



## Mapping the Saudi State, Chapter 8: The Judiciary and the Ministry of Justice

### I. Introduction

Saudi Arabia's judges inhabit an unenviable position within the larger governing system. On day-to-day matters, they exercise near-extraordinary powers. The reigning *Hanbali* school of jurisprudence saddles them with remarkable authority and its accompanying strain. When weighing competing arguments or meting out sentences to convicts, they cannot look to a set penal code, nor do they draw from precedent. Even the regulations that structure legal proceedings are ambiguous. A judge who rules in a manner perceived as unjust or who fails to delicately attend to local social and political divisions can find himself undermined in the eyes of his community.

Judges, however are not independent actors, but representatives of an absolute monarchy that draws the kingdom's red lines. The members of the Supreme Judicial Council and high-ranking officials within the Ministry of Justice (MoJ), who oversee the courts, all serve at the pleasure of the king. The king, in turn, possesses the power to bypass his own officials and directly release judges from their positions. So, while standard affairs remain largely within the judge's control, politically-sensitive cases often come with foregone conclusions.

Intra-ministry competition further delimits the judge's field of action; powers normally reserved for the judiciary often find themselves in the hands of others. For example, the public prosecution<sup>1</sup> warrants for arrest, search, and seizure, while the Ministry of Interior (MOI) determines the length and conditions of a suspect's pretrial detention. The chief of the prosecution sits alongside MoJ officials on the Supreme Judicial Council in setting judicial policy. And new anti-terrorism laws, implemented by a new class of anti-terrorism courts, have transferred further powers from the judiciary to law enforcement officials.

By the time a defendant stands before a criminal court, having passed through the MOI's processing, he or she has received little institutional support, while the weight of the government's criminal justice system bears strongly against his or her most competent defense. This is especially true in cases touching upon the government's political interests, including those of outspoken reformists, women's rights activists, and nonviolent dissidents, where even the most well-intentioned judge is incapable of swimming against the tide.

Chapter 8 of *Mapping the Saudi State* details the history and structure of the Saudi MoJ and the system of criminal justice that it oversees. The information presented in the opening pages sets the backdrop for the human rights violations detailed in the chapter's second half. Saudi Arabia's judges, under consistent institutional pressure, repeatedly hand down rulings that repeatedly validate the actions of a politicized law enforcement (as detailed in MSS chapters 2 and 3).

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<sup>1</sup> The Public Prosecution is itself a subordinate body of the Minister of Interior.



## II. History

### A. Origins and Traditions

Before King Faisal first established the MoJ in 1970, Saudi Arabia lacked a central judicial authority—with the critical exception of the king himself.<sup>1</sup> Instead, for the first four decades following Saudi Arabia's establishment, the kingdom's judiciary comprised a network of some 300 semi-autonomous Sharia courts of varying competence and capacity.<sup>2</sup> The first-instance courts in this initial system were parochial and exercised limited jurisdiction over small claims and minor offenses at the kingdom's periphery.<sup>3</sup> At this stage, the government only empowered the three high courts in Mecca, Medina, and Jeddah, known as *kubra* courts, to adjudicate significant cases and crimes.<sup>4</sup>

In both its early and contemporary forms, the Saudi judicial system has adhered to strict *Hanbali madhāhib*, or one of the several Sunni schools of Islamic law.<sup>5</sup> Lacking a formal penal code to guide their decisions, the school's judges, or *qadis*, ruled with wide discretion. They based their judgments on existing *Hanbali* religious scholarship and their individual interpretations of the Quran and the *hadith*, the accepted statements of the Prophet Muhammad.<sup>6</sup> Consequently, a *qadi's* judgment rarely adhered to codified guidelines, and was not constrained by a standard system of jurisprudence or legal precedent,<sup>7</sup> features that still define Saudi jurisprudence.<sup>8</sup>

While their religious stature allowed them to exercise considerable autonomy in the courtroom, the *qadis* increasingly derived their force of judgment from the governing partnership between the House of Saud and the senior religious scholars, or *ulama*. Within this framework, the *qadis* became arbiters of a Saudi king who derived his legitimacy from Islam's most conservative jurisprudential school. In its own reporting, the U.S. Library of Congress emphasized that the broad religious authority exercised by Saudi courts cannot be divorced from the monarchy, identifying the *qadi's* rulings as a direct extension of executive authority.<sup>9</sup>

Even as courts exercised the will of the monarchy and its favored *ulama*, they resisted bureaucratic centralization. Though Ibn Saud<sup>ii</sup>, modern Saudi Arabia's first king, gradually worked to standardize the courts through a series of royal decrees and regulations enacted from the 1920s through the mid-1950s,<sup>10</sup> the judicial system remained relatively ill-defined and provincial.<sup>11</sup> It was not until 1938 that the Sharia Judicial Responsibility Law formally delineated a basic judiciary and court structure.<sup>12</sup> Nearly two more decades would pass before the government began to expand the courts' jurisdictions to the entire kingdom, rather than specific cities or municipalities.<sup>13</sup>

