, 287 U.S. 45 (1932).

felony in a federal court if the defendant cannot afford counsel.⁴²¹ In *Zerbst*, two Marines, Jonson and Bridwell, who were charged in a federal court with “feloniously uttering and passing four counterfeit twenty-dollar Federal Reserve notes and possessing twenty-one such notes.”⁴²² No counsel was retained for the two men while their case was bound over to a federal grand jury or at trial.⁴²³ In addition, the two had to stay in jail, because they could not post bail. At trial, they were convicted and sentenced to four and one-half years in the penitentiary. As a result, Jonson filed a petition claiming “that he had been denied assistance of counsel at his trial after making a timely request for such assistance.”⁴²⁴ Ultimately, the Supreme Court held that “any defendant in a federal criminal case involving a felony offense, who cannot afford to retain a lawyer, is entitled to the appointment of counsel,” unless he or she waives that right.⁴²⁵ The Court stated: “The Sixth Amendment withholds from federal courts, in all criminal proceedings, the power and authority to deprive an accused of his life or liberty unless he has or waives the assistance of counsel.”⁴²⁶ Justice Hugo Black clarified that:

It embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned

⁴²¹ *Johnson v. Zerbst*, 304 U.S. 458 (1938).

⁴²² *Id.* at 460.

⁴²³ DEAN J. CHAMPION, *THE AMERICAN DICTIONARY OF CRIMINAL JUSTICE: KEY TERMS AND MAJOR COURT CASES* 353 (2005).

⁴²⁴ *Id.*

⁴²⁵ Stephen A. Gerst, *Forfeiture of the Right to Counsel: A Doctrine Unhinged from the Constitution*, 58 Clev. St. L. Rev. 97, 99-100 (2010).

⁴²⁶ *Johnson v. Zerbst*, 304 U.S. 458 (1938).

counsel. That which is simple, orderly and necessary to the lawyer, to the untrained layman may appear intricate, complex and mysterious.⁴²⁷

However, in *Betts v. Brady*, 316 U.S. 455 (1938), the Supreme Court did not acknowledge the consequences of such a criminal prosecution in state courts.⁴²⁸ In other words, the Court applied different standards to similar situations. Betts was accused of robbery in Carroll County, Maryland. He was an indigent defendant and, thus, was unable to hire a lawyer to represent him. Therefore, he requested that the court appoint counsel to represent him. “The judge advised him that this would not be done, as it was not the practice in Carroll County to appoint counsel for indigent defendants ...”⁴²⁹ Later, the defendant was convicted, and the judge sentenced him to eight years in prison. The defendant filed two petitions for writs of habeas corpus, but both were denied, after which the defendant applied to the Supreme Court for certiorari.⁴³⁰

The Supreme Court considered “whether due process of law demands that, in every criminal case, whatever the circumstances, a State must furnish counsel to an indigent defendant.”⁴³¹ The Court held that “the Fourteenth Amendment’s due process clause did not mandate counsel for an indigent defendant charged with a felony offense in state court.”⁴³² By so deciding, the Court interrupted the evolution of the right to counsel in criminal cases in the American legal system in general and state courts in particular. However, in its 1963 decision in *Gideon v. Wainwright*, 372 U.S. 375 (1963), the Court

⁴²⁷ *Johnson v. Zerbst*, 304 U.S. 458 (1938).

⁴²⁸ *Betts v. Brady*, 316 U.S. 455 (1942).

⁴²⁹ *Id.* at 457.

⁴³⁰ *Id.* at 455.

⁴³¹ *Id.*

⁴³² CRAIG HEMMENS, DAVID C. BRODY, CASSIA C. SPOHN, CRIMINAL COURTS: A CONTEMPORARY PERSPECTIVE 168 (2012).

unanimously “overruled Betts and held that indigent defendants charged with a felony in state courts must have counsel provided to them at state expense.”⁴³³

Gideon initially was tried in a state court in Florida for the crime of larceny. Since he was unable to pay for counsel,⁴³⁴ he requested that the court appoint one to represent him. In denying his request, the judge stated:

Mr. Gideon, I am sorry, but I cannot appoint Counsel to represent you in this case. Under the laws of the State of Florida, the only time the Court can appoint Counsel to represent a Defendant is when that person is charged with a capital offense. I am sorry, but I will have to deny your request to appoint Counsel to defend you in this case.⁴³⁵

Gideon was thereafter convicted and sentenced to five years in prison. He filed a petition for a writ of habeas corpus, but his petition was denied by the Florida Supreme Court. Gideon then sent a letter to the U.S. Supreme Court to inform the justices that he was denied his constitutional right, because he was tried in a criminal court without the assistance of counsel.⁴³⁶ The Supreme Court granted certiorari and held that the Sixth Amendment right to counsel applies to defendants accused of felonies in state courts under the due process clause of the Fourteenth Amendment.⁴³⁷ The Court acknowledged

⁴³³ *Id.* at 175.

⁴³⁴ *Gideon v. Wainwright*, 372 U.S. 335 (1963).

⁴³⁵ *Id.*

⁴³⁶ RONALD W. EADES, *FIGHTS FOR RIGHTS* 28 (2000).

⁴³⁷ *Gideon v. Wainwright*, 372 U.S. 335 (1963).

that a fair trial can be obtained in the American criminal system of justice only when an accused is provided counsel to defend against a competent accuser.⁴³⁸

Thereafter, the Supreme Court elaborated on how the right to counsel is implemented. In *Strickland v. Washington*⁴³⁹ decided not to overturn a trial court ruling even though defense counsel failed to provide effective assistance to the defendant client, “so long as those failures did not materially prejudice the outcome.”⁴⁴⁰ The Washington case facts are summarized as follows:

The defendant, David Leroy Washington, was charged with committing three murders. He was not an ideal client, to put it mildly. He confessed to the police against his attorney’s advice. He then pleaded guilty, again contrary to his attorney’s advice, and waived the right to a jury. Perhaps discouraged by each of those decisions, his attorney put on a very thin sentencing case. The attorney viewed his client as competent, and spoke only to family members without consulting an expert, seeking a psychiatric exam, or providing any witnesses at all, including character witnesses. He did little more than ask for the judge’s mercy and present his client’s remorse. Washington was sentenced to death.⁴⁴¹

⁴³⁸ Margareth Etienne, *The Declining Utility of the Right to Counsel in Federal Courts: An Empirical Study on the Diminished Role of Defense Attorney Advocacy Under the Sentencing Guidelines*, 92 CAL. L. REV. 425, 428 (2004).

⁴³⁹ *Strickland v. Washington*, 466 U.S. 668 (1984).

⁴⁴⁰ Brandon L. Garretta1, *Validating the Right to Counsel*, 70 Wash. & Lee L. Rev. 927, 928 (2013).

⁴⁴¹ *Id.* at 932-933.

Though defense counsel did not exercise due diligence in investigating mitigating evidence, the Court denied Washington relief on the basis that, even though the trial counsel could have offered mitigating evidence at the sentencing hearing, the sentencing may still have been the same.⁴⁴² In this ruling, however, the Court did not recognize that defense counsel's failure to provide mitigating evidence in a death penalty sentencing may amount to the ineffective assistance of counsel.⁴⁴³

The limitations in its rulings before *Gideon* "showed that the U.S. Supreme Court was still reluctant to interfere in the judicial business of the states."⁴⁴⁴ However, this was not the case in *Gideon*, in which the Court intervened and made the right to counsel a fundamental right in all courts. By acknowledging the right to counsel in both federal and state courts, the Supreme Court made "state laws uniform in regard to appointing a defense attorney for an indigent defendant."⁴⁴⁵ Following *Gideon*, the Court has expanded the right to the effective assistance of counsel to cover almost all stages of interrogation and prosecution, including "the process of custodial interrogation, a lineup or other pre-trial identification proceeding, a probation revocation hearing, a preliminary hearing, and a parole revocation hearing."⁴⁴⁶

⁴⁴² *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

⁴⁴³ Brandon L. Garretta1, *supra* note 440, at 935.

⁴⁴⁴ RON FRIDELL, *GIDEON V. WAINWRIGHT: THE RIGHT TO FREE COUNSEL* 38 (2007).

⁴⁴⁵ *Id.* at 40.

⁴⁴⁶ Richard Klein, *The Role of Defense Counsel in Ensuring a Fair Justice System*, 36-JUN Champion 38, 39 (2012).

III. The Importance of the Right to Counsel in the American Criminal System

The Sixth Amendment right to counsel is a fundamental constitutional principle in the American criminal system. According to Justice Hugo Black:

The right of one charged with a crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law.⁴⁴⁷

It seems that Americans today tend to agree about the significance of the right to counsel in criminal cases. They understand that this right protects civil liberties guaranteed in the Bill of Rights and limits the government's power to constrain individual liberties when people are accused of wrongdoing. For this reason, this right has been described as "the most important of all rights, because it is inextricably connected to the 'client's ability to assert all other rights'."⁴⁴⁸ Justice Schaefer, of the Supreme Court of Illinois, explained that, "of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have."⁴⁴⁹

⁴⁴⁷ *Gideon V. Wainwright*, 372 U.S. 335 (1963).

⁴⁴⁸ Abbe Smith, *The difference in criminal defense and the difference it makes*, 11 Wash. U. J. L. & Pol'y 83, 87 (2003).

⁴⁴⁹ DAVID FELLMAN, *supra* note 406, at 208.

Richard Klein,⁴⁵⁰ a law professor, explained that defense attorneys can accurately be considered “law enforcers”, because they try to “police the police” if the police cross boundaries and abuse their power. In so doing, they confront prosecutors with opposing evidence and counter their accusations as meritless and ill founded. They also ensure that prosecutors adhere to the rules of professional responsibility of which the layperson is not aware.⁴⁵¹ To show his appreciation for the role of criminal defense, Klein continued by saying:

When vigorous advocacy informs the police that they will not be able to “get away with” an illegal, unconstitutional search of a particular person's home, the benefits accrue to and protect us all. If we did not keep them honest, or as honest as we can keep them, there would be nothing to deter the police from entering any of our homes at will. One can succeed, probably, in not committing a crime, but may not be as successful in not being charged with a crime. The freedoms enjoyed by everyone would be at risk if we did not.⁴⁵²

The importance of the right to counsel in criminal cases applies not only to scholars and law professionals but also to laypersons.⁴⁵³ As a boot repairman stated: “If people who get arrested did not have lawyers, then anybody the police suspected would

⁴⁵⁰ “Richard Klein is the Bruce K. Gould Distinguished Professor of Law at Touro College Jacob D. Fuchsberg Law Center. He worked for 10 years as a senior trial attorney with the Criminal Defense Division of the Legal Aid Society. His scholarly publications have focused on the constitutional right to effective assistance of counsel and constitutional challenges to the death penalty.” Klein Richard, *supra* note 446, at 38.

⁴⁵¹ Richard Klein, *supra* note 446, at 39.

⁴⁵² *Id.*

⁴⁵³ Abbe Smith, *supra* note 448, at 125.

be railroaded off to the jail. It would be a police state.”⁴⁵⁴ In addition, three different studies⁴⁵⁵ conducted at three different times revealed that 93% to 97% of American citizens view the right to counsel as a constitutional guarantee.⁴⁵⁶ Moreover, Americans in general are not willing to give up this constitutional right; “a 1994 Gallup/America’s Talking poll on patriotism found that only 14% of people would willingly give up their right to have a lawyer if they were arrested.”⁴⁵⁷

American lawyers have worked effectively to represent and prove the innocence of their clients. This is apparent in capital crimes, in which life and liberty are in jeopardy. In Philadelphia, Pennsylvania, for example, both public defenders and appointed defense attorneys contribute to the reduction in murder convictions;⁴⁵⁸ “... public defenders in Philadelphia reduce their clients’ murder conviction rate by 19%. They reduce the probability that their clients receive a life sentence by 62%. Public defenders reduce overall expected time served in prison by 24%.”⁴⁵⁹

Nonetheless, some commentators have questioned the defense counsel’s role. William Simon, author of *The Ethics of Criminal Defense*, criticized defense lawyers for engaging in systematic practices that defeat the purpose of serving justice. He accused defense lawyers of “routinely engaging in overly aggressive and ‘ethically questionable practice, such as delaying a case in order to frustrate government witnesses, presenting

⁴⁵⁴ Michael E. Tigar, *Defending*, 74 TEX. L. REV. 101,101 (1995).

⁴⁵⁵ The studies were conducted by (1) the National Center for State Courts (1977), (2) the Hearst Corporation (1983), and (3) Belden, Russonello, and Stewart from the National Aid and Defender Association.

⁴⁵⁶ Amy E. Lerman, *The Rights of the Accused*, in PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY 41, 52 (Nathaniel Persily, Berkeley Jack Citrin, Patrick J. Egan eds., 2008).

⁴⁵⁷ *Id.* at 52.

⁴⁵⁸ James M. Anderson and Paul Heaton, *How Much Difference Does the Lawyer Make? The Effect of Defense Counsel on Murder Case Outcomes*, 122, Yale L. J. 154 (2013).

⁴⁵⁹ *Id.*

perjured testimony by embarrassing or blaming alleged victims.”⁴⁶⁰ This allegation has been forcefully rebutted by Abbe Smith, who has argued that lawyers cannot serve the best interest of their clients unless they use such tactics, which Simon may call unethical.⁴⁶¹

In his book, *The Practice of Justice: A Theory of Lawyers’ Ethics*,⁴⁶² William Simon also argued “that lawyers must take personal responsibility for quality of justice, and to some extent, for the production of just outcomes, in every representation, even when doing so may work against the client’s interest.”⁴⁶³

In contrast, Abbe Smith argued that a lawyer’s number one duty is to defend and advocate the best interest of his or her client. This obligation supersedes all other principles that may come into conflict with the defendant’s right to effective legal representation,⁴⁶⁴ including any conflict of interest in the course of the representation of other clients or any form of ties with the state. This duty was summarized a long time ago by “Lord Brougham in his defense of Queen Caroline in 1821.” He said:

An advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and amongst them, to himself, is his first and only duty; and in performing this duty he

⁴⁶⁰ Abbe Smith, *supra* note 448, at 98.

⁴⁶¹ *Id.*

⁴⁶² WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS’ ETHICS* (1998).

⁴⁶³ Robert W. Gordon, *The Radical Conservatism of the Practice of Justice*, *Tan. L. Rev.* 51:903, 925 (1999).

⁴⁶⁴ Abbe Smith, *supra* note 448, at 89.

must not regard the alarm, the torments, the destruction which he may bring upon others.⁴⁶⁵

Smith's points have merit. The truth is the prosecutor is always in a powerful position to investigate crimes, arrest suspects, file charges, and make the case before a court of law. This inherited constitutional power puts the prosecutor at an advantage in all criminal proceedings. Accordingly, rigorous advocacy is required from the criminal defense side to rebut the prosecutor's case.

IV. Scope and Application of the Right to Counsel in the U.S.

Today, the Sixth Amendment right to counsel applies to criminal prosecutions in both federal and state trials. Defendants enjoy this right not just at the trial level but at every "critical stage" of the proceeding even before the trial takes place and in almost all types of crimes.⁴⁶⁶ In fact, the right to counsel begins "at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment."⁴⁶⁷

As stated earlier, in *Powell v. Alabama*, Justice Sutherland described the time from arraignment until the trial as the most critical stage of the criminal proceeding.⁴⁶⁸

⁴⁶⁵ Scott Schumacher, *Is Zealous Advocacy Obstruction of Justice?*, 132 Tax Notes 1169-76 (2011); Available at: <http://www.taxanalysts.com/www/features.nsf/Articles/9FEFC892C93D544F85257912006D031D?OpenDocument>

⁴⁶⁶ PAUL B. WICE, PUBLIC DEFENDERS AND THE AMERICAN JUSTICE SYSTEM 7 (2005).

⁴⁶⁷ *Kirby v. Ill.*, 406 U.S. 682, 689 (1972).

⁴⁶⁸ In *Powell v. Alabama*, the Supreme Court held that, "during perhaps the most critical period of the proceedings against these defendants, that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thoroughgoing investigation and preparation were vitally important, the defendants did not have the aid of counsel in any real sense, although they were as much entitled to such aid during that period as at the trial itself." *Powell v. Alabama*, 287 U.S. 45 (1932). Statistics confirm this statement. In fact, approximately 90%-95% of criminal

Accordingly, defendants have the right to counsel at every step of criminal proceedings that comes after the indictment. For example, in *United States v. Wade*,⁴⁶⁹ the defendant was indicted on a charge of bank robbery, and the Federal Bureau of Investigation (FBI) placed him in a lineup⁴⁷⁰ without informing his counsel. The U.S. Supreme Court held that the period in a lineup after a person has been indicted on a crime is considered a critical period of the proceeding, in which the defendant has the right to counsel.⁴⁷¹

The right to counsel in criminal cases also goes beyond the trial stage. It is attached to the initial appeal that takes place after the criminal trial.⁴⁷² However, the right to free counsel does not attach beyond the initial appeals. For example, defendants are not entitled to free legal representation to appeal before state supreme courts or the United State Supreme Court. Similarly, defendants are not entitled to free legal representation in the habeas corpus process. In other words, if a defendant wants to contest a conviction after the initial appeal, the defendant must prepare his or her own case if employing an attorney is not financially feasible.⁴⁷³ Finally, the right to counsel in criminal cases is a

cases were disposed of through a guilty plea. Lindsey Devers, Plea and Charge Bargaining, retrieved from: <https://www.bja.gov/Publications/PleaBargainingResearchSummary.pdf>.

⁴⁶⁹ *United States v. Wade*, 388 U.S. 218 (1967).

⁴⁷⁰ “In a lineup, a group of individuals, one of whom is the suspect in custody, appears before a victim or witness, who is usually shielded from the suspect’s view. Often, the individuals in the lineup are asked to walk, turn sideways, wear certain items of clothing, or speak to assist the victim or eyewitness in making a positive identification.” JOHN SCHEB AND JOHN SCHEB II, CRIMINAL LAW AND PROCEDURE 547 (2013).

⁴⁷¹ RONALD J. ALLEN, WILLIAM J. STUNTZ, JOSEPH L. HOFFMANN, DEBRA LIVINGSTON, ANDREW D. LEIPOLD, CRIMINAL PROCEDURE: ADJUDICATION AND RIGHT TO COUNSEL 160 (2011).

⁴⁷² CHRISTOPHER E. SMITH, COURTS AND TRIALS: A REFERENCE HANDBOOK 46 (2003).

⁴⁷³ *Id.*

constitutional right; violation of this right “affects the entire context in which the trial is held, making it a structural error rather than simply a procedural error.”⁴⁷⁴

Despite the fact that the right to counsel in criminal cases applies in both federal and state criminal proceedings, the application of this right differs in federal versus state proceedings. Obstacles have undermined the right to counsel in criminal cases in each system. In federal proceedings, for example, federal district courts apply the Federal Sentencing Guidelines in all criminal cases. The guidelines were enacted in November 1987 and were intended to promote uniformity in sentencing in federal district courts; they cover almost all aspects of sentencing. All federal crimes are categorized in the sentencing guidelines and “assigned a certain number of points.... Similarly, every defendant is categorized on a scale of one to six based on prior criminal history.”⁴⁷⁵ At first, the guidelines were mandatory; however, they “were challenged on constitutional grounds almost immediately after their adoption.”⁴⁷⁶ Consequently, the United State Supreme Court in *United States v. Booker*⁴⁷⁷ “instructed judges to take the guidelines into consideration when sentencing, but to tailor the sentences in light of other statutory concerns. As a result, the guidelines were subsequently amended and made merely advisory instead of mandatory.”⁴⁷⁸

⁴⁷⁴ CRAIG HEMMENS, DAVID C. BRODY, CASSIA C. SPOHN, *supra* note 432, at 183. In *Gideon*, the Supreme Court held that indigent defendants have the right to free counsel when accused with a crime punishable with a “deprivation of liberty. Denial of such right is considered a clear denial of due process under the Fourteenth Amendment. J. SCOTT HARR, KÄREN M. HESS, *CONSTITUTIONAL LAW AND THE CRIMINAL JUSTICE SYSTEM* 320 (2007).

⁴⁷⁵ Margareth Etienne, *supra* note 438, at 432.

⁴⁷⁶ Scott A. Schumacher, *Tomko and Sentencing Guidelines in Tax Cases after Booker*, 125 Tax Notes 149 (2009).

⁴⁷⁷ *United States v. Booker*, 543 U.S. 220 (2005).

⁴⁷⁸ ROLANDO DEL CARMEN, *CRIMINAL PROCEDURE: LAW AND PRACTICE* 414 (2013).

Notwithstanding their intended purposes, Margareth Etienne, in her study, “The Declining Utility of the Right to Counsel in Federal Criminal Courts,” argued that the guidelines are “complex and rigid” and that they influence defense strategy in federal district courts to the detriment of defendants. In other words, when representing defendants and putting forward defense strategies, defense attorneys think of the guidelines and their possible chilling effect on zealous advocacy rather than the best interest of defendants. Such influence undermines the Sixth Amendment right to counsel in federal courts.⁴⁷⁹

One rule in the guidelines that emphasizes effective legal representation is the acceptance of responsibility principle in section 3E 1.1.⁴⁸⁰ According to this section, a judge, after a “presumptive sentence” is decided, must determine whether a defendant is entitled to the 2-3 level of reduction. The level of reduction could be significant based on the type of crime and presumptive sentence. For this reason, defendants opt to enter a guilty plea to reduce the possibility of receiving a higher sentence.⁴⁸¹ However, defendants could lose such a reduction, as explained in the next paragraphs.

⁴⁷⁹ Margareth Etienne, *supra* note 438, at 428-31.

⁴⁸⁰ 3E 1.1 states “(a) If the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by 2 levels.

(b) If the defendant qualifies for a decrease under subsection (a), the offense level determined prior to the operation of subsection (a) is level 16 or greater, and upon motion of the government stating that the defendant has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently, decrease the offense level by 1 additional level.”

Available at : http://www.uscourts.gov/Guidelines/2010_guidelines/Manual_HTML/3e1_1.htm

⁴⁸¹ Statistics show that more than 90% of defendants in federal courts are convicted. Thus, it is no wonder that defendants lean toward pleading guilty; Margareth Etienne, *supra* note 438, at 446.

Unlike the plea bargain, the reduction under acceptance of responsibility is not guaranteed. Defendants may lose the reduction in points because of the defense strategies that their attorneys chose to follow. In other words, while zealous advocacy is required to serve justice in the American adversarial criminal system, the guidelines punish criminal defense attorneys for vigorous advocacy, such as the making of motions and arguments; consequently, reduction will be denied for the defendant's failure to accept responsibility.⁴⁸²

A second reason for which a defendant can lose the acceptance of responsibility is making a "frivolous" argument. This was a common reason for denying a defendant a reduction under the acceptance of responsibility principle. If a judge decides that the defense has made a frivolous or "false" argument, a defendant can lose the acceptance of responsibility reduction.⁴⁸³ One problem associated with a frivolous argument is that no unified standard exists that courts can apply in all situations. This gave the presiding judge discretionary power to determine which arguments are frivolous, which undercut the role of the sentencing guidelines. In addition, it influences defense plans to defendants' detriment. That is, an attorney may not make a strong argument for fear that the client may lose the reduction under the acceptance of responsibility.⁴⁸⁴

The Sixth Amendment right to counsel is no better in state courts than in federal courts. As noted in the National Counsel Commission's 2009 report, *Justice Denied*:

⁴⁸² Margareth Etienne, *supra* note 438, at 447.

⁴⁸³ *Id.*

⁴⁸⁴ *Id.* at 447- 448.

America's Continuing Neglect of Our Constitutional Right to Counsel,⁴⁸⁵ “[t]he long-term neglect and underfunding of indigent defense has created a crisis of extraordinary proportions in many states throughout the country.”⁴⁸⁶

Despite Court’s promise in *Gideon* of effective assistance pursuant to the Sixth Amendment right to counsel, a significant number of poor defendants have been denied access to counsel. Typically, those defendants are pushed to waive their right to counsel and to enter a guilty plea without fully understanding their legal rights.⁴⁸⁷ According to an American Bar Association (ABA) report:

Lawyers are not provided in numerous proceedings in which a right to counsel exists in accordance with the Constitution and/or state law. Too often, prosecutors seek to obtain waivers of counsel and guilty pleas from unrepresented accused persons, while judges accept and sometimes even encourage waivers of counsel that are not knowing, voluntary, intelligent, and on the record. Throughout the country, indigent defendants who have not knowingly, voluntarily, and intelligently waived their right to counsel are denied representation at critical stages of the criminal process, in violation of constitutional requirements.⁴⁸⁸

⁴⁸⁵ NATIONAL RIGHT TO COUNSEL COMMISSION, JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL (2009).

