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**UNIVERSITY OF SUSSEX
LAW SCHOOL**

Dissertation for the Degree of Doctor of Philosophy

On the subject of

**Human Rights in the Stage of Criminal Investigation:
A Comparison between Law and Practice in Saudi Arabia and
England and Wales**

PhD Candidate :

Suliman Abdullah Alkharashi

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Abstract

This thesis is a comparative study of the pre-trial procedures of England and Wales and Saudi Arabia. Its aim is to show how the pre-trial procedures of Saudi Arabia could be re-designed in order to conform to both the standards set by international human rights and the norms of *Shari'ah* law and argues that there is much common ground between the two. It addresses the human rights relevant to pre-trial procedures and explores in-depth how these are expressed in international human rights legislation and in the current legislation of England and Wales with particular reference to the Police and Criminal Evidence Act (1984). They are contrasted with the relevant articles of the Code of Criminal Procedure 2001 (CCP) of Saudi Arabia. Individual rights such as the right to liberty, the right to silence, the right to privacy, the right to bail and the right to an effective remedy are examined in depth and relevant case law is cited throughout.

The history of pre-trial procedures and regulations in England and Wales and Saudi Arabia is explored in order to understand how these have developed into what exists today. The former is traced from the Norman period to the present day and the latter from the pre-Islamic era of the Arabian Peninsula.

The actual practice of these procedures is explored comparatively through a fieldwork project involving semi-structured interviews with police officers and lawyers in England and police officers, police officers, prosecutors and lawyers in Saudi Arabia.

The thesis ends with a thorough examination of how pre-trial procedures in Saudi Arabia could be regulated and monitored so as to bring them in line with the standards required by international human rights legislation and international practice and with the demands of Islamic law.

Table of Abbreviations

ACHR Arab Charter on Human Rights 2004

AL Attorney Law 2001

BIPP Bureau of Investigation and Public Prosecution

BLG Basic Law of Governance (Saudi Arabia) 1992

CAT Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984

CDHRI Cairo Declaration of Human Rights in Islam 1990

CEDAW Convention on the Elimination of All Forms of Discrimination against Women

CCP Code of Criminal Procedure of Saudi Arabia 2001

CPS Crown Prosecution Service

CRC Convention on the Rights of the Child 1989

ECHR European Convention on Human Rights 1952

ECHR European Court of Human Rights

ECOSOC Economic and Social Council

HRA Human Rights Act 1998

HRC Human Rights Committee

ICCPR International Covenant on Civil and Political Rights 1966

ICESCR International Covenant on Economic Social and Culture Rights 1966

IPCC Independent Police Complaints Commission

INGO International Non-Governmental Organization

NSHR National Society for Human Rights

OIC Organization of the Islamic Conference

PACE Police and Criminal Evidence Act 1984

PCA Police Complaints Authority

PSD Professional Standards Department

TA Terrorism Act 2000

UDHR Universal Declaration of Human Rights 1948.

UN United Nations

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Chapter One

Introduction

1. General Introduction:

Saudi Arabia's position with regard to international human rights has been widely debated; especially since the Saudi Government declined to vote in favour of the Universal Declaration of Human Rights UDHR in 1948. The reason for this abstention was that in the Saudi perspective, the UDHR reflects aspects of Western culture that are frequently at odds with Arabic culture (Alhargan 2012 p.607). However, it will be argued here that some of these international human rights can be applied to non-Western countries without prejudice to their cultural values. In the last ten years there has been significant procedural reform in Saudi Arabia involving a new Code of Criminal Procedure (CCP) (2001) and the *Shari'ah* Procedure Law (2000) (*see Appendix C.1 for full list*). These laws appear to protect human rights at the stage of criminal investigation among other stages of the legal process to meet the requirements, if not explicitly, of the standards of international human rights, showing these to be compatible with Islamic law (*Shari'ah*) and Saudi culture. The basis of Islamic law is religious rather than secular and rests on the *Qur'an* and *Sunnah* (the sayings of the Prophet), rather than any purely governmental ordinances. In spite of these Islamic laws, the reality of what happens before a trial might be different. This thesis, therefore, aims to examine the issue of human rights at the stage of criminal investigation in Saudi Arabia.

The injustices at this stage of criminal investigation are not always acknowledged by students of the law in Saudi Arabia. Al Anad (2007) suggests that human rights have become the most important legal issue in Saudi Arabia and the relevant law is a perfect reflection of the principles of Islamic law. Similarly, Al Salem argues that Saudi law in all its 'features and roots' is totally Islamic and as such is perfect and just (2010 p.5). However, case studies in 2011 from Amnesty International show a gap between these claims and the reality of enforcement officers' practice. For example, Saudi Arabia has

arrested hundreds and sent them to prison under cover of fighting terrorism, some of whom have been killed and some of whom were sentenced without trial (Amnesty International 2012). Amnesty has identified 58 Saudi cases in 2011-12 which raise serious human rights issues at the pre-trial stage. To date the literature has revealed there has been almost no empirical research carried out by Saudis of their own pre-trial system. The main criticisms of the system have come from outsiders who have had no direct experience of how the Saudi system of criminal investigation actually works in practice. This thesis seeks to rectify this lack by interviewing current officers and lawyers about their actual practice and comparing this to how things are done in England and Wales, where the pre-trial system is regulated by legislation such as the Police and Criminal Evidence Act 1984 (PACE).

Not everyone agrees that the situation is unproblematic. Vogel for example has conceded: “the law in Saudi Arabia is perfect, but humans are not, mankind struggles to learn *Shari’ah* from the *Qur’an* and *Sunna*. The process by which scholars find laws by the interpretation of revealed text is *ijtihad*.”(2000 p.1). ‘*Ijtihad*’ means the *Qadi* or judge’s personal judgement, which may be partly based on precedent and partly on his interpretation. To undertake this properly takes skill and expertise and Vogel suggests that it does not always take place and Saudi law therefore does not perfectly apply *Shari’ah* (*ibid.*) Finally, Vogler proposes that the law in Islamic countries like Saudi Arabia has become part of a tradition “which is largely inquisitorial, to produce a form of justice which is highly authoritarian.” (Vogler 2005.p 105).

The recent uprisings in Arabic countries meanwhile have demonstrated that the Arab people are intensely aware of issues of human rights and the shortcomings of legal systems that do not adequately reflect these (Hauge 2011). Saudi Arabia is no exception and, over the last ten years, there has been some movement towards meeting these concerns with, for example, the establishment in 2004 of the Human Rights Commission¹.

¹ Human Rights Commission in Saudi Arabia (www.haq-ksa.org).

I intend to explore the above debate and show that, in practice, Saudi Arabia still has not gone far enough in introducing rights for those involved in pre-trial procedures and there is a need for more regulated procedures as an important step forward.

2. Rationale.

The idea of this study stemmed from two influences: one was personal and the other was professional. The first arose out of my own personal experience at the Ministry of Interior in Saudi Arabia. During my working experience, I was interested in ways in which the system of criminal justice was regulated. Initially, I believed that if the Saudi government issued a law and was strict when someone breached the law, criminal justice would be perfect. I still believe that our government has a willingness to develop Saudi Arabia's criminal justice system to be both effective and fair. However, I realized that criminal justice needs a proper infrastructure, rather than just a single individual decision. Justice begins at arrest, not at the trial and pre-trial procedure in Saudi Arabia mostly rests on commands from the head of police or the head of prosecution, and also from the judge. My experiences of monitoring police stations for the Ministry of the Interior made me question whether these commands were sufficiently regulating the process, and what measures could be put in place to improve matters.

The second reason was that the Saudi government has invested lot of money in the development of criminal justice. Despite this massive expenditure, the quality of civil rights is weak (as is shown in Chapter Seven).

Another problem that Saudi government suffers from in pre-trial procedure is that of applying *Shari'ah* law without prejudice. *Shari'ah* has a central principle of respecting humanity, but its principles are more general than codified. *Shari'ah* says everyone should monitor him or herself, which in practice is an insufficient guideline for effective criminal procedure. *Shari'ah* is mainly concerned with moral guidance and says that wrongdoing (such as not behaving humanely towards people in custody) is a sin which the perpetrator will have to account for to their Creator.

These problems mentioned above gave rise to an idea to find an effective system that the government could adopt which would comply with both the norms of *Shari'ah* and international human rights laws. The challenge of this study is how to persuade the Saudi government to adopt pre-trial procedures and regulations from the West, as this is a controversial issue.

3. Questions for the Thesis.

The central question for this thesis is to discover a way to introduce pre-trial procedures into Saudi law that both reflect the human rights principles contained in *Shari'ah* and International Human Rights law. There are a series of sub-questions that emerge from this. Firstly, how far is International Human rights law and Islamic law compatible on the issue of human rights at pre-trial and what do Islamic scholars have to say about this? Secondly, how does the law of England and Wales regulate pre-trial, and how are these applied in practice? Thirdly, how are pre-trial procedures regulated and practiced in Saudi Arabia? Finally, what elements of pre-trial procedures could be usefully applied in Saudi Arabia as well as an effective system for training and monitoring?

4. Literature Review.

There are only a limited number of studies that deal specifically with a comparison of the criminal procedures in Saudi Arabia with those of the West. Many of these are general and deal with comparisons between Human Law and *Shari'ah*. To date, I have not found any studies that deal specifically with the comparison of pre-trial procedures within the legal systems of England and Wales and Saudi Arabia, although there are many studies that compare legal systems in general e.g. Bielefeldt (2000), Abu-Sahlieh (1990), El-Fadl (2003) and Ahmad (1994). These studies are largely descriptive and I have had problems finding sufficient academic sources that offer any kind of analysis. My own study aims to complete the gaps in knowledge on this specific topic. Also, the literature which analyses Saudi pre-trial procedures, notably that of Alhargan, starts with the

prosecution service and does not look at the practices that go on in Saudi police stations. There are, however, many more studies of the criminal procedures in England and Wales, which I intend to explore when completing my thesis – e.g. Zander (2013) and Leonard (2000).