At the time of his passing, Ibn Saud had managed to centralize the Saudi court system under the Presidency of the Judiciary, based in Riyadh.<sup>14</sup> By 1970, King Faisal had taken his father's policies to their logical conclusion by approving the 1970 Criminal Law<sup>15</sup> and transforming the Presidency of the Judiciary into a full government ministry, the MoJ.<sup>16</sup>

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<sup>ii</sup> Abbreviated name of Abdulaziz bin Abdulrahman Al Saud



## B. The Ministry: New Courts and Institutions

Five years after Royal Decree No A/126 established the MoJ, the Saudi government promulgated the 1975 Law of the Judiciary in order to formally restructure the judicial system and codify the role of the ministry.<sup>17</sup> This new legal framework reorganized the previous court network into a tripartite hierarchy under the MoJ: the Courts of First Instance (including General Courts, Summary Courts, Juvenile Courts, and Courts of Guarantee and Marriages), followed by the Courts of Appeal (also known as the Courts of Cassation), and concluding with the Supreme Judicial Council, at that time the highest court in Saudi Arabia.<sup>18</sup>

Six years later in 1982, Royal Decree No. M/51 created a separate administrative judicial system<sup>19</sup> for arbitrating specific commercial and governmental cases.<sup>20</sup> This system, called the Board of Grievances, maintains its own courts of first-instance and appeals that function in their own specialized circuits, parallel to those of the standard judiciary and independent of the MOJ.<sup>21</sup> Additionally, the president of the Board of Grievances is a ministerial level position, and comes under the direct authority of the king.<sup>22</sup>

This basic legal framework went mostly unaltered until 2005, when King Abdullah initiated a comprehensive reform program culminating in the promulgation of a new Law of the Judiciary in 2007.<sup>23</sup> Among other changes, the 2007 Law restructured the hierarchy of courts, creating a High Court to serve as the ultimate judicial authority under the king.<sup>24</sup> The law also reorganized the Courts of Appeal and the Courts of First Instance, establishing new appellate circuits and first-instance court divisions.<sup>25</sup> In order to implement these changes, King Abdullah allocated \$2 billion to the judiciary reform program.<sup>26</sup>

The following section will trace the evolution of these courts and judicial institutions from the 1975 Law of the Judiciary on through the 2007 restructuring. It will focus specifically on the development of the main judicial hierarchy under the MoJ: the Courts of First Instance, the Courts of Cassation, the Supreme Judicial Council, and the High Court.<sup>iii</sup>

## III. Structure and Legal Functions

### A. The Courts of First Instance

#### *Pre-2007*

Under the 1975 Law of the Judiciary, the two non-specialized subdivisions of the Courts of First Instance, the Summary Courts and the General Courts, served as the kingdom's basic organ for criminal and civil adjudication.<sup>27</sup> The Supreme Judicial Council determined the composition and jurisdiction of these two courts, and both were staffed with one or more judges based on this determination.<sup>28</sup> Broadly speaking,

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<sup>iii</sup> As the Board of Grievances operates separately from the MoJ, this chapter will not examine it in detail.



both courts maintained relatively similar jurisdictions;<sup>29</sup> the 1975 Law primarily differentiates between the two bodies in regards to corporal punishment guidelines and the degree of jurisdiction over civil cases, allowing Summary Courts greater discretion in the former and General Courts greater leeway concerning the latter.<sup>30</sup>

In addition to the existing Summary and General Courts of First Instance, the Supreme Judicial Council could also recommend that the king establish separate specialized first-instance courts, empowered to rule on specific issue areas.<sup>31</sup> King Faisal, for example, founded two specialized Courts of First Instance: the Courts of Guarantee and Marriage, which adjudicated family law,<sup>32</sup> and the Juvenile Court.<sup>33</sup>

## *Post-2007*

Since 1932, when it consisted primarily of three courts in Mecca, Medina, and Jeddah, the Saudi judiciary has had significant difficulty addressing its expansion, standardization, and public accessibility challenges.. Section 4 of the 2007 Law of the Judiciary attempts to address these difficulties, stating that “first instance courts shall be established in provinces, [governorates] and districts as needed.”<sup>34</sup>

This provision has led to a steady proliferation of first-instance courts throughout the kingdom.<sup>35</sup> Post 2007, the Courts of First Instance maintain the General Courts of the previous structure, but now also encapsulate Labor, Personal Status, and Commercial Courts (the last of which is expected to begin operating in 2017).<sup>36</sup> Additionally, the government has adapted the previous Summary Courts to serve as Criminal Courts of First Instance.<sup>37</sup> The 2007 Law—as well as the 2000 Law of Procedure before Sharia Courts and the 2013 update to the Law of Criminal Procedure—has also expanded the competence of first-instance courts to rule on nearly any manner of dispute or offense relating to their jurisdiction, a key distinction between the function of the courts before and after 2007.<sup>38</sup>

The 2007 Law empowers the Criminal Courts of First Instance to rule on the majority of criminal cases in Saudi Arabia, and—unlike the 1975 Law—mostly restricts General Courts of First Instance from exercising overlapping jurisdiction.<sup>39</sup> The government has further subdivided Criminal Courts into four circuits designated as follows: a *qisa* panel that adjudicates cases that may demand retributive punishment, a *hadd* panel for cases that may demand a punishment explicitly prescribed in the Quran, a *ta'zir* panel for cases that permit the judge to determine punishment at his discretion, and finally a juvenile panel for cases involving defendants under the age of 18.<sup>40</sup>

The three non-juvenile subdivisions of the Criminal Courts correspond to the most serious offenses in the Saudi interpretation of Islamic law. First, *qisa* crimes typically include premeditated or unintended murder or injury<sup>41</sup> and grant the victim or the victim’s family the right to contribute to the determination of a retaliatory sentence.<sup>42</sup> A judge must determine whether or not a crime qualifies as *qisa*, and thus whether or not the offender is subject to a retributive punishment.