⁴⁸⁶ Richard Klein, *supra* note 446, at 39.

⁴⁸⁷ Mary Sue Backus and Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 *Hastings L. J.* 1031,1072-1073 (2006); NATIONAL RIGHT TO COUNSEL COMMISSION, JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 84 (2009).

⁴⁸⁸ Mary Sue Backus and Paul Marcus, *supra* note 487, at 1073.

Another problem that faces public criminal defense is underfunding. “[T]here is abundant evidence that systems of indigent defense routinely fail to assure fairness because of under-funding and other problems.”⁴⁸⁹ In Fairfax, Virginia, for example, the head of the public defense office resigned, because his staff could not effectively defend their clients due to caseloads that were caused by lack of funds.⁴⁹⁰ Similarly, the head of the public defense office in St. Louis, Missouri, declared that his office would not represent indigent defendants charged with minor offenses.⁴⁹¹

The problems of indigent defense in federal and state courts harm both individuals and society. At the individual level, defendants may receive higher sentences than they might have received at trial or had their defense counsel defended them zealously. On the other hand, the lack of a zealous defense undermines the integrity of the criminal justice system and the role of the defense attorney.⁴⁹² Therefore, Mary Sue Backus and Paul Marcus, in their article, *The Right to Counsel in Criminal Cases, A National Crisis* on the right to criminal defense counsel, argued that Gideon’s promise of effective assistance of counsel is not fully fulfilled.⁴⁹³

To make their point clear, they provided examples such as the following:

⁴⁸⁹ *Id.* at 1039-1040.

⁴⁹⁰ *Id.* at 1039-1033.

⁴⁹¹ Mary Sue Backus and Paul Marcus, *supra* note 487, at 1070. Louisiana provides another stark example of an overwhelming caseload caused by underfunding, as this quotation explains: “Because of the caseload burden, Rapides Parish public defenders began to refuse new clients, so a judge in Louisiana’s Ninth Judicial District used the telephone book to call attorneys and appoint them to represent indigent defendants. Recognizing the situation as dire, the judge said, ‘We’ve run into a real crisis that we just can’t address on the local level. What we need to do is hire more attorneys and pay them well, at least as much as the prosecutors are making’.” Mary Sue Backus and Paul Marcus, *supra* note 487, at 1039-1055.

⁴⁹² Margareth Etienne, *supra* note 438, at 479.

⁴⁹³ Mary Sue Backus and Paul Marcus, *supra* note 487, at 1039.

In a case of mistaken identity, Henry Earl Clark of Dallas was charged with a drug offense in Tyler, Texas. After his arrest, it took six weeks in jail before he was assigned a lawyer, as he was too poor to afford one on his own. It took seven more weeks after the appointment of the lawyer, until the case was dismissed, for it to become obvious that the police had arrested the wrong man.⁴⁹⁴

The second example comes from the state of Georgia:

Sixteen-year-old Denise Lockett was retarded and pregnant. Her baby died when she delivered it in a toilet in her home in a South Georgia housing project. Although an autopsy found no indication that the baby's death had been caused by any intentional act, the prosecutor charged Lockett with first-degree murder. Her appointed lawyer had a contract to handle all the county's criminal cases, about 300 cases in a year, for a flat fee. He performed this work on top of that required by his private practice with paying clients. The lawyer conducted no investigation of the facts, introduced no evidence of his client's mental retardation or of the autopsy findings, and told her to plead guilty to manslaughter. She was sentenced to twenty years in prison.⁴⁹⁵

The first example highlights the significance of the right to counsel when criminal procedures are initiated against a defendant. In this case, had Clark had a defense lawyer when he was arrested and charged, that lawyer would have met

⁴⁹⁴ *Id.* at 1031-1032.

⁴⁹⁵ *Id.*

Clark early on and may have discovered that the police had arrested the wrong person. The second case, on the other hand, demonstrates the importance of effective assistance of counsel. To contrast the two cases, though Lockett had an appointed attorney, he was of no help to her; he did not perform due diligence in preparing her defense, and he did not provide her with good legal advice. To make it worse, he advised her to plead guilty to a crime that she might not have committed, and there was no indication that the death was a result of an intentional act. Here, the defense counsel did not provide effective assistance, which renders the Sixth Amendment right to counsel meaningless.

Finally, today the right to counsel in the U.S. is viewed as a fundamental right. The right was initially denied under the common law, as explained earlier in the chapter. However, the right has evolved “through both judicial decisions and legislation.”⁴⁹⁶ As a result, defendants have enjoyed their right to be represented by counsel for a long time. If a defendant cannot afford to pay for a private lawyer, the defendant will be entitled to a lawyer at the state’s expense. Today, the right to counsel in criminal cases in the U.S. is very advanced when compared with other countries. Nonetheless, this right is affected by some changes in the legal system that might sometime undermine the right. However, Americans continue to challenge obstacles that come in the way of the application of defendants' right to counsel, as they view this to be a constitutional right that they are not willing to give up.

⁴⁹⁶ JOHN SCHEB AND JOHN SCHEB II, *supra* note 470, at 139.

2. Right to Defense Counsel in Saudi Arabia

I. Introduction

Few studies have been conducted on the Saudi legal system in general and the Saudi legal history in particular. According to Frank E. Vogel, a law professor at Harvard Law School and the author of *Islamic law and legal system: Studies of Saudi Arabia*, “the Islamic legal system of Saudi Arabia is little known or understood outside the kingdom. Even within the kingdom, little information about this system is available except to the officials and practitioners who work within it.”⁴⁹⁷

During my visits to Saudi libraries, I noticed that the number of books that address criminal procedures is small. Several reasons can account for this scarcity of studies on Saudi law. First, as explained earlier, Saudi Arabia did not codify the area of criminal procedures or the practice of law until 2001. Their codification allowed lawyers to appear in criminal courts. Second, it is difficult to access case law in Saudi Arabia, since not all cases are published. Third, because criminal defense appears to be unpopular, many researchers may be reluctant to take up studies in the field for economic, social and religious reasons. After conducting field work, I suspect that Saudi authors are more attracted to commercial law than criminal law and criminal procedures.

Nonetheless, this section covers the right to criminal counsel in Saudi legal history since the kingdom’s founding in 1927 by King Abdulaziz. It explains the theories applied earlier by Saudi authorities to deny defendants the right to a criminal defense and the justification for the reform that resulted in recognition of this right. For organizational

⁴⁹⁷ FRANK VOGEL, *supra* note 61, at 1 .

purposes, the Saudi criminal defense history is divided into two parts. The first is the pre-Law of Criminal Procedures era from 1927 to 2001. The second is the post-Law of Criminal Procedures era, which started in 2001 and continues to the present day, under which defense lawyers are allowed to represent criminal defendants in Saudi criminal courts.

II. Historical Background

Saudi Arabia strictly adheres to Islamic law; the founders of the country vowed to restore Islam as it was interpreted and applied by the Prophet and the four orthodox Muslim rulers.⁴⁹⁸ Moreover, “Saudi Arabia never experienced the western colonization that in virtually every other Muslim country drastically transformed the legal system.”⁴⁹⁹ Thus, Islamic law in Saudi Arabia today “remains largely unchanged since the time of the Prophet.”⁵⁰⁰ In fact, the country adheres “to the rules of the old Islamic law, probably to a degree greater than many Islamic states of the past.”⁵⁰¹ Therefore, it is important to refer to the Islamic court system as it existed during the Prophet’s times when addressing the Saudi criminal court system. Generally, during the lifetime of the Prophet Muhammad (PBUH), proceedings regarding acts that amounted to criminal charges were simple, and criminal cases were very similar.⁵⁰²

⁴⁹⁸ “Shari'a is also to be understood in Saudi Arabia in a somewhat different way than elsewhere, given the 275-year history of Saudi states' adherence to the Wahhabi and Salafi tradition. Salafism ... holds that the true Islam is what was practiced by the earliest generations (salaf), disregarding later accretions.” ROBERT W. HEFNER, *supra* note 8, at 55.

⁴⁹⁹ FRANK E. VOGEL, *supra* note 61, at XIV.

⁵⁰⁰ ANTHONY HAM, *supra* note 60, at 169.

⁵⁰¹ FRANK E. VOGEL, *supra* note 61, at XIV.

⁵⁰² ABDULRAHMAN AL-HUMAIDI, *supra* note 261, at 233-236.

Typically, defendants who committed crimes came before the Prophet and pled guilty to their crimes without the involvement of any defense counsel.⁵⁰³ In other words, they willingly testified against themselves to be cleansed before God, though some of these crimes carried the death penalty.⁵⁰⁴ For example, one man, Ma'iz, came before the Prophet and confessed to adultery; the prophet turned him away. However, Ma'iz kept coming and confessing, and, on his fourth attempt, the Prophet asked, "Is the man mad?" He was informed that the man was not mad. He then asked if the man was drunk, and he was informed that the man was not drunk. The Prophet asked the man if he had committed adultery, and Ma'iz's answer was "yes." Ma'iz was then convicted.⁵⁰⁵

If sued, on the other hand, defendants were expected to tell the truth even against themselves. The *Qur'an* states:

O you who believe! Stand up 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 more entitled to both (than you). So follow not whims, lest you may avoid justice. And if you distort your witness or refuse to give it, verily Allah is Ever Well-Acquainted with what you do.⁵⁰⁶

In the meantime, "[t]he qadi [judge] is accountable to Allah in the performance of his duties."⁵⁰⁷ In practice, since the Prophet's times, a Muslim judge listens to the party

⁵⁰³ *Id.* at 234.

⁵⁰⁴ Salim Farrar, *The Role of the Defense in Islamic Law* (Sydney Law School No. 10/42, 2010).

⁵⁰⁵ FRANK E. VOGEL, *supra* note 61, at 244.

⁵⁰⁶ *Qur'an* 4:135.

⁵⁰⁷ MATTHEW LIPPMAN, SEAN MCCONVILLE, AND MORDECHAI YERUSHALMI, *supra* note 210, at 67.

and the witnesses and questions them without the presence of lawyers.⁵⁰⁸ However, a judge is responsible for protecting the rights of the defendants. Therefore, a judge in *Shari'ah* court is viewed as “the protector of the weak.”⁵⁰⁹ Thus, many Muslim scholars have argued that “Islamic criminal procedure did not require a particular role to be played by the defense, because the responsibilities typically associated with defense counsel were conducted by a competent *Qadi*.”⁵¹⁰

Similarly, criminal defense was not initially recognized under Saudi Arabia’s legal system. Indeed, it was not until the beginning of the 21st century that the Saudi legal system granted criminal defendants the right to legal representation. In 2001, Saudi Arabia introduced its first Code of Law Practice and its first Law of Criminal Procedures. The Code of Law Practice establishes the requirements to become a lawyer and outlines the duties and rights of lawyers. The Law of Criminal Procedures lays out the procedures for initiating criminal prosecution, the rules for collecting and producing evidence, and the rules for seizure, detention, bail, and jurisdiction. More importantly, the new laws recognize, for the first time, the right of defendants to legal representation by criminal defense attorneys during investigation, trial, and appeal. The following sections address the situation in Saudi Arabia before and after the issuance of the law regarding criminal procedures.

⁵⁰⁸ ABDULRAHMAN AL-HUMAIDI, *supra* note 261, at 298.

⁵⁰⁹ MATTHEW LIPPMAN, SEAN MCCONVILLE, AND MORDECHAI YERUSHALMI *supra* note 210, at 67.

⁵¹⁰ Salim Farrar, *supra* note 504.

A. Pre-Law of Criminal Procedures Era

The pre-Law of Criminal Procedures era started with King Abdulaziz's unification of various regions as the Kingdom of Saudi Arabia in 1927; it ended in 2001. During this era, criminal defense was not recognized in Saudi Arabia's legal system. When King Abdulaziz unified the kingdom, he issued a royal decree annulling the Ottoman laws that allowed legal representation in criminal cases. Put another way, representation of criminal defendants was prohibited by virtue of that royal decree.⁵¹¹

In pre-Law of Criminal Procedure Saudi Arabia, criminal trials occurred “in a religious court before [an independent] qadi, who is typically a religious cleric or deeply religious individual.”⁵¹² The Saudi Basic Law provides that “judges shall be subject to no authority other than that of the Islamic *Shari'ah*.”⁵¹³ Nonetheless, they are responsible before God for the performance of their duties.⁵¹⁴ Therefore, “Saudi judges believe that their job puts their own salvation at risk.” By *Shari'ah*'s mandate, a judge must verify accusations against defendants, accept evidence, and weigh that evidence in accordance with the *Shari'ah* rules of evidence.⁵¹⁵ It is worth noting that Saudi *Shari'ah* courts are not adversarial. In other words, “it is not based on two sides arguing out a case. Rather, in an Islamic court, the onus is on the judge(s) to find the truth.”⁵¹⁶ In this way, judges have played an active role in the legal process. Judges do not rely on the pre-trial stage. For

⁵¹¹ SAUD AL-DREEB, *supra* note 274, at 334.

⁵¹² MATTHEW LIPPMAN, *CONTEMPORARY CRIMINAL LAW*, SAGE 80 (2006).

⁵¹³ The Basic System of Governance, Art. 46.

⁵¹⁴ MATTHEW LIPPMAN, SEAN MCCONVILLE, AND MORDECHAI YERUSHALMI, *supra* note 210, at 67.

⁵¹⁵ Ziauddin Sardar, *The Saudi Judges Are Not Fools*, *New Statesman* (May 29, 1998).

⁵¹⁶ *Id.*

instance, if a defendant confesses to a crime during the pre-trial stage of the criminal proceedings, a judge will often ask the defendant to rethink the confession.⁵¹⁷

As discussed in the previous chapter, the prohibition of criminal defense in this era can be attributed to two factors. First, *Shari'ah* law does not contain any direct reference to lawyers.⁵¹⁸ Secondly, Saudi judges and jurists interpreted the Islamic text relevant to crimes in a way that prohibited the practice of criminal defense in general.⁵¹⁹

Nonetheless, the role of criminal defense in Saudi Arabia has evolved. Lawyers have gradually been allowed to represent defendants in Saudi criminal courts. In 1997, Salah Al-Hejailan, a Saudi lawyer, was allowed to represent two British defendants, Lucille McLauchlan and Deborah Parry, who were accused of murdering their Australian co-worker, Yvonne Gilford. Gilford worked as a senior nurse at the King Fahd Medical Complex in Dhahran, Saudi Arabia. She was found dead after being stabbed many times and suffocated on December 11, 1996. Eight days later, McLauchlan and Parry, British nurses who also worked at the medical center, were arrested and accused of murdering Gilford. The defendants were detained and questioned by the police without being represented by a lawyer. Five days after their arrest, the defendants confessed to the murder and their confessions were later verified by three Saudi judges.⁵²⁰

McLauchlan and Parry's case received significant attention in Great Britain. The Saudi police did not initially accept the British embassy's requests to meet with the

⁵¹⁷ *Id.*

⁵¹⁸ Joseph L. Brand, *Aspects of Saudi Arabian Law and Practice*, 9 B.C. Int'l & Comp. L. Rev. 13 (1986).

⁵¹⁹ See the previous chapter for more detail.

⁵²⁰ Mary Carter Duncan, *Playing by Their Rules: The Death Penalty and Foreigners in Saudi Arabia*, 27 Ga. J. Int'l & Comp. L. 231, 231-233 (1998-1999).

defendants. As a result, concern grew among the British that the two defendants would not be allowed legal representation or receive a fair trial in the Saudi legal system. Thus, they would be sentenced to death. Five days after the arrest, with much diplomatic pressure, the British Consul was allowed to meet with the defendants. Six days later, “the women were able to choose, through the British Consul, a legal advisor to represent them.” That lawyer was Salah Al-Hejailan. This was the first time that a lawyer was allowed to represent a defendant in a Saudi criminal court.⁵²¹ By representing the defendants, he “made legal history as the first defense lawyer allowed into a Saudi courtroom.”⁵²² “With his help, the women worked to retract their previous confessions, claiming that the confessions were secured after Saudi officials promised the women that they would be deported in lieu of standing trial for crimes in Saudi Arabia.”⁵²³

In the end, the defendants were found guilty. It is worth noting that a convicted murderer receives the death penalty only if the victim's family requests it. The family can also choose to forgive the murderer and receive *diyya* (financial compensation). In addition, the family can choose to forgive both the execution and *diyya*. However, if they do so, the convicted will still receive about a five-year jail sentence.⁵²⁴ In this case, the two defendants were released, because the victim’s family chose to receive the *diyya*.⁵²⁵

⁵²¹ Salah Al-Hejailan, *Legal Developments in Saudi Arabia*, 4 Y. B. Islamic & Middle E. L. 338, 346 (1998).

⁵²² Salim Farrar, *supra* note 504.

⁵²³ Mary Carter Duncan, *supra* note 520, at 233.

⁵²⁴ *Id.* at 239.

⁵²⁵ Hossein Esmaeili and Jeremy Gans, *Islamic Law Across Cultural Borders: The Involvement of Western Nationals in Saudi Murder Trials*, 28 Denv. J. Int'l L. & Pol'y 145,171 (2000).

Three years later, the Saudi authorities, following the 1997 precedent, granted criminal defendants limited legal representation.⁵²⁶ In 2000, the Saudi Ministry of Foreign Affairs issued a non-binding document entitled “Protection of Human Rights in Criminal Procedures and in the Organization of the Judicial System.” The document states that “[t]he accused person has the right to avail himself of the service of a lawyer or legal representative.”⁵²⁷ This was followed by the landmark legal reform of 2001 that recognized for the first time the right to counsel in criminal cases.⁵²⁸

B. From 2001 (post-Law of Criminal Procedures) to the Present

Saudi authorities have enacted and adopted many laws to fill gaps between its law and modern needs and to fulfill the country’s international obligations.⁵²⁹ Saudi Arabia, like many other countries in the international community, is required to provide fair trials to defendants accused under its criminal law. Article 10 of the Universal Declaration of Human Rights states: “Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.”⁵³⁰ Even though this article is not binding, “it is still a potent instrument used to apply moral and diplomatic pressure on states that violate the Declaration’s principles.”⁵³¹ The measures taken by the Saudi authorities to enhance human rights included the Law of Criminal Procedures and the Code of Law Practice.

⁵²⁶ Salim Farrar, *supra* note 504.

⁵²⁷ Mashood A. Baderin, *supra* note 10, at 157-158.

⁵²⁸ The Code of Law Practice, *supra* note 7.

⁵²⁹ Joseph L. Brand, *supra* note 518, at 23.

⁵³⁰ <http://www.un.org/en/documents/udhr/>

⁵³¹ For questions and answers about the Universal Declaration of Human Rights, see <http://www.unac.org/rights/question.html>.

Saudi jurists and judges have remained hesitant to approve any changes that might affect the function of the judicial branch, which is the only branch of government over which the royal family does not have complete control.⁵³² However, Saudi jurists and judges also recognize that the king has the authority to promulgate laws and regulations based on the doctrine of *siyasa sahariyya*.⁵³³ *Siyasa shariyya* is a doctrine that is applied in Saudi Arabia; it is based on *Ibn Taymiyya*'s teaching.⁵³⁴ It “declares that the ruler may take any acts, including legislation, to supplement the shari’a and create new courts that are needed for the public good, provided that the shari’a is not infringed thereby, or, in another formulation, as long as the shari’a has no text on the matter.”⁵³⁵ The doctrine simply gives the king the authority to make law following the guidance of Islamic *Shari’ah*. To pass new laws, the king uses his inherent authority of legislation under the doctrine of *siyasa shariyya*.

Using his authority, the Saudi king issued the Law of Criminal Procedures, which recognized for the first time the right to a criminal defense. Article 4 of the Law of Criminal Procedures states that “[a]ny accused or charged person shall have the right to seek the legal assistance of a lawyer or a representative to defend him during the investigation and trial stages.”⁵³⁶ In addition, Article 70 of the Law of Criminal Procedures prevents the removal of a suspect’s lawyer by the prosecutor: “The Investigator shall not, during the investigation, separate the accused from his

⁵³² Ziauddin Sardar, *supra* note 515.

⁵³³ FRANK VOGEL, *supra* note 61, at 173.

⁵³⁴ Esther Van Eijk, *supra* note 120, at 146.

⁵³⁵ FRANK VOGEL, *supra* note 61, at 173-174.

⁵³⁶ Law of Criminal Procedure, *supra* note 7, Art. 2.

accompanying representative or attorney⁵³⁷ Moreover, Articles 35 and 116 provide for the right of an arrested person to communicate with any person of his or her choice.⁵³⁸ Article 139 grants the right to counsel in criminal cases at the trial level.

In 2009, the Saudi Specialized Criminal Court started to inform defendants of their right to have a lawyer.⁵³⁹ This act had no precedent in the Saudi courts. In 2011, a defendant in the Saudi Specialized Criminal Court requested that the court appoint counsel for him, because he could not afford to hire an attorney; the court approved his request.⁵⁴⁰ Also, in the same year, judges of the Saudi Specialized Criminal Court started to inform defendants that, if they could not afford an attorney, the Saudi Ministry of Justice would provide an attorney for them.⁵⁴¹ However, no law codified the right to free assistance of counsel; rather, it was left to each judge's discretion. This continued until 2013, when King Abdullah issued a royal decree modifying Saudi criminal procedure law.⁵⁴²

By virtue of this royal decree, defendants in Saudi criminal courts accused of major crimes are entitled to the free assistance of counsel at the trial stage, if they cannot afford an attorney. Prior to the modification, Article 140 stated:

⁵³⁷ *Id.*

⁵³⁸ *Id.*

⁵³⁹ Turki Bin Rashid Al Abdulkarim, *Specialized Courts Meet the Requirements of the Modern Time*, Alriyadh, Issue no. 14930 (May 10, 2009).

⁵⁴⁰ Mohammed Ghoneim, *The Judge Agrees to Appoint Counsel for the Defense of One of the Defendants*, Alriyadh, No. 15694 (June 13, 2011).

⁵⁴¹ 11 Defendants Accused in the Crime of Yabno Appear Before the Criminal Court for Trial... Prosecutor Calls for Death Penalty, Alriyadh, No. 15667 (May 11, 2011); also Criminal Court Hears a Case Filed by the Public Prosecutor, Accusing 86 Defendants (84 Saudis, 1 Jordanian, and 1 Somali), Saudi Press Agency, May 2, 2012.

⁵⁴² Royal Decree No. M/2 (Nov. 25, 2013).

In major crimes, the accused shall personally appear before the court without prejudice to his right to seek legal assistance. As to other crimes, he may be represented by a representative or an attorney for his defense. In all cases, the court may issue an order for the personal appearance of the accused.

However, the new royal decree changed this article to become Article 139, which states:

In major crimes, the accused shall personally appear before the court without prejudice to his right to seek legal assistance. If the defendant is not financially able to employ counsel, then the defendant has the right to request that the court appoint or furnish counsel for him at the state's expense. As to other crimes, the defendant may be represented by a representative or an attorney for his defense. In all cases, the court may issue an order for the personal appearance of the accused.⁵⁴³

III. Scope and Application of the Right to Counsel in Saudi Arabia

The right to counsel in criminal cases in Saudi Arabia has changed gradually. Today, defendants enjoy the right to counsel in all criminal cases. The right to counsel attaches at the pre-trial and trial stages in all crimes regardless of the crime type or level.⁵⁴⁴ However, the right to free criminal counsel for indigent defendants who cannot afford an attorney attaches in major cases only at the trial stage of the criminal

⁵⁴³ *Id.* Art. 139.

⁵⁴⁴ Article 4 of the Law of Criminal Procedure states: "Any accused person shall have the right to seek the assistance of a lawyer or a representative to defend him during the investigation and trial stages."

proceeding.⁵⁴⁵ The law does not define major crimes, but rather leaves this to the Ministry of Interior and the Bureau of Investigation and Prosecution to decide. Article 112 states: “The Minister of the Interior shall, upon a recommendation by the Director of the Bureau of Investigation and Prosecution, specify what may be treated as a major crime requiring detention.” Accordingly, the Saudi Minister of the Interior issued a resolution specifying what are to be treated as major crimes, as follows:⁵⁴⁶

- 1- *Hudud* crimes the punishment for which is the death penalty or amputation.
2. Intentional or semi-intentional homicide.
3. Crimes of terrorism and crimes against the security of the state.
4. Crimes that involve weapons and ammunition, counterfeiting coins and banknotes, fraud, bribery, impersonating a public official, and money laundering if the punishment for such crime is imprisonment for more than two years.
5. Auto theft.
6. Prostitution.
7. Use of drugs and intoxicants, which includes consuming, smuggling, presenting to others, and growing or producing drug or intoxicants.
8. Embezzlement money from the government, a joint stock company, or a bank.
9. Assault, in cases other than death, which causes injury that requires more than 15 days to heal, unless the victim forgives the accused.
10. Destruction of public or private property with a value in excess of 5,000 riyals, unless the owner waives the right.