Whilst there are a limited number of key texts that focus on criminal justice in Saudi Arabia more generally, these texts have a number of limitations. For example,

“Accusatory Systems in Saudi Arabia” by Ali Ben Mohammed Al Salem (2010).

is a descriptive study and somewhat vague, as ordinances are mentioned but not specified. The description of the accusatory system is also generalised and Al Salem does not distinguish between the different eras with reference to the development of *Shari’ah* law. He does, however, agree with my thesis that proper pre-trial procedures are essential for the establishment of justice in Saudi Arabian law. I intend to take this further by distinguishing the different stages of pre-trial procedures; i.e. search, arrest and investigation none of which are specifically addressed by Al Salem, who asserts that the accusatory system exists within *Shari’ah* and thus the legal system of Saudi Arabia, rather than just stemming from Latin law or Anglo-Saxon law, and that for this reason *Shari’ah* is sufficient. I hope to show that specific guidelines and the monitoring of procedures need to be put in place if the principles of human rights contained in *Shari’ah* are to be adhered to.

Another key source is *Judicial Officer” by Share Niaf Al Guari (2003).* This study focuses on the role of the investigating officer. The first stage of an investigation is described and there is a description of how this role is carried out in other legal systems. This study appears to support my emphasis on the importance of the proper regulation of the role of the investigating officer and that any abuse of this procedure may lead to transgressions of human rights. Al Guari concentrates only on the role of the investigating officer and the Prosecution and Investigation Act. He does not put this in the context of other relevant Saudi Acts such as the Lawyers’ Act, Penal Procedures Act or the *Shari’ah* Pleadings Act. This means that the study is limited when it comes to providing an

analysis of how criminal investigation procedures function in Saudi Arabia and thus offers no real critical analysis.

“The Saudi Pre- Trial Criminal Procedure and Human Rights” by Alhargan, Abdullhamid (2006), which provides a comparison between Saudi law and Canadian law, took international human rights as a base. It did not make recommendations as to how Saudi law needs to change, but rather it focussed on criticisms rather than giving solutions or remedies for the defects from which Saudi law suffers especially in its practical application at the stage of criminal investigation. Alhargan agrees that Saudi law is a long way from reflecting international human rights standards (2006 p294); he also believes that Canadian law completely respects them. His work is, however, not based on any evidence from looking at how pre-trial procedures are actually interpreted and carried out in police stations and I intend to rectify this. I will be using the law of England and Wales as a model, just as Alhargan used Canadian law, but will also look at how this law works in practice.

Alharagan suggests that it is impossible to change Saudi law because it entirely applies *Shari’ah*; on the other hand, he also asserts it is possible to change its application if you change the education of the *qadis* (judges), stating that they need to have more education and training in politics in order to understand what is going on in the world and to be aware about any new events. Alharagan thus believes the *qadis* are a hindrance to the development of Saudi law. I disagree with Alhargan in that the *qadis* in Saudi Arabia are like any judges in other countries. The problem is that Saudi law cannot be just down to the *qadis*, it should lay down regulations from the first arrest and search by the enforcement officers. Once there is proper regulation in pre-trial procedure there will be a great deal of progress in Saudi law. ,

However, Alhargan does not cover pre-trial procedures in *Shari’ah* and Saudi Law. This thesis will adopt a different approach and provide more analysis about Saudi law as well as effective recommendations based on this regarding necessary changes and developments of the procedure at the stage of criminal investigation.

The role of Qadis in Saudi Arabia has further been explored by Vogel (2000) in *“Islamic law and legal system: Studies of Saudi Arabia”*. Vogel spent many years in Saudi Arabia in order to study the legal system, working alongside *Qadis* and *Ulama* (experts in *Shari’ah*). He recorded his observations in order to draw conclusions about how Islamic law was being applied and concluded that in the legal system in Saudi Arabia the courts did not simply apply regulations but also consulted scholars of *Shari’ah*. Vogel’s study concentrates mainly on marriage and divorce and does not focus on pre-trial procedures. However, he does contend that, contrary to what the West might expect, the Saudi legal system is actually very flexible and pragmatic. My study also reaches this conclusion, suggesting that there will not necessarily be any contravention of *Shari’ah* law by introducing the effective regulation of pre-trial procedures.

A recent study is *“Islamic Law and International Human Rights Law”* by A.M. Emon et al (2012) Oxford. The study covers the major debates about the conflicts that have arisen between *Shari’ah* and international human rights law. The authors point out that there is common ground between the two, such as minority rights and rights for non-Muslims, as *Shari’ah* recognises the rights of both these groups. However, the authors found serious divergence when it came to the rights of women and for Muslims wishing to change faith. They suggest, however, that this is more to do with local culture than with Islam itself. The authors believe that it is more difficult to find a compromise between *Shari’ah* and international human rights where Islam is the basis of the law. So, for example, Islam forbids apostasy. However, when it comes to deciding what the punishment should be, there are different interpretations, and not all schools of thought agree that apostates should be executed.

Generally, the authors seem to be more focused on pre-modern interpretations of *Shari’ah* and do not take much account of modern interpretations which might be easier to reconcile with international human rights. The book concentrates on issues such as the rights of women, minority groups and apostasy and does not directly address conflicts between *Shari’ah* and international human rights law with regard to pre-trial procedures. The explorations of this thesis suggest that there may not be such major conflict in this

area. It is one of the aims of this thesis to show how these conflicts may, to some extent, be reconciled here.

5. Debates on the compatibility of Saudi Law, *Shari'ah* and internationally recognised human rights standards.

There are two main perspectives on Saudi law. Firstly there are those who, like Alsalem (2010) argue that Saudi Law is strictly in accordance with *Shari'ah*, that it is immutable and that the introduction of elements such as pre-trial procedures is not an import from the 'infidel' West and should not be countenanced. Secondly, there are those such as Almajed (2011) who argue that Saudi law needs to change as it is no longer properly representative of the humanitarian spirit of Islam. They hold that pre-trial procedures such as the right to legal representation are not the sole property of the West, but a wider manifestation of universal human rights.

Thus, there is disagreement among theoreticians in this field as to whether Saudi Arabia applies the *Shari'ah* concepts of human rights at the pre-trial procedure stage of criminal investigation. This is discussed later in Chapter 2. This thesis seeks to explore differing perspectives on this question in a positive way with a view to examining how a more developed form of pre-trial procedures could usefully be incorporated in Saudi law. In order to do this, it seeks to build on the theoretical ideas of thinkers like, Alanad, Duyfer and Almajed, as well as examining the extent to which the CCP and other relevant legislation at the stage of pre-trial investigation complies with international human rights standards and thus provides a sound basis for an implementation of laws and practices consistent with these human rights. Firstly however, compatibility between *Shari'ah* and internationally recognised human rights standards needs to be examined with a view to discovering the extent to which they conflict or coincide.

According to Islamic Law (*Shari'ah*), human rights come from God and are embodied in *the Qur'an* and the teachings of the Prophet Mohammed. For this reason, this thesis will focus on critiquing the practical effects of the interpretations of some of these teachings as pertain to pre-trial procedures, rather than the teachings themselves, as doing the latter

would be unacceptable to both the Saudi government and the people. This thesis aims to find positive solutions for an effective and fair administration of pre-trial procedures which could usefully contribute to a process of progressive change to Saudi Law without actual prejudice to religious ideals.

This thesis uses the laws of England and Wales as a focal point for comparison with Saudi Law. It explores how many of the pre-trial procedures represented by the laws of England and Wales are, in effect, not too dissimilar to ideas contained in Islamic law. . It also seeks to show how these ideas are not at present contained in Saudi Law in terms of their practical application to pre-trial procedures, or in some cases, that the actual codification of Saudi Law is ambiguous and allows the police to act with impunity in terms of how they execute pre-trial procedures. The thesis seeks to find a solution to this gap in Saudi Law in terms of its regulations and monitoring of their practical application in pre-trial procedures. My study will have a specific section about the history of criminal justice in the UK; moreover, I intend to supplement the evidence with interviews. My aim is to discover if the officers and lawyers are really happy with the Acts I mentioned earlier. This data will then be analysed and compared to that from Saudi Arabia, with a view to examining how that country could implement effective law at the stage of criminal investigation.

The laws of England and Wales have been selected firstly, because instruments such as the Police and Criminal Evidence Act 1984 (PACE) recognise the rights of the suspect in a manner comparable to that adopted by international human rights law; and secondly because they provide a basis by which to determine the extent to which Saudi law and practice comply with international human rights law. This will allow the researcher to determine the nature of the changes that need to be made for better compliance with these standards. It is also the case that PACE has been tried and tested for about 30 years and amended to improve it as an instrument for, among other things, regulating pre-trial procedures. PACE also has the advantage of providing a balance between the rights of the community to be protected and the rights of suspects at the stage of pre-trial (Zander

2012). According to Vogler (2005 pp.152-153), PACE (1984) not only establishes a complete codification of pre-trial procedures and process rights, but also a detailed code of practice. There is wide acclaim for PACE as a statutory system which provides for tight time limits in police detention and investigation, and protects the rights of suspects and detainees during arrest, stop, search and seizure and detention as well as providing for the repeated notification of rights, including the right to silence. Although this thesis uses the laws of England and Wales as a template for introducing pre-trial procedures, it will not disregard the criticisms of these laws, and these will be discussed in relation to international criteria about which human rights are addressed in pre-trial procedures.

As an illustration of how Islamic Law contains the concepts of human rights that underlie laws pertaining to pre-trial procedures in England and Wales, we can consider the Saudi criminal procedure law s.35, which stipulates that arrests should be carried out *badawn unf* (without force) (Almajed p.5 2011). This thesis sets out to show that the reality is very different and the police do not follow these procedures. It will also explore how complaining effectively about this is virtually impossible not least because the bureaucracy that deals with complaints is very slow.

This links to the more general question of the compatibility of human rights with *Shari'ah*. There are a number of different perspectives on this issue. For example, Meyer (2006) has suggested that the conservative Islamic perspective on human rights is the result of the political system. She believes that it is this, rather than actual Islamic writings, which shape policy in relation to human rights and she compares this to the way in which conservative Islamic authors reject Western models of freedom for political rather than religious reasons. Resistance to the introduction of pre-trial procedures is presented by Meyer as being based on an adherence to *Shari'ah* whereas in reality it is the result of political forces. In comparison, Aldosari (2010 p.19) is at pains to point out that there is a fundamental difference in Western and Islamic perspectives on human rights. In Islamic law there is the notion that these rights come from God and therefore they do not originate from any secular source such as a monarch or legislature even

though they may be implemented by it (these ideas will be explored further in Chapters 2 and 3).