*Hadd* (pl.: *hudud*) crimes are those few offenses explicitly detailed in the Quran. Assistant Dean and Adjunct Professor at St. John’s University School of Law, Jeffrey K. Walker, states that the Saudi



interpretation of Sharia conceives of seven *hadd* crimes.<sup>43</sup> The Sharia ostensibly dictates specific punishments for each of these seven *hudud*: stoning for the crime of adultery, 100 lashes for the crime of extramarital sex, 80 lashes for the crime of making a false accusation of adultery, death for the crime of apostasy, 80 lashes for the crime of consuming alcohol, amputation of the right hand for the crime of theft, and amputation of the hands and feet for the crime of highway robbery.<sup>44</sup>

Lastly, *ta'zir* crimes encompass all those offenses for which there is no exact punishment dictated in the Quran, and which may or may not amount to *qisa*.<sup>45</sup> Accordingly, Saudi judges exercise wide discretionary sentencing power in *ta'zir* cases, “limited only by the confines of the teachings of the *Shari'a*”—which the government empowers them to interpret in such unspecified contexts.<sup>46</sup>

Although the Saudi government promulgated a Law of Criminal Procedure in 2001, neither it nor the 2007 Law of the Judiciary have adjusted the *qisa-hadd-ta'zir* framework detailed above. Both laws have additionally failed to codify clear *qisa* and *ta'zir* sentencing guidelines, nor have they limited the courts' discretionary sentencing powers in *ta'zir* cases.<sup>iv</sup> In 2010, the Minister of the Justice and the Council of Senior *Ulama* announced their intent to codify these aspects of Saudi criminal law.<sup>47</sup> According to Carlyle Murphy of *Middle East Online*, the government introduced the codification project as part of the judicial reform program initiated in 2005, but its progress has been substantially delayed by both the difficulty of the reforms and opposition from conservative scholars.<sup>48</sup> At time of writing in 2015, little headway has been made.<sup>49</sup>

### *A note on the Specialized Criminal Court (SCC)*

The Specialized Criminal Court (SCC)<sup>v</sup> is a national security tribunal established in 2008.<sup>50</sup> The Saudi government organized the SCC to more efficiently try terror suspects and later to review cases falling under the 2014 Law for Crimes of Terrorism and Its Financing.<sup>51 5253</sup>

## **B. The Courts of Appeal**

### *Pre-2007*

The 1975 Law of the Judiciary provides for an appellate Court of Cassation (alternately the Courts of Appeal, or appellate courts) of the MoJ to hear appeals of first-instance judgments.<sup>54</sup> Prior to 2007, Dr. Ansary, a former director general of legal affairs and international cooperation at the Saudi MOI, indicates that the kingdom maintained only two Courts of Cassation, in Mecca and Riyadh, which heard appeals from the Western provinces and the Central/Eastern provinces respectively.<sup>55</sup> Typically, each Court of Cassation panel consisted of three judges, although the number can be increased to five in cases of certain *qisas*, *hadd*, or *ta'zir* punishments.<sup>56</sup> The General Council of the Court of Appeal, tasked

<sup>iv</sup> See Section IV for further details.

<sup>v</sup> ADHRB analyzed how the government uses the SCC and its anti-terror and anti-cybercrime legislation to prosecute activists, dissidents, and human rights defenders in *Mapping the Saudi State, Chapter 2: The Ministry of the Interior (Part 1)* and *Mapping the Saudi State, Chapter 3: The Ministry of the Interior (Part 2)*.



with resolving conflicts that might arise between the Courts of First Instance and the Court of Cassation, oversaw the panels.<sup>57</sup>

The 1975 Law — and the later Law of Procedure before Sharia Courts from 2000<sup>58</sup> — privileged Courts of First Instance over Courts of Cassation. Certain cases, such as abduction, burglary, and severe corporal or capital punishment, automatically triggered higher review.<sup>59</sup> Rulings that entailed lesser *ta'zir* punishments, however, were not subject to appeal.<sup>60</sup> Additionally, Courts of Cassation could only uphold or refer lower court judgments; they could not reject them outright.<sup>61</sup> Under the 1975 Law, if the Court of Cassation found against a particular ruling, it was required to send the case back to the original court for revision,<sup>62</sup> after which the original judge or panel could then opt to maintain or alter the judgment.<sup>63</sup> In the former case, the Court of Cassation could ultimately replace the original judge or panel with new justices and order another review of the case in the lower court.<sup>64</sup>