⁵⁴⁵ Article 139 of the Law of Criminal Procedure.

⁵⁴⁶ Interior Minister's Resolution - No. 1900 Date 09/07/1428 AH (2007).

11. Attacking an officer of public official while in the course of his duties or damaging his vehicle or equipment.
12. Use or showing of a firearm with the intention to assault or threaten others.
13. Breaking into a home with the intention to attack people or property.
14. Violating privacy by taking pictures and threatening to publish them.
15. Assault by a child against the child's parent by beating that parent, unless the parent forgives the assault.

Despite the changes made by the Saudi government, Saudi Arabia is still criticized by activists and international human rights organizations for not fully implementing the right to criminal counsel. The criticism is well summarized below:

The right to counsel may be the best example of the difference between what is theoretically possible and what really occurs in the Saudi criminal justice system. Historically, the accused was expected to take charge of his own legal defense. But, with the passing of the new Criminal Procedure Law, this was supposedly modified. According to Chapter 1, Article 4, “Any accused person shall have the right to the assistance of a lawyer or a representative to defend him during the investigation and trial stages.”

However, it appears that not everyone involved in the Saudi System enjoys the benefit of right to counsel.⁵⁴⁷

Critics further claim that defendants are not aware of their right to counsel. For example, Human Rights Watch claims that Saudi authorities are under no obligation to inform the defendant of this right; therefore many defendants are not aware of their right

⁵⁴⁷ HARRY DAMMER AND JAY ALBANESE, *supra* note 411, at 144.

to counsel.⁵⁴⁸ Saudi lawyer named Aiman stated: “The criminal procedure code is still new for prison officials. A detainee has to insist on his rights and know them. Nobody will tell him his rights or facilitate his access to them.”⁵⁴⁹

Saudi officials and judges are accused of not understanding or appreciating the rights and duties of criminal defense lawyers. Consequently, defendants continue to be tried pro se.⁵⁵⁰ Sultan Al-Hazmi, a Saudi lawyer, believes that those in a position of authority have misunderstood the meaning of some clauses in the Law of Criminal Procedures. Consequently, defendants are not able to communicate with their lawyers as they should.⁵⁵¹ This undermines the right to counsel in criminal cases and renders the role of criminal defense of little or no value to defendants.⁵⁵²

The *ulama* and judges are also accused of being hesitant about this new law as with any new regulation. Meanwhile, the Saudi “government has been unable to completely subdue the *shari’a* scholars’ and judges’ suspicion and sometimes bold opposition to the state regulations.”⁵⁵³ For example, in December 2006, Human Rights Watch asked Salih Al-Luhaidan, the head of the Saudi Supreme Judicial Council and a member of the Senior Council of *ulama*, “why Saudi Arabia does not provide poor defendants with free legal assistance.” He answered: “If the case involves an injury, a

⁵⁴⁸ Human Rights Watch, *Adults Before Their Time: Children in Saudi Arabia's Criminal Justice System*, 25 March (2008).

⁵⁴⁹ Human Rights and Saudi Arabia's Counterterrorism Response: Religious Counseling, Indefinite Detention, and Flawed Trials, page 16, Human Rights Watch (2009).

⁵⁵⁰ According to Judge Wahaibi Al-Wahaibi, about 80% of the criminal trials in Saudi Arabia are pro se. Rakan Al-Dosari, *supra* note 405.

⁵⁵¹ Chairman of the Committee of Lawyers in the City of Medina: Police Prevent Defendants from Enjoying Their Rights ... Investigator May Not Isolate Lawyer from Accused Alriyadh, Issue no. 14843 (Feb. 12, 2009).

⁵⁵² Rakan Al-Dosari, *supra* note 405.

⁵⁵³ Esther Van Eijk, *supra* note 120, at 148.

murder, a theft, then it does not require an attorney, it requires witnesses, evidence, and the individual to defend himself.”⁵⁵⁴ Al-Luhaidan’s view gives the impression that Saudi judges do not appreciate the practice of criminal law, which is one reason why some critics do not have high hopes for significant progress in defendants’ rights in the country. Therefore, Saudi Arabia continues to be the subject of criticism for not fully implementing the new laws.⁵⁵⁵

Judges’ negative view of criminal defense counsel has at times affected their attitude toward lawyers in some court cases. For example, Abdulrahman Al-Lahim is a legal figure among Saudi lawyers. In November 2007, he represented a 19-year-old girl from *Al-Qatif* accused of *khilwa* (being alone with a man who is not a relative) before a criminal court in *Al-Qatif*.⁵⁵⁶ In his book, *Inside the Kingdom*, Robert Lacey stated that this case “became the issue everyone discussed”⁵⁵⁷ inside Saudi Arabia. The girl had a relationship with a man over the phone. Desperate to see the girl, the man threatened to tell her family about the relationship unless she gave him a photo of herself, which she did. Later, the girl married another and asked the man to return her photo. He agreed on the condition that she meets with him. The girl agreed, and when she went to get the photo, she was gang raped by seven men. Consequently, the girl was accused of *khilwa*.⁵⁵⁸

⁵⁵⁴ Human Rights Watch interview with Salih Al-Luhaidan, December 21, 2006. Available at: http://www.hrw.org/search/apachesolr_search/saudi%20arabia

⁵⁵⁵ Esther Van Eijk, *supra* note 120, at 155.

⁵⁵⁶ Salim Farrar, *supra* note 504.

⁵⁵⁷ ROBERT LACEY, *INSIDE THE KINGDOM: KINGS, CLERICS, MODERNISTS, TERRORISTS, AND THE STRUGGLE* 313 (2009).

⁵⁵⁸ Jabreel, Muhammad, *Case Choked Saudi, Provoked the World, Moheet* (Nov. 27 2007).

This case reveals the negative view of the criminal defense role in the Saudi criminal system.⁵⁵⁹ Al-Lahim initially represented the girl, but “he was banned from the courtroom.”⁵⁶⁰ The *Qatif* court sentenced the girl to a lashing and imprisonment for the crime of *khilwa* as charged. The publicity of this case resulted in demands from around the world for the girl to be pardoned. In response, the King issued an official pardon overruling the *ta'zir* punishment.⁵⁶¹

Moreover, there is a certain level of tension between defense lawyers and judges on the one hand and law enforcement officials on the other. The U.N. Special Rapporteur on Independence of Judges and Lawyers commented after his visit to Saudi Arabia in 2002:

I have learned that there is some resistance on the part of some judges to the presence of lawyers in their courts due to a perception that they interfere with the ability of the judge to ensure that justice is done in a particular case. I have also been informed that there is opposition by some prosecutors, as they perceive that lawyers interfere with their ability to investigate the case.⁵⁶²

It seems that this negative perception of lawyers led to poor treatment from judges toward lawyers. As a result, lawyers complained about judges' attitude toward them while courts are in session. They claimed that they were treated with disrespect by

⁵⁵⁹ Salim Farrar, *supra* note 504.

⁵⁶⁰ *Id.*

⁵⁶¹ Abdullah Alalmi, *Girl from Al-Qatif Pardoned*, Al-Watan Newspaper No. 2636 (Dec. 18, 2007).

⁵⁶² Mashood A. Baderin, *supra* note 10, at 157.

judges.⁵⁶³ Similarly, some lawyers believe that police officers do not fully cooperate with lawyers. For example, one Saudi lawyer accused the police of obstructing justice by not allowing defendants to contact their lawyers.⁵⁶⁴

However, the U.N. Special Rapporteur on Independence of Judges and Lawyers also commented after his visit to Saudi Arabia in 2002 that, “[i]n this respect, there has not been a culture of legal representation in the courts, but this may soon be ratified.”⁵⁶⁵ The following chapter will reveal the extent to which this has been ratified by presenting the current perceptions of judges and lawyers regarding the role of criminal defense attorneys.

3. Comparative Analysis

This part compares the right to criminal defense in Saudi Arabia and the United States. It highlights the differences between the two systems of criminal defense and provides reasons behind these differences. In particular, it argues that the doctrine of the separation of state and church is mainly responsible for the early establishment of the right to counsel in criminal cases in the American criminal defense system. Similarly, it claims that the unity between the mosque and the state followed in Saudi Arabia contributed to the late start of the country’s criminal defense system.

⁵⁶³ In 2010, 50 lawyers submitted a letter to the head of the Saudi Supreme Judicial Council complaining about the harsh and inappropriate treatment that they receive from judges, and they accused a number of judges of "cruelty" against lawyers, Muhamed Albkeet, *Numer of Judges Are Acceded of Cruelty Against Lawyers*, *Al-Madina* (June 6, 2010).

⁵⁶⁴ Chairman of the Committee of Lawyers in the City of Medina: Police Prevent Defendants from Enjoying Their Rights ... Investigator May Not Isolate Lawyer from Accused Alriyadh, Issue no. 14843 (Feb. 12, 2009).

⁵⁶⁵ Mashood A. Baderin, *supra* note 10, at 157.

One major difference between the two systems is that the right to a criminal defense is constitutionally established in the U.S. Though American courts initially interpreted the right to effective assistance of counsel narrowly, the Founding Fathers acknowledged the significance of criminal charges early on. Accordingly, the right to a criminal defense guaranteed in the Sixth Amendment was made part of the Constitution in 1791, shortly after the country's founding and the ratification of its constitution.⁵⁶⁶ The early recognition of this right has had significant consequences in the American legal system in general and in criminal law in particular.

As explained earlier in this chapter, criminal defendants have been able to invoke their right to legal representation throughout American legal history. In other words, the constitutional principle of criminal defense made it possible for defendants to assert their rights regardless of the outcome. Equally, the constitutional framework provided the American legal system with the chance to interpret the Constitution in a manner that serves the best interests of the American people. Thus, it came as no surprise that the Supreme Court eventually interpreted the Sixth Amendment to mandate the effective assistance of counsel, the absence of which may give a defendant the right to challenge his or her conviction on constitutional grounds.⁵⁶⁷ Furthermore, the American legal system acknowledges and enforces the constitutional right to free and effective assistance of counsel for poor defendants as explained earlier.

Today, defendants in American criminal courts are provided due process of law. They are advised of their constitutional right to the assistance of counsel at an early stage

⁵⁶⁶ RON FRIDELL, *supra* note 444, at 32.

⁵⁶⁷ MATTHEW LIPPMAN, *CRIMINAL PROCEDURE* 517 (2010).

of the criminal proceedings.⁵⁶⁸ American society and the legal profession support defendants' right to the effective assistance of counsel. Put another way, the right to a criminal defense has become part of the American culture. In fact, most Americans expect to have legal counsel if they are charged with a crime regardless of their ability to hire a lawyer.⁵⁶⁹

In contrast to its history in the U.S., the criminal defense is fairly new in Saudi Arabia. Officially, it started in 2001 with application of the Law of Criminal Procedures and the Code of Law Practice.⁵⁷⁰ Prior to 2001, criminal defense by a lawyer was not permitted, except in the case of the two British citizens in the 1990s, which was addressed earlier. That case was not only an exception to the rule, but defense counsel was also a privilege rather than a constitutional right. To explain, the two defendants who were allowed criminal defense counsel in that case were not Saudis; they were British working in Saudi Arabia. Since Saudi Arabia and the United Kingdom are strong allies, diplomacy, as well as international pressure, may have played a role in allowing legal representation for those defendants.⁵⁷¹ Nonetheless, permitting criminal representation in that case was a remarkable experience in Saudi legal history that may have contributed to the legal reform of 2001.

Earlier, the Saudi government had adopted an opinion that opposed the practice of law in criminal defense in particular, which was explained in detail in the third chapter.

⁵⁶⁸ JOHN N. FERDICO, HENRY FRADELLA, AND CHRISTOPHER TOTTEN, *CRIMINAL PROCEDURE FOR THE CRIMINAL JUSTICE PROFESSIONAL* 528 (2012).

⁵⁶⁹ Amy E. Lerman, *supra* note 456, at 52.

⁵⁷⁰ The Code of Law Practice, *supra* note 7.

⁵⁷¹ "British exports to Saudi Arabia in 1996, a substantial portion of which were weapons, were valued at 2.5 billion pounds, while imports from Saudi Arabia, primarily oil, totaled 750 million pounds. Any diplomatic rift could damage the substantial trade between the two countries." Mary Carter Duncan, *supra* note 520, at 237.

In addition, the opponents of law practice and criminal defense argue that the practice of law is not an Islamic tradition; it was brought to Islamic society during the colonization era and enforced against the will of Muslims under colonial influence.

In addition, unlike American citizens, who insist on their right to be represented by a defense attorney, Saudi citizens in general believe that advocacy is more than making professional arguments. This revolves around their faith in God and their submission of their affairs to him.⁵⁷² Reliance upon God “represents the utmost degree of faith.”⁵⁷³ It is in the *Qur'an*: “And put your trust in Allah, and sufficient is Allah as a wakil (trustee or disposer of affairs).”⁵⁷⁴ The doctrine was endorsed and emphasized by the Prophet Muhammad (PBUH) in his teachings to Muslim followers.⁵⁷⁵ Professor Khan Liaquat,⁵⁷⁶ in his article “Advocacy Under Islam and Common Law,” called this a “singular trust doctrine.”⁵⁷⁷

The doctrine of “singular trust” and submission to God led some Muslims to reject the idea of employing a representative. The idea is that, since humans trust God, they should fear nothing and raise no complaint, if things go wrong. Put another way, “any injury that the trusting individual suffers—the loss of liberty or life—is God’s doing, to which the individual submits with no resentment.”⁵⁷⁸ On November 19, 2013, MBC

⁵⁷² Liaquat Khan Ali, *supra* note 280, at 560-562. “If an individual believes that God is just, powerful, and sincere, and that He will not betray the individual's genuine interests, a relationship of trust is formed. The individual will then be prepared to trust God in the disposal of his affairs.”

⁵⁷³ NAAJEH IBRAHIM, AASIM ABDUL MAJID AND ESAAM UD DEEN DARAALAH, *IN PURSUIT OF ALLAH'S PLEASURE* 121 (1984).

⁵⁷⁴ MUHAMMAD SAED ABDUL-RAHMAN, *THE MEANING AND EXPLANATION OF THE GLORIOUS QUR'AN* 360 (2009).

⁵⁷⁵ Liaquat Khan Ali, *supra* note 280, at 562.

⁵⁷⁶ Professor of Law, Washburn University.

⁵⁷⁷ Liaquat Khan Ali, *supra* note 280, at 547.

⁵⁷⁸ *Id.* at 560.

TV interviewed a defendant, who was accused of crimes. The defendant initially had a lawyer but later decided to fire him. The defendant was asked why he took this action even though he might have had a chance for acquittal. His answer was that he had committed a sin and knew that he was dealing with God before anyone else. He concluded that his repentance required him to go without a lawyer and to tell the truth regardless of the outcome. This is an example of the rejection of legal representation based on the doctrine of “singular trust” and submission to God.

The difference between the criminal defense systems in the two countries can also be attributed to the constitutional structure of the countries. In the U.S., constitutional institutions are well established; the Constitution separates state and church.⁵⁷⁹ According to the American Constitution, neither the president nor members of Congress must pass a religious test to be elected to public office or the legislative branch, nor do they have to belong to a certain religious affiliation.⁵⁸⁰ Accordingly, laws in the U.S. are made without direct reference to a supreme power, and the main sources of law are created by humans. That is, courts in their interpretation of the law follow the Constitution and case law established by American courts, including the Supreme Court.⁵⁸¹ Consequently, judges in the U.S. may feel no pressure of a supreme power other than the interest of serving justice for the American people. This has provided the criminal defense system in the

⁵⁷⁹ The First Amendment states that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” Americans interpret the First Amendment to mean separation of state and church. PHILIP HAMBURGER, *SEPARATION OF CHURCH AND STATE* 2-3 (2009).

⁵⁸⁰ “Article VI, Clause 3, of the U.S. Constitution says that (no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.)” PAUL FINKELMAN, *ENCYCLOPEDIA OF AMERICAN CIVIL LIBERTIES* 1314 (2013).

⁵⁸¹ JEFFREY JENKINS, *THE AMERICAN COURTS: A PROCEDURAL APPROACH* 121 (2011); STEPHEN BREYER, *AMERICA'S SUPREME COURT: MAKING DEMOCRACY WORK* 19 (2010).

U.S. with the opportunity to change rapidly. In other words, since criminal law is created by humans and is secularly interpreted, courts, including the Supreme Court, must follow the rules and principles of the Constitution. Since the Constitution itself guarantees defendants the right to legal representation, that right must be fulfilled regardless of Americans' respective religious views.

Unlike the U.S., Saudi Arabia is a religion-based state. The structure of the country is based on the rule of Islamic *Shari'ah*. Article 1 of the Basic Law states: "The Kingdom of Saudi Arabia is a sovereign Arab Islamic State. Its religion is Islam. Its constitution is Almighty God's Book, The Holy *Qur'an*, and the *Sunn[h]a* (Traditions) of the Prophet (PBUH)."⁵⁸² Pursuant to this article, the mosque and the state are not separate in Saudi Arabia. The rule of law is driven directly from the *Qur'an* and the *Sunnah*. Accordingly, they supersede all other rules, if a conflict arises. In fact, no law will be enacted if there is doubt about it conflicting with the rule of *Shari'ah* law.

Furthermore, non-separation of mosque and state is clearly reflected in the judicial branch. The Basic Law preserves the independence and impartiality of judges, but it also emphasizes the spiritual foundation of the country's legal system. Article 46 states: "The Judiciary is an independent authority. The decisions of judges shall not be subject to any authority other than the authority of the Islamic *Shari'ah*."⁵⁸³ More importantly, as stated earlier, the Basic Law provides that the *Qur'an* and the *Sunnah* are the constitution of the country. This is further confirmed in Article 48 of the Basic Law, which states: "The Courts shall apply rules of the Islamic *Shari'ah* in cases that are

⁵⁸² The Basic Law, *supra* note 1, Art. 1.

⁵⁸³ *Id.*, at Art. 46.

brought before them, according to the Holy *Qur'an* and the *Sunnah*, and according to laws which are decreed by the ruler in agreement with the Holy *Qur'an* and the *Sunnah*.” The inference is that a judge can reject the application of any law seen as conflicting with the rule of *Shari'ah*. Therefore, Saudi judges seemed to refuse to apply the defendants' right to lawyer in criminal cases when it was recognized first by the Law of Criminal Procedure as indicated in the Human Rights Watch interview with Salih Al-Luhaidan, the head of the Saudi Supreme Judicial Council and a member of the Senior Council of *ulama* that was mentioned earlier in this chapter.⁵⁸⁴

Therefore, since some criminal charges are provided for in the *Qur'an* and the *Sunnah* and certain procedures were followed by the Prophet and his companions, courts in Saudi Arabia must apply those rules regardless of any human-created laws. In the view of many Muslim scholars, *Qur'anic* criminal rules and charges cannot be changed. This may explain why Saudi Arabia still does not have a criminal code.⁵⁸⁵ Though it enacted criminal procedures, such reform was reluctantly and slowly made. This may continue to be true with any legal change that Saudi Arabia contemplates in the area of criminal law and procedures. Many consultations must take place, and any direct conflict between a proposed reform and the rule of *Shari'ah* must be clarified. However, in some areas, changes may not occur, because the matter may be decided by the *Qur'an* or the *Sunnah*. In this case, criminal defense in Saudi courts may not mirror the Western standard due to the intrinsic nature of the two legal systems.

⁵⁸⁴ Human Rights Watch interview with Salih Al-Luhaidan, *supra* note 554.

⁵⁸⁵ After the issuance of the Kuwait penal code in 1960, Saudi Arabia remained the only Arabian state to apply unamended Islamic criminal law. MUHAMMAD SALIM AL AWWA, FIUSUL AL-NIZAM AL-JINAI AL-ISLAMI [THE ORIGINS OF THE ISLAMIC CRIMINAL LAW], 17 (1983).

Conclusion

This chapter has demonstrated that there are more differences than similarities between the American and the Saudi systems. The only aspect that the two systems seem to have in common is that criminal procedures were not initially adversarial. Rather, the responsibility was on the judge to find the truth. Put differently, defendants' right to counsel in a criminal case was not initially recognized in colonial America or in the Kingdom of Saudi Arabia. However, the U.S departed earlier from the British common law that deprived defendants of legal representation. Later, Americans chose to include the right to the assistance of counsel in the Constitution.

As under British common law, defendants were denied the right to legal representation in Saudi criminal courts by virtue of certain interpretations of the relevant rules in Islamic law. However, unlike in the U.S., the grounds for deprivation in Saudi Arabia were religious. Though laws allowing criminal defense were finally introduced, the differences between the two systems remain significant. The right to the assistance of counsel is endorsed by the American public; it is not popular in Saudi Arabia. This can be attributed to, among other things, the role of religion in the two legal systems, cultural heritage, and constitutional institutions that separate church/mosque and state. Since differences are mostly ideological, the gap between the right to counsel in the two countries may remain huge.

Chapter Five: The Practice of Criminal Defense: Perceptions of Judges and Lawyers

Introduction

The practice of criminal defense was not much appreciated by Saudi judges and prosecutors when it was first adopted in Saudi Arabia in 2001, as explained earlier. This continued for a few years before the practice gained its approval by judges. However, some writers continue to criticize Saudi courts, accusing them of ignoring the law's criminal procedures and of refusing to allow lawyers into the courtroom.⁵⁸⁶ It seems, however, that this criticism and accusation are based on anecdotal observations of the situation before and shortly after 2001, giving limited credit to the Law Reform and its ultimate impact and without studying the status quo. No systematic empirical studies were ever conducted to find out what impact the new law governing criminal defense was having on Saudi courts.

This chapter presents the perceptions of judges and lawyers about the practice of criminal defense based on survey data collected from a representative sample of these legal professionals in Saudi Arabia. To that end, sixty interviews were conducted for this chapter with two different groups. The first group consists of 32 judges, whose work experience ranges from 4-35 years (mean 18.5). All of them hold a bachelor degree in *Shari'ah* from Imam Muhammad bin Saud Islamic University in Riyadh or from one of its branches in other cities. The second group consists of 28 lawyers, whose work experience ranges from 3-12 years (mean 8.6). This second group was divided into two groups. The first group consists of 11 *Shari'ah* graduate lawyers, who graduated from

⁵⁸⁶ MARK WESTON, *supra* note 9, at 284.

Imam Muhammad bin Saud Islamic University, Qassim University or Taif University. The second group consists of 17 law graduate lawyers, who graduated from King Saud University or King Abdulaziz University.⁵⁸⁷

Each participant was informed that participation in the study was voluntary and that each was free not to answer any question for whatever reason. Some of the participants did not answer all of the questions, although this was mainly because they did not have enough time. For this reason, the result and the tables state the number of participants in each particular question.

I used the chi-square test of homogeneity (X^2) to compare two different samples taken from two populations, namely judges and lawyers or law graduates and *Shari'ah* graduates. The chi-square test of homogeneity is used to determine if the two groups are significantly different. The determination is made based on the p.value of this test. In this study, I used the .05 level of significance, which means that, if the p.value is equal to or less than .05, we will conclude that there is a statistically significant difference between response proportions made by judges and lawyers or law and *Shari'ah* graduates.

Participants were asked questions relevant to the practice of the criminal defense. In particular, they were asked about the significance of defense representation at pre-trial and trial and about a lawyer's role at these two phases of criminal procedures. This was followed by set of questions about the participants' perception of the law reform of 2001. As jurists in a leading Islamic country, judges were asked about their thoughts generally on the practice of law under Islamic *Shari'ah*. Participants were also asked about the role of lawyers in criminal cases. Further, participants were asked about the effectiveness of

⁵⁸⁷ For the purpose of this study, the words "lawyer", "counsel" and "attorney" are used interchangeably.

legal assistance provided by defense counsels. They were also asked about the impact that lawyers have on case outcomes and on defendants themselves. This was followed by a set of questions regarding enforcement of a defendant's right to an attorney as it is applied by courts and other law enforcement officials. Finally, participants were asked whether there are any obstacles to the practice of law and criminal defense. The chapter is concluded by a discussion of the results.

Results

This part presents the participants' responses in the following eight different categories: 1) Significance of Legal Representation in Criminal Cases; 2) Participants' Perception about 2001 Reform; 3) *Shari'ah* and Legal Representation in Criminal Cases; 4) A Lawyer's Role in Criminal Cases; 5) Lawyers and Effective Legal Assistance; 6) The Impact of Lawyers in Criminal Cases and Defendants; 7) The Application of the Right to Legal Representation in Criminal Cases; and 8) Obstacles Preventing Effective Legal Representation. Whenever used in this thesis, unless otherwise specified, "participants" means both lawyers and judges. Similarly, references to judges and lawyers in the results mean those who participated in answering those specific questions.