Litman (1999) meanwhile also suggests that the Cairo Declaration of Human Rights in Islam CDHRI (1994), and Arab Charter of Human Rights 2008, which was in part a belated response to the Universal Declaration of Human Rights demonstrates Islamic awareness of Western ideas of human rights as these charters sought to provide guidelines on the implementation of human rights, albeit according to the principles of Islamic Law. (See more details in Chapter 2, Arab Charters of Human Rights).

Jones points out that there are many *Shari'ah* rules and practices that are at odds with international human rights, such as punishment by execution, limb amputations, stoning and imprisonment for women found guilty of adultery as well as the criminalization of sex outside marriage and homosexuality. Other factors such as non-recognition of transgendered people, rules concerning polygamy, honour killings and child custody of children over 7 only for fathers, are also problematic (2013 p.54). In terms of pre-trial procedures, this could, for example, affect the issue of where a transgendered person would be put into custody.

Another factor to consider is the role of the Islamic religion that underpins *Shari'ah* law. Rehman (2011 p.38) has outlined how religion has often been used to promote intolerance and justify the persecution or elimination of religious minorities. Furthermore, concerns over whether Islam is compatible with Western human rights standards have intensified since September 11, 2001, as Islam has been portrayed as an enemy of democracy, human rights and freedom and synonymous with terrorism and violence. *Shari'ah* law is thus seen as causing much violence, injustice and human rights violations. Proponents of this view cite examples such as *Hudud* which prescribes harsh punishments and the Law of Inheritance which discriminates against women and non-Muslims (Moghaddam 2012 p.4-5). However, it should be noted that there are high standards of proof necessary before harsh punishments can be given, and this is only in a small number of cases. For example, if a conviction of adultery is to be obtained, the accused must confess to it four times or four adult male witnesses of good character must

testify that they witnessed the sex act. If considered over its entire history, Islamic law has offered the most human and liberal legal principles anywhere in the world. These principles and those of international human rights can be adhered to when it comes to pre-trial procedures under *Shari'ah* (Dacey & Koproske 2008 p.22).

However, Aldosari (2010 p.47) argues that, in spite of this, the Western perspective is fundamentally a secular one and that this perspective has its origins in concerns about historical events such as slavery and the Holocaust. This culminated in the UDHR (1948). He goes on to suggest that since secularisation, many scholars from the Western tradition have viewed religion as an obstacle to the development of human rights and believe that many Islamic states prevent the internationalisation of these rights because of their adherence to *Shari'ah*. It should be noted that this argument contains a contradiction, since adherence to a religion is such a fundamental human right. He also believes that, although this fundamental difference cannot be bridged, it is possible for both perspectives to co-exist and for a respectful dialogue to be maintained. However, I will seek to demonstrate that Aldosari's perspective ignores the fact that *Shari'ah* is based on respect for humanity and is thus in harmony with the principles of international human rights.

Although there are undoubtedly problem areas, there are equally many areas of common ground, especially with regard to the regulation and control of pre-trial procedures. The overall aim of this thesis is to analyse all aspects of pre-trial procedures that could be incorporated into Saudi Law in such a way as to reflect the human rights ideals encapsulated in Islamic Law. The rights that relate specifically to pre-trial procedure are: the suspects' rights to liberty, to legal advice, against self-incrimination, to privacy, to bail and to an effective remedy. It will do this by using English and Welsh Law for comparison. As a result, this thesis will be using a comparative methodology both in its secondary source research, where the two bodies of laws relating to pre-trial procedures will be examined, and in its primary source research where similar semi-structured interviews will be used to explore the pre-trial procedures of both the English and Saudi

legal systems. The thesis also aims to show how the pre-trial procedures outlined in PACE could be incorporated into Saudi Law without prejudice to Islamic principles.

6. Methodology.

This thesis will be using a comparative methodology both in its secondary source research, where the two bodies of laws relating to pre-trial procedures will be examined, and in its primary source research, where similar semi-structured interviews will be used to explore the pre-trial procedures of both the English and Saudi legal systems. The thesis also aims to show how the pre-trial procedures outlined in PACE could be incorporated into Saudi Law without prejudice to Islamic principles.

The aim of this study is to explore and understand actual practice of pre-trial procedures in both the laws of England and Wales and Saudi Arabian law. Furthermore, the study explores international human right laws and the Islamic law (*Shari'ah*), in order to demonstrate if there is any conflict between them. The investigation uses some case laws, adopting a qualitative research paradigm. The data was obtained from the documents relating to the study, also the data collected from the police officers and solicitors in England, and police officers, prosecutors and lawyers in Saudi Arabia.

6.1. Secondary sources.

“Secondary data helps us to understand the condition or status of a group, but compared to primary data they are imperfect reflections of reality. Without proper interpretation and analysis they do not help us understand why something is happening.”²

I have obtained a large number of secondary sources to inform my investigation of pre-trial procedures. Some of these are Arabic sources and some are English. The Arabic sources are not analytic and are largely descriptive. Although there are explanations, laws that stem from religious writings are not criticized. Conversely, English sources do contain critiques and are more international in their focus. As is often the case with secondary sources, it was difficult to find the information that one is looking for. I devoted much time to locating precisely the information that I required— in particular

² (<http://pqdl.care.org>).

historical information about the legal system of England and Wales and Saudi law. Some of these sources contained information that was out-of date, incomplete and inaccurate and it was important to select it carefully and be aware of bias. Sources on the Internet in particular may not be subject to close editorial scrutiny and may therefore be unrepresentative or lack validity.

6.2. Primary Sources (Interviews).

Interviewing is regarded as the most commonly used and preferred method of qualitative research, as they help to explain reality from the respondents' point of view (Schstak 2009). Kvale defines interviewing as simply a conversation with a structure and an objective. However, it is not merely everyday conversation, but extends beyond such pleasantries to a professional dialogue involving careful questioning and listening techniques. He adds, it is an 'inter-view, where knowledge is constructed in the interaction between the interviewer and the interviewee' (2009 p.3). Interviews are generally divided into three types: structured, semi- structured, and unstructured (Cohen et al 2011).

This study used just one research method, i.e. semi-structured interviews; it is also used audio recordings of most of the interviews. Semi-structured interviews have a clearly developed interview with a list of questions and themes that need greater discussion (Bernard 2011). This approach allows researchers to maintain their focus on key issues, while allowing the respondents to expand and provide more details. In addition, it allows the respondents to comment on issues they see relevant to the topic that the researcher might not have thought about. Furthermore, it allows other themes to emerge and provides more in-depth understanding about the phenomena. This type of interview is useful for collecting data about how the respondents contextualise their attitude, values and opinions about the issues under study and giving participants a greater chance to input into the research. Bryman (2012) stressed that the use of semi-structured interviews is suitable when the investigation has a fairly clear focus but there might be an expectation of emergent issues to be addressed.

This study conducted a number of semi-structured interviews both in Saudi Arabia and in Brighton. These interviews were conducted with criminal investigations officers; arresting officers; custody sergeants; prosecutors and defence lawyers. The aim of these interviews was to collect qualitative data about pre-trial procedures and to identify whether these procedures are carried out in accordance with what is legally required and with notions of human rights.

There are a number of issues associated with conducting semi-structured interviews, which I had to take into consideration. For example, I had to obtain permission to carry out these interviews from the appropriate authorities. In Saudi Arabia I needed to approach the Ministry of the Interior (General Security, Prosecutors and public inquiry) and the Sussex Police and CPS in Brighton. Other ethical considerations include issues of confidentiality and anonymity and the importance of gaining informed consent from the respondents.

In carrying out my research, semi-structured interviews allowed me to gain a better understanding of the context from the interviewees' points of view. I chose to use semi-structured interviews as this format both ensures that all the questions in the interview guide are asked, and allows the opportunity for the interviewee to raise unanticipated issues which can provide a new insight into the topic. Formal interviews were conducted at the beginning of the study, and I was obliged to ask the interviewees to give up their time. The interviewees spoke about how they dealt with suspects and their feelings toward the law in both England and Wales and Saudi Arabia. Some of them added some suggestions while others complained about the law that applies in Saudi Arabia. It should be noted that the interviews in England were more formal in tone as they were conducted with participants who were not known to me and for this reason were quite uniform in terms of time taken and environment in which they were conducted. In Saudi Arabia, I was able to interview a couple of participants more informally as they were known to me. These interviews were lengthier and I was able to get more detailed information. Given the nature of the topic, I would say that it was helpful to have these more informal

interviews as the participants were able to open up. One issue which was not anticipated but which emerged as a result of using the semi-structured format was how suspects in Saudi Arabia are taken to the Notary in handcuffs if they want to have the necessary documentation for legal representation. Although there was no specific question in the interview guide about this point, it emerged as part of the interview.

I was also aware that my presence could affect how the interviewee responded, especially on such a sensitive matter. The questions I asked largely determined what responses I got so I needed to be aware not to ask leading questions.

Prior to administering the interview guides to the police officers, prosecutors, and lawyers, the interview guides were piloted. Flyvbjerg (2006) argues the importance of piloting the tools for individual interview and how this can help to improve the quality of the information obtained.

6.3. The Interviews –Brighton and Riyadh.

Sampling is regarded as a unit of analysis that helps to identify the potential sources of information. Careful selection of the sample is imperative for the development and understanding of the case study under investigation (Shenton 2004). The type of sampling that should be used is determined by the type of the research (Yin 2009). Qualitative research tends to study small samples where participants are usually recruited to a study because of their exposure to participation in or experience of the phenomenon in question (Flyvbjerg 2006).

As one research question of this study focuses on understanding what actual practice in England and Wales is, I conducted all the interviews at a Sussex police station; and interviewed nine people - seven police officers and two solicitors. I did not encounter any problems while conducting these interviews. The reason I limited the number of interviews was that there were many sources to help me understand the pre-trial procedure in England and Wales (Books, articles, journals, and media). The interviews

conducted in Brighton were just to observe actual practice in pre-trial procedure. The interviews in Brighton all went very smoothly.