### *Post-2007*

The 2007 Law granted more powers to the Courts of Cassation and eliminated the previous constraints on the establishment of appeals courts, stating that each province must now maintain at least one Court of Cassation.<sup>65</sup> Moreover, the Law enables the Courts of Cassation to directly reverse the judgments of the lower courts, avoiding the cumbersome referral and modification process.<sup>66</sup>

Nevertheless, appellate courts retain their basic structure under the 2007 Law. Article 15, Section 3 stipulates that ordinary appeals panels consist of three judges, with another two justices added in “cases of criminal homicide, amputation, stoning or *qisas*,” only now they have been subdivided into six set panels for Jural, Penal, Family, Commercial, and Labor cases.<sup>67</sup> The 2013 Law of Procedure before Sharia Courts has also reformed the provisions on appellate courts articulated in its 2000 predecessor, reemphasizing that any judgment of the lower courts is appealable except for those handed down for “petty cases, as defined by the Supreme Judicial Council.”<sup>68</sup>

## **C. The Supreme Judicial Council & the High Court**

### *Pre-2007*

From the early 1970s through 2007, the Supreme Judicial Council was, with the exception of the king, the highest judicial authority in Saudi Arabia.<sup>69</sup> Functionally, the Supreme Judicial Council served as both an independent supreme court and a key administrative organ of the MoJ.<sup>70</sup> The U.S. Library of Congress summarizes the Council as a supervisory and evaluation body, approving all sentences of death and amputation and reviewing contentious cases legal questions.<sup>71</sup> The Council consisted of eleven members, including a mix of royally-appointed appellate justices, head justices of General Courts of First Instance, and the Minister of Justice.<sup>72</sup>

The Minister of Justice mostly determined the Supreme Judicial Council’s day-to-day operations.<sup>73</sup> Practically, this meant that much of the Council’s responsibilities included assisting the minister with





general regulation and administration.<sup>74</sup> Over the next few decades, the Minister of Justice emerged not just as the judiciary's administrative authority, but also as the kingdom's *de facto* chief justice.<sup>75</sup>

## *Post-2007*

The implementation of the 2007 Law effectively halved the portfolio of the Supreme Judicial Council, transferring its limited powers of judicial review to the new High Court.<sup>vi</sup> While the 2007 law details twelve separate advisory responsibilities, nowhere does it empower the Council to undertake direct juridical functions, as it had under the previous legislation. In fact, Article 9, Section 1, Chapter 3 removes the Council from the Hierarchy of Courts altogether.<sup>76</sup>

Notably, though the 2007 Law stripped the Supreme Judicial Council of its most significant powers, it did link the MoJ to the Saudi Ministry of the Interior (MOI) and its public prosecutor's office, the Bureau of Investigation and Public Prosecution (BIP). Article 5, Chapter 2 of the law reconfigured the Council, substituting several appellate judge seats with the High Court's chief justice and the Chairman of the BIP.<sup>77</sup> The new arrangement allows the BIP to play a direct role in the judiciary's personnel determinations, as well as its formulation of regulation and inspection regimes, as set out by Article 6, Chapter 2 of the law.<sup>78</sup> Moreover, it ensures the BIP and the MOI—the institutions responsible for issuing arrest warrants, apprehending suspects, and securing convictions<sup>79</sup>—have oversight platform for intervention into the Saudi judicial system.

With the Council officially relegated to these administrative, regulatory, and supervisory duties, the 2007 Law created a new supreme judicial authority in the High Court, located in Riyadh and headed by the chief justice, who also holds the rank of minister.<sup>80</sup> When reviewing cases and issuing judgments, the High Court assembles ordinary or specialized penal panels.<sup>81</sup> Five judges compose panels reviewing death, amputation, stoning, or *qisa* penalties, while other cases merit a panel of three justices.<sup>82</sup> The High Court also maintains a General Panel made up of all active High Court judges, and led by the Chief Justice; this panel “determines general principles in issues relating to the judiciary,” and settles disagreements between lower panels, thereby establishing a form of judicial review.<sup>83</sup>

## **IV. Human Rights and Due Process Violations**

As demonstrated in Sections II and III, a lack of legal precedence and formal regulation better enables the executive and even the MOI to influence the judiciary. The same judges that exercise wide-ranging authority over legal interpretation and sentencing serve directly under the king, a relationship further prescribed by existing law. Article 45 of the 2007 Law of the Judiciary states that “a member of the judiciary shall enjoy the rights and guarantees provided for in the Civil Service Law and Retirement Law and shall observe the duties provided for in the Civil Service Law which do not conflict with the nature of

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<sup>vi</sup> The official English translation of the 2007 Law of the Judiciary refers to the High Court as the Supreme Court. In the interest of clarifying the distinction between this new institution and the Supreme Judicial Council, this chapter will refer to the former as the High Court.



judicial positions.”<sup>84</sup> This provision clearly situates the judiciary within the civil service, which answers directly to the monarchy. Crucially, by emphasizing that Saudi judges operate as civil servants within the general bureaucratic hierarchy, this provision belies the Law’s repeated claims to judicial independence.<sup>vii</sup> The judges themselves may be free to disregard precedent, for example, but the judiciary as an institution does not operate separately from the other mechanisms of executive power.