1st Category: Significance of Legal Representation in Criminal Cases

Two questions were asked to measure participants' general views of the importance of lawyers' participation during pre-trial and trial phases of criminal proceedings. Each answer was rated on a three-point scale: important, somewhat important and not important. Table 1 gives the result of the participants' responses to the two questions.

Table 1: Significance of Defense Counsel Representation

Topic		Judges		Lawyers		Total		X ²
		No.	%.	No.	%	No.	%	
How significant is the defense counsel representation in the pre-trial procedures?	Important	16	66.67%	26	92.86%	42	80.77%	5.89
	Somewhat	7	29.17%	2	7.14%	9	17.31%	P.Value 0.053
	Important							
	Not	1	4.17%	0	0.00%	1	1.92%	
	Important							
How significant is the defense counsel representation in the trial procedures?	Important	10	43.48%	24	88.89%	34	68.00%	X ² 12.09
	Somewhat	11	47.83%	3	11.11%	14	28.00%	P.Value 0.002
	Important							
	Not	2	8.70%	0	0.00%	2	4.00%	
	Important							

A- Significance of the Defense Counsel Representation in Pre-trial Procedures

During the interviews, both judges and lawyers acknowledged the significance of defense lawyers' participation at the pre-trial phase of criminal proceedings. The results show that all the participants, except one judge, believe that lawyers' presence at this stage, at the police stations or at the Bureau of Investigation and Prosecution, is either important or somewhat important. Among the reasons given for these perceptions were:

1. A lawyer's presence maintains justice and limits or prevents the abuse of power.

According to the participants, violations of the law take place very often at the pre-trial stage. Accordingly, the participants call for the intervention of competent lawyers to address such violations and have them voided for the benefit of the affected defendants.

2. Pre-trial is an important phase of the criminal procedures upon which a guilty or not guilty verdict could be based. Accordingly, a lawyer's presence at this stage is important to advise a defendant of his or her rights, to make the defendant aware of the

consequences of his or her testimony and to protect him or her against making a confession or a damaging statement under psychological or physical pressure that may be detrimental to him or her, since many of defendants, as lay people, are not aware of their rights. For example, a defense counsel protects a defendant from being misled by deceptive promises of release in return for his or her confession to committing a crime.

3. A defense counsel aids the prosecutor by presenting evidence and documents and by verifying compliance with criminal procedures. In addition, an attorney may bring some evidence and documents that shows his client's innocence, which may lead to an early dismissal of a criminal case or the release a jailed defendant at the least.

4. A lawyer's presence at this stage saves a judge time and effort. There is a working presumption that a defendant's rights were not violated pre-trial procedures if the defendant was represented by counsel. Moreover, according to the participants testimony by a defendant in the presence of his counsel is presumed by courts to be willingly given.

5. Since many defendants do not know their rights, counsel enlightens a defendant of his or her rights and about relevant issues of which he or she may not be aware, as well as advocating on his or her behalf.

6. Many defendants do not know legal and jurisprudential terms even though it may appear to others that they are knowledgeable of them. Once again, lawyers help those defendants understand these terms and explain all related matters, whether they are in their clients' favor or not.

7. Most defendants feel nervous and insecure. Thus, they need someone who can put them more at ease and make them feel more comfortable. A defense counsel can do that professionally and effectively.

However, one judge stated that a lawyer's presence during pre-trial procedures is not important. First, he believes that a criminal defendant is aware of the truth, and whatever he says under direct examination may help reach the truth. The judge will make sure that the defendant means what he or she says. Second, he argues that the right to a criminal defense is protected before the courts, where a defendant's testimony has to be heard de novo regardless of what he says in pre-trial procedures. Third, he believes that lawyers are sneaky; they complicate things, even though their efforts may not change the outcome of the investigation.

Judges and lawyers responded slightly differently to this question. This is what the P. value of the chi-square test for homogeneity between the two groups given in Table 1 has confirmed (0.053). While approximately 93% of lawyers believe that lawyers' participation during the pre-trial stage is important, only 67% of the judges agreed.

B- Significance of Defense Counsel Representation During Trial

As with the view about lawyers' presence at pre-trial, all the participants, except two judges, believe that it is either important or somewhat important that a lawyer represent a defendant at trial. However, disparities are apparent between judges and lawyers. Fewer than half of the judges believe that a lawyer's presence is important during trial, and all but two of the rest believe that a lawyer's presence at trial is somewhat important, whereas two-thirds of the judges believe that the presence of a lawyer is important during pre-trial. Participants who believe that criminal representation during trial is important or somewhat important base their opinions on the following reasons:

1. A lawyer helps a judge and explains vagueness to the judge.

2. A lawyer helps his client by articulating his case, since most defendants do not know legal and Islamic jurisprudential terms, which may work to their disadvantage.
3. Even though judges are human beings, they have absolute authority to make fateful decisions, especially in *tazeer* crimes. Consequently, a lawyer can help a judge to interpret the law and can monitor the judge's application of the law.
4. A lawyer assesses a criminal case and helps a defendant understand allegations against him or her.
5. A lawyer helps a defendant understand his or her position, rights and defense, including filing motions, and strives to enforce such rights.
6. Often, a criminal defendant is vulnerable. Thus, an attorney can help the defendant to make his or her case without becoming overwhelmed by emotional pressure. In this way, lawyers' presence at trial helps to maintain the course of justice.
7. As a lay person, the defendant does not know the consequences of his testimony and may be susceptible to making fatal statements. Against this background, a lawyer prevents his client from making statements that may be damaging to the client.
8. A lawyer presents mitigating circumstances and contests a crime on the defendant's behalf, which may lead to an acquittal or to a reduced punishment.

In contrast, two judges believe that a lawyer's presence is not important during the criminal trial. They base their views on the following grounds:

1. The duty of the court is to decide cases in accordance with the *Shari'ah* rules and to take into account all circumstances that mitigate punishment. Therefore, a judge must play the defense attorney's role.
2. A lawyer may complicate the situation and delay the disposition of criminal cases.

3. *Shari'ah* courts treat all defendants equally. Consequently, judges do not care whether a lawyer is present or not. They are more concerned with reaching the truth. In addition, judges are responsible before God to reach the truth.

4. A lawyer's presence is important in the pre-trial proceedings as opposed to trial, where a judge helps a defendant in the court whether he has counsel or not.

The responses of judges and lawyers to this question differ significantly. The disparity between the two groups is apparent, as the P.value given in Table 1 indicates (P. Value = .002). While the majority of judges believe that lawyers' participation in the trial stage is somewhat important, the majority of lawyers view such participation to be important.

2nd Category: Participants' Perception about 2001 Reform

The participants were asked three questions about the national laws that are directly related to legal representation in criminal cases, namely the Law of Criminal Procedure and the Code of Law Practice. The aim of these questions was to learn each participant's point of view about the 2001 law reforms and their impact on the justice system.

A. Impact of the 2001 Reform:

Table 2: Impact of 2001 Legal Reform

Have the 2001 legal reform had an impact on criminal procedures?	Yes		No	
	No.	%	No.	%
	29	96.66%	1	3.33

Since lawyers were not involved in criminal proceedings prior to the 2001 reform, only judges were asked about the impact of the reform. All of the judges, except

two, believe that the laws have caused “a big revolution”. They make their argument as follows:

1. The reform makes it clear that defendants have the right to counsel in all criminal cases, including early phases of criminal procedures.
2. The issuance of the law has successfully curbed the abuse of power to a great extent. It has limited violations and irregularities; as a result, violations during arrest have dramatically decreased. Further, it forces the prosecutors to do more investigating.
3. The change made by the new law is evident in the increased number of criminal cases. Lawyers encourage victims in private criminal cases to sue.⁵⁸⁸
4. The laws have been beneficial to the court. Today, a judge can be assured that a defendant has been given his or her due process of law during arrest, investigation and trial.
5. The laws have clarified criminal procedures and resulted in greater assurances and enforcement of defendants’ rights. Accordingly, Saudi citizens today vindicate their rights and do not hesitate to assert them in Saudi courts by themselves or through their lawyers.
6. Since the issuance of the reform, the number of criminal defense attorneys and advocates of criminal defense has increased.
7. The reform has streamlined many of the procedures that were previously vague and too complicated to understand.
8. The laws have improved the image of justice in Saudi Arabia.

⁵⁸⁸ Victims in criminal cases can initiate a criminal prosecution according to Article 17 of the Law of Criminal Procedures, which reads: “The victim or his representative and his heirs may initiate criminal action with respect to all cases involving a private right of action, and shall follow-up any such case before the competent court. The competent court shall serve a summons to notify the Prosecutor.”

However, one judge challenges the majority’s position and claims that the impact of the legal reform is minimal, because *Shari’ah* had already established the rights of criminal defendants, including the right to a power of an attorney and the right to legal representation, under the doctrine of adversarial agency, *Wakalah-bil-Khusumah*.

B. Views on the Code of Law Practice

Table 3: Code of Law Practice

Topic		Judges		Lawyers		Total		X ²
		No.	%.	No.	%	No.	%	
How do you rate the Code of Law Practice?	Excellent	10	32.26%	6	21.43%	16	27.12%	3.77
	Average	20	64.52%	17	60.71%	37	62.71%	P.Value
	Poor	1	3.23%	5	17.86%	6	10.17%	.152

The participants were asked about their views of the Code of Law Practice. Their answers were rated on a three-point scale: excellent, average and poor.

The average view

The results show that the majority of participants rated the Code of Law Practice to be average. Among the reasons given for the perception that the Code of Law Practice should be rated average were:

1. The code has not changed or evolved for thirteen years as opposed to other national laws, which have evolved and changed. The law needs to be amended to give more power to a defense lawyer, which will ease the burden imposed on courts.
2. The practice of law is one of the most important professions, the interference with which is damaging to the society at large. Nonetheless, the law is lenient as to its requirements; they allow incompetent people to practice law.

3. The law is good, but it is not fully and actually protective of a lawyer as it should be. The law must give lawyers more authority and give more respect to the profession of practicing law as it occurs in other countries.
4. The law is good; however, the practice of law in Saudi Arabia must be led by an independent bar association with the power to evaluate and categorize lawyers based upon their specialties, such as, family lawyers and criminal lawyers, and to make regulations related to the practice of law. Nonetheless, the code has not established such an association; instead, it has linked lawyers with the Ministry of Justice.
5. The code covers most issues regarding the legal profession; however, it has overlooked some of lawyers' rights and burdened them with more responsibilities.
6. Some of the participants explained that, since the law is crafted by humans, it is reasonable and cannot be perfect.

The excellent view

More than one quarter of the participants believe that the Code of Law Practice is excellent. They explain that the code is comprehensive and protective of both lawyers and clients. According to their view, the code recognizes the profession of practicing law for the first time in the history of the Kingdom. It has what a lawyer needs to do his job and includes all rules relevant to the practice of law, such as the rights and duties of attorneys. Therefore, they concluded that the Code of Law Practice is an integrant part of the justice system.

The poor view

In contrast to the excellent view, a small number of participants believe that the Code of Law Practice is poor. Among the reasons given for the perception that the Code of Law Practice should be rated poor were:

1. The law allows non-lawyers to represent three clients at the same time. The law also allows a distant relative of fourth degree to represent a defendant, a family member, which leaves the door wide open for non-lawyers to practice law.
2. The Code is concerned with lawyers' disciplines more than their rights.
3. It is clear that the law in general is adopted from other Arabic legal systems, mostly from the Egyptian system. However, attorney's immunity was not adopted.
4. Nothing in the Code requires that courts respect the rights granted to attorneys under the Code.
5. The Code links lawyers to the Ministry of Justice, which makes them dependents of the Ministry.

Judges and lawyers have convergent views about the Code of Law Practice as validated by the X^2 test given in Table 3 (P.value = 0.152).

C. Views on the Law of Criminal Procedure

Table 4: Law of Criminal Procedure

Topic		Judges		Lawyers		Total		X^2
		No.	%.	No.	%	No.	%	
How do you rate the Law of Criminal Procedures?	Excellent	13	41.94%	5	17.86%	18	30.15%	5.48 P.Value 0.064
	Average	14	45.16%	21	75.00%	35	59.32%	
	Poor	4	12.90%	2	7.14%	6	10.17%	

With regard to the question about the Law of Criminal Procedure, participants' answers were rated on a three-point scale: excellent, average and poor.

The average view

The results show that most participants assess the law to be average. Different participants observed that the law is not perfect, because it is not written by experts who have first-hand experience with the law, such as judges and lawyers. Therefore, some executive regulations are needed to fill the gaps and to clarify vagueness. In addition, the law has undergone many amendments, which does not support the stability of the judicial system.

Also, as with the Code of Law Practice, some believe that the law cannot be perfect, since it is crafted by humans and is not divine law.

The excellent view

About 30 % of the participants rate the law as excellent. Among the reasons given for the perception that the Law of Criminal Procedure should be rated excellent were:

1. The law has made a significant change and shift in judicial proceedings. It has largely limited the room for interpretation by courts, arresting authorities and investigating authorities.
2. The law is comprehensive and precise with almost no loopholes. It has defined the power of all authorities that play a role in a criminal case.
3. The law adopted contemporary methods of arrest, interrogations, investigations, gathering of evidence, prosecution and trial, which helps preserve the rights of defendants and of society.

4. The law has filled a vacuum, since there was no law in this regard prior to 2001. It covers all procedural phases from arrest to trial. It specifies procedures that a lawyer must follow, which saves effort.

The poor view

A few of the participants think that the law should be rated poor. They argue that the law is difficult to apply, because it borrowed too much from the French and Egyptian legal systems with no consideration of the nature of *Shari'ah* courts in Saudi Arabia. In addition, they argue that some articles of the law, such as Article 114, are not in line with Islamic jurisprudence, because it allows the prosecutor to detain an accused for up to 180 days before transferring the case to the court or releasing the defendant. Finally, lawyers claim that the Law of Criminal Procedure does not define the role of a defense lawyer in clear and explicit terms that limit the power of a judge with regard to allowing lawyers in the courtroom.

There was a slight difference between the views of the judges and lawyers about the Law of Criminal Procedures as given by the (P. value = 0.064) in Table 4. While approximately 42% of the judges believe that the Law of Criminal Procedure is excellent, approximately 18% of the lawyers agree. Most of the lawyers believe that the law is average.

3rd Category: *Shari'ah* and Legal Representation in Criminal Cases

Table 5: *Shari'ah* and Legal Representation in Criminal Cases

Do you see any conflict between Islamic <i>Shari'ah</i> and the practice of criminal defense?	Yes		No	
	No.	%	No.	%
	2	6.67%	28	93.33

The results show that all judges, except two, believe that the Law of Criminal Procedure and the Code of Law Practice are compatible with Islamic law. As such, they can be applied in *Shari'ah* courts. They argue that there is no conflict between the right to a lawyer in criminal cases and *Shari'ah*, especially if the defense attorney also seeks the truth and is bound by the ethics of the legal profession. In other words, they argue that law practice is permissible in Islam if the practice aims to help a defendant in his or her defense, and it is done in accordance with *Shari'ah* guidelines without misleading or obstructing justice. They provide several bases to support their argument:

1. *Shari'ah* preserves people's rights and addresses grievances, and the practice of law is in line with the *Shari'ah* in this regard.
2. A defense attorney seeks to exonerate his client, the defendant, which is a main principle in *Shari'ah* (innocence is presumed). In addition, the Islamic rule stipulates that "*Hudud* punishments must be avoided when doubts are raised", and a lawyer helps to identify doubts.
- 3- *Shari'ah* encourages forgiving (pardon), and a lawyer can help bring that about.
4. Since its advent, *Shari'ah* has preserved the rights of defendants, long before laws and regulations came into being. Its principles have covered everything including legal representation under the doctrine of adversarial agency, *Wakalah-bil-Khusumah*.
5. *Shari'ah* has what it takes to support justice, and criminal defense is a corner stone in the judicial system.
6. The criminal regulations in Saudi Arabia, including rules regarding legal representation, are procedural not substantive. Therefore, they do not conflict with the Islamic criminal law.

However, two judges disagree with the opinion of majority. They claim that, according to *Shari'ah*, a defendant has to take charge of his or her own defense as a basic rule in the Islamic criminal procedures. In addition, they accuse lawyers of obstructing justice when they advise and encourage their clients to deny charges that they committed.

4th Category: The lawyer's Role in Criminal Cases

A. Lawyers' Involvement and Preparation

Participants state that lawyers get involved in criminal cases, most of the time, at the commencement of the trial or sometimes even after commencement. Lawyers mention that it is very rare that they represent defendants at the pre-trial phase. Their engagement usually begins when they are approached by a defendant's family. Then, they collect information relevant to the case and study the case file. Thereafter, the lawyer makes an educated prediction or anticipation of the outcome and on that basis decides whether he will accept or refuse the case. The results of the interviews reveal many reasons why lawyers take criminal cases. Among the reasons given by participants are: seeking God's blessing by defending the aggrieved party, serving justice, the obvious innocence of a defendant, the relationship with the defendant, financial rewards and spreading the values of pardoning.

Once a lawyer agrees to represent a defendant, he must notarize the agreement and have it registered with the Notary Office. Then, he meets with the defendant or his or her family, in person or by phone, as needed to study the case with the help of the defendant or the defendant's family. Thereafter, the lawyer undertakes a thorough investigation to assess the credibility of the evidence and information. When he is clear on the law and the facts as presented, he advises the defendant of his or her rights and

provides legal counseling. In the meantime, he follows up the flow of criminal procedures in accordance with the law. Finally, the lawyer prepares his defense orally and in writing. If the case is transferred to the court, he then contacts the court to find out the time of the trial and to request all relevant documents to study them.

Table 6: Attorney Client Relationship

Topic	Law graduates		<i>Shari'ah</i> graduates		Total		X ²	
	No.	%.	No.	%	No.	%		
Do you solicit the defendants' point of view when preparing the defense?	Yes	10	71.43%	5	55.56%	15	65.22%	0.61
	No	4	28.57%	4	44.44%	8	34.78%	P.value 0.435

Lawyers were asked if they solicit the defendants' point of view when preparing their defense. About 65% of the lawyers say that they consider and welcome feedback from defendants. They explain that each client has knowledge of his or her case. Therefore, if he or she has a good idea that convinces the lawyer, the lawyer should accept the client's input as long as it is in the client's best interests and does not violate *Shari'ah* or the law.

In contrast to the majority, about 35% of lawyers say that they do not allow defendants to participate in the defense preparation and do not follow client's instructions, since he or she sought their help. They argue that, if a defendant was able to help himself, he would be better off representing himself and not seeking lawyer's help.

There was no significant difference between the rate of responses of law graduates and the responses of *Shari'ah* graduates to this question as given by the (P. value = 0.435) in Table 6.

B. The Lawyers' Role During the Pre-Trial Phase

As a general rule, the participants maintain that lawyers do not get involved in the pre-trial phase. A criminal defense lawyer often takes a case during trial or even after the prosecution has rested. Some participants also state that many defendants contact attorneys after shocking decisions are rendered against them. When representing clients at pre-trial procedures, the participants give examples of tasks undertaken by lawyers as follows:

1. Attend pre-trial procedures and develop a defense strategy based on evidence and facts.
2. Verify the legitimacy of procedures, identify violations of the law and abuses of power and address them appropriately.
3. Assess a defendant's case and advise him or her of his or her rights guaranteed by *Shari'ah* or the law.
4. Prepare his defense by collecting information and interview a defendant or his or her family.
5. Comfort a defendant and put him or her at ease.
6. Represent a defendant before the relevant authorities in an efficient manner. In other words, he serves as a liaison between his client and the authorities.
7. Help a defendant with the legal terms that a layperson may not know.
8. Consult with the defendant and advise him or her about the legal consequences of his or her testimony and the information that the defendant may provide to the prosecutor.

This way, a lawyer protects his defendant client from falling into a legal trap and making needless statements that may be used against him at trial. For example, a lawyer can

advise a defendant against giving an incriminating statement under verbal threat or a false promise.

9. Follow up his client's case as it moves on the docket.

10. Monitor procedures, preserve his client's interests, and report any violation to the court.

11. Monitor every procedure taken by the prosecutor's office involving the defendant and contest it if it is wrongfully executed. A lawyer also protects a defendant from abuse of power by law enforcement and/or investigating authorities and make sure that a defendant was not coerced by authorities into giving information.

C. The Lawyer's Role During Trial

According to the participant's accounts, a lawyer's role during trial may consist of some or all of the following:

1. Advise an accused of his *Shari'ah* and legal rights that are relevant to his case and present his case before the court.

2. Explain to a defendant the nature of the accusation against him and the course of procedures.

3. Identify weaknesses in the prosecutor's case, challenge presented evidence, make and respond to motions about substantive and procedural aspects in accordance to *Shari'ah* and law.

4. Follow up on a defendant's behalf and keep him or her informed of all procedures and hearing dates.

5. Make sure that a defendant is given due process of law. To that end, the lawyer may protest the selective use of the defendant's testimony. He also may negotiate the

convenience of sentencing and make sure that the punishment matches the crime committed.

6. Research the relevant law, seek to exonerate his client or mitigate the punishment by presenting extenuating circumstances.

7. Help a defendant with the legal terms that a layperson may not know.

8. Comfort a defendant, show support, and put a defendant at ease.

9. Provide religious counseling to a defendant, persuade him to repent sincerely, and point out the significance of speaking the truth as well as pleading guilty to his sin.

10. Help the defendant present his or her defense in a legal manner.

11. Collaborate with defendants and/or their families to create a plan and come up with persuasive arguments.

12. Preserve a defendant’s legal rights and make sure that courts follow the procedures impartially.

13. Help a court understand a criminal case and determine the truth.

D. The Lawyer’s Role During the Execution of Punishment

Table 7: Lawyers’ Role During Execution

Topic		Law Graduate		<i>Shari’ah</i> Graduate		Total		X ²
		No.	%.	No.	%	No.	%	
Do you play any role during the execution of punishment?	Yes	6	46.15%	1	10.00%	7	30.43%	3.49 P.value 0.062
	No	7	53.85%	9	90.00%	16	69.57%	

More than two-third of the lawyers interviewed say that they do not play any role during the execution of punishment, while slightly less than one third of them say that

they play a very limited role during this time. Their role, according to the result of interviews, may be confined to the following:

- 1- Make sure that their client is not mentally or bodily injured.
- 2- Provide religious counseling and remind their client that this is not the final judgment against him and that the final judgment is before God on the Judgment Day.
- 3- Seek pardon from victims or their relatives, for God’s sake, if they have the right to forgive, for example in *qessas* crimes. Lawyers also seek pardon from the King if he has the right to forgive as in *tazeer* crimes.
- 4- Make sure that punishment is rightly executed without violations.

The results show that the law graduate lawyers do slightly more work during the execution of punishment in comparison to *Shari’ah* graduates. There was a very slight disparity between law graduates and *Shari’ah* graduates in their responses to this question as shown by P. value = 0.062 given in Table 7. While 46% of law graduates state that they play a role during the execution of punishment, only 10% of *Shari’ah* graduates state that they play a role during the execution of punishment.

E. Pro Bono Work

Table 8: Pro Bono Cases 1

Topic	Law Graduate		<i>Shari’ah</i> Graduate		Total		X ²	
	No.	%.	No.	%	No.	%		
Do you do pro bono cases?	Yes	13	92.86%	11	100.00%	24	96.00%	0.82 P.value 0.366
	No	1	7.14%	0	00.00%	1	4.00%	

To examine the humanitarian aspect of lawyers’ role in criminal cases, another set of questions was posed to the lawyers and judges. First, lawyers were asked if the take

pro bono cases. All of the lawyers, except one, say that they take pro bono cases. They further state that they always offer free legal consultations via phone or in meetings to raise community awareness of defendants' rights. In doing so, they state that they are also seeking God's reward. In their opinions, at least a preliminary legal consultation is like a science, and similar to *fatwa* (legal opinion), should be provided to everyone for free.

The P. value of 0.366 given in Table 8 indicates that there is no significant difference between law graduates and *Shari'ah* graduates in their responses to this question.

Table 9: Pro Bono Cases 2

13. Based on the performance of counsel in court, do you think a defendant with a free lawyer receives the same attention as a defendant who pays for counsel?	Yes		No	
	No.	%	No.	%
	16	69.57%	7	30.43%

Second, judges were asked, based on their observations of the performance of counsel in court, whether they think that an indigent defendant with a free lawyer receives the same attention as a defendant who pays for counsel. The majority of judges, about 70%, believe that there is no connection between money and serving justice, to which a Muslim attorney is committed, especially when a pro-bono attorney works for God's sake.