When I conducted the interviews in Saudi Arabia in Riyadh, I interviewed 25 people: five investigating officers, three custody sergeants, five arresting officers, five prosecutors, and seven lawyers. I interviewed the police officers in four police stations, I had to apply for permission to conduct the interviews to the head of General Security, and it took over 6 months to receive the permission. Some of the officers did consent to my recording of the interview, so I had to write up the interview on paper and then type it up. One of them did not tell the truth about the pre-trial procedures in Saudi Arabia, he explained the procedures at pre-trial in Saudi Arabia as an ideal process, so I decided not to include his interview in the data analysed. Three of the prosecutors said that they preferred me to take notes and type them up later.

The biggest problem I encountered was finding lawyers who work at this stage of criminal investigation. There is no Bar Association in Saudi Arabia to ask about them. I had to find interviewees, by asking friends and police officers if they knew a lawyer who worked in pre-trial procedure. There is a lack of criminal lawyers in Saudi Arabia (see more information in Chapter Six, Section 2- the right to legal advice). I interviewed the lawyers in their offices and worked day and night to finish off the interviews successfully.

The reason for interviewing a large number of interviewees in Saudi Arabia was the lack of resources. There are only five books and a few Articles that talk about pre-trial procedure in Saudi Arabia, so I had to interview widely to find out the truth for my thesis and see how the procedures work in Saudi Arabia.

6.3.1. Piloting of the interview.

I had already developed a semi-structured interview based on research questions which I had piloted with one solicitor in England and Wales and one police officer in Saudi

Arabia, which I further adapted for the present study. The pilot study in England helped me to understand the importance of translating the interview guide into Arabic (i.e. the mother tongue of the interviewees in Saudi Arabia). Moreover, in this first interview, I thought I would be able to easily and instantly translate the questions into Arabic for the interviewees. This interview showed how difficult it was to do this in an interview context, as it was not easy to follow the conversation and at the same time think about accurate translation. Thus, it was necessary to translate the entire police officers', prosecutors' and lawyers' interview guide in advance, and this also helped to ensure that all the interviewees received exactly the same information. Furthermore, piloting with English lawyer helped me to avoid any unacceptable questions such as those about discrimination. Also it allowed me to understand the way to approach interviews within English culture and how best to obtain the information that I was looking for.

Further issues arose which required to be addressed before conducting the interviews with prosecutors in England and Wales. The pilot highlighted that the prosecutors are not involved with the investigation procedures, and that is entirely different to Saudi law, where it is the police who are not involved with the investigation procedures. That helped me to decide that there was no need to interview prosecutors in England and Wales.

The interview guide was piloted once more with a police officer in Saudi Arabia. This gave me a full understanding of pre-trial procedures in Saudi Arabia. There were some issues arising about my interview guide for Saudi interviewees. For example, to include questions about the attorney, and the role of police soldiers, neither of which exists in England and Wales. Because of these anomalies, I had to add questions that I asked the interviewees in Saudi Arabia to have the actual information that I needed and which were relevant to the thesis.

These pilot interviews also gave me the opportunity to sharpen and clarify the interview questions and think about alternative ways to phrase them in order to be able to prompt the interviewees without leading them. In addition, the transcripts from the pilot interviews helped me to identify emerging themes and patterns.

6.4. Audio recording.

Audio recording is regarded as a powerful method of data collection. One of the main advantages of such media is that much of what takes place can be recorded and played back, allowing focus on various aspects of events as one chooses (Richards & Lockhart 2002).

I tape-recorded the interviews so that I had a more accurate record of what was said. This also allowed me to concentrate more on the respondent without the distraction of making notes. Some respondents, however, felt awkward about being taped or worried about the tape being heard by others; even though I offered a promise of confidentiality and offered to give them the tape once I had finished with it. The interviewees were assured at the beginning of the interview that no one would listen to the recording other than me or my supervisor. However, some of the interviewees asked me to stop the tape for a while and then carried on the interview without taping. On some occasions, they allowed me to write the conversation down but not to record it.

Even with taped interviews, it is possible to misinterpret what a respondent means; and I was aware of this. I got clarification from the respondent, and tried not to let my own views affect what conclusions I drew from these interviews. The analysis of the audio recordings allowed me to gain a deeper understanding of the experiences and attitudes of those questioned, as the data was very detailed and lead to further insights.

Semi-structured interviews will, I hope, afford me some insights into how pre-trial investigations are carried out. It is, of course, not possible to generalise from single case studies, but I hope to gain details, which it would not be possible to gain from conducting a survey.

I investigated sources which gave guidelines on the correct methodology in doing research into legal matters. From this, I devised a research plan, which allowed me to effectively gain the necessary authorization as well as formulating a set of pertinent

questions for my semi-structured interviews. I also investigated how to correctly analyse the data which such interviews would yield.

6.5. Data Analysis.

Once data had been collected, the next stage of the research project was to analyse it. To analyse the interviews, I mainly used the 'meaning condensation' methods after indentifying themes suggested by Kvale, who defines the technique thus: "meaning condensation; entails an abridgment of the meaning expressed by the interviewees into shorter formulation. Long statements are compressed into briefer statements in which the main sense of what is said is rephrased in a few words" (2009 p.205).

Based on this definition, Kvale highlights the following five steps in utilising this approach; firstly, the whole of interview transcript should be read once to establish the main ideas; secondly, the exact words of the subjects are identified by the researcher; thirdly, a main theme is assigned to each response by the researcher without bias; fourthly, meaning units should be related to the purpose of the study, which can be done by reminding oneself of its main questions; fifthly; the researcher gives a relevant description to each theme.

Before commencing the process of analysis, I recorded the interview digitally. I then listened once to each recording to get a sense of the whole. Next, I began a transcript of the interview, translating from Arabic to English as I went along. However, the Brighton recordings were transcribed verbatim. However, there were a few interviewees in Riyadh who refused to be recorded, so I had to write the whole of the conversation on paper and then type it up. The next step was to identify the main themes that emerged from interviewees' responses. Sometimes, themes could be determined though the use of repeated words. I used different coloured pens to mark relevant themes, from which I was able to identify meaning units as they emerged from the text. Finally, I gave an appropriate title to each theme with each having a sub-theme. Under each of them, I

made a short introduction, and then related then to arguments from authors. After that, I suggested solutions that could resolve difficulties highlighted in the interviews.

It is important here to highlight several methodological issues encountered when translating the interviewees' interviews. Culturally and linguistically, English and Arabic are two different languages and thus translating the interviewees' views from Arabic to English was a significant challenge. Regmi et al (2010) argue that translating qualitative data across language is a challenge that requires competency in both languages. As a researcher who developed the theoretical framework for this inquiry in English and also as an Arabic speaker, I was able to translate the interviewees' interviews from Arabic onto English. It must be acknowledged that I had to check with another English speaker about my translation of specific concepts that I had in the interviewees' data to validate the translation accuracy.

Data obtained from documents (books, articles, and case laws) was used throughout the study, from developing the rationale of the study, reviewing the literature, analysing the documents and writing up the findings and analyses. From the start of the study, all the different documents that I was able to access about international human rights laws, pre-trial procedure in England and Wales, and Saudi Arabian pre-trial procedure were analysed. On obtaining data from the interviews, the analysed data obtained from the documents was then linked to emerging themes and patterns.

6.6. Trustworthiness.

Trustworthiness has to be established through the reflexivity of the researcher, the use of an appropriate methodology, instrument representation, and the approach to data collection (Flyvbjerg 2006). Yin (2009) suggested that the rigorousness of qualitative research has to be formulated at the level of data collection, where different tools and resources are used to complement each other in order to safeguard rigour, and through good practice. Trustworthiness within this study is applied at different group as way of evaluating the validity and rigour of the whole research process from start to finish.

More than six months were spent on the fieldwork. This helped me to gain an understanding of the different issues that the interviewees had to deal with on a daily basis. Working with the Ministry of Interior for more than 17 years also allowed a relationship of trust to be established with the interviewees, and thus they could act more naturally and speak freely. My work with 21 -criminal cases panels- which included police officers- had allowed me to further understand the pre-trial procedure clearly and to more easily gauge how accurate interviewees' responses were. Furthermore, the data was collected through documents, and the interviews. These different tools were used to construct reality from different sources, which could then be triangulated in the analysis stage. In addition, interviews were conducted with 9 interviewees in England and Wales, and 25 interviewees in Saudi Arabia, with different groups involved in the pre-trial procedure in different roles. These viewpoints, which were sometimes at odds with each other, allow me to gain more credible information.

Another measure for establishing trustworthiness was through the way in which participants were recruited. All the participants who took part in this study were volunteers from various stages of the fieldwork. Although, there was a purpose in selecting different groups- arresting officers, investigating officers, prosecutors and lawyers- this helped to minimise the bias in this study. Also, none of the interviewees were forced to take part; they also had the option of refraining from the answering any question with which they felt uncomfortable and that also built a trusting rapport.

Although, initially there was some mistrust among the participants, which I had to cross out from the study. I had suspicion from the information I had been given from one police officer and one from the prosecutors in Saudi Arabia, which I had to focus on with the others officers, prosecutors, and lawyers to find the truth that this study was seeking for. However, all the interviewees in this study contributed willingly and provided genuine and honest information.

6.7 How the interview data was used in the thesis.

The data obtained from the interviews was used to highlight points about how pre-trial procedures are actually carried out by the police. Quotations from the interview transcripts were extracted to illustrate specific points, such as whether detainees were allowed to have legal representation; and this allowed the answers from English and Saudi officers to be contrasted. The data was also used to construct a general impression of the culture that exists in the two police stations investigated. For example, the interview data was used to illustrate how the culture in Saudi police stations is one of 'following precedent' whereby officers do what their predecessors did and that this is seen as more important than following regulations in the CCP. This was contrasted with the culture observed in the English police station, where things are done 'by the book'. The data obtained from Saudi Arabia is unique in that the researcher found no other study in which police practice in that country has been investigated in this way.