Additionally, the king retains the right to directly interfere in key aspects of the MoJ’s structure, and in general judicial affairs. As indicated in Section III of this chapter, the 2007 Law states that the king can unilaterally interfere in judicial affairs in the following respects: he can issue royal orders to appoint chief judges of the Courts of First Instance as well as the Chief Justice of the High Court, he can create specialized Courts of First Instance (like the SCC), he can alter judge’s salaries, he can transfer judges to different courts, he can directly discipline judges for alleged misconduct, and he can promote or remove judges at will.<sup>85</sup>

Combined with the discretionary power of individual judges, the monarchy’s influence within the judiciary can extend to the actual determination of convictions and penalties. Although judges have wide latitude when making decisions, royal approbation governs which judges obtain and retain their positions. This mutually-reinforcing dynamic directly contributes to the following human rights and due process violations committed by criminal courts under the MoJ.

## **A. Infringement of Open and Public Trials**

Conducting criminal trials in a public and open manner is an internationally-recognized due process right, as articulated in Article 10 of the Universal Declaration of Human Rights.<sup>86</sup> The Saudi government mandates that its courts respect this right. Article 155 of the Law of Criminal Procedure declares, “Court hearings shall be public.” Judges may only close them under exceptional circumstances: “for security reasons,” the “maintenance of public morality,” or if such closure “is deemed necessary for determining the truth.”<sup>87</sup>

Despite this international due process standard, and in contravention of existing domestic law, Saudi courts frequently close criminal hearings to the public, even when conditions do not meet the government’s own “exceptional” standards. According to the Department of State’s 2014 report on the status of human rights practices in Saudi Arabia, “many trials during the year were closed.”<sup>88</sup> In its August 2015 report on the prevalence of capital punishment in Saudi Arabia, Amnesty International identified secret hearings as recurring elements of cases in which judges administered the death penalty.<sup>89</sup>

On 24 April 2013, for example, the criminal court in the city of Buraidah initiated the third hearing in the trial of Dr. Abdulkareem al-Khoder, a founding member of the Saudi Arabian Civil and Political Rights

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<sup>vii</sup> Article 1, Chapter 1 of the 2007 law states that, in the administration of justice, “No one may interfere with the judiciary.”





Association (ACPRA), a civil society organization that documented human rights violations committed by Saudi MOI officials and called for wide-ranging political reforms.<sup>90</sup> The court's presiding judge prevented women from al-Khoder's family, including his mother, wife, and daughter, from entering the court to observe the proceedings.<sup>91</sup> When Dr. al-Khoder protested the order, the judge directed authorities to place him under arrest.<sup>92</sup>

Some judges and officials within the MoJ have made efforts to make trials more open and transparent. In 2012, the public prosecution brought prominent political reformers and ACPRA-members Dr. Mohammed al-Qahtani and Dr. Abdullah al-Hamid to trial. At their first hearing, the judge permitted both press and public observers to fill the court room,<sup>93</sup> a development that the BBC correspondent noted as unusual.<sup>94</sup> Even this measure of openness, however, came with restrictions; the judge ordered security officers to record the names and identification numbers of all present, a move identified by Dr. al-Hamid as an act of intimidation.<sup>95</sup> In 2013, the Riyadh criminal court did permit local supporters to attend the hearings of activist Eisa al-Nekhaify, whom authorities sentenced to three years and eight months<sup>viii</sup> in prison..<sup>96</sup>

The specialized criminal justice system, however, lacks consistent transparency. International human rights organizations have documented repeated cases of SCC judges convening trials in secret, without the knowledge of the defendant's family or legal representative. According to information obtained by ADHRB sources, the SCC secretly convened several opening hearings of the trials of four young Eastern Province protesters: Ali Saeed al-Rebh, Reda Jafar al-Rebh, Ali al-Nimr, and Mohammed Faisal al-Shioukh. Their families and attorneys only learned of these hearings after their completion. The SCC initially sentenced all four defendants to death; since then, the appeals court has downgraded the sentence of Reda Jafar al-Rebh to 25 years in prison. As of October 2015, Ali al-Nimr, Mohammed al-Shioukh, and Ali Saeed al-Rebh have exhausted the appeals process and faces execution at any time.<sup>97</sup>

In addition to political protesters, the SCC has also closed the trials of established human rights activists, as it did for Mohammed al-Bajady, another ACPRA co-founder. In 2012, the SCC sentenced al-Bajady to four years in prison and a further five-year travel ban. This sentence concluded a trial during which the judge prohibited the presence of independent observers and even refused access to al-Bajady's attorney.<sup>98</sup>

## **B. Obstruction of Legal Defense**

As can be gleaned from the examples above, courts frequently fail to facilitate the defendant's access to legal counsel, despite nominally guaranteeing this right within codified legal procedure. Articles 4 and 140 of the Law of Criminal Procedure guarantees the defendant's right to seek legal counsel during trials that adjudicate standard criminal cases.<sup>99</sup> In the specialized court system, the law protects the right to access legal representation less robustly. Article 10 of the Law of Crimes of Terrorism and Their Financing, the law governing the SCC, states that the accused is "entitled" to legal representation, but

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<sup>viii</sup> A separate court later increased this sentence to nine years.