In contrast, about 30% of the judges believe that there are differences, and they explain their answers. They blame the lack of education about the duty to provide pro bono services among attorneys claiming that it has contributed to a lack of appreciation of the importance of pro bono services by some lawyers. They also have two rationales for the differences between the attention given to an indigent defendant as compared to

the attention given to a counsel-paid defendant. The first rational that it is just human nature; whoever pays gets better service. According to them, a highly paid lawyer is more motivated than a non-paid or less paid lawyer. In other words, attorneys work for profit; the more they get, the better they do. The second rational is that a defendant who retains a lawyer and pays for his services will hold that lawyer responsible for any deficiency.

5th Category: Lawyers and Effective Legal Assistance

A. Characteristics of a Good Lawyer

In general, participants believe that the number of qualified criminal defense lawyers in Saudi Arabia is small. Participants were asked what characteristics make a good criminal defense lawyers. Among their responses, a good criminal defense lawyer is described as being:

1. Knowledgeable of *Shari'ah* and law, in particular criminal law and criminal procedures. For example, he must be aware of the elements of a crime and know about appeals at all levels.
2. Knowledgeable of the rules of evidence in *Shari'ah*.
3. Knowledgeable of legal principles and precedents relevant to cases on which he is working.
4. Knowledgeable of relevant sciences, such as sociology, psychology and medical terms.
5. Intelligent, intuitive and be able to predict possible outcomes of a given case.
6. Patient and punctual.
7. Experienced and professional.
8. Precise, whether in writing or verbally; focuses on important points.
9. A good listener, observant, and make inferences.

10. A good writer, persuasive and able to make his points in a legally logical manner.
11. Honest, trustworthy, loyal, God fearing, and more concerned with God's sake rather than winning a case.
12. Adherent to the ethics of the profession. For example, he does not over charge defendants or exploit their weaknesses.
13. Professional with a good reputation among judges and the public.

B. Lawyers' Effectiveness

To understand the role of criminal defense lawyers, participants were asked to rate the effectiveness of the role of lawyers in the criminal justice system. Their answers were scaled on a three-point scale as follows: very effective, effective and ineffective.

Table 10: Lawyer Effectiveness

Topic		Judges		Lawyers		Total		X ²
		No.	%.	No.	%	No.	%	
How effective is the role of defense lawyer in general?	Very effective	4	13.79%	6	21.43%	10	17.54%	1.51
	Effective	16	55.17%	11	39.29%	27	47.37%	P.value
	Ineffective	9	31.03%	11	39.29%	20	35.09%	.470

More than two-thirds of the participants believe that lawyers play either a very effective or an effective role in in the criminal justice system. In addition to assisting a defendant with his or her defense, a lawyer's presence serves as a shield against the abuse of power and coercion by law enforcement to force a defendant to confess to a crime.

In contrast, slightly less than one-third of the participants believe that lawyers play an ineffective role in the criminal justice system. Among the reasons given for these perceptions were:

- 1- A lawyer's role is limited, because he does not take part at the beginning of the interrogation and arrest. He appears to represent a defendant after the case is ready for trial, and in some cases, confessions may have been already made. This limits the role of criminal defense counsel. Moreover, often motions made by criminal defense lawyers, such as the DNA test, are not accepted by the court.
2. Most lawyers lack experience in the field of criminal defense.
3. Some practicing criminal defense lawyers may sometime withdraw from criminal investigations and procedures for religious, societal or economic reasons.
4. Often, a defendant does not give a defense lawyer the chance to do his job and may ignore his advice.
5. The role of criminal defense is very limited during trial, because a judge also helps a defendant in his or her defense.
6. Judges are not trained to deal with lawyers, and some judges do not approve the lawyer's role, which has negatively impacted the role of defense attorney.
7. The free advice or the *fatwa* (legal opinion) given by Muslim jurists to defendants has contributed to the limitation of the defense lawyer's role.
8. Some officials in the judicial system and in law enforcement see a lawyer as an opponent not a colleague. Consequently, a lawyer is sometime asked not to interfere or talk to his client during an investigation or trial.

The P-value of 0.470 given in Table 10 is high, which indicates that there is not a statistically significant difference between judges and lawyers on this issue.

C. Assessment of Lawyers' Success

The participants were asked how they would assess a lawyer success in a criminal case. Generally, they note that it is not easy to gauge a lawyer's success in a case. Nonetheless, they offer some insights and inputs on how they would assess the success of a lawyer in a particular case. The following reasons were given for deeming a lawyer to be successful if he is able to accomplish one of the following:

1. Express his client's position in a convincing and legally founded way that convinces the judge and the prosecutor.
2. Challenge axioms that were established during investigations and rebut them to the advantage of his client.
3. Use his legal and *Shari'ah* expertise to the benefit of his client and end a case in his client's favor either by an acquittal or by the least possible punishment.
4. Respond adequately to a complaint or criminal allegation and present good motions on his client's behalf.
5. Invoke all defense rights that were guaranteed by *Shari'ah* and national laws.
6. Close a case quickly and focus on important points in his defense and gives reasons and justifications for his motions.
7. Bring to the court's attention core issues related to a criminal case and help the court to reach just decisions.
8. Communicate effectively with the court and write a coherent legal argument.
9. Get the charges dismissed early on in pre-trial procedures.

10. Study the case file and identify loopholes, hints and clues and advocate them.
11. Protest illegal procedures taken by investigating authorities.
12. Present evidence and clues to aid reaching the truth.
13. Refer to laws, treatises and case law.
14. Serve justice regardless of the case outcome and uncover the truth.

6th Category: The Impact of Lawyers in Criminal Cases and Defendants

To determine the extent of defense lawyers' impact on criminal proceedings and outcomes of criminal cases, three questions were asked. The first question was about the impact of lawyers on defendants during the pre-trial stage. The second question was about the impact of lawyers on defendants during trial. The final question was about the impact of lawyers on the case outcome. Participants' responses were rated on a three-point scale: positive impact, negative impact and no impact.

Table 11: Lawyers Impact

Topic		Judges		Lawyers		Total		X ²
		No.	%.	No.	%	No.	%	
Impact of the defense counsel participation in the pre-trial procedures. In terms of defendant interest.	Positive Impact	11	64.71%	25	89.29%	36	80.00%	6.12
	No Impact	6	35.29%	2	7.14%	8	17.78%	P.value
								0.047
	Negative Impact	0	0.00%	1	3.57%	1	2.22%	
Impact of the defense counsel participation during the trial procedures. In terms of defendant interest.	Positive Impact	8	47.06%	23	85.19%	31	70.45%	X ²
	No Impact	8	47.06%	4	14.81%	12	27.27%	7.72
								P.value
	Negative Impact	1	5.88%	0	0.00%	1	2.27%	0.021
Impact of the defense counsel participation in case outcome. In terms of defendant interest.	Positive Impact	6	31.58%	19	76.00%	25	56.82%	X ²
	No Impact	8	42.11%	5	20.00%	13	29.55%	9.48
								P.value
	Negative Impact	5	26.32%	1	4.00%	6	13.64%	0.009

A. Lawyers' Impact on Pre-trial Procedures

Positive impact

Eighty percent of the participants believe that a lawyer's presence has a positive impact on pre-trial procedures. Participants believed that a lawyer gives legitimacy to

criminal procedures, and that there are also a number of benefits that defendants receive from being represented by attorneys including:

1. A lawyer in some cases manages to get a case dismissed by convincing the prosecutor that a criminal charge is baseless, which may lead to an early dismissal of a criminal case or at least the release of a jailed defendant.
2. A lawyer may advise a defendant not to plead guilty to a crime.
3. A lawyer creates a shield against abuse of power and coercion that investigators may use against a defendant.

No impact

All of the other participants, except one lawyer, believe that lawyers have no impact on the defendants at pre-trial proceedings. They argue that a lawyer only expresses the viewpoint of his client and nothing more. They also argue that, most of the time, a defendant's testimony matters most without regard to whether the defendant is represented by an attorney or refuses such assistance.

Negative impact

Finally, one lawyer alleges that lawyers have a negative impact on the defendants at pre-trial proceedings. This participant believed that lawyers complicate things at pre-trial, since they have the tendency to argue with law enforcement officers and prosecutors which may negatively impact their clients.

The P.value here is low, which indicates that there is a statistically significant difference between the groups, judges and lawyers. As with most other responses, there were differences between the answers of judges and lawyers to this question as given by P. value = 0.047 in Table 11. Approximately 90% of lawyers believe that lawyers'

presence has a positive impact on pre-trial procedures, whereas approximately 65% of judges believe so.

B- Lawyers' Impact During Trial

Positive impact

Approximately 70% of the participants agree that lawyers positively impact the defense of their clients during trial. The results show that defendants represented by attorneys have many advantages. Among the advantages they observed were:

1. A defendant represented by an attorney will likely be aware of his or her rights and the procedures of criminal law.
2. A lawyer's presence comforts defendants, especially those who cannot express themselves and those who can be easily misled. This helps a defendant to be more comfortable answering questions posed to him. Simultaneously, it allows him or her to challenge charges against him.
3. A lawyer helps a court reach the truth. For example, he may file a motion asking the court to follow a specific procedure that a judge may mistakenly skip.

No impact

The rest of the participants, except one judge, believe that lawyers have no impact on the defendants' interests during trial. Among the reasons given for this perception were:

1. *Shari'ah's* courts guarantee fair trials under the supervision of judges regardless of a lawyer's presence.

2. *Shari'ah* courts strive to affect justice and exonerate innocent defendants. Thus, a lawyer does not have great effect on the court procedures, since a judge plays the lawyer's role.
3. *Shari'ah*'s courts consider all parties to be equal and do not discriminate on the basis of a lawyer's presence.
4. In court, a judge conducts direct examination and does not question a defendant's attorney.
5. A lawyer is subject to a court's instructions and is not given a significant role to play.

Negative impact

Finally, one judge believes that lawyers may have a negative impact on defendants during trial if the lawyer tries to mislead the court. Such behavior may be damaging to the defendant's case. The judge also accused lawyers of unnecessarily prolonging a trial.

The P.value given in Table 11 is low (P. value = 0.021), which means that there is a statistically significant difference between the opinions of judges and lawyers. While 85% of lawyers believe that lawyers' presence has a positive impact on the trial, only 47% of judges agree.

C. Impact on the Case Outcome

Positive impact

More than half of the participants believe that lawyers have a positive impact on cases' outcomes favoring defendants. Among the reasons given for this perception were:

1. Criminal courts sometime give more weight to a defendant's statement that was given in his or her lawyer's presence, especially if the lawyer is a Muslim scholar.

2. An argument made by a lawyer has a positive effect on the outcome of a case, since he is more eloquent than a defendant.
3. Some lawyers advise their clients against confessing to charges, which makes it more difficult to convict a defendant.
4. A lawyer in some cases is able to get the charges dismissed or the punishment reduced.
5. An attorney may reach a settlement if the law allows.
6. After conviction, some lawyers seek a pardon on behalf of their clients from the King, if the crime is *tazeer*, or from the victim or his family if the crime is *gesas*.

No impact

On the other hand, approximately 30% of the participants believe that lawyers have no impact on case outcomes. They argue that the course of justice is not affected by the absence or presence of a lawyer, since a judge plays the lawyer's role in court. They explained that even if a lawyer is not present, a judge will still play his role to seek the truth.

Negative impact

Roughly 14% of the participants believe that lawyers in criminal cases have a negative impact. Some lawyers aggravate judges when they encourage their clients to lie or to plead not guilty. This may anger a judge. Consequently, he applies the maximum sentence.

The P.value of 0.009 given in Table 11 is extremely low, which means that there is a statistically significant difference between the groups' opinions. While most lawyers believe lawyers have a positive impact on the case outcome, most judges believe that lawyers have no impact on the case outcome.

7th Category: The Application of the Right to Legal Representation in Criminal Cases

The participants were asked about the application of the right to legal representation by courts and authorities. In other words, they were asked about the application of rules regarding the right to legal representation at per-trial and trial. Their responses were rated on a three-point scale: compliant, largely compliant and non-compliant.

Table 12: Application of the Law

Topic	Judges		Lawyers		Total		X ²	
	No.	%.	No.	%	No.	%		
To what extent do authorities enforce a defendant's rights to assistance of counsel in pre-trial procedures?	Compliant	11	61.11%	4	14.81%	15	33.33%	10.69
	Largely	3	16.67%	7	25.93%	10	22.22%	P.value 0.005
	Compliant							
	Non-Compliant	4	22.22%	16	59.26%	20	44.44%	
To what extent do courts enforce a defendant's rights to assistance of counsel?	Compliant	17	80.95%	4	14.81%	21	43.75%	X ²
	Largely	4	19.05%	19	70.37%	23	47.92%	21.41
	Compliant							P.value
	Non-Compliant	0	00.00%	4	14.81%	4	8.33%	<.0001

A. Compliance with the Right to Legal Representation During Pre-trial

Compliant

Approximately 33% of the participants believe that the authorities are complying with the right to legal representation during pre-trial. They explain that, by virtue of the law, every defendant has the right to an attorney of his choice at any phase of criminal procedures, whether during interrogations, pleading or trial. According to them, when an accused asks for the assistance of a defense attorney, his request is satisfied. Judges also explain that defense attorneys never complain during trials about maltreatment by

authorities in pre-trial procedures and use that as an indication that these authorities do not violate the right to legal representation.

Largely compliant

Approximately 22% of the participants believe that the authorities are largely compliant with the right to counsel in pre-trial proceedings. According to them, awareness of the defendant's rights has increased among officials. Consequently, these rights are now more respected, even though they are not fully enforced.

Non-compliant

Approximately 45% of the participants believe that the authorities are not in compliance with the right to council in criminal cases during the pre-trial phase. Among the reasons given for this belief were:

1. Usually, a defendant is unaware of his right to the assistance of counsel during investigations or interrogation. Consequently, some defendants forfeit their right to counsel in the criminal procedure.
2. Investigators have discretionary authority with regard to a lawyer's presence during an investigation, which weighs against full compliance of defendants' rights to an attorney in pre-trial procedures.
3. Some officials barely appreciate the role of an attorney; they think that a defense counsel may disrupt or delay criminal procedures or may impede the disposition of a case. Consequently, they do not bother or attempt to enforce the right to have a lawyer.
4. Authorities require a power of attorney authorizing a lawyer to represent a defendant, which is sometimes impossible to get, especially if the defendant is in prison.

5. The prosecutor does not inform a defendant of his or her right to an attorney. As a result, the defendant is questioned without his attorney being present.

As with most other responses, the P.value given in Table 12 is low (P. value = 0.005), which means that there is a statistically significant difference between the groups' opinions. While approximately 61% of judges believe that authorities are complying, approximately 59% of lawyers believe that authorities are not complying.

B. Courts' Compliance with Legal Representation (at trial)

Compliant

Approximately about 44% of the participants believe that courts are complying with the right to a lawyer in criminal cases. According to the participants, a defendant has the right to a lawyer of his or her choice to represent him or her in criminal procedures, and the right is fully enforced. This is in part because neither *Shari'ah* court nor the law denies a defendant the right to the assistance of counsel. These participants explained that the courts in most cases inform a defendant of the right to a defense counsel of his or her choice and, in some cases, even advise pro se defendants to hire a defense lawyer if needed. However, many defendants do not hire lawyers, which is their choice.

They explained that the general rule is that courts do not deny any defendant the right to an attorney. In fact, the court allows a defense attorney to access the case file, which includes the prosecution's allegations. Therefore, an accused may seek the assistance of a lawyer and any other legal agent. By law, this right cannot be denied. Observers noted that, often when a poor accused asks for an attorney, a court may contact the Ministry of Justice to appoint one for him at the state's expense if the court feels that counsel would be beneficial to the accused.

Largely compliant

On the other hand, approximately 48% of participants believe that courts are largely compliant with the defendants' right to counsel during the trial. According to them, the enforcement of defendants' right to counsel during the trial depends on the sitting judge. Among the reasons given for judges not allowing lawyers to defend their clients fully in criminal courts include:

1. Some judges do not differentiate between lawyers and adversarial agents.
2. Some judges think that defense in *hudud* cases falls under the court's duty. Therefore, they do not fully allow lawyers to defend their clients when it comes to *hudud* crimes.

Non-compliant

Approximately 8% of the participants believe that courts are not complying with the defendants' right to counsel. They state that there is no cooperation between lawyers and judges. They have observed judges expel lawyers from the courtroom for no legitimate reasons, or, even when lawyers are allowed in the courtroom, judges are not allowing lawyers to speak. In addition, a defense lawyer is seen by some judges as an odd person defending criminal acts. Other judges believe that lawyers twist the facts. Consequently, they prefer to talk directly to defendants.

There is a significant disparity between the responses of the lawyers and judges as given by the low P. value = <.0001 in Table 12. While most judges believe that courts are complying, most lawyers believe that courts are largely complying.

Extra time for defense:

Table 13: Extra Time for Defense

Topic	Always		Sometimes		Never	
	No.	%	No	%	No.	%
Do you accept a counsel's request of more time to prepare his defense?	10	41.67%	12	50.00%	2	8.33%

To examine the level of compliance with the right to an attorney during trial further, judges were asked if they are willing to allow extra time for lawyers to prepare their defense when such time is requested. The judges' responses vary. Approximately 41% of the judges state that they always honor such a request. Among the reasons given were:

1. The aim is to conduct a fair trial. Allowing extra time for defense preparation helps to achieve this goal most of the time.
2. The goal is to serve justice and to determine the defendants' rights. Since the rule in Islam is that a defendant is presumed to be innocent, anything that helps to prove his innocence should be allowed by the court, including permission for extra time to prepare his or her defense.
3. Islam is lenient on proving crimes, especially *hudud* crimes because of their harsh punishments. For this reason, a judge should allow whatever helps a defendant in his defense to avoid the unjust application of the punishment.
4. The request of extra time is within the defense attorney's right, which should help to reach the truth.
5. Courts accept the request, because adequate time to prepare a defense is one of the defendants' fundamental rights.

However, half of the judges admitted that they only sometimes honor lawyers' requests for extra time to prepare their defense. They believe that the determination of time for defense preparation falls under the court's discretionary power. When considering a lawyer's request for extra time, reasons they gave for rejecting such a request include:

1. If granting additional time would disrupt the course of justice.
2. If the extra time requested is unnecessary. According to some judges, some charges do not require additional time, while others deserve more time to prepare the defense.
3. If both parties have rested, and the case is ready for decision.
4. If granting additional time would be unfair to other parties.
5. If the request is repeated over and over and for the same reason and/or without a legitimate reason.

In contrast, two judges maintain that they do not accept lawyers' requests for extra time to prepare their defense, because time is limited and giving more time is unfair to other parties. They also do not allow it out of concern that it will unnecessarily prolong the proceedings.

To examine the issue of extra time from a different angle, lawyers were asked if courts honor their requests for extra time to prepare their defense. All lawyers (23) confirmed that judges in general honor their requests, but in rare cases they do not allow it. They often go on to confirm that the matter is at the discretion of the court.

When asked about what they think is adequate time for a lawyer to prepare his defense, the judges acknowledge that every case is unique and that there is no standard time. Among the factors that judges believe influences the appropriate time are the

attorney, the size of the case, its complexity, the amount of evidence and its characteristics. Some judges, however, said that the preparation time should not be more than a month.

Indigent defendants:

Table 14: Indigent Defendants

Topic	Always		Sometimes		Never	
	No.	%	No.	%	No.	%
Do you appoint a defense counsel for an indigent defendant?	6	20.69%	7	24.14%	16	55.17%

Judges were asked if they are willing to request that a counsel be appointed at government expense for a poor defendant if needed. Approximately 21% of judges state that, whenever an indigent defendant asks for an attorney, the court recommends to the Ministry of Justice that one be appointed for him or her. On the other hand, about 24% of the judges stated that they sometimes recommend to the Ministry of Justice that a lawyer be appointed for poor defendants. Among the reasons given for always or sometimes requested appointed counsel were:

1. If the assistance of an attorney is important for discovering the truth.
2. If a defendant is in critical need of the assistance of an attorney.
3. If it is a serious crime. (According to the law, the Ministry of Interior identifies serious crimes).

The judges agree that their recommendations to appoint attorneys for indigent clients are always honored by the Ministry of Justice.

On the other hand, about 55% of the judges state that they do not appoint lawyers or recommend that a lawyer be appointed for an indigent defendant. However, they

advise a defendant that he or she has the right to legal representation by a lawyer or other person of his or her choice. Among the reasons given to justify not appointing or recommending lawyers in such circumstances were:

1. The court does not have the authority to appoint or recommend the appointment of an attorney, and the law does not require the court to do so.
2. The appointment of an attorney falls under the authority of the Ministry of Justice not the court.
3. The court is a neutral entity. Therefore, a third party should undertake this duty.
4. It is not the court's duty to help defendants in this regard.
5. A court does not distinguish between a fortunate and an indigent defendant. Thus, it does not appoint a counsel for a defendant, just because he or she is indigent.

8th Category: Obstacles Preventing Effective Legal Representation

During the interviews, it became clear that a number of obstacles get in the way of providing effective legal services in criminal cases. Some of these obstacles are listed below:

A. Education

Table 15: Legal Education

Topic		Judges		Lawyers		Total		X²
		No.	%.	No.	%	No.	%	
Do you see any gap between legal education that you received and law practice?	Yes	19	70.37%	22	78.57%	41	74.55%	0.49
	No	8	29.63%	6	21.43%	14	25.45%	P.value 0.485

Education is an apparent obstacle that prevents many lawyers from providing effective legal services to defendants. Approximately 75% of the participants believe that there is a gap between the education that they received during their school years and the practice of law. According to those participants, legal education alone cannot prepare students for the practice of law. Consequently, a *Shari'ah* or law graduate must be trained by a competent lawyer in a law office before start practicing on his own. In their view, the gap between education and practice is attributed to the following reasons:

1. Many school professors do not have law practice experience, and many mentioned a well-known Arabic saying, “you cannot give what you do not have.”
2. There is shortage of competent professors knowledgeable of both *Shari'ah* and the law.
3. There is distance between theoretical education and real life experience. Education is incompatible with reality, because it does not include current applicable law or case law studies that make students aware of reality on the ground.
4. There is a lack of consistent cooperation between the judiciary and universities.
5. There is a lack of field experience and internship during education.
6. There is a lack of coordination between *Shari'ah* schools and law schools.
7. Teaching does not cover legal terms used by judges and law enforcement officials upon arrest and investigation.

In contrast, approximately 25% of the participants believe that there is no gap between legal education and practice. They claim that codification of the procedural laws has closed the gap. Consequently, a lawyer can easily access and understand these laws.

The P.value given in Table 15 is very high, which indicates that there is no significant difference between the responses of the judges and lawyers (P. value = 0.485).

Shari’ah Education vs. Law Education

The participants explained that *Shari’ah* graduates lack an understanding of national law, while law graduates lack an understanding of *Shari’ah*. Slightly fewer than half of the participants believe that *Shari’ah* graduates are more prepared to practice law in the criminal defense arena than law graduates. By contrast, only 10% of the participants believe that law graduates are more prepared than *Shari’ah* graduates to practice criminal defense. Approximately 42% of the participants believe that there are no differences between *Shari’ah* and law graduates.

Table 16: Shari’ah Colleges vs. Law School 1

Topic		Judges		Lawyers		Total		X ²
		No.	%.	No.	%	No.	%	
Based on your experience with Sharia school and law school graduates, whom do you think are more prepared to practice law in the criminal defense arena?	<i>Shari’ah</i> graduates	15	68.18%	9	32.14%	24	48.00%	8.23 P.value 0.016
	Law graduates	0	0.00%	5	17.86%	5	10.00%	
	No difference	7	31.82%	14	50.00%	21	42.00%	

The P. value given in Table 16 is low, which indicates that there is a significant difference between the responses of lawyers and judges (P. value = 0.016). While none of the judges believe that law graduates are more prepared to practice criminal defense in comparison to *Shari’ah* graduates, 10% of lawyers believe that law graduates are more

prepared to practice criminal defense. However, most of the *Shari'ah* graduate and law graduate lawyers believe that there is no difference between law graduates and *Shari'ah* graduates. In addition, there was no significant difference between lawyers' responses to this question as the P. value in Table 17 indicates (P. value = 0.916).