The data acquired thus acted in two ways. In the case of England and Wales, the researcher was coming from a different culture and had no specific views on what to expect; thus, the interviews allowed an insight into police procedures both from the point of view of the police and that of the lawyers. This was important in informing the investigation into each of the human rights relating to pre-trial procedures such as the right to silence where the police and the lawyers having different interests – solving the crime and protecting the suspect. In contrast, having worked in police stations in Saudi Arabia, the researcher anticipated that regulations would not be followed by the police and the interviews served to confirm the extent to which this was the case. As will be seen, the study highlights just how far regulations are not just flouted but even unknown by the police in Saudi Arabia. Most of the interviewees were totally unaware about the Code of Criminal Procedure(CCP), they thought it vague and difficult to apply. That led the researcher to believe that there was an urgent need to change the CCP to be more applicable and that enforcement officers needed to be trained to apply it. Furthermore, the interviews showed that there was no effective way to obtain the right to an effective remedy. Before the interviews, I had thought being able to claim against a police assault

would be a basic right to find in any country. However, the interviews revealed that in Saudi Arabia even the police and prosecutors have no clear idea about how someone could claim as the CCP neglected that right. Also there was no monitoring of custody in the Saudi police stations as the CCP also remains silent about that. As data such as this emerged from the interviews, it confirmed the central idea of this thesis that the CCP needs to be change and enforcement officers should be monitored and trained to be compatible with Islamic law and intentional human rights norms

7. Proposed Thesis Structure.

After a general introduction, the second chapter explores the principles of International Criminal Justice. This chapter concerns the international instruments relating to Human Rights, such as the European Convention on Human Rights (1950) and the International Covenant on Civil and Political Rights (1966). The Arab Charter on Human Rights (2008) is also discussed here. A discussion of the philosophical and historical origins of human rights and the sources of international human rights is also provided. It explores the difference between the international and regional human rights treaties at the stage of criminal investigation. I briefly review how the concept of human rights is contained in these instruments, comparing and contrasting them with notions of human rights in Islamic law.

The following chapter (3) examines procedural rights at the stage of criminal investigation by comparing international human rights laws and *Shari'ah*. The purpose of examining these laws is to ascertain if there is any conflict between them, in terms of respecting human rights at the pre-trial stage, and how the fundamental principles they contain are manifested in specific pre-trial procedures. Chapter Three also examines how international human rights law applies to human rights at the stage of criminal investigation. A further objective is to determine if international human rights laws can be adopted by Muslim countries, without prejudice to Islamic principles.

The next chapter (4) aims to investigate the history and development of criminal justice in England and the major events which led to the development of criminal justice in

England and Wales. Chapter Four starts with the Norman period, then briefly examines relevant legal development into the current century. In particular, the 20th and 21st centuries are examined because it was then that the majority of Acts which pertain to Human Rights and pre-trial procedures were passed.

Chapter Five looks at the procedure of criminal investigation in England and Wales. In order to understand the success or failure of English Law in respect to human rights at the stage of criminal investigation, English Law is analysed in terms of international human rights and the practice of pre-trial procedures. I include my comments about the Police and Criminal Evidence Act 1984 (PACE), which is considered the main Code relating to the stage of criminal investigation. I conducted interviews in Brighton Police station in order to understand actual practices used in dealing with suspects. The aim of this chapter is to examine PACE in order to consider its potential application to Saudi pre-trial procedures, in a way that is compatible with *Shari'ah* and international human rights laws. Furthermore, this chapter considers the use pre-trial procedures embedded in PACE to make recommendations about changes required in Saudi law.

The history and development of criminal justice in Saudi Arabia is considered in Chapter 6. This chapter explores the major events which led to the development of criminal justice in Saudi Arabia; and notes how Saudi Arabia has never been colonised and Islamic law has never been influenced by Western law. The first part is about criminal justice before Prophet Mohammed and second part is about criminal justice after the Prophet. The chapter describes how there was no legal system as such before Prophet Mohammed as every tribe had its own rules and procedures. The chapter then briefly examines relevant legal development into the current century in Saudi Arabia.

The following chapter (7) examines the procedure of criminal investigation in Saudi Arabian Law, in particular the Code of Criminal Procedure (2001), which is considered a revolution in criminal procedure in Saudi Arabia. This chapter will analyse this and discover if it is compatible with human rights requirements. This will be done for each element used in pre-trial procedure. I conducted interviews in Riyadh Police stations in

order to understand actual practices used in dealing with suspects. The aim of Chapter Seven is to examine the CCP in order to ascertain the extent to which it complies with international human rights standards. Finally, Chapter Eight covers conclusions and recommendations.

Appendix A looks at The Contemporary Development of Criminal Justice in England and Wales: the Terrorism Acts 2000-06; the Serious Organized Crime and Police Act(2005); the Criminal Justice Act (2003)and the Human Rights Act (1998).

Appendix B lists various relevant Saudi Royal Decrees.

Chapter Two

The Principles of International Human Rights Law

Introduction:

The origins of human rights has been hotly debated, whether it has religious roots, or has just arisen from ideas about 'natural law' and the rights contained therein. In many Muslim countries there is a belief that human rights came with the birth of Islam (Jones 2013 p.47). On the other hand, in Western countries there is a belief that the evolution of human rights began with the Enlightenment and that the US and French revolutions initiated the movement for modern human rights (Klug 1999 p.68). Gilbert (1987) points out that human rights developed radically after the Second World War. Many nations had suffered serious losses due to the activities of despots like Hitler, not least due to the Nazi extermination of over six million Jews between 1939 -1945. As well as the six million Jews who were murdered, more than ten million other non-combatants were killed by the Nazis (*ibid.*,p.68). Partly because of this, it was recognized that there was a need to establish international legislation to protect humanity from authoritarian regimes and also to protect human rights in times of war.

Thus the starting point for modern human rights law was the establishment in 1945 of the United Nations (UN) which was to provide a new international system to safeguard human rights. The Universal Declaration of Human Rights (UDHR) of 1948 is thus the charter around which progress in international human rights has been made. Since the UDHR, there have been a large number of charters and treaties generated, signed and ratified around the world. These aim to protect human rights at every stage and in every area, including crime, the media and education. Notably, the UDHR marks the first truly international system.

Muslim countries believe that the origin of human rights came with the birth of Islam. Many Muslims also believe that 'international' human rights are based on philosophies that exist in Western culture and thus are not suitable for Muslim states (Bielefeldt p.3

2000). In view of this, basic human rights as established in *Shari'ah* will be explored in this chapter, in order to assess the compatibility between international human rights law and Islamic law. What *Shari'ah* has to say about human rights specifically at the stage of criminal investigation will be examined in depth in Chapter Three. Hence, the aim of this chapter is a general exploration of the origin of human rights and their development both in the West and in Muslim countries. This chapter will argue that the origin of human rights has religious roots in both Western and non-Western countries. The chapter will be organised as follows: Section One explores the origins of human rights; Section Two explores the jurisprudential basis of human rights and Section Three specifically investigates human rights in the Islamic tradition.

1. The Origins of Human Rights.

The idea that an individual has rights just by virtue of being human is seen as a relatively modern one and, according to Alhargan, has its origins in the philosophical and political revolutions of the 17th and 18th centuries (2006 p.42.). Freeman points out that there were, however, ideas about power and its abuse which are much older. The ancient Greeks developed the concept of the tyrant who governs unjustly and treats people oppressively for his own ends. This was similar for the Romans, but neither conceived of the idea that all people had rights (2002 pp16-17).

Chaudhry (1993 p.13), among others, believes that it is possible to see the emergence of the modern concept of human rights during the rise of the Islamic civilisation fourteen centuries ago, which will be explored in more detail later. This section will argue that all modern human rights have religious roots; and will examine two different periods. The first is the late 18th century, when declarations of human rights were proclaimed in North America and France, the second, the present day, from which we look back over the development of human rights and the effects of their important historical interpretation.

Joas (2006 p.3) mentioned Weber who showed that the ideas of natural law and humanity were not, as was often assumed, "merely modern or merely West European concepts"

but rather " ideas of a great antiquity". Religion is often identified as a source of ideas about human rights, for example the 10 Commandments are partly about how people should be treated. What all the major religions do have in common are ideas about human dignity and worth. They all contain norms and values about how people should behave towards each other and, in particular, how humans have a responsibility for caring about each other and helping those who are oppressed or suffering. It is in the latter belief that the global nature of human rights resides (Lauren 2008 p.95). Having said this, religious beliefs have often been perverted by leaders who were prepared to sanction oppression, bigotry and even genocide to serve their own ends. Lauren cites the examples of “anti-Semitism, the Spanish Inquisition...wars between Sunnis and Shi’ites and between Catholics and Protestants, violence between Hindus and Muslims, crusades against ‘heathens’, and *jihads* or holy wars against infidels” (*Ibid.* p.96). It is this disparity between religious principles and the behaviour of those purporting to uphold religious principles that will be later examined in relation to human rights in Saudi Arabia.

The US Declaration of Independence (1776) was based on the idea that citizens were ‘endowed by their Creator with certain inalienable rights’. This was echoed in the French National Assembly’s Declaration of the Rights of Man and Citizen (1789). This proclaimed a universal right to ‘liberty, property, security and resistance to oppression. It affirmed equality before the law, freedom from arbitrary arrest and the presumption of innocence’ (Freeman 2002 p24.). However, by the end of the eighteenth century the belief in natural rights was opposed on the one hand by radicals, such as the Jacobins who felt it justified inequalities of wealth, and on the other by conservatives who considered the concept of natural rights too subversive and egalitarian and believed that the French Revolution was stark evidence that their fears were justified (*ibid.*, p.27). Joas cites Jellinek who argues that the belief in the dignity of all people is rooted in the centuries-old Judeo-Christian tradition, though this tradition cannot be treated as an unbroken process of maturation that gave rise to modern ideas (2006 p.11). Joas disagrees saying: ‘this view cannot be defended. It does not obtain for France in any case; nor did religious freedom exist in most of North America until the 20th century’. He adds

that the codification of human rights was more a matter of secular forces (*ibid.*). It could be argued here, that there is a difference between codification and principles at the roots of human rights. For example, Islamic law contains human rights principles but is uncoded; and that has led to many interpretations which have negatively affected pre-trial procedures as will be explained in Chapter Seven. However, ideas about treating other human beings with respect can be found in both the Judeo-Christian and Islamic philosophies and form an important part of the history of ideas about human rights (Joas 2006 p.12).

Arguably, one of the major challenges for the modern human rights movement is how to engage with different faith communities. According to Marthoz & Saunders (2005 p.2), it is not possible for human rights to become truly global unless their relevance can be acceptable to all states, including those whose behaviour is determined by religion. As far as Muslim States such as Saudi Arabia are concerned, human rights principles are contained in Islamic Law and the state simply needs to establish clear regulations relevant to the native culture. Furthermore, after over sixty years the UDHR has been the backbone of the human rights movement and could usefully be the link between the West and Muslim countries.