that such contact with an attorney may only occur within a timeframe deemed adequate by the investigative authority.<sup>100</sup>

In a Saudi criminal court, the public prosecution, working at the discretion of the Minister of Interior, wields extraordinary powers vis-à-vis the defense attorney. Article 160 of the Law of Criminal Procedure permits the prosecution to “amend the memorandum of charges” brought against the accused “at any time,” including during trial.<sup>101</sup> Also, the court is not bound to supply the defense with a copy of the accused’s charges until the trial is underway,<sup>102</sup> leaving attorneys little opportunity to prepare their case. For example, one defense attorney for a man accused of drug trafficking informed Human Rights Watch in 2008 that he did not know the charges against his client until the judge read them aloud during the trial’s opening hearing.<sup>103</sup> Public prosecutors are also not obliged to share evidence with the defense attorney. The representative referenced in the preceding paragraph had to settle for an “oral briefing” from the prosecutor concerning the state’s evidence against his client, even though this evidence purportedly included forensic proof of his client’s guilt.<sup>104</sup>

This imbalance between the public prosecution and the defense is wider in the specialized criminal system. Article 12 of the Law of Terrorism Crimes and Their Financing permits the judge of the SCC to, in coordination with the public prosecution, hear witness testimony in the absence of both the defendant and his attorney, precluding any opportunity to cross-examine the state’s witnesses.<sup>105</sup> Though the law is new, this particular article has already yielded real-world consequences. In October 2014, the SCC sentenced dissident cleric Sheikh Nimr al-Nimr to death based in part on eyewitness testimony stating that he had violently resisted arrest; the presiding judge, however, prevented al-Nimr’s attorneys from cross-examining the witnesses, who submitted written testimonials and did not appear in court.<sup>106</sup>

At other times, the courts are unable to assist the accused in securing unimpeded legal defense. Prison officials working under the MOI routinely deny defense attorneys access to their jailed clients,<sup>107</sup> even in the face of judicial intervention. In the aforementioned case of Ali al-Nimr, the presiding judge wrote to officials of the prison where he was held, requesting that Ali’s attorney be allowed to meet with him.<sup>108</sup> The prison refused the judge’s request, hampering the preparation of Ali’s defense.<sup>109</sup> Despite being aware of this due process violation, the judge allowed the proceedings to continue as scheduled.

Defense attorneys that take up politically-sensitive cases often face government persecution, up to and including prison sentences. Attorney Waleed Abu al-Khair is currently serving a 15-year sentence for charges related to his human rights activism. He initially garnered the negative attention and harassment of MOI officials after leading the defense of a group of arbitrarily detained reformers from Jeddah in 2009.<sup>110</sup> The aforementioned Eisa al-Nekhaify, who took up the cases of Saudi citizens that had gone uncompensated after government forces displaced them from their homes along the Yemeni border, is serving a nine-year sentence.<sup>111</sup> Abdulaziz al-Shubaili, another ACPRA member who represented families seeking compensation for the ongoing arbitrary detention of relatives, is currently on trial before the SCC.<sup>112</sup> Abdulaziz al-Hussan, a prominent commercial attorney who chose to represent the aforementioned Mohammed al-Qahtani and Abdullah al-Hamid *pro bono*, fled Saudi



Arabia after tweeting about the unjust conditions of his clients' detention, an act which prompted the MOJ to challenge his law license and the MOI to interrogate him.<sup>113</sup>

The Saudi government has also prosecuted attorneys who directly challenge the MoJ. In October 2014, the SCC sentenced attorneys Abdulrahman al-Subaihi, Bandar al-Nogaithan, and Abdulrahman al-Rumaih, to prison terms ranging between five and eight years for insulting the judiciary.<sup>114</sup> The attorneys had tweeted critical remarks concerning the lack of legal reforms within the kingdom, and had publicly identified a judge with whom they were dissatisfied.<sup>115</sup> Speaking on condition of anonymity, one Saudi activist informed the media outlet *Middle East Eye* that “these three lawyers made an enemy of the Minister of Justice Mohammed bin Abdulkareem al-Issa and are suffering the consequences.”<sup>116</sup>

### C. Discretionary Sentencing Powers

As discussed in Sections II and III, Saudi judges exercise substantial authority over legal interpretation, trial procedure, and sentencing, as long as their decisions do not conflict with the vested political or religious interests of the executive. The broad discretionary power of judges has contributed to the widely-reported rise in harsh judicial penalties, particular capital punishment.<sup>117</sup> At time of writing, Saudi Arabia has executed at least 137 people in 2015, most of them by public beheading,<sup>118</sup> a significant increase over the previous year. In addition to beheadings, the judiciary occasionally sentences capital offenders to crucifixion and has imposed flogging, amputation, and stoning for lesser crimes.<sup>119</sup>

In particular, it is the judge's power to adjudicate on *ta'zir* crimes<sup>ix</sup> that is driving this recent spike in harsh punishments. The lack of even minimal codification for *ta'zir* crimes provides judges with authority to issue corporal and capital penalties to a variety of other, more dubiously grounded offenses. Noting that roughly half the executions carried out in 2015 stemmed from drug-related convictions, Amnesty International reported that judges are free to impose harsh sentences for nonviolent offences, including drug trafficking, apostasy, sorcery, and anti-government demonstrating, because they “fall under this group of *ta'zir* crimes.”<sup>120</sup>