Table 17: *Shari'ah* Colleges vs. Law School 2

Topic		Law graduates		<i>Shari'ah</i> graduates		Total		X ²
		No.	%.	No.	%	No.	%	
Based on your experience with <i>Shari'ah</i> school and law school graduates, whom do you think are more prepared to practice law in the criminal defense arena?	<i>Shari'ah</i> graduates	5	29.41%	4	36.36%	9	32.14%	0.18 P.value .916
	Law graduates	3	17.65%	2	18.18%	5	17.86%	
	No difference	9	52.94%	5	45.45%	14	50.00%	

Shari'ah school proponents

About half of the participants believed that *Shari'ah* graduates are more prepared to practice law in the area of criminal defense. Among the reasons given for this belief were:

1. On the one hand, the curriculum taught at *Shari'ah* schools is driven by Islamic *Shari'ah*, which is applied in Saudi Arabia, and by reality on the ground. A law student, on the other hand, studies foreign law and uses terms and language that are different from those used by judges.

2. Graduates of *Shari'ah* schools have profound knowledge of Islamic jurisprudence upon which the Saudi judiciary system is based. Unlike *Shari'ah* studies, national law and its procedures are simple and easy to understand even on a self-study basis.
3. The criminal law is based more on *Shari'ah*, and crimes of *hudud*, *qesas* and *tazeer*, for example, are more fully developed in Islamic jurisprudence than in national law.
4. Graduates of *Shari'ah* schools are more accepted by judges, because they have the demeanor that is more preferred by judges as opposed to law graduates. Demeanor here means the way they dress and the language they use.

Law graduate proponents

In contrast, 10% of the participants, all lawyers, believe that law graduates are more prepared to practice law in the criminal defense arena, and they make the following argument in support of their opinion.

1. The curriculum at law schools focus more on what future lawyers will practice on the ground after graduation.
2. Unlike *Shari'ah* schools, national criminal laws and criminal procedure classes are taught at law schools, which work to the advantage of law graduates.
3. The curriculum at law school is comprehensive. Students study criminal courses and some *Shari'ah* courses. *Shari'ah* curriculum, on the other hand, focuses only on Islamic teachings and ignores the national laws despite their importance, especially after the issuance of many criminal regulations.
4. The Kingdom of Saudi Arabia is part of the modern world, and the same types of crimes are committed in Saudi Arabia are similar to those committed in other countries.

Nonetheless, new crimes, such as crimes related to computers, cyberspace and forgery, are taught at law schools and are not taught at *Shari'ah* schools.

Neutral view of *Shari'ah* and law education

Approximately 42% of the participants believe that there is no difference between law graduates and *Shari'ah* graduates with regard to who is more prepared to be a criminal defense lawyer. They believe that laws and regulations are better understood when applied and practiced and cannot be theoretically learned. What makes a difference is good training after graduation, not academic studies.

Moreover, they explained that both graduates miss an important part of legal knowledge, while *Shari'ah* graduates lack law education, law graduates lack advanced *Shari'ah* education. Therefore, whoever knows both *Shari'ah* and national law is best prepared to succeed as a criminal defense lawyer.

B. Law

The national laws present another obstacle that prevents lawyers from providing effective legal service to defendants. Some participants complain that national laws have caused some difficulties in providing effective legal assistance to their clients as they explain below:

1. The law does not prevent a judge from dismissing a lawyer from the courtroom or denying him the right to represent his client. Often, a judge ends up playing a defense role by examining the defendant even when the defendant's lawyer is present.
2. The law gives discretionary authority to judges and prosecutors regarding a lawyer's representation. This is one of the hurdles in the Saudi criminal defense. For example, Article 70 of the Law of Criminal Procedure states: "The representative or attorney shall

not intervene in the investigation except with the permission of the Investigator.” This article is vague and has been misused by prosecutors. Thus, some of them refuse to allow lawyers to represent defendants in criminal procedures.

3. Laws grant an indigent defendant a free lawyer at trial and for serious crimes only. These laws have been interpreted as not providing a free defense lawyer at pre-trial or for the less serious crimes.

4. The law bans advertising for legal services, which has prevented lawyers from reaching out to the public.

5. The law does not allow lawyers to have other jobs besides the practice of law, which imposes financial pressure on young attorneys and puts them at a disadvantage.

6. The practice of law is difficult, because it is new and not fully understood by judges, practicing attorneys and *Shari’ah* scholars.

7. The law is not easily understood by law enforcement officials. Consequently, the law is often wrongfully interpreted. Regretfully, such erroneous interpretations may prevail.

8. The law does not provide a mechanism for holding officers accountable for mistakes that they make during the course of their investigations.

C. Representation of Women

Table 18: Representation of Women

Topic	Law Graduate		<i>Shari’ah</i> Graduate		Total		X ²	P.value
	No.	%.	No.	%	No.	%		
Is there any difference in defending a man and a woman?	Yes	10	71.43%	4	50.00%	14	63.64%	1.01
	No	4	28.57%	4	50.00%	8	36.36%	0.315

More than half of the lawyers agree that representing women is different from representing men and is more difficult. To explain their point of view, the following real life examples were offered:

1. In most cases, a lawyer does not meet with a female defendant. Often, they meet with one of her relatives, who informs the lawyer of the charges against her. Lawyers voice concern about these kinds of meeting. They see them as less effective, because they are indirect.
2. Meeting with a female defendant in prison is always performed under the supervision of the Committee for the Promotion of Virtue and the Prevention of Vice. If it is in an office, the meeting is very restricted. It has to be in the presence of other people, usually a first degree relative or a female officer. Consequently, a lawyer cannot get all of the information that he needs from his client, because she will be afraid to speak in front of other people.
3. In Saudi society, women are not accustomed to speaking directly to men. Therefore, they do not feel comfortable describing incidents or facts directly to men and many female defendants prefer to meet via the telephone.
4. Judges do not like lawyers representing women.
5. Some issues arise regarding identity, because women may wear the veil.
6. It is difficult to communicate with a woman efficiently and quickly because of traditions imposed by society.
7. More emphasis is given to a woman's confidentiality than to a man's. Her reputation is at stake when she is a suspect in a criminal case.

On the other hand, one-third of the lawyers believe that there is no difference in representing women or men.

The P. value is high as given in Table 18 (P. value = 0.315), which indicates that there is no significant statistical difference between lawyers' responses based on their type of degree, *Shari'ah* as opposed to law.

D. Negative image

Society's misperception about lawyers and the law profession presents another obstacle to criminal defense lawyers. This has led many defense lawyers to leave the criminal law field. Society's misperception, as described by lawyers, comes in different forms such as:

1. People may believe that a lawyer has a magic wand and that he can prove a defendant's innocence regardless of the strength of the evidence of guilt.
2. People may not realize that a lawyer also helps with sentence reduction or its execution. Instead, they think that a lawyer's sole objective is to prove a defendant's innocence.
3. People may think of a lawyer as someone who seeks to change the truth and to acquit a defendant from his charge. In other words, they believe that a lawyer is biased and does not care about justice.
4. People may not distinguish between an adversarial agent and a lawyer.
5. People may not appreciate the significance of a defense lawyer's role when they have to go to court.
6. People may think that a defense lawyer adopts a defendant's position. Consequently, they see him as an accomplice to the crime.

7. People may believe that a criminal defense lawyer is entirely motivated by profit and has no conscience.
8. People may think that a lawyer defends criminals or their wrongdoings, which weighs against the presumption that a defendant is innocent until proven guilty.
9. The confusion between an accused and a criminal may lead to the misconception that a lawyer defends criminals. As a result, a lawyer is seen as not earning an honest living in accordance with Islam.
10. There is a general lack of public awareness of a lawyer's role and lack of trust of lawyers in Saudi society. Many people do not trust lawyers, and they think that attorneys' fees are unreasonably high.

E. Faith and Beliefs

Table 19: Faith and Beliefs

Topic	Law graduates		<i>Shari'ah</i> graduates		Total		X ²	
	No.	%.	No.	%	No.	%		
Do your faith and beliefs play a role in your decision of representing a defendant?	Yes	10	71.43%	9	90.00%	19	79.17%	1.22
	No	4	28.57%	1	10.00%	5	20.83%	P.value 0.269

About 79% of the lawyers admit that their faith and beliefs play a role in accepting criminal cases. They explain if a defendant confessed to committing a crime that is against a lawyer's faith and beliefs, that lawyer will not represent that defendant regardless of the financial award. These lawyers site the *Qur'anic* verse, "be not an advocate on behalf of the treacherous", which is interpreted as meaning that a lawyer

should not accept a case if he is not convinced of a defendant's innocence, or if the defendant admits his guilt.

The rest of the participants believe that their faith and beliefs do not play any role in accepting a criminal case. They believe that a successful lawyer studies cases objectively in accordance with professional ethics. Likewise, a lawyer must be impartial, and he cannot impose his ideas on others. They also argue that a criminal defendant, who has been arrested, is vulnerable to abuse and violations at any proceeding or trial. Therefore, he must be protected.

The P. value of Table 19 is high (P. value = 0.269), which indicates that there is no significant statistical difference between lawyers' responses based on their type of degree, *Shari'ah* as opposed to law.

F. Other Obstacles

In addition to the obstacles discussed above, the lawyers also identified others that prevent them from providing effective legal services. Such obstacles are listed below:

1. The law profession does not have a mechanism for monitoring lawyers' offices and does not discipline lawyers who violate ethical rules.
2. Some government agencies do not appreciate a lawyer's role. Consequently, they do not cooperate with lawyers. Moreover, lawyers are not protected against abuse of power by some judiciary officials.
3. The legal service is expensive and rather commercial. Some lawyers are there for the money. Therefore, they may impede cases, especially those who charge by court appearance. Consequently, lawyers have acquired a bad reputation.

4. The requirements of practicing law are lenient; accordingly, a license to law practice is easily obtained. As a result, many law practitioners are not qualified in the first place.
5. A non-lawyer can represent up to three clients. In addition, a distant relative from a fourth degree can also represent his relatives in court.
6. A lawyer gets involved in a criminal case late, since most defendants retain lawyers when a case is ready for trial, or it is already in court.
7. Many lawyers do not take criminal cases, because such cases are religiously and socially sensitive. In addition, many lawyers think that criminal cases are not financially rewarding, and lawyers struggle to get paid by their clients when the representation ends.
8. Today, there are few competent defense lawyers and experienced lawyers are not willing to appear in criminal cases. Instead, they delegate attorneys who are being trained on-the-job to represent criminal defendants.
9. Categorization of rules and regulations to law and *Shari'ah* has caused tension between lawyers and judges, on the one hand, and among lawyers themselves, on the other hand.
10. The law profession is attached to the Ministry of Justice, and there is no independent body, such as a bar association, to represent and protect lawyers.
11. There is no stability in the legal profession due to constant amendments of laws.
12. It is very expensive to establish a law office and to keep it running, as it costs a minimum of approximately 100,000 Rial a year (about 26,656 USD).
13. There is a lack of codification. For example, there is no formal codified criminal law specifying crimes and their punishments and too many interpretations are made. As a result, a lawyer is not able to give concrete, specific legal advice generally and

particularly in criminal law cases, since the outcome falls within a judge's discretionary authority.

14. The practice of law is a newly established profession in Saudi Arabia. It is based on good principles. However, it was preceded by the profession of adversarial agency, which had a bad reputation. Thus, it may take some time to change that bad reputation to a good one.

15. Because judges lack awareness of a lawyer's role, some of them rush lawyers into answering questions in writing before them.

16. There is no software or website that lawyers can use to update their knowledge of new court decisions and new laws.

17. In many cases, the language of arraignment is unclear and inconsistent.

18. Bureaucracy is an impediment to lawyers. Some government agencies take too long to respond to a lawyer's request to review a case file or have a question answered. This has made it difficult for lawyers to provide prompt and significant legal services.

19. The relationship between a lawyer and his client in many cases is marked with dishonesty and distrust. Also, in some cases a lawyer does not get to meet his client early on. Rather, he meets with the client late in the investigation process or trial. In fact, some investigation officials make it difficult for a lawyer to represent a defendant during the investigation by insisting on a power of attorney as a pre-requisite to meeting a jailed defendant.

20. The law of the judiciary system has not been fully enforced. For example, appellate courts still function as fact-finding committees without deciding the issues. This limits the attorney's role at the appellate courts.

Discussion

I. Significance of Legal Representation in Criminal Cases

A. At Pre-trial Procedures

The results of the analysis of the interview data show that a lawyer's role at pre-trial procedures is "important" or "somewhat important". The majority of the participants acknowledge that defense lawyers should play a significant role at pre-trial proceedings. There was hardly an opposing view to this sweeping majority. In fact, only one judge disagreed. The reasons that the participants gave in support of their perspective are convincing and can be used as strong support for the role of defense attorney in general and at pre-trial in particular. What stands out from their argument is that pre-trial developments may significantly influence the fate of a defendant. In addition, a lawyer is needed to quell any possible abuse of power, to advise the defendant of his or her legal rights, to guide him or her through the prosecution's procedures, and, most importantly, to advise against giving up the right not to make incriminating statements that will prejudice the defense in court.

In contrast, the argument made by the lone dissenting judge is divergent. The evidence offered in support of his contention that lawyers complicate things does not stand up well against the evidence for the majority's view. In other words, how could the judge be accurate that lawyer make things worse while the rest of his colleagues acknowledge the significance of a defense lawyer's presence at pre-trial? The same is true as of his other assertions. This judge also argues that testimony must be heard *de novo* during the trial; therefore, a lawyer's presence is not important during the pre-trial

stage of criminal proceedings. However, the judge' argument here is less persuasive than the majority's argument, because, while it is true that a judge examines a defendant directly in *Shari'ah* court, this procedure does not undermine a lawyer's role at pre-trial. A defendant represented by an attorney at pre-trial will be aware of his rights while he is being examined by a judge. Nevertheless, as the majority of participants argue, defendants often feel insecure and nervous, and the presence of an advocate may help them to feel more comfortable.

The lone dissenting judge further argues that the defendant knows the truth and that his or her direct words help to reach the truth. Even though that may also be true, it does not justify the judge's negative view of lawyers. An accused has the right to know his options presented by expert in the field. As a result, the accused will be able to make an educated and informed decision as to the defense strategy followed by his attorney, including whether to plead guilty. All of the benefits mentioned above may not happen if the defendant is not allowed to seek the assistance of counsel, even though a defendant may be aware of the truth and the facts of the criminal charges as the judge argues.

B. At Trial

Similarly, the majority of participants believe that a lawyer's presence during trial is either "important" or "somewhat important." Their argument is similar to their first argument regarding the presence of a lawyer at pre-trial. The majority holds that, in addition to helping a defendant at trial, lawyers help the judge to apply the rules of both law and *Shari'ah*. As one would have thought, lawyers in general view their role during the trial to be essential; however, most of the judges also believe that the participation of lawyers in criminal cases is "important" or "somewhat important".

In contrast, the two judges in the minority offer a position that, though factually accurate, is less persuasive than the majority's view. It is true, as the two judges argue, that a court is an impartial entity empowered with the authority to decide cases in accordance with *Shari'ah*. However, this view fails to recognize the prosecutor's strong position with all governmental resources at his disposal to bring charges against an individual, who may be poor, ill-educated, illiterate and innocent. Differently put, since the prosecutor uses the government's resources in the name of the people of Saudi Arabia, and the prosecutors are well trained, it is fair to counter the prosecutor's power in a court of law with a competent attorney, who fights for a defendant's innocence through means available in the legal field.

Secondly, the minority's contention that a lawyer may delay the disposition of a case is counter to the Islamic legal principle that "a judge is better making an error exonerating a defendant than convicting him."⁵⁸⁹ This principle is strictly applied to crimes with harsh punishment, mainly *hudud* crimes. In his book about the Saudi Legal system, Frank Vogel explains that Saudi courts apply two rules from the *Qur'an* and the *Sunnah* to *hudud* crimes . First, "the convictions for these crimes should be averted in the case of any doubt."⁵⁹⁰ Second, "it is better for the authorities to err in exonerating than in punishing."⁵⁹¹ He further states: "I observed a case where conviction, clearly technically justifiable under the rule of the school, was reversed on the implicit ground that the

⁵⁸⁹ *Fatwa* No. 176677 available at: <http://fatwa.islamweb.net/>.

⁵⁹⁰ FRANK E. VOGEL, *supra* note 61, at 101.

⁵⁹¹ *Id.*

appellate court ... believed that the facts of the case aroused doubt sufficient to require reversal.”⁵⁹²

Finally, while it is true that courts are concerned with the truth, as the two judges argue, it is also true that lawyers are equally concerned with the truth, and they are there to serve justice. In fact, they are equally responsible before God, as is every Muslim, judges included. The *Qur'an* states: “O you who believe, be maintainers of justice, bearers of witness for Allah, even though it be against your own selves or (your) parents or near relatives -- whether he be rich or poor...”⁵⁹³ This verse of the *Qur'an* applies to judges and lawyers alike.

Moreover, it is true that *Shari'ah* courts treat defendants equally, as the two judges argue; however, the positions of the prosecution and defense are not equal, as explained earlier. That is to say, the presence of the prosecutor puts the government at advantage over the defendant and gives the prosecutor more leverage to prove the case in the absence of defense counsel, who is better able to counter the prosecutor's claims.

II. Perception of the 2001 Reform

All of the judges, except two, agree that the 2001 law reform has made a significance change in the criminal system of Saudi Arabia. As explained in the results section, lawyers did not participate in this part, because criminal defense practice was not

⁵⁹² *Id.*

⁵⁹³ Also, Prophet “(PBUH) said, (Help your brother, whether he is an oppressor or is oppressed). A man enquired: (O Messenger of Allah! I help him when he is oppressed, but how can I help him when he is an oppressor?) He (PBUH) said, (You can keep him from committing oppression. That will be your help to him).” ABU ZAKARIA AL-NAWAWI, RIYADH US SALEEHEEN, [The Paradise of the Pious] 237 (2010).

allowed then. Testimony given by the judges shows that the recognition of the practice of criminal defense has greatly impacted the criminal proceedings. In essence, they explain that, since lawyers have been allowed to practice criminal law, justice has been better served; abuse of power has been limited, procedures have been made clearer, and defendants have been made aware of their rights. Consequently, they argue that the image of justice has improved in Saudi Arabia as a result of the reform. Therefore, the presence of a criminal defense attorney is crucial; it is a sign of justice regardless of the charges brought against a defendant.

In comparison, the evidence offered to support the minority view of the law reform is not strong. The minority contends that *Shari'ah* has an established criminal defense system under the doctrine of adversarial agency, *Wakalah-bil-Khusumah*. However, this contention is based on a misunderstanding of the differences between the traditional Islamic concept of adversarial agency and the modern Western concept of the practice of law. As discussed in chapter three, there are striking differences between the practice of law as it was initially applied in Europe and adversarial agency in Islam. The main difference is that the practice of law is a legal profession organized and recognized by the government of a country, while adversarial agency is mostly governed by social and moral rules. Consequently, the organization of the practice of law is itself based on law. Lawyers must be licensed to practice law, and they must have established law offices for practicing law, whereas adversarial agents can represent others without having a law education or a license to practice law.

A. Views on the Code of Law Practice

The majority of the participants rate the Code of Law Practice as average. Although average is not a high grade, this view is positive and supportive of the legal profession. Obviously, the majority's view is not against the code; rather they are not satisfied with it. Consequently, they ask for reform of the law so that it can be more effective. Meanwhile, some of those participants are happy with the law but are not satisfied with its application. To make a difference, they call for the establishment of an independent bar association. All of these points made against the Code of Law Practice confirm and support the significance of the practice of law and the role of the criminal defense lawyer.

The next most frequent rating is the excellent view of the Code of Law Practice. This view praises the law for its obvious achievements, among which is the recognition of the practice of law. This point of view, like the previous view, was average. In other words, both views acknowledge the significance of the Code of Law Practice. While, this group of participants seems satisfied with the Code as it is, the first group is not; therefore, they are asking for more regulations that will organize the profession and protect lawyers.

A third group of participants rates the Code of Law Practice as poor. Their critique is centered on the fact that the code is loose as to the requirements of law practice. This has resulted in the acceptance of incompetent individuals representing defendants. As with the first group, this third group, which is the minority, is extremely unhappy with the law for these obvious reasons. However, their discontent must not be confused with the profession of the practice of law. That is to say, this point of view

seems fully to support the law practice. However, they hope for a more rigorous law that keeps incompetent persons away from the practice of law. Simultaneously, they expect the law to be more protective of lawyers' rights and against judicial power and to establish a bar association that is independent from the Ministry of Justice.

B. Views on the Law of Criminal Procedure

As with the Code of Law Practice, the majority of participants have rated the Law of Criminal Procedure as average. Only 41.94% rate it as excellent. In essence, however, the analysis behind all three ratings (Excellent, Average, and Poor) supports the law practice and the role of criminal defense. The first rating, for example, is average; here it seems that the participants are not totally satisfied with the law, because their input was not solicited when the law was drafted. Consequently, they contend that many amendments were made that have caused instability. All of these seem to be good points to make in favor of the practice of law in general and criminal defense in particular but not the law itself.

The second rating is excellent and counts for 41.94% of the participants, all of whom think highly of the Law of Criminal Procedure. They are very satisfied with the law for the obvious and positive changes that they have seen. For example, they claim that the Law of Criminal Procedure has set up and clarified rules that were once left to the sole interpretation of prosecutors and investigating authorities. In short, all of the points they make, as noted in the results, cannot be denied even by the unsatisfied rating group, which has a poor view of the Law of Criminal Procedure. However, they may be exaggerating when they say that "the law is comprehensive and precise with almost no

loopholes.” As pointed out by other rating groups, the law has some loopholes that have not yet been closed.

Those with the poor view also make good, solid points. For example, their claim is well made that the law is in conflict with the *Shari’ah* because of its foreign origins. In particular, they bring to light the issue of detention for up to six months. The implication is that a defendant stays in jail for six months without being able to see a judge. If that is the case, this allegation must be seriously taken. It runs afoul of one of the core principles of justice in Islam, which is the presumption of innocence, to which all defendants are entitled. Nonetheless, this view is more supportive of defendant’s rights under the Law of Criminal Procedure. Its critiques are not against the role of the defense lawyer or the practice of law. Instead, they demand that the law itself must be brought in line with the principles of *Shari’ah*, which is the supreme law of the country.

III. Compatibility of Legal Representation in Criminal Cases with *Shari’ah*

The majority of judges believe that both the Law of Criminal Procedure and the Code of Law Practice are in compliance with *Shari’ah* teachings and principles. The argument that this group makes, in their responses, is solid and compelling. Since all of these judges are *Shari’ah* graduates, they are experts in Islamic jurisprudence. In their capacity, they have provided convincing reasons in support of their position as explained in the results. However, they do not support their points of views with verses from the *Qur’an* or other sources, such as *Sunnah*. Had they provided such support, their argument would have been considerably stronger. These issues are discussed in Chapter 3, which reviews arguments based on Islamic jurisprudence. Results show that judges today in

general adopt the view that supports the practice of law and that acknowledges a defendant's right to a lawyer in a criminal case.

On the other hand, the argument made by the two judge minority is not persuasive. The allegation that a defendant in *Shari'ah* courts must take care of his or her own defense does not take into account the many difficulties that defendants are likely to encounter as they try to defend themselves. This argument does not rebut the argument made by the majority that these laws are not in conflict with *Shari'ah*. In addition, the two judges do not provide any concrete evidence to support their point of view. The allegation that lawyers obstruct justice when advising their clients is probably not accurate and certainly oversimplifies the role of the defense attorney. Those lawyers are Muslims and are as bound by the *Qur'an* as are these two judges. Therefore, when advising their clients, lawyers may refer to the *Qur'an* and perform legal and religious counseling as well.

Additionally, the few critics seem not to recognize the magnitude of changes that have taken place in Saudi society in recent decades. In today's world, as a practical matter, a defendant is simply not able to take charge of his or her own defense, as they argue. Legal issues have become more complicated just as in other fields of life and maybe more than most. This is true in even developed countries, such as the United States, where literacy is not an issue, and the people are aware of their rights. Since the practice of law is new in Saudi Arabia in comparison to its American counterpart, as explained in chapter 4, defendants may be less aware of their rights. Thus, criminal defense must be allowed on the bases of Islamic law. In addition, the benefits that a

defendant gets when he or she is represented by an attorney, as the majority of judges assert in their argument, outweigh the disadvantages pointed out by their critics.

Further, the majority's view endorses the position of the Saudi legislature. Before the issuance of the law reform, there was no law of criminal procedure, and criminal defense was not allowed in the Saudi criminal courts. By enacting the law reform, Saudi Arabia has sided with the proponents of the practice of law in Islamic theory and rejected the opposite opinion that law practice is in violation of *Shari'ah* rules.