States such as Saudi Arabia could be encouraged to ratify the International Covenant on Civil and Political Rights 1966 (ICCPR) if it is demonstrated that its underlying principles are not in contradiction but rather support the human rights principles contained in Islam. Having looked briefly at the origin of human rights in Western thought, it is now important to consider the jurisprudential basis to these rights. This is the means whereby human rights can be encapsulated in law and instruments by which people can have their rights established.

2. The Jurisprudential Basis of Human Rights:

The United Nations (U.N), since it was established in 1945, has played an instrumental role in providing human rights with international protection. Over the last sixty years, the

U.N has gone through various stages to finally achieve a coherent system for the protection of human rights. It started its mission on human rights by initially expressing the international concern over human rights under the United Nations Charter 1945; declaring a list of universal rights in the Universal Declaration of Human Rights 1948; elaborating internationally protected rights and providing enforcement mechanisms to ensure the practice implementation of these rights at the national level. This was done through the International Covenant of Civil and Political Rights 1966 (ICCPR), and the International Covenants of on Economic, Social and Cultural Rights 1966 (ICESCR). The Declaration and the two Covenants represent the U.N Bill of Rights.

2.1. The Universal Declaration of Human Rights.

The Commission on Human Rights was established by the Economic and Social Council of the U.N in June 1946. The main task of the Commission was to draft an International Bill of Rights (Reichert 2002 pp.41-42).The General Assembly eventually adopted the Universal Declaration of Human Rights (UDHR) unanimously, with eight abstentions, on December 10, 1948. It is noteworthy that Saudi Arabia did not vote for the Declaration did not signed or ratified the ICCPR -this point is illustrated later- (*ibid.*, p.43).The UDHR provides “a common standard of achievement for all peoples and all nations.” Every “individual and every organ of society” shall promote “respect for these rights and freedoms ... by progressive measures ...” The goal was “to secure their universal and effective recognition and observance.”(UDHR 1948). McGuinness (2011 p.750) observes that the UN General Assembly may have set norms regarding human rights but had no actual legal authority or indeed any mechanisms of enforcement to compel its member states to comply. The Commission on Human Rights thus regarded its next step as the formation of a binding human rights treaty in order to ensure that the principles laid out in the UDHR were adhered to. The next section will elaborate on the ICCPR (1966) and why Saudi Arabia and some Muslim countries did not sign or ratify it, even though it is one of the most significant human rights treaties.

2.1.1. The Two Covenants.

The Human Rights Commission had an arduous task in deciding what the appropriate means to enforce the UDHR was to be. Cole (2004 p.5) notes that the West was most concerned with civil and political rights and the Communist States with economic, social and cultural rights. Eventually, a compromise was reached whereby there were to be two distinct documents dealing with the different categories of rights and outlining how best to enforce these. After 18 years of negotiations, this process produced the International Covenant on Civil and Political Rights 1966 (ICCPR), and the International Covenant on Economic, Social, and Culture Rights 1966 (ICESCR) (Özden 2006 p.4).

As pre-trial procedures are the theme of this thesis, the ICESCR will not be discussed and the chapter will focus on the ICCPR. The ICCPR has been ratified by a large number of States (168 of 168 States Parties to the ICCPR as of 1 Dec 2014 but there are a number of key members who remain outside the system, particularly China and Cuba, Saudi Arabia has also not signed (Brown 2008 p.11). Saudi Arabia's refusal to ratify the ICCPR rests on their objections to just two Articles (discussed below). Because of these objections, they refused to ratify the entire treaty. However, it must be noted that no specific objections were made to any other part of the ICCPR, including those sections relevant to pre-trial procedures.

Brown believes that many countries view the UDHR with suspicion, in particular, states which follow what he calls 'political Islam', a movement that started in the nineteenth century, but gained momentum after the Second World War. Political Islam asserts that its laws come directly from God and should be paramount (2008 p.12). Brown goes on to say that it is unsurprising that strict Islamists have problems with the UDHR as it supports equality between men and women, and between Muslims and non-Muslims, the right to leave one's country and the right to marry who one chooses. However, the most problematic Article is Article 18: "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance" (ICCPR 1966).

Muslims do not accept apostasy from Islam, and in some Islamic states it is punishable by death (Bagnh ND). Brown also points out that in Saudi Arabia, religious practices other than those of Islam are forbidden and any attempt to convert a Muslim is also a crime (2008 p.12).

Article 19 is also problematic as it states: “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers” (ICCPR 1966). Many Muslims would not accept the freedom to criticise Islam (Brown 2008 p.12). Saudi Arabia's refusal to sign the ICCPR has attracted criticism about its record on human rights from organisations such as Amnesty International although Saudi Arabia decided to accept several recommendations as to how it could improve this during the recent United Nations Human Rights Council review session in Geneva. Said Boumedouha, Deputy Director of Amnesty’s Middle East and North Africa programme, commented “(u)ntil Saudi Arabia’s actions match its words the Kingdom’s dire reputation as a grave violator of human rights is unlikely to change,” . Indeed, Saudi Arabia refused to ratify the ICCPR saying that this was still only under consideration. It also refused to ratify the International Covenant on Economic, Social and Cultural Rights (ICESCR) or withdraw reservations about the Convention on the Elimination on all Forms of Discrimination against Women (CEDAW). It did however; fully accept 145 out of 225 recommendations (Amnesty Organization 19 Mar 2014).

Although Saudi Arabia has problems with Articles 18 and 19 there is nothing to stop it from ratifying other Articles of the ICCPR which do not violate *Shari’ah* and submitting reservations about the relevant articles. Specifically, it does not need to disregard those Articles which relate to pre-trial procedures, to integrate them into domestic law and implement them in practice. The ECHR, the Cairo Declaration of Human Rights (CDHR) and the Arab Charter of Human Rights (ACHR) will next be examined as these are all relevant to the issue of pre-trial procedures in both Saudi Arabia and England and Wales.

2.1.2 Regional instruments.

The global human rights system is complemented by regional mechanisms in the Americas, Africa, and Europe. In some instances, treaties with strong monitoring and redress mechanisms have been developed. Currently there are three human rights systems that operate at the regional level. These are the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, the American Convention on Human Rights 1969, and the African Charter on Human People's Rights 1981. Asia, the Pacific and the Arab States are the regions where regional human rights mechanisms still have to enter into force. The Arab Charter on Human Rights came into force on 15 May 2008, however, it is not accepted internationally as an effective way to uphold human rights, as I argue later, as it is not backed up by any kind of Court of Human Rights.

2.1.2.1 The European Human Rights system.

The first major treaty the Council of Europe produced after the Statute and the General Agreement on Privileges and Immunities of the Council of Europe was the [European] Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). The convention was signed on November 4, 1950, and came into force on September 3, 1953. It was the first real human rights treaty. The first section of the Convention sets out the particular human rights and fundamental freedoms that are to be protected (ECHR). The first thirteen items, which appear in the original ECHR, were intended to restrain governments from tyrannizing the people. This was the result of the experience of occupation during the war on the continent. Since they were set up in 1953, the structure of the Council's enforcement institutions has changed twice. In 1998 the European Commission of Human Rights was discontinued and Protocol 11 gave over its functions to the Court (Hart 2010 p.538). Protocol 14 (2010) developed from Protocol 11 and aimed to improve the efficiency of the Court by eliminating cases that were unlikely to succeed along with those which were similar to cases already brought against the same member state. For a case to be admissible the applicant has to have suffered 'significant disadvantage'; and this can only be used "when an examination of the application on the

merits is not considered necessary". Also, the matter of the application will have to have been considered by a national court (ECHR Protocol 14).

2.1.2.2. The Cairo Declaration on Human Rights in Islam (CDHRI).

The CDHRI was adopted in 1990 by members of the Organization of the Islamic Conference (OIC) and a version of the CDHRI was submitted to the UN by the OIC prior to the World Conference on Human Rights in Vienna in 1993. It has been signed by 45 states so far and adopts the Islamic perspective of human rights in response to the Universal Declaration of Human Rights. The member states include Saudi Arabia. This declaration provides an overview of Islamic human rights, in accordance to *Shari'ah* (Islamic Laws). CDHRI declared its purpose to be "general guidance for its member states in the field of human rights" (CDHRI 1990). Although the declaration does talk about all men being equal in terms of 'dignity' (Article 1(a), it does not state that rights are equal for all individuals and nor does it accept equal dignity for men and women and for Muslims and non-Muslims, and so does not necessarily entail them having the same rights (Delling 2004 p.47)

According to Laluddin et al, this declaration differs from the secular UDHR, as it is seen as embodying God-given rights which cannot be amended by legislation. (2012 pp. 115-6). When the UDHR was adopted, Saudi Arabia delegation's abstention was prompted primarily by two of the Declaration's Articles: Article 18, which states that everyone has the right "to change his religion or belief"; and Article 16, on equal marriage rights. Saudi Arabia and Iraq asked the UN Commission on Human Rights to accept the Cairo Declaration as an alternative for Muslim states; but, the UN Secretary General Kofi Annan refused saying that human rights were universal. (Delling 2004 p.47). Brown comments that as the Cairo declaration affirms its basis in *Shari'ah* in Arts. 19, 24 and 25 it is therefore subject to different interpretations of *Shari'ah* "of which the most extreme without a doubt falls outside the international human rights standards" (2008 p.12).

Thus, many Arabic Countries felt that there was a failure to ensure human rights in Islam through the CDHRI, and formulated these in the Arab Charter of Human Rights (ACHR

2008). The ACHR is more accurate and many of its Articles are similar to those in international human rights charters, and that will be examined next.

2.1.2.3. The Arab Charter of Human Rights (ACHR 2008).

This charter was revised from the original Charter that was published in 1994, but not ratified by any state. The main weakness with the 1994 version was the lack of any human rights enforcement mechanism, particularly in comparison to those within the European and American Conventions on Human Rights, and the African Charter on Human and Peoples' Rights. The new version came into force on March 15 2008 and has been ratified by more than half the members of the League (22 states). As of November 2013, the Charter has been ratified by Algeria, Bahrain, Iraq, Jordan, Kuwait, Lebanon, Libya, Palestine, Qatar, Saudi Arabia, Syria, the UAE and Yemen. Member states are expected to submit a report to the Arab Human Rights Committee after a year of accepting the Charter and every three years thereafter (Article 48); but by 2012, only Algeria, Jordan and Bahrain had done this and there were delays in making the reviews public. On July 1 2013, Qatar submitted its report, the United Arab Emirates followed on October 2 2013, and on September 14 2014 Iraq handed in its report; however, Saudi Arabia has to date not submitted its report.