### D. Use of Coerced Confessions

Judges have repeatedly applied the discretionary sentencing practices outlined above to cases in which the prosecution lacked compelling evidence. In particular, as Saudi legal experts informed the UN Special Rapporteur on the independence of judges and lawyers during his 2002 visit to the kingdom, confessions, in the absence of other evidence, play a prominent role in determining guilt.<sup>121</sup> As noted in previous *Mapping the Saudi State* chapters, and studied more thoroughly in ADHRB's report *The Basis of Brutality: Torture in Saudi Arabia*,<sup>122</sup> the MOI routinely subjects apprehended suspects to severe physical and mental abuse, typically with the aim of extracting forced confessions or testimony. The public prosecution then submits these coerced confessions to criminal courts as incriminating evidence.

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<sup>ix</sup> See Section III.A



Several private sources have informed ADHRB that a number of judges exercise what autonomy they have by rejecting self-incriminating testimony they believe to be falsified or coerced. While judges, on a case-by-case basis, may resist the influence of MOI officials, ADHRB and a series of human rights organizations have documented enough credible allegations concerning the acceptance of coerced testimony to consider it a consistent shortcoming of the Saudi criminal justice system.

Most recently, the judiciary's readiness to sentence three young Eastern Province protesters—Ali al-Nimr, Dawood al-Marhoon, and Abdullah al-Zaher—to death illustrates this shortcoming. All three defendants confessed to a series of charges brought against them by the public prosecution, the most serious among them including wielding Molotov cocktails and burglarizing a pharmacy.<sup>123</sup> Since their convictions, however, the defendants have universally alleged that they were tortured into confessing to the prosecution's charges. According to the allegations, MOI authorities subjected al-Nimr to repeated beatings, electrocuted al-Marhoon, and whipped al-Zaher with metal cables before each confessed in his respective interrogation.<sup>124</sup> Nevertheless, according to ADHRB sources, when the defendants and their families raised these allegations before the SCC, the judges dismissed them without investigation.

## E. Discrimination against Women

The Saudi judiciary systematically discriminates against women. No female judges serve in the kingdom.<sup>125</sup> Though a member of the Board of Senior Religious Scholars informed the UN Special Rapporteur on the independence of judges and lawyers that “in Islamic jurisprudence there is no definite opinion that states that women cannot become judges,” and although there are no explicit prohibitions in Saudi state law, the dominant *Hanbali* interpretation of the Sharia precludes female judgeship, citing an example from early Islamic history in which a woman was prevented from serving as a judge despite appropriate qualifications.<sup>126</sup>

This informal ban discriminates against women based on gender in contravention of the Convention on the Elimination of all forms of Discrimination against Women (CEDAW), to which Saudi Arabia is a party.<sup>127</sup> Further, the dearth of female judges has also prevented women from adequately accessing the justice system, and has undermined the kingdom's ability to address gendered crimes like sexual assault.<sup>128</sup> Antoinette Vlieger, in an interview-based socio-legal study on domestic works in Saudi Arabia and the United Arab Emirates, describes the typical interactions between women and judges in court as severely obstructed. While some judges will allow women relatives of the accused to enter as a group, others bar them completely,<sup>129</sup> enforcing in court the strict gender segregation that the state maintains in society. Additionally, “most judges refuse to look at women's faces...some judges refuse to let women talk entirely, and other [sic] refuse them as witness.”<sup>130</sup> This obstruction directly violates the Arab Charter on Human Rights, to which Saudi Arabia is a party. Article 9 explicitly guarantees equality before the judiciary and judicial recourse to everyone residing within the territory of a state signatory.<sup>131</sup>

One of Vlieger's female interviewees argues that these impediments contribute to the widespread underreporting of sexual assault and domestic abuse in Saudi Arabia and the UAE: “If [a woman] is



abused, she has to prove it. How? She cannot show her bruises to the judges, she cannot even show him a picture of her face, so how can she show her bruises? And it's impossible for her to talk with the judge about sex, so how can she talk of sexual abuse? This is not possible."<sup>132</sup> In a country report on Saudi Arabia, Freedom House noted that the guardianship scheme places women at a distinct disadvantage in divorce and child custody cases, wherein their husband is often their guardian and their legal opponent.<sup>133</sup> According to Freedom House, if a woman can surmount this obstacle and actually file a claim, the judge will likely value her testimony and any potential compensation at half that of a man.<sup>134</sup>

This discriminatory system has even worse implications for rape or sexual assault proceedings. Though rape is ostensibly criminalized in Saudi Arabia, it is among the legal system's most vaguely codified offenses; as such, judges retain their default level of discretionary power over sex crimes, and have even been known to convict female victims on charges related to their own assaults. A General Court of First Instance in Qatif, for example, convicted a 19-year-old woman of improperly mingling with men after she and a male friend were raped by seven attackers.<sup>135</sup> The court sentenced the woman to 90 lashes and six months in prison.<sup>136</sup> When she appealed the decision, the Supreme Judicial Council argued that she was attempting to "aggravate and influence the judiciary through the media," and actually increased her sentence to 200 lashes.<sup>137</sup> According to *The Guardian*, the government revoked the license of the victim's attorney, Abdul Rahman al-Lahem, for agreeing to file the appeal; al-Lahem had faced prison time and travel bans for his past work on women's rights.<sup>138</sup> It took international pressure, and another year, for the king to issue the woman a royal pardon.<sup>139</sup> ADHRB notes in its report on violence against women in Saudi Arabia, *The Evasion of Equality*, that not every woman gets a royal pardon;<sup>140</sup> cases like these likely deter many women from reporting sex crimes for fear of prosecution and further violence.