IV. Role and Effectiveness of Lawyers in Criminal Cases

The results reveal a defense lawyer's significant role in criminal proceedings. Participants overwhelmingly acknowledge that a lawyer's role is essential to the service of justice. Approximately 65% of the participants argued that defense lawyers play a "very effective" or "effective" role in the criminal proceedings. For example, they argue that, at the pre-trial phase, a lawyer advises a defendant of his or her rights, monitors for abuses of power by the prosecutor, and seeks every opportunity to have a case dismissed early on. Similarly, they argue that the trial lawyers represent defendants at court and make arguments on their behalf in accordance with the *Shari'ah* and law. This is a very positive result for the role of defense lawyers in Saudi Arabia. In fact, it is a good reason for defense lawyers to celebrate their success in the field of criminal law.

In addition, the results reveal that lawyers do a significant amount of work representing their clients at all criminal proceedings, pre-trial, trial and execution. Thus, it comes as no surprise that approximately 57% of the participants believe that a defense counsel in a criminal case positively impacts the case outcome in terms of the defendant's

interest. The participants also listed the tasks that lawyers undertake during the pre-trial stage of the criminal proceedings. However, results show that lawyers are more active in the trial phase of the criminal proceedings in comparison to their role during the pre-trial and the execution phases.

Although lawyers, as they claim, are not involved in the pre-trial procedures very often, their role is still significant and may be satisfactory given the fact that law practice is a newly established profession in Saudi Arabia. However, this must be changed very soon, because lawyers need to be more involved during the pre-trial phase of the criminal proceedings. The same is true about lawyers' roles concerning execution. The absence of lawyers at pre-trial is problematic for the criminal justice system of Saudi Arabia. The majority of lawyers and judges agree that procedures done at pre-trial can be detrimental to defendants and that lawyers should participate in the pre-trial phase, so that justice can be better served.

Finally, the result is also positive about pro bono cases. Though there is no history of a free legal clinic in the country, both lawyers and judges acknowledge the value of pro bono work to the service of justice. Further, judges credit pro bono lawyers. They attest that money is not a concern for defense lawyers when they represent indigent clients. For example, judges believe that there is no connection between money and serving justice, to which a Muslim attorney is committed, especially since a pro bono attorney works for God's sake. Here, a lawyer's belief plays an important role. Both lawyers and judges refer to God's reward when they speak of pro bono work. On the other hand, few participants argued that lawyers are motivated by money. Although this argument may be reasonable and logical, it does not undermine the free legal services

provided by lawyers. Although people work for money, they can still support the course of justice by providing free legal services as a way of paying society back, satisfying their humanitarian needs and seeking God's blessing.

V. Qualities of a Good Lawyer

Participants identified a number of features that they believe a good lawyer must maintain in the fifth category of the results. Participants' answers to the characteristics of a good lawyer show that a Saudi lawyer is expected to share the same qualities and personal traits with their counterparts in other countries. In other words, these traits are shared by lawyers in other countries, in which the practice of law is organized as a profession. For example, according to participants, a good lawyer must be knowledgeable of *Shari'ah* and law and adhere to the ethics of the profession. Similarly, a good American lawyer must be knowledgeable of American law and demonstrate good ethical conduct.⁵⁹⁴ This, once again, shows that the Saudi Arabia legal system has benefited from other countries and that it is heading in the right direction with regard to the practice of criminal defense as well.

However, the results do not show the extent to which Saudi criminal defense counsels possess these qualities. The results also do not show the percentage of lawyers who have these qualities. It would be interesting to learn how participants view lawyers' personal traits, which would make a good topic of a future study. Answers are not specific enough and do not amount to numbers. That is to say, the results do not show how many criminal lawyers are successful in Saudi Arabia. Instead, participants spoke of

⁵⁹⁴ WILLIAM M. SULLIVAN, ANNE COLBY, JUDITH WELCH WEGNER, LLOYD BOND AND LEE S. SHULMAN, EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 126 (2007).

situations, in which they would consider a lawyer successful. Nonetheless, the results show that the Saudi definition of a lawyer, his characteristics and success is no different than in any other country.

VI. Lawyers and Difference Making

A. Lawyer's Impact on Pre-trial Procedures

The majority of participants, 80%, rated a lawyer's impact on the pre-trial as positive. This makes a strong case for the role of defense attorneys in general and criminal defense attorneys in particular. Only a few participants have an unfavorable rating of lawyers' involvement in pre-trial procedures, and few participants allege that defense counsels do not impact procedures. One lawyer believes that a lawyer negatively impacts pre-trial procedures. He argues that lawyers tend to argue with law enforcement and prosecutors, which may end up hurting defendants rather than benefiting them. However, this argument lacks merit. Making arguments is one of the best tools or weapons that a lawyer has and should never give away. In fact, their job is to argue against wrongs committed against their clients and to protect their clients' best interests. This mission of a lawyer is universally recognized in Islamic countries and elsewhere. In addition, making a good argument may result in the early dismissal of a case or release on bail. In this way, a lawyer maintains a defendant's rights, which, in the end, contributes to the service of justice. Moreover, the benefits of having a lawyer present at the pre-trial outweigh the critics' disadvantages.

B. Lawyer's Impact on Trial

As with the impact of the pre-trial, the majority of participants rate a lawyer's impact on the trial as positive, and they list a number of good reasons to support their points of views. The majority argues that defendants are better off having attorneys representing them at trial as well as other proceedings because of the attorney's positive impact at the trial. In contrast, the minority rated an attorney's impact as negative or non-existent. The argument made by one judge that lawyers have no impact at trial can be easily rebutted. Since a lawyer's representation is effective at the pre-trial, the same should be true as to his representation at trial. Only a lawyer can bring up an issue of irregularity that may have taken place during pre-trial procedures. In other words, an attorney can challenge the prosecutor's case on the ground of illegality for some procedures that were taken against his client and that a statement by the defendant was made against his will, such as well in instances of coercion. Though a judge conducts a direct examination, the judge has no way of knowing what has happened at pre-trial if it is concealed by investigating authorities. Moreover, a pro se defendant might be intimidated by the prosecutors and afraid to speak against their case.

Some participants argued that lawyers have no impact on criminal cases, because *Shari'ah* courts strive to affect justice and exonerate innocent defendants. Thus, a lawyer does not have great effect on the court procedures, since a judge plays the lawyer's role. It is true that *Shari'ah* courts are obliged to exonerate innocent defendants. However, a lawyer's role is to help a court to reach that decision. Therefore, he is as much needed at trial as in pre-trial. On the other hand, the judge opposed to the practice of criminal defense accused lawyers of misleading courts. This accusation may be harsh and unfair

and fails to acknowledge that the government is represented by a competent attorney, who has all resources at his disposal to convict an accused. In other words, the logic followed here should lead to the exclusion of both the prosecutor and the defense attorney so that both parties stand in the same footing, but that is not happening. In addition, the prosecutor and law enforcement officers may mislead the court for the sake of keeping their jobs. In such a case, the defendant should be able to challenge their false allegations with the assistance of an expert, who knows how to do that effectively. A defense lawyer is such an expert.

C. Lawyer's Impact on Case Outcome

A little more than 50% of participants rate an attorney's impact on a case outcome as positive. They believe that lawyers manage to end cases in their clients' favor most of the time. This rating, again, is in favor of criminal defense lawyers and their performances that result in positive outcomes. On the other hand, the minority's opinions, 30% of whom believe that lawyers have no impact and 14% of whom believe that they have a negative impact, do not make good arguments in support of their point of views. In other words, sounder reasons are needed to show that a lawyer has no impact or has a negative impact on the outcome of criminal cases. The mere aggravation of judges and judge's playing the role of lawyer for the defendant do not come close to the strong argument made by the majority.

VII. Enforcement of Right to Legal Representation

A. Compliance During Pre-Trial

A third of the participants praise authorities for complying with the right to legal counsel. This group of participants does not give specifics regarding the government's compliance with the right. In other words, they claim that each defendant has such a right, but they do not state how that right is enforced. They just claim that, whenever defendants ask for the assistance of counsel, their requests are honored. They also allege that defense lawyers are not voicing concerns about a lack of compliance by the authorities, and they construe such silence in favor of the authorities. This is not enough to prove compliance with the right to the assistance of counsel. Giving no specifics regarding compliance makes the opposite rating of non-compliance more compelling. On the other hand, 45% of the participants believe that the authorities do not appreciate the right to criminal defense counsel. They accuse prosecution officials of making it hard for defense counsels to represent defendants. While this argument seems to have merit, it cannot be established, because police officers and prosecutors did not participate in this study. The responses given by the lawyers in particular might be biased. Thus, it would be good to consider including police officers and prosecutors in future studies.

B. Courts' Compliance with Legal Representation

The results favor Saudi courts as to compliance with the right to legal representation. While 44% of participants believe that the courts are complying with the right, 48% of them rate courts as largely compliant with the right. According to the results, participants allege that courts often inform defendants of their rights to an

attorney and honor their requests for the assistance of counsel. On the other hand, only approximately 8% of the participants believe that courts are not compliant with the right.

Associated with the right to criminal defense is the issue of allowing counsels the time needed for defense preparations. Generally, the results show that judges acknowledge the importance of defense preparation; therefore, they tend to give lawyers enough time to prepare their defenses. Judges allow extra time for preparation for a variety of reasons, among which is the service of justice and compliance with religious teachings. They claim that allowing that time is one of the Islamic principles of justice. Reasons given by judges make a strong case for courts to cooperate with the right to legal representation. However, whether to grant extra time is at the discretion of the court. It is not clear whether there is an initial permitted time for defense preparation, with the exception of one judge, who claimed to grant only three requests for extra time per defendant. This seems reasonable and may be generous by some standards. Judges' position on allowing extra time is endorsed by lawyers, who give judges credit for giving them extra time to prepare their defenses.

C. Indigent Defendants

While 45% of the judges recommend appointing free defense counsel from the Ministry of Justice when needed, 55% of the judges never recommend the assistance of counsels. However, most of them claim that they advise every defendant of his or her right to hire a counsel of his or her choice. Some defendants may not be able to afford private counsel. As an administrator of justice, it is the Court's obligation under such circumstances to make sure that a defendant has an attorney to represent him or her if the defendant requests counsel. The allegation that courts do not have the authority to

recommend a lawyer does not stand up to scrutiny in light of the assertion of the other 45% of the judges, who say that their recommendations to hire an attorney are always honored by the Ministry of Justice. If courts lacked such authority, those requests would not have been granted by the Ministry of Justice; they would have been rejected. Thus, it is safe to conclude that judges' allegation that courts lack the power to recommend a counsel is not legally based.

Some judges also stated that they do not appoint a lawyer or recommend that a lawyer be appointed. They argue that a "court does not distinguish between a fortunate and an indigent defendant. Thus, it does not appoint a counsel for a defendant, just because he or she is indigent." They further argue that "the court is a neutral entity. Therefore, a third party should undertake this duty." However, this argument is not persuasive, because a court does not lose its impartiality when it recommends retaining counsel. Rather, by doing so, it makes sure that a defendant stands on the same footing as the prosecutor. This way, justice is better served. Also, even though it is the responsibility of the Ministry of Justice to retain counsel as some judges argued, it is the court's responsibility to bring it to the attention of the Ministry that a defendant in a specific case needs the assistance of counsel but cannot afford one.

VIII. Obstacles to Providing Effective Legal Representation

A. Education

Based on the results, the gap between *Shari'ah* education and law education with regard to the practice of criminal defense is obvious. The participants attributed the gap to professors' lack of field experience, the absence of field study or intern courses, and

the lack of cooperation between courts and universities in one hand and *Shari'ah* colleges and law schools on the other. Clearly, the majority give compelling reasons for the gap between law education and law practice. They have thus identified the problem, which should help to solve it.

In contrast, approximately 25% of the participants believe that there is no gap between legal education and practice. They claim that codification of the procedural laws has closed the gap. However, the minority's opinion does not match their conclusion. It may be true that codification has helped law professionals do their jobs. However, this view fails to recognize that the codified law must also be taught so that students may understand them. Additionally, those laws must be taught with examples from actual practice and from former cases. This way, students will have a better understanding of how the law and *Shari'ah* rules are applied in the real world. Nevertheless, the results confirm the majority's view that students in *Shari'ah* and in law schools lack in law or *Shari'ah*, since their schools focus on one kind of education, *Shari'ah* or law.

Based on arguments made by many participants, *Shari'ah* graduates seem to be more prepared and favored by courts. This claim seems to have merits. Logically, judges may prefer *Shari'ah* graduates, because they speak the same language, which they learned at *Shari'ah* colleges. If this is true, law graduates may be at a disadvantage. They will not be liked by judges, who are *Shari'ah* graduates themselves. This may mark the whole justice system with bias against law graduates. Such favoritism may affect the role of a defense lawyer, because lawyers may not feel comfortable representing criminal defendants, if they think that their appearances as law graduates will not benefit their clients. Some lawyers may even quit the field of criminal defense for the same reason.

The low number of participants who favor law school graduates is alarming. Only 10% of the participants favor law school graduates for criminal defense practice. The difference between the two opposing groups is significant. This alerts Saudi law schools, officials, lawmakers and law professionals of what law school may be or really is lacking.

B. Law

Some participants complained that the law is difficult for law enforcement officers to understand and that it gives too much power to judges. Others have valid concerns that must be addressed by the legislature in the future. Recently, more laws and regulations are being issued by the legislature to facilitate the role of law enforcement and the way they cooperate with defendants and lawyers to achieve justice. For example, in 2013, King Abdullah issued a royal decree modifying Saudi criminal procedure law. As explained in chapter 4, by virtue of this royal decree, defendants in Saudi criminal courts accused of major crimes are clearly entitled to the free assistance of counsel at the trial stage, if they cannot afford an attorney. Such reforms will definitely help fill the gaps in the laws regarding criminal defendants' right to counsel.

C. Representation of Women

Many participants stated that interviewing a woman defendant is a concern for lawyers. It is hard for counsel to interview a woman directly. This does not help a lawyer to build the trust required in a lawyer-client relationship. In addition, a lawyer is unable to observe the demeanor of a female defendant as she makes statements or provides information. Moreover, the presence of another person, a family member or a female prison guard, violates confidentiality. Further, a female defendant may not feel comfortable speaking about incidents of moral turpitude before a family member or a

stranger. This may hinder a defense counsel's ability to develop an appropriate strategy. However, this issue may not be easily resolved, as it is deeply rooted in Saudi society by virtue of the Islam religion. Therefore, in August of 2013, Saudi Arabia allowed women to practice law, which should resolve the issue, since a woman today is able to retain a female lawyer to represent her.

D. Negative image

Interview results have revealed another obstacle to the effective assistance of counsel. Defense lawyers are not popular in Saudi Arabia. As stated in the results section, there are many reasons for this negative image. Saudi criminal justice does not have a long history with criminal defense, which is still a new concept to be understood and accepted by many in the society. As a result, most Saudis lack the understanding of a defense lawyer's role in the field of criminal law. Not surprisingly, lack of awareness is evident even among law enforcement officials. Consequently, a defense lawyer is seen by some citizens as a defiant Muslim, who makes his living defending criminals or justifying their wrongdoing.

In addition to the brief existence of the practice of criminal defense, many other reasons have contributed to this negative view of lawyers, lawyers themselves being one of them. While some lawyers are accused by the public of being incompetent, others are accused of defending criminals and of working only for money. Therefore, lawyers are partially responsible for this negative image. According to the results, some lawyers are indeed incompetent and work merely for the money. Therefore, lawyers need to do more to enhance their image in the society.

It must be made clear to the top officials and the public that lawyers' services are essential to the cause of justice. Without lawyers helping defendants, justice will not be served. Consequently, injustice will result, which is not desired in the Islamic traditions, as Islam promotes justice. As stated in the earlier chapters, many verses in the *Qur'an* encourage and require Muslims to be just to one another and to others as well.⁵⁹⁵ Consequently, if the service of justice in today's world requires the assistance of counsel, lawyers should be allowed in courtrooms to serve justice. Muslims who have long resisted criminal defense should rethink their position under applicable principles of Islamic jurisprudence, such as the public interest, necessity, and the like. In fact, Muslims are required solve new issues that arise within the Islamic community.

E. Faith and Beliefs

Some lawyers explained that their faith and beliefs are behind lawyers' decisions to represent defendants. Many lawyers have made it clear that they will not represent a defendant who admits his guilt, while others do not represent a defendant if they are not sure of his innocence. For such lawyers, not committing wrongdoing is a pre-requisite to representing a defendant. This seems odd considering the role of the criminal defense attorney. Generally speaking, a defendant seeks the help of an attorney, because he is faced with a criminal accusation that he or she has committed a crime. In discharging their duties, counsel do their homework by interviewing a defendant and verifying his or her side of the story. In other words, criminal defense cannot turn into another type of prosecution by requiring defendants' innocence as a condition of representation. To do

⁵⁹⁵ The *Qur'an* states: "O ye who believe! stand out firmly for Allah, as witnesses to fair dealing, and let not the hatred of others to you make you swerve to wrong and depart from justice. Be just: that is next to piety: and fear Allah. For Allah is well-acquainted with all that ye do." 5:8.

otherwise would turn the rules of criminal procedure and evidence upside down, because it is the prosecutor's responsibility to prove beyond a reasonable doubt that a defendant is guilty. This basic principle of evidence is true in Islamic laws.

This approach must be changed. As a few lawyers argued during the interviews, a criminal defendant, who has been arrested, is vulnerable to abuse and violations at any proceeding or trial. Therefore, he must be protected. In fact, protecting defendants from the abuse of power is one of the most important roles that defense lawyers must play.

F. Other Obstacles

The results also revealed other hurdles to effective defense counsel that must be overcome. Some of these obstacles are absence of a bar association and a lack of public awareness of a lawyer's role, including public officials. Another obstacle is the cost of the practice of law. It is expensive to practice criminal defense, especially since it can be practiced by non-licensed individuals who have never been to *Shari'ah* or law schools, and lawyers are prohibited from advertising their legal services. These and other concerns that are expressed by participants should be well considered in any future reform.

Conclusion

In accordance with the Law Reform of 2001, the practice of law is now allowed in Saudi Arabia. Defense attorneys are allowed in criminal courtrooms to represent defendants. Through their presence and rigorous defense, criminal defense counsels have contributed to the advancement of the cause of justice in Saudi Arabia. This is evident in the results of interviews given by the judges and lawyers who took part in this empirical study. The majority of the participants acknowledge that legal services provided by defense counsel are essential to the service of justice in the Saudi legal system.

Nonetheless, Saudi Arabia has been criticized by international and some regional and national commentators as explained in chapter 4. They allege that Saudi courts do not fully enforce the Law Reform, which acknowledged a defendant's right to legal representation. The results of the interviews, however, favor Saudi courts over their critics. The majority of participants maintain that Saudi courts are in compliance with the defendant's right to counsel. The critics seem to base their critiques on the situation as it existed before 2001, which was outdated by the Law Reform and the application of rules relevant to criminal defense.

Nonetheless, participants voiced concerns about the role of the lawyers during the pre-trial procedures. The results indicate that lawyers play a limited role during the pre-trial phase of the criminal proceedings. This can be attributed to the fact that Saudi criminal justice does not have a long history with the practice of criminal defense, which is still a new concept to be understood and accepted by many in Saudi society. As a result, most Saudis do not understand a defense lawyer's role in the field of criminal law,

law enforcement included. To overcome these issues fully, the government must raise the public's awareness about the role of criminal defense lawyers. Its mission should start with public sector employees, including law enforcement officials, who implement laws relevant to criminal defense and a defendant's right to an attorney. Those government officials should help with the public awareness campaign. It should be made clear to the public that defense lawyers are professionals, who have committed themselves to serve justice by representing those who need help with their defense.

For their part lawyers must be trained and encouraged to participate in the pre-trial phase. Workshop training should be held across the country for this purpose. To improve the competency of lawyers, law schools should include some *Shari'ah* classes into their curriculum so that their graduates may compete with *Shari'ah* graduates in the practice of law. Similarly, *Shari'ah* graduates should be exposed to some national law courses to understand the legal system better in general and the criminal procedures in particular.

Finally, the profession of law practice should be more organized. Lawyers should have the right to organize in an independent organization that preserves their rights and enables them to discharge their duties to their clients. In addition, law practice as a profession should be limited to individuals with a legal education and skills. Representing defendants is not an easy task that every person can undertake. Even though some people may have the language skills, this alone is not a qualifying factor. Similarly, education is not alone sufficient to enable a person to practice law effectively. This was very apparent in the example of Hassan bin Thabit, which was discussed in the third chapter. He was one of the most articulate people in the early history of Islam. He was a poet and was

highly knowledgeable of the Arabic language. Nonetheless, he lost in a court of law, because he was not able to make a sound legal argument to support his allegation.

Chapter Six: Conclusion and Recommendations

Saudi Arabia adheres to the *Salafi* tradition, which calls for applying Islam as it was practiced by the earliest Muslim generations. Muslim jurists play a significant role in Saudi Arabia.⁵⁹⁶ Soon after the founding of the country, the religious leaders issued a *fatwa*, a legal opinion, in which they requested an immediate cancellation of all man-made law that was promulgated by the Ottomans.⁵⁹⁷ Thus, Islamic law in Saudi Arabia today remains to a great extent unchanged since the Prophet's time.⁵⁹⁸ In fact, the country adheres to the classic Islamic law more than the Islamic states that preceded it.⁵⁹⁹ Nonetheless, Saudi Arabia has recently promulgated some laws. For example, in 2001, Saudi Arabia issued the Code of Law Practice, which recognized for the first time the practice of law, and the Law of Criminal Procedures, which lays out the procedures for initiating criminal prosecution, the rules for collecting and producing evidence, and the rules for seizure, detention, bail, and jurisdiction. More importantly, the law recognizes the right of defendants to legal representation by criminal defense attorneys during investigation, trial, sentencing and appeal.

In my dissertation, I aimed to study the practice of criminal defense in Saudi Arabia. My ultimate goal was to answer different questions related to the issue of the practice of criminal defense in the country. The first question was: "Is the practice of criminal defense compatible with the Islamic law as applied in Saudi Arabia?" To answer the question, I studied the Islamic literature and found out that the practice of law is alien to Islamic law. Therefore, its emergence in the Muslim world has generated heated

⁵⁹⁶ NATALIE GOLDSTEIN, *RELIGION AND THE STATE* 118 (2010).

⁵⁹⁷ Ayoub Al-Jarbou, *supra* note 332, at 200-201.

⁵⁹⁸ ANTHONY HAM, *supra* note 60, at 169.

⁵⁹⁹ FRANK VOGEL, *supra* note 61, at XIV.

debate among Muslim jurists. First, the opponents of the practice of law protest against this profession and call for abolishing in order to restore the Islamic judicial system to the way it was practiced by the earliest Muslim generations. The core of their argument is that the practice of law was brought to Islamic society during the colonization era and was enforced under its influence. They further argue that lawyers are driven by profitmaking rather than serving the cause of justice. Not surprisingly, they accuse them of obstructing justice and misleading courts on behalf of their guilty clients just to make a profit and that they are being used by some litigants who bring meritless claims.

On the other hand, proponents of the practice of law argue that, even though the practice of law evolved in the West, it was practiced in the Islamic legal system, although under a different name: adversarial agency, *Wakalah-bil-Khusumah*.⁶⁰⁰ Their argument is based on verses from the *Qur'an*, *Sunnah* and other Islamic sources. For example, they use the popular story of the Prophet Moses as authority for allowing legal representation and criminal defense. The *Qur'an* tells that Moses was afraid to meet the Pharaoh and his followers, because he had killed a person before leaving town. Accordingly, Moses asked God that his brother Aaron accompany him to make the case on his behalf, since Aaron was more elegant and articulate than Moses.⁶⁰¹ It is also clear that Moses was asking for some kind of representation. He did not ask for material or logistical support, because he was not going to fight with the Pharaoh and his followers. That was not the message of his mission. His mission was to show them that he was sent to them by God, and he had proof. However, because he had killed a person before, he thought that they would not

⁶⁰⁰ Salih Bin Ghanim Alsaldan, *Adversarial Agency from Islamic and Legal Perspectives* 14. http://www.alsaldan.net/publish/cat_index_21.shtml.

⁶⁰¹ The *Qur'an* 28:34

believe him and that they might instead kill him. Consequently, to him make the case that he was trustworthy, he asked for the help of his brother Aaron, who was known for being articulate and elegant. The point made by proponents of the practice of law is that Moses' request was honored and that God sent Aaron with him so that Aaron could support him. Thus, since Moses used someone else to represent him, so can other people.