The Charter comprises a preamble and 53 Articles. In terms of Articles relevant to pre-trial procedures it enshrines the principle of non-discrimination (Article 3) and equality before the law (Article 11). It protects privacy of family, home, and correspondence (Article 21), enshrines the right to liberty and security of persons, prohibits arbitrary arrest and detention (Article 14), torture and cruel, inhuman, or degrading treatments which are considered as crimes not subject to any statute of limitations, and sets out the right to reparation for victims of torture (Article 8) and the humane treatment of persons deprived from their liberty (Article 20). The Charter also provides for a separate judicial system for juveniles (Article 17) (ACHR 2008). According to Akram & Al-Midani, the problem is that the Charter is not effectively enforced. State compliance is monitored by an Expert Committee which receives reports from state parties, but no individual or state

can petition the Committee if there have been violations; nor is there an Arab Court for Human Rights. The Charter will have to be amended if it is to provide a human rights system that is both meaningful and enforceable (2006 p.149). Rishmway comments that there are further problems with the Charter as it does not prohibit punishments that are inhuman and degrading, including the death penalty for children, if the national law allows it; nor does it extend rights to non-citizens in many areas. (2009).

In spite of this, Akram and Al Midani point out that the Arab Charter represents a step forward in the protection of human rights, and in accepting that human rights are universal (2006 p.147). It is the first time that Arab states have adopted unanimously and without reservation a charter that not only affirms this universality, but also establishes protection for a great number of rights on a par with other international and regional instruments. The ACHR 2008 Articles that relate to pre-trial procedure resemble those of the ICCPR. Art. 14 (1) of ACHR and Article 9 (1) of the ICCPR both provide: "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest, search or detention without a legal warrant." Art. 14 (1) requires a 'legal warrant' but it is not clear if that means any enforcement or judicial department can issue that warrant. This would clearly be unsatisfactory and this should be interpreted as meaning 'without a judicial warrant. Meanwhile Article 9(1) of the ICCPR also provides that: 'No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.' Article 14(2) of the ACHR is similar, but additionally provides 'and in accordance with such procedure as is established thereby.'

Art. 14 (3) of the ACHR also uses similar wording to Art.9 (2) of ICCPR and states that " Anyone who is arrested shall be informed, at the time of arrest, *in a language that he understands*, of the reasons for his arrest and shall be promptly informed of any charges against him. *He shall be entitled to contact his family members*". The words in italics are those that are not found in the ICCPR and enlarge the right. Art.9 (2) of ICCPR does not give suspects a right to contact their family, which is a point in favour of the ACHR The first sentence of Art. 14 (5) of the ACHR is exactly the same as the first sentence of Art.9 (3) of the ICCPR which states " Anyone arrested or detained on a criminal charge shall

be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release.’

Article 14(5) ACHR then goes on to provide: ‘His release may be subject to guarantees to appear for trial. Pre-trial detention shall in no case be the general rule.’ This compares to Article 9(3) of the ICCPR which provides that: ‘It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement’. However, the Arabic version of the ACHR is a bit confusing as it states that " He may be released if his detention or arrest is unlawful" , which gives Arab states more leeway over detention.

Art. 16(4) of the ACHR gives the suspect the right to have free legal advice if he cannot defend himself or if the interests of justice so require, and the right to the free assistance of an interpreter if he cannot understand or does not speak the language used in court. However, these rights are not afforded to the suspect at the pre-trial stage. Furthermore, it is not the case that the right to legal advice is guaranteed by the local laws such as the Criminal Procedure Law in Saudi Arabia; indeed, this thesis will show that in law and practice there is no guarantee for the suspect to have a free legal advice. This is similar to the ICCPR Art.14 3(d) and (f).

Art. 14 (7) of ACHR requires that anyone who has been the victim of arbitrary or unlawful arrest or detention shall be entitled to compensation. That is highly optimistic, given the current situation in most Arab states. This thesis will show that in Saudi Arabia there is no easy way to make a claim for compensation when someone has been subjected to arbitrary arrest or detention. It could be argued as having been included to avoid criticism by the UN and non-government organisations. Saudi Arabia signed a Memorandum of Understanding with the OHCHR in 2012.

Art. 16 of the ACHR requires that "Everyone charged with a criminal offence shall be presumed innocent until proved guilty by a final judgment rendered according to law and, in the course of the investigation and trial", which is similar to Art.14 (2) of the ICCPR.

Art. 21 of the ACHR mirrors Art. 17 of the ICCPR and reads: "No one shall be subjected to arbitrary or unlawful interference with regard to his privacy, family, home or correspondence; nor to unlawful attacks on his honour or his reputation". Art.8 of the ACHR also echoes Art.7 of the ICCPR and reads "no one shall be subjected to physical or psychological torture or to cruel, degrading, humiliating or inhuman treatment", but omits that this applies also to punishment after sentencing. The ACHR gives Arab states the right not to comply with the ACHR, in a state of public emergency. Art.4 (2) states: "In exceptional situations of emergency, no derogation shall be made from the following Articles: Arts. 5, 8, 9, 10, 13, 14 Para 6, 15, 18, 19, 20, 22, 27, 28, 29 and 30. In addition, the judicial guarantees required for the protection of the aforementioned rights may not be suspended". This Article undermines the principles of the ACHR as the most important human rights relating to pre-trial procedures in this Charter are in Arts.14 & 21. By allowing derogation states will easily avoid having to abide by these articles. Moreover, the ACHR entirely neglects the right to bail which is required in human rights law internationally. Although non- discrimination has been addressed in the ACHR (Article 3 (1), the preamble of the ACHR calls on signatories to discriminate against those who do not believe in divine religion as it reads "in furtherance of the eternal principles of fraternity, equality and tolerance among human beings consecrated by the noble Islamic religion and the other divinely-revealed religions". This is in contradiction of Article 3 which prohibits discrimination on grounds of religious belief as well as race, colour, sex, language, opinion, thought, national or social origin, property, birth, and disability.

Saudi Arabia signed and ratified the ACHR, and, as is shown above, the ACHR articles for pre-trial procedure are similar to the ICCPR's. Saudi Arabia's rejection of Articles 18 and 19 of the ICCPR (See Chapter 6) need not prevent it from signing and ratifying it (with reservations) and rectifying its reputation for abusing human rights including during pre-trial procedures, such as not informing suspects of what they are accused of, or keeping suspects in detention for unnecessarily long periods. Signing and ratifying the ICCPR would also act as an encouragement to other Muslim nations to follow suit (such

as Oman, United Arab Emirates, Qatar, and Palestine who have not signed or ratified the ICCPR).

It is submitted there is no proper justification to keep Saudi Arabia from signing the ICCPR and reassuring the world and its own citizens of its commitment to human rights. Although, Saudi Arabia has signed and ratified the CDHR 1990 and the ACHR 2008 this is not sufficient to ensure that human rights principles will be adhered to, as these two Charters have been shown to be ineffectual. The Arab Charter does pay lip service to human rights, in that the committee receives reports and comments on them, but there is no mechanism for these rights to be enforced. As the Arab Charter is ineffective in upholding human rights, this thesis will not be examining it in depth as a means of doing so. Having examined briefly the jurisprudential basis of human rights, the next section will demonstrate the origin of human rights in the Islamic tradition in order to identify its roots and why such rights have not been backed up with any effective means of enforcing them.

3. Human Rights in the Islamic Tradition.

Prophet Muhammad received his first revelation from Allah in AD 610. He started teaching his companions that all they needed in life was to behave respectfully and lawfully towards all people. In Islam, the only law is the law of God, and the law of God is the *Shari'ah* [all Muslims believe that Islamic law is intended to serve as the expression of God's will]. Literally 'the pathway', *Shari'ah* is the civil and criminal law of the religion that Prophet Muhammad and his companions followed (the criminal law procedures of pre-trial will be discussed in-depth below). Indeed, 'the term 'Islam' means "submission" and the *Shari'ah* is meant to regulate "daily life, religious activity, social behaviour, financial transactions, and family affairs ... and provides punishment for crimes and civil offences" (Walker 1993 p.863). According to Jones (2013 p.47), it is possible to view *Shari'ah* as an all-encompassing metanorm and philosophy that, to practicing Muslims, is more than just a rule of law; although it acts as a legal system like any common or civil law. It refers to established sources such as the *Qur'an* and the

Sunna in order to make legal decisions and is analogous to human rights law. In spite of this, *Shari'ah* will need to change considerably to come into line with the latter on all matters.

Shari'ah has different applications and interpretations in different Islamic states. Because currently there is no single political or religious institution that can speak for the entire Muslim world; interpretations and applications are often contradictory and controversial. Some of these interpretations are contrary to international human rights standards. Some of the more controversial examples of this are to do with discrimination against women and the concept of *Jihad* or 'holy war' (Moghaddam 2012 p.20). A'n Na'mi & Deing (1990 p.178) also point out that difficulties arise when a human right recognized in international human rights law is not treated in the same way in *Shari'ah*. They give freedom of religious affiliation as an example as, according to *Shari'ah*, an *al-murtad* (a Muslim who repudiates his faith in Islam) is accorded the death penalty if he refuses to return to Islam. Not only this, but according to the influential Hanafi School of jurisprudence, anyone who kills an *al-murtad* is not punished, since disbelief is a legitimate cause for execution. This has ramifications for pre-trial, as an *al-murtad* might die in custody as the result of their treatment there.

Furthermore, women and non-Muslims are not accorded the same level of remedy for violations of their rights, although all Muslim men, women and *dhimis* (protected non-Muslim minorities) all have the right to life. Mayer (2002 p.3) points out some people may consider international human rights standards as alien and distorting when used to evaluate the situation of women in Muslim societies. She also believes that it is important to make a distinction between genuine and principled applications of women's international human rights and those applications which are just politically motivated.

Olowu (2008 p.62) cited Howard who strongly believes that 'the Islamic conception of justice is not one of human rights' Olowu believes that ideas such as those of Howard mean that many acts, such as those of *Al-Qaida*, are mistakenly labelled as being from an Islamic perspective when this is not the case. There are however some academics in

Western countries who open their minds to discuss the ideas of Islam. Olowu (2008 p.63) cited Simonsen as an example who said:

Politically active groups in all parts of the Islamic world, exhausted by political oppression, saluted the growing international focus on human rights from the middle of the 1970s onwards and tried to take advantage of it. Several Muslim intellectuals argued for compatibility between Islam on the one hand and the concept of human rights as defined by the UN on the other. A parallel trend has been the publication of a number of books in which Muslim intellectuals argue that human rights have always been an integrated part of Islam along the lines of the Cairo Declaration''.

Mayer (1995 pp.64-5) contends that 'contemporary endorsement of international human rights by Muslims is more apparent than real', because applying Islamic law under *Shari'ah* will lead to many violations particularly against non-Muslims and women. According to Vogler (2005, p.126), the current Islamic revivalism does not bode well for criminal justice reforms; especially when compared to the progress that has been made with this in other parts of the world. Although many would point to the inability of *Shari'ah* to determine state policy and a lack of strong procedural norms in Qur'anic authority; Vogler believes that a much more important factor in explaining authoritarianism in Islamic state justice has been the almost continuous domination of military regimes in the region.

However, human rights in Islam have a religious aspect in that the norms of Islam are perceived as stemming from a divine source, therefore all right actions and social deeds of Muslims are ordered by God (Awan 2009 p.1)³. This would include the treatment of suspects before trial as well as prisoners. Islamic law has two categories; the first one being commandments for religious and spiritual purposes which include the norms of worship and faith. The second category is the rules and law which organize society. The latter includes criminal and civil law as well as laws relating to the constitution and international laws. The two categories are intertwined in Islam (Khatab and Bouma 2007 p. 94).

³ The Glorious *Qur'an* says: "*Allah commands justice, the doing of good, and liberality to kith and kin, and He forbids all shameful deeds, and injustice and rebellion: He instructs you, that ye may receive admonition.*" [Qur'an, 16:90-91]

Al Awabdeh (2005 p.100) identifies the place of religion and God as the most significant difference between modern Western attitudes and Islamic attitudes to human rights. The former has a secular approach, whilst the latter sees God as the ultimate source of justice, including human rights. According to the *Qur'an*, Islam requires the establishment of human right for all members of a Muslim state; it stipulates over 20 basic human rights, including the right to life, freedom, dignity, social security and protection against harassment. However, these principles were only legally recognized in the West in the aftermath of the French Revolution, whereas they have formed part of Muslim philosophy for over 1,000 years.

Al Awabdeh goes on to suggest that although, Islamic law has a moral-legal autonomy and is not based on legislation arising from international human rights conventions which rely on the acceptance, ratification and adherence of single states, it does not necessarily follow that there is a contradiction between the two (2005 p.101). Muslims generally regard *Shari'ah* as a strong basis on which to socialize their children and give their society and relationships a moral foundation; it thus functions as the Islamic element of local culture and is regarded as a comprehensive and integrated theological, ethical and jurisprudential system despite not being a formally enacted code of positive law (A'n Na'mi & Deing p.178 1990).

Furthermore, there are three principles regarding the basis of the notions of human rights in Islam; *Tawhid* (Unity of God), *Rasal* (Prophethood) and *Khilafa* (Caliphate). A'laMawdudi (1995 p.5) points out that an understanding of these three principles are fundamental to an understanding of Islamic Law. In this section, it is necessary to explain the role of a *Khilafa* in relation to human rights in Islam. *Khilafa* means in Islam the representative of God on the earth, He must follow what the prophet Mohammed received from God and apply it on earth. A group or community can just appoint a *Khilafa* and decide whether he deserves to be the representative of God on the earth (*ibid.*).

“This is the point where democracy begins in Islam; every person in an Islamic society enjoys the rights and powers of the caliphate of God and in this respect all individuals are equal. NO one takes precedence over another or can deprive anyone else of his rights or powers” (*ibid.* p.2).

Islam has laid down fundamental rights that are appropriate to every Muslim, whatever their status or location. In Islam no one is allowed to spill any blood without a strong reason and every person has to have his/her rights without any prejudice or discrimination (*ibid.*, p.8). According to the sacred writings of the *Qur'an*, the soul of every human being deserves respect ‘*We have honoured the progeny of Adam*’ (*Qur'an*, 17:70) which means that God gave every single person on this earth full respect and no one is allowed to demean others.

Islam also laid down the rights of non-Muslims. They are given their rights without prejudice and they have the same rights as Muslims in respect of civil or criminal law. They have the freedom to practice their religious rites and ceremonies in any way they like. Although, the rights that are given are not restricted, they have to respect the legislation of each Muslim country (A’laMawdudi 1995 p.8). Crane points out that it is useful to consider human rights in Islam from legal, political, economic and spiritual perspectives, and it is the first of these that he addresses. This legal perspective on human rights in Islamic jurisprudence, which constitutes the roots (*usul*) of Islamic law (*Shari’ah*), developed over centuries (2007 p.86). Islamic jurisprudence has, as its guiding principles, the *Maqasid* or purposes of Islamic law (Crane 2007 p.88). *The Maqasid* incorporates both spiritual and social principles. According to Laluddin et al (2012 p.112), the *Maqasid* form the basis of Islamic human rights with the avoidance of harm as the focal point. The six higher purposes of securing and preserving religious rights and the right to life, lineage, property, dignity and intellectual rights are seen as essential to the existence and continuation of society and human life.

Malekian (2009 p. 591) points out that there is no serious difference between international and Islamic justice, except for the interests of their exponents and the political power behind their motivations. Pure Islamic justice does not refute logic, theory, norms or the Statute. Some practical virtues of Islamic law are its adaptability, flexibility,

development of justice on case law, as well as its insistence on the use of peaceful means to settle international disputes. The entire Islamic juridical, political philosophy is based on the promulgation of the principles of universal human rights justice. Islamic law "enjoins justice" and judges all man-kind as "a single nation" (*ibid.*). This perspective would suggest that, given that there are no fundamental conflicts in Western and Islamic ideas of justice at the pre-trial stage, there would not be any jurisprudential reasons why suspects could not be afforded the rights they given in international human right law in Islamic legal systems.

Thus, it can be seen that the relationship between *Shari'ah* and international human rights law is complicated and problematic and that many of these problems have more to with fundamentalist interpretations of *Shari'ah* rather than Islam itself. However, to regard human rights as being irreconcilably divided into 'Western' and 'Islamic' would be an end to the concept of universal human rights. As Bielefeldt commented: "the language of human rights would thus simply be turned into a rhetorical weapon for intercultural competition" (2000 p.91). However, it is important to recognize that Islamic law is, largely, a 'jurists' law' and it is specialists in legal science and scholarly handbooks that hold sway rather than the state (Dacey & Koproske 2008 p.16).

Conclusion

The basis of the Islamic notion of human rights lies in the divine revelations of the *Quran* and the Prophetic *Sunnah*, and is contained in *the maqasid* of *Shari'ah* Law. It is a comprehensive system which covers a range of rights, all classes of people and provides a set of values that are appropriate for all eras and geographical locations. Muslims believe that because these rights are rooted in divine sources they have the strength and durability which make them applicable both nationally and internationally. Having said this, there are fundamental issues of equality which need to be addressed if there is to be reconciliation between international human rights law and *Shari'ah*. Principles contained in universal human rights are at odds with the values of traditional caste societies, which need to be transformed so as to contain the idea that all humans should be treated humanely and with equality before the law. This thesis suggests that this can be in part

accomplished by overhauling the pre-trial procedures in Saudi Arabia's Code of Practice. More discussion on this topic will be presented in Chapter 6 and 7. The next chapter meanwhile aims to compare procedural rights at the pre-trial stage in international human rights law and *Shari'ah*, in order to examine the extent to which there is harmony and conflict between them.

Chapter Three

Procedural Rights at the Pre-trial Stage in International Human Rights Law and *Shari'ah*

Introduction:

This chapter will examine Islamic principles of human rights, in particular to demonstrate whether there is any conflict between these and the principles expounded in international human rights law. The chapter goes on to explore specifically the rights which pertain to pre-trial procedures. With respect to Islamic law there are simply general principles which can be applied to pre-trial procedures, such as the right to privacy. International human rights law has both general principles, and specific regulations. According to Islam, human rights come from God and it is important to understand the Islamic tradition from this perspective; both in terms of how it is that these general principles inform *Shari'ah*, and with respect to the difficulties involved in making accurate translations across cultures.

The aim of this comparison is to show how pre-trial procedures, derived from the Police and Criminal Evidence Act (1984) PACE are in accordance with international human rights law and would not be in conflict with the spirit of Islamic law. The chapter will first consider pre-trial procedural rights in the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights (ECHR) as the two most established civil and political rights instruments at both the international and European levels before comparing and contrasting with *Shari'ah*, it will then proceed to discuss the same rights from the perspective of *Shari'ah*.

I intend to examine the provisions contained in the ICCPR, and ECHR with regards to specific rights. It should be noted that these rights focus on the right of the suspect to have their human rights respected. These rights are often contrasted with the 'right' of the

community to be protected against crime by the successful detection and prosecution of criminals. However, although there is a difference of focus, these rights are not in conflict with each other. The public's need for protection is best served by an efficient police force, this does not mean a police force that is willing to abuse the rights of suspects. It is arguably in the interests of everyone to have a humane police force that is seen as fair and accountable. I will also show how these treaties have limited powers in enforcing the rights encapsulated in them on their signatories. Saudi Arabia has not signed, or ratified, the ICCPR (See Chapter 2); and there are still major problems in ensuring that detainees are given their rights at the pre-trial stage of criminal investigation.

This thesis aims to show how the principles of human rights contained in *Shari'ah* are not in conflict with those of International Human Rights law in terms of the treatment of suspects and detainees at pre-trial. The following discussion highlights the importance of not only establishing clear definitions of these rights, but crucially ensuring that they are reflected in clear guidelines controlling actual police behaviour. Given the large cultural difference between countries, international definitions are wide so as to encompass this. Individual states need to make sure that rights relate to