While the judiciary is marked by extensive informal exclusion, the Saudi government also formally prohibited women from becoming attorneys until 2013.<sup>141</sup> Previously, in 2006, the government began permitting women to enroll in law school, but it did not allow them to practice upon graduation.<sup>142</sup> By 2012, female graduates could reportedly find work "in the women's section of law firms and government offices," and some were allowed "to argue cases in court on the behalf of other women as legal representatives, but not officially as lawyers."<sup>143</sup> A year later, the government began accepting applications from female law school graduates for 5-year licenses to practice, and it registered at least four women as the kingdom's first female attorneys;<sup>144</sup> several months after that, one of these women started the first female law office in Saudi Arabia.<sup>145</sup>

Though these developments signal welcome progress for the status of women in the Saudi justice system, the all-male judiciary may likely subject female lawyers to the same informal obstacles as they would any Saudi woman.<sup>146</sup> As indicated above, the government has suspended and revoked the licenses of male attorneys who specialize in women's rights,<sup>147</sup> without significant, formal protections against gender-based discrimination, it is as yet unclear how female lawyers will be able to overcome these hurdles and practice law effectively.



## V. Conclusion: A Note on Deterrence

Proponents of a judiciary that exercises broad discretionary powers while lacking political independence have cited the upside of some of the aforementioned practices. Regarding capital punishment, for example, Saudi officials regularly attribute the relatively low crime rate<sup>148</sup> to the imposition of violent punishment or its threat.<sup>149</sup>

Yet the wide variation for criminal sentencing, especially for non-violent crimes, does not follow the logic of deterrence. If deterrence is an aim of criminal justice, its mechanisms are effective inasmuch as they are consistent and objective: the would-be criminal knows that certain crimes will result in definitive punishments, so he or she can rationally weigh the risks and choose to refrain accordingly. In Saudi Arabia, this arrangement is often unclear and unfounded, casting doubt on the one supposedly positive effect of the kingdom's floating penal code and escalating execution rate.<sup>150</sup>

At their worst, these practices actively deter moderate dissent while encouraging violent or radical challenges to state authority. Peaceful activists like Raif Badawi<sup>151</sup> and Waleed Abu al-Khair,<sup>152</sup> for example, who are serving 10- and 15-year prison terms respectively, have received longer sentences than many convicted extremists.<sup>153</sup> The 11 founders of ACPRA, Mikhlif al-Shammari, Samar Badawi, Fadhel al-Manasif, Sheikh Nimr al-Nimr, Manal al-Sharif, and all the reformists, activists, journalists, and nonviolent dissidents cited in this ongoing project<sup>154</sup> have proven powerful warnings to the Saudi citizen that desires nonviolent change. If the treatment of these reformers is any indication, the MoJ is crafting a predictable, effective deterrent mechanism—albeit only for non-violent offenders.

## VI. Recommendations

To the **Kingdom of Saudi Arabia**:

- **Mitigate** the influence of the king on the judiciary wherein judges are always appointed by an independent body of judicial experts;
- **Formally codify** a penal code, thereby making *ta'zir* rulings obsolete;
- **Guarantee** public access to all criminal trials, and discipline judges who arbitrarily close legal proceedings to independent observers;
- **Remove** the Chairman of the Bureau of Investigation and Prosecution from the Supreme Judicial Council;
- **Empower** the High Court to fully engage in a process of judicial review independent of MoJ or monarchical interference;
- **Appoint** female judges to the first degree and appellate levels, and appoint at least one female justice to the high court;
- **Facilitate** the education and practice of women attorneys, and allow women attorneys to argue before the court as equals to their male counterparts;





- For all criminal proceedings, **supply the defendant** with his charges well in advance of trial, and respect defense requests for more time to prepare their case;
- **Cease** reprisals against attorneys that take up cases of women’s rights or other politically-sensitive topics; and
- **Investigate** all allegations of torture brought to the court by the defendant, **halting** judicial proceedings until an impartial investigation has been concluded.

## To the international community:

- **Hold accountable** the Kingdom of Saudi Arabia by publicly commenting on the implementation of the recommendations made by the UN Special Rapporteur on the independence of judges and lawyers and the Special Rapporteur on violence against women;
- **Publicly condemn** the Saudi government’s continued use of the death penalty for nonviolent offenses;
- **Support**, both publicly and privately, a program of the Office of the High Commissioner for Human Rights to train the Saudi judiciary in basic human rights practice; and
- **Publicize and advocate** for the cases of men and women whom the Saudi government has subjected to unfair trials.

## VII. Notes

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<sup>31</sup> Ibid.

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