The Islamic debate about the practice of law was discussed in the third chapter. It was imperative to start with presenting the two opposing views of the practice of law before delving into the practice of criminal defense in Saudi Arabia, because this argument was the reason behind prohibiting the practice of criminal defense in the first place and for the acknowledgement of the practice of criminal defense later on. Moreover, any progress in the field of criminal defense practice in Saudi Arabia depends on the Saudi jurists understanding the practice in Islamic teaching. The clearer that it becomes to the jurists and to Saudi officials that the practice of criminal defense is permitted within the meaning of Islam, the greater will be the role that defense lawyers will play. As a result, defense lawyers will have greater opportunities to discharge their duties to their clients.

As stated earlier, the practice of criminal defense was not initially recognized in Saudi Arabia. However, in 2001, Saudi Arabia introduced its first Code of Law Practice, which is a code for the legal profession, and the Law of Criminal Procedures. These two laws mark the first official acknowledgement of the right to a criminal defense lawyer in Saudi Arabia. Such reforms gave defendants the right to be represented by counsel and provided criminal defense lawyers with great opportunities to participate in the criminal Procedures. In 2002, the Saudi government established a committee at the Ministry of

Justice to organize the legal profession called the Lawyers' Registration and Admission Committee. This committee was tasked to process applications and issue licenses for those who meet the requirements to practice law.⁶⁰²

Nonetheless, as with other written laws, Saudi judges at the beginning resisted application of the right to counsel. In general, Saudi judges are not supportive of written laws, codification. According to Al-Jarbou, a Saudi law professor, rejection of the codes is based on the following beliefs:⁶⁰³

- A. They limit the *ijtihad*, or creativity, of judges. In other words, the codified rules obligate judges not to go beyond the codified rules.
- B. They generally create stagnation in the codified rules; therefore, Islamic jurisprudence would evolve and develop in a narrow area that is clearly within the codified rules. This idea perhaps stems from judges' understanding that their role should be more than applying solid rules. Judges should invent rules or at least choose among different solutions while judging cases and controversies.
- C. Codifying the rules of *Shari'ah* would deter judges from resorting to its main resources, which are the Holy *Qur'an* and *Sunnah*. God says in the Holy *Qur'an*, 'O ye who believe! Obey Allah, and obey the Messenger, and those charged with authority among you. If you differ in anything among yourselves, refer it to Allah and his Messenger if you do believe in Allah.'⁶⁰⁴

This resistance to the practice of law was noted by the U.N. Special Rapporteur on Independence of Judges and Lawyers in his visit to Saudi Arabia in October of 2002.

⁶⁰² MOHAMMED BIN BARRAK AL FAWZAN, *supra* note 339, at 75.

⁶⁰³ Ayoub Al-Jarbou, *supra* note 332, at 194-195.

⁶⁰⁴ The *Qur'an* 4:59.

The resistance to the practice of criminal defense was also implied in the statement of the highest judicial officer in Saudi Arabia, Salih Al-Luhaidan, and the former head of the Saudi Supreme Judicial Council (1992-2009). He stated that, “[i]f the case involves an injury, a murder, a theft, then it does not require an attorney, it requires witnesses, evidence, and the individual to defend himself.”⁶⁰⁵ This statement indicates that Saudi judges did not initially approve of the practice of criminal law. Initially, only the court had the burden to help the defendant and to protect defendants’ rights. This means that the lawyers are not expected to fill a vacuum; instead, they are expected to help judges help defendants and insure justice.

Despite the early resistance to the practice of criminal defense, lawyers, as the results of the interview reveal, did a good amount of work representing their clients at all criminal proceedings: pre-trial, trial and execution. For example, a lawyer helps a defendant with the legal terms that a layperson may not know. A lawyer also explains to his client the nature of the accusation against him and the course of the procedures. Similarly, a lawyer follows up on his client’s behalf and keeps him or her informed of all procedures and hearing dates. Most importantly, a lawyer helps the court to understand a criminal case and to determine the truth. Therefore, the court benefits the most from the practice of criminal defense, as the results in the fifth chapter show. Today, a judge can be assured that a defendant, who is represented by a lawyer, has been given his or her due process of law during arrest, investigation and trial. Consequently, judges’ resistance to the practice of criminal defense has diminished as the results reveal.

⁶⁰⁵ Human Rights Watch interview with Salih Al-Luhaidan, December 21, 2006. Available at: http://www.hrw.org/search/apachesolr_search/saudi%20arabia

The empirical findings show that, despite the early resistance, the practice of criminal defense is now much appreciated and welcomed by Saudi courts. The results show that all interviewed judges except two believe that the practice of criminal defense is compatible with Islamic law. In fact, approximately 92% of all of the interviewed judges and lawyers stated that courts are either compliant or largely compliant with the right to a lawyer in criminal cases. It was shocking to me, as it may be to some of the readers and observers of the Saudi legal system, law professionals and scholars included, that Saudi courts comply with the right to the assistance of counsel. There was a widespread allegation that Saudi Arabian judges ignore defendants' right to counsel and refuse to allow lawyers in the courtroom.⁶⁰⁶ The number of participants who acknowledge the courts' compliance with the right to an attorney is staggering. What is significant about the result is that lawyers themselves concede that judges are allowing them into courtrooms. This testimony proves that judges in Saudi Arabia today generally favor the practice of criminal defense. This makes the study and its finding significant to the practice of law and to the criminal defense.

Another question that I aimed to answer in my dissertation was: "What is the role of defense lawyers in Saudi Arabia?" The role of Saudi lawyers was presented in the fourth category of the fifth chapter. The results show that lawyers play a very significant role during the criminal proceedings. In the pre-trial, for example, the lawyer verifies the legitimacy of procedures and identifies violations of the law and abuses of power. In addition, a lawyer at the pre-trial phase of the criminal proceedings assesses a defendant's case and advises him or her of his or her rights guaranteed by *Shari'ah* or the law.

⁶⁰⁶ MARK WESTON, *supra* note 9, at 384. Mashood A. Baderin, *supra* note 10, at 157 (2005).

Lawyers also play a significant role during the trial. For example, a lawyer makes sure that a defendant is given due process of law. To that end, the lawyer may protest the selective use of the defendant's testimony. He also may negotiate over the appropriate sentence and make sure that the punishment matches the crime committed.⁶⁰⁷ Most importantly, a lawyer represents a defendant before the court and the relevant authorities in an efficient manner. In other words, he serves as a liaison between his client and the authorities.

In my dissertation, I also tried to determine whether lawyers make a difference in the criminal cases? Based on the results of the interviews, the answer is a solid yes. According to the testimony of the participants, 80% believe that criminal defense lawyers have a positive impact on pre-trial procedures. They argue that a lawyer may manage to get a case dismissed early on. The same is also true about lawyers' impact on trial procedures. About 70% of the participants believe that lawyers have a positive impact on trial procedures in defendants' favor. The impact is obvious here, because lawyers represent defendants at court and make arguments on their behalf in accordance with the *Shari'ah* and law. More than half of the participants believe that lawyers end criminal cases in their clients' favor. The implication is that, if lawyers were not present, the outcomes would be different and would be worse for the defendants. This means that defendants without lawyers would be at a disadvantage, since outcomes would likely have been different.

Another question that I aimed to answer in my dissertation was: "What features of the Saudi practice of criminal defense today create opportunities and barriers to the

⁶⁰⁷ The results also show that some lawyers seek a pardon on behalf of their clients from the King, if the crime is *tazeer*, or from the victim or his family if the crime is *qesas*.

criminal defense lawyers as they work?” The dissertation presented some of the factors that motivate lawyers to undertake the practice of criminal defense. The changing view created a very welcoming and promising environment that attracts many to practice law. In fact, the number of lawyers has dramatically increased. For example, in 2011, there were 1,611⁶⁰⁸ lawyers; the number jumped to 2,115 in 2012.⁶⁰⁹ In addition, based on the interviews conducted with lawyers and judges, many other factors appear to motivate new lawyers to practice criminal defense. These factors can be summarized as follows:

1. The small number of practicing criminal lawyers in Saudi Arabia.
2. The ease with which individuals who meet the requirement can be certified to practice law.
3. The increasing number of criminal cases.
4. The attention given by the Ministry of Justice.
5. The law practice has a *Shari'ah* basis, which is the equivalent of adversarial agency in *Shari'ah*, which in turn makes it acceptable in courts.
6. The idea of a lawyer's role has dramatically and positively changed in the eyes of society and the courts.
7. There is an increasing demand for lawyer's services while the number of lawyers is still limited.
8. The economy in Saudi Arabia is stable, which allows lawyers' fees to be high.

As result, in the last four years, 15 departments in different universities and colleges have started to offer law programs. These departments will introduce their first

⁶⁰⁸ Ministry of Justice: *Number of Lawyers Exceeds 1600*, AL-RIYADH NEWSPAPER, Issue No. 15761, (Aug. 19, 2011).

⁶⁰⁹ *2115 Lawyers in the Kingdom 22% of Them in Riyadh*, AL-RIYADH NEWSPAPER, Issue No. 16274, (Jan. 13, 2013).

classes (graduates) very soon. These are in addition to students who have scholarships to study law overseas. In fact, as of 2013, 1,527 students are working toward their bachelor's degree in law outside of Saudi Arabia (1,250 males and 277 females), 1,629 students are working toward their master's degree in law (1,325 males and 304 females), and 301 are studying for their doctorate (286 males and 15 females).⁶¹⁰

On the other hand, the results showed that criminal defense lawyers face many obstacles, such as the gap between education and practice, the law and its application, gender, negative image, faith and beliefs, etc. Overcoming these obstacles is not an easy task considering the cultural makeup of the country. Any attempt to solve the issue of criminal defense practice in Saudi Arabia has to fall under *Shari'ah* principles. To that end, Muslim jurists should be encouraged to find solutions to such complicated issues. Although I am not a jurist, I nevertheless offer a number of suggestions that may enrich the discussion on this topic. I hope that they are in line with the *Shari'ah* and that they do not offend anyone in the Islamic community of Saudi Arabia; that is not my intention by any means.

To help lawyers play a more effective role and improve the practice of criminal defense, the following should be undertaken:

1. The requirements for obtaining a law practice license must be changed. Skills testing should be administered to obtain a license. Testing should occur every five years as a requirement for license renewal.

⁶¹⁰ Saudi Arabia Ministry of Higher Education Annual Report 2012.

2. Establishment of a criminal law department at universities and conducting training workshops in criminal defense.
3. Establishment of public defense offices supervised by the Ministry of Justice to defend indigent defendants without charge.
4. Attorneys must be categorized as practicing in their specialty, such as criminal law, family law, etc. In this regard, a criminal defense lawyer should not represent clients involved in civil litigation or family matters.
5. There must be periodic monitoring and evaluation to determine the competence of lawyers and their compliance with the rules. The law profession must be filtered by weeding out those who corrupt it and prevent agents from representing their relatives. An attorney who violates the ethics of the profession must be harshly punished, including the termination of his license.
6. A mechanism must be implemented to enforce cooperation of government bureaus and institutions with lawyers and vice versa in accordance with applied law and regulations. For example, official website should be created to facilitate the communication among all parties.
7. Modify the law so that a defense memorandum must be signed by an attorney.
8. Issuance of powers of attorney must be available to lawyers at the investigating authority in addition to the Ministry of Justice, so that lawyers can obtain the powers of attorney without delay.
9. Lawyers must be allowed to have their names and telephone numbers published in a periodic publication and to advertise for themselves.

10. National laws and court decisions must be published, to which everyone should have access, including lawyers.
11. An independent Saudi bar association must be established to monitor lawyers' performance, to regulate, to advocate on behalf of lawyers, and to develop rules that advance the profession of the practice of law.
12. *Shari'ah* and law students must intern in law offices and gain moot court experience while they are at school.
13. Provision of periodic training sessions in *Shari'ah*, law and regulations for lawyers and other members of the legal profession.
14. Educating police officers of every defendant's right to the assistance of counsel.
15. Establish specialized training centers where workshops are held and require lawyers to attend those workshops.
16. Open workshops must be held at which lawyers, prosecutors and judges discuss ways to overcome obstacles and to find better ways to determine defendants' rights.
17. Raise society's awareness of the defense attorney's role through the media and other possible means.

Finally, by virtue of the Law Reform of 2001, the practice of criminal defense is now allowed in Saudi Arabia. Nonetheless, Saudi criminal justice is criticized by international and national commentators alike. These commentators seem to base their critiques on the situation before and little after 2001 while giving limited credit to the Law Reform and its ultimate impact.

In this study, participants have expressed dissatisfaction with the law and listed a number of obstacles to effective legal counseling and effective assistance of counsel. By

doing so, they urge for more reform to advance the cause of justice. Such calls for reform exist in every system, even in countries such as the United States, where the practice of criminal defense is very advanced in comparison to other countries; there are still demands for reforms, as explained in the fourth chapter. Despite the obstacles that the participants listed, criminal defense has much improved in Saudi Arabia as is evident in the responses of the judges and lawyers to this empirical study. Participants overwhelmingly agree that the Law of Criminal Procedure and the Code of Law Practice have had a positive impact. They also agree that these two laws have served justice. With this, it is safe to conclude that the Saudi criminal defense system is heading in the right direction, although more needs to be done.

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Appendix A
Interview Results: Judges and Lawyers

1.

Topic		Judges		Lawyers		Total		X²
		No.	%.	No.	%	No.	%	
How significant is the defense counsel representation in the pre-trial procedures?	Important	16	66.67%	26	92.86%	42	80.77%	5.89
	Somewhat	7	29.17%	2	7.14%	9	17.31%	P.Value 0.053
	Important							
	not	1	4.17%	0	0.00%	1	1.92%	
How significant is the defense counsel representation in the trial procedures?	Important	10	43.48%	24	88.89%	34	68.00%	X ² 12.09
	Somewhat	11	47.83%	3	11.11%	14	28.00%	P.Value 0.002
	Important							
	not	2	8.70%	0	0.00%	2	4.00%	
	Important							

2.

Topic	Judges		Lawyers		Total		X ²	
	No.	%.	No.	%	No.	%		
How do you rate the Code of Law Practice?	Excellent	10	32.26%	6	21.43%	16	27.12%	3.77
	Average	20	64.52%	17	60.71%	37	62.71%	P.Value
	Poor	1	3.23%	5	17.86%	6	10.17%	.152

3.

Topic	Judges		Lawyers		Total		X ²	
	No.	%.	No.	%	No.	%		
How do you rate the Law of Criminal procedures?	Excellent	13	41.94%	5	17.86%	18	30.15%	5.48
	Average	14	45.16%	21	75.00%	35	59.32%	P.Value
	Poor	4	12.90%	2	7.14%	6	10.17%	0.064

4.

Topic	Judges		Lawyers		Total		X ²	
	No.	%.	No.	%	No.	%		
How effective is the role of defense lawyer in general?	Very effective	4	13.79%	6	21.43%	10	17.54%	1.51
	effective	16	55.17%	11	39.29%	27	47.37%	P.vlue
	ineffective	9	31.03%	11	39.29%	20	35.09%	.470

5.

Topic		Judges		Lawyers		Total		X ²
		No.	%.	No.	%	No.	%	
Impact of the defense counsel participation in the pre-trial procedures. In terms of defendant interest.	Positive Impact	11	64.71%	25	89.29%	36	80.00%	6.12
	No Impact	6	35.29%	2	7.14%	8	17.78%	P.value
	Negative Impact	0	0.00%	1	3.57%	1	2.22%	0.047
Impact of the defense counsel participation during the trial procedures. In terms of defendant interest.	Positive Impact	8	47.06%	23	85.19%	31	70.45%	X ²
	No Impact	8	47.06%	4	14.81%	12	27.27%	7.72
	Negative Impact	1	5.88%	0	0.00%	1	2.27%	P.value
								0.021
Impact of the defense counsel participation in case outcome. In terms of defendant interest.	Positive Impact	6	31.58%	19	76.00%	25	56.82%	X ²
	No Impact	8	42.11%	5	20.00%	13	29.55%	9.48
	Negative Impact	5	26.32%	1	4.00%	6	13.64%	P.value
								0.009

6.

Topic	Judges		Lawyers		Total		X ²	
	No.	%.	No.	%	No.	%		
To what extent do authorities enforce a defendant's rights to assistance of counsel in pre-trial procedures?	Compliant	11	61.11%	4	14.81%	15	33.33%	X ²
	Largely	3	16.67%	7	25.93%	10	22.22%	10.69
	Compliant							P.value
	Non-Compliant	4	22.22%	16	59.26%	20	44.44%	0.005
To what extent do courts enforce a defendant's rights to assistance of counsel?	Compliant	17	80.95%	4	14.81%	21	43.75%	X ²
	Largely	4	19.05%	19	70.37%	23	47.92%	21.41
	Compliant							P.value
	Non-Compliant	0	00.00%	4	14.81%	4	8.33%	<.0001

7.

Topic	Judges		Lawyers		Total		X ²	
	No.	%.	No.	%	No.	%		
Do you see any gap between legal education that you received and law practice?	Yes	19	70.37%	22	78.57%	41	74.55%	0.49
	No	8	29.63%	6	21.43%	14	25.45%	0.485

8.

Topic		Judges		Lawyers		Total		X ²
		No.	%.	No.	%	No.	%	
Based on your experience with <i>Shari'ah</i> school and law school graduates, whom do you think are more prepared to practice law in the criminal defense arena?	<i>Shari'ah</i> graduates	15	68.18%	9	32.14%	24	48.00%	8.23
	Law graduates	0	0.00%	5	17.86%	5	10.00%	P.value
	No difference	7	31.82%	14	50.00%	21	42.00%	0.016

Appendix B
Interview Results: Judges

1.

Have the 2001 legal reform impacted the criminal procedures?	Yes		No	
	No.	%	No.	%
	29	96.66%	1	3.33

2.

Do you see any conflict between Islamic <i>Shari'ah</i> and the practice of criminal defense?	Yes		No	
	No.	%	No.	%
	2	6.67%	28	93.33

3.

13. Based on the performance of counsel in court, do you think a defendant with a free lawyer receives the same attention as a defendant who pays for counsel?	Yes		No	
	No.	%	No.	%
	16	69.57%	7	30.43%

4.

Topic	Always		Sometimes		Never	
	No.	%	No.	%	No.	%
Do you accept a counsel's request of more time to prepare his defense?	10	41.67%	12	50.00%	2	8.33%

5.

Topic	Always		Sometimes		Never	
	No.	%	No	%	No.	%
Do you appoint a defense counsel for an indigent defendant?	6	20.69%	7	24.14%	16	55.17%

Appendix C
Interview Results: Lawyers

1.

Topic		Law		Shari'ah		Total		X ²
		Gradate	Gradate	No.	%	No.	%	
How significant is the defense counsel representation in the pre-trial procedures?	Important	15	88.24%	11	100%	26	92.86%	1.39
	Somewhat	2	11.76%	0	0.00%	2	7.14%	P.value 0.238
	Important							
	not	0	0.00%	0	0.00%	0	0.00%	
How significant is the defense counsel representation in the trial procedures?	Important	16	94.12%	8	80.00%	24	88.89%	X ² 1.27
	Somewhat	1	5.88%	2	20.00%	3	11.11%	P.value 0.260
	Important							
	not	0	0.00%	0	0.00%	0	0.00%	
	Important							

2.

Topic		Law		<i>Shari'ah</i>		Total		X ²
		Gradate		Gradate				
		No.	%.	No.	%	No.	%	
How do you rate the Code of Law Practice?	Excellent	4	23.53%	2	18.18%	6	21.43%	1.10
	Average	11	64.71%	6	54.55%	17	60.71%	P.value 0.576
	Poor	2	11.76%	3	27.27%	5	17.86%	

3.

Topic		Law		<i>Shari'ah</i>		Total		X ²
		Gradate		Gradate				
		No.	%.	No.	%	No.	%	
How do you rate the Law of Criminal procedures?	Excellent	3	17.65%	2	18.18%	5	17.86%	3.40
	Average	14	82.35%	7	63.64%	21	75.00%	P.value 0.182
	Poor	0	0.00%	2	18.18%	2	7.14%	

4.

Topic		Law		<i>Shari'ah</i>		Total		X ²
		Gradate		Gradate				
		No.	%.	No.	%	No.	%	
How effective is the role of defense lawyer in general?	Very effective	4	23.53%	2	18.18%	6	21.43%	1.83
	effective	8	47.06%	3	27.27%	11	39.29%	P.vlue .401
	ineffective	5	29.41%	6	54.55%	11	39.29%	

5.

Topic		Law		<i>Shari'ah</i>		Total		X ²
		No.	%.	No.	%	No.	%	
Impact of the defense counsel participation in the pre-trial procedures. In terms of defendant interest.	Positive Impact	15	88.24%	10	90.91%	25	89.29%	.75
	No Impact	1	5.88%	1	9.09%	2	7.14%	P.value
	Negative Impact	1	5.88%	0	0.00%	1	3.57%	0.688
Impact of the defense counsel participation during the trial procedures. In terms of defendant interest.	Positive Impact	12	75.00%	11	100.00%	23	85.19%	X ²
	No Impact	4	25.00%	0	0.00%	4	14.81%	3.23
	Negative Impact	0	0.00%	0	0.00%	0	0.00%	P.value
								0.072
Impact of the defense counsel participation in case outcome. In terms of defendant interest.	Positive Impact	11	78.57%	7	70.00%	18	75.00%	X ²
	No Impact	2	14.29%	3	30.00%	5	20.83%	1.46
	Negative Impact	1	7.14%	0	0.00%	1	4.17%	P.value
								0.481

6.

Topic		Law		Shari'ah		Total		X ²	
		Gradate		Gradate					
		No.	%.	No.	%	No.	%		
To what extent do authorities enforce a defendant's rights to assistance of counsel in pre-trial procedures?	Compliant	3	18.75%	1	9.09%	4	14.81%	0.48	
	Largely	4	25.00%	3	27.27%	7	25.93%		
	Compliant								P.value
	Non-Compliant	9	56.25%	7	63.64%	16	59.26%	0.785	
To what extent do courts enforce a defendant's rights to assistance of counsel?	Compliant	3	18.75%	1	9.09%	4	14.81%	4.27	
	Largely	9	56.25%	10	90.91%	19	70.37%		
	Compliant								P.value
	Non-Compliant	4	25.00%	0	0.00%	4	14.81%	0.118	

7.

Topic		Law		Shari'ah		Total		X ²
		Gradate		Gradate				
		No.	%.	No.	%	No.	%	
Do you see any gap between legal education that you received and law practice?	Yes	14	82.35%	8	72.73%	22	78.57%	0.37
	No	3	17.65%	3	27.27%	6	21.43%	
							P.value	
							0.544	

8.

Topic		Law		<i>Shari'ah</i>		Total		X ²
		Graduate		Graduate				
		No.	%.	No.	%	No.	%	
Based on your experience with <i>Shari'ah</i> school and law school graduates, whom do you think are more prepared to practice law in the criminal defense arena?	<i>Shari'ah</i> graduates	5	29.41%	4	36.36%	9	32.14%	0.18
	Law graduates	3	17.65%	2	18.18%	5	17.86%	0.916
	No difference	9	52.94%	5	45.45%	14	50.00%	
								P.value

9.

Topic		Law		<i>Shari'ah</i>		Total		X ²
		graduates		graduates				
		No.	%.	No.	%	No.	%	
Do you solicit the defendants' point of view when preparing the defense?	Yes	10	71.43%	5	55.56%	15	65.22%	0.61
	No	4	28.57%	4	44.44%	8	34.78%	0.435
								P.value

10.

Topic	Law Graduate		Shari'ah Graduate		Total		X ²	
	No.	%.	No.	%	No.	%		
Do you play any role during the execution of punishment?	Yes	6	46.15%	1	10.00%	7	30.43%	3.49
	No	7	53.85%	9	90.00%	16	69.57%	0.062
								P.value

11.

Topic	Law Graduate		Shari'ah Graduate		Total		X ²	
	No.	%.	No.	%	No.	%		
Do you do pro bono cases?	Yes	13	92.86%	11	100.00%	24	96.00%	0.82
	No	1	7.14%	0	00.00%	1	4.00%	0.366
								P.value

12.

Topic	Law Graduate		Shari'ah Graduate		Total		X ²	
	No.	%.	No.	%	No.	%		
Is there any difference in defending a man and a woman?	Yes	10	71.43%	4	50.00%	14	63.64%	1.01
	No	4	28.57%	4	50.00%	8	36.36%	0.315
								P.vlue

13.

Topic	Law graduates		<i>Shari'ah</i> graduates		Total		X ²	
	No.	%.	No.	%	No.	%		
Do your faith and believes play a role in your decision of representing a defendant?	Yes	10	71.43%	9	90.00%	19	79.17%	1.22
	No	4	28.57%	1	10.00%	5	20.83%	0.269
								P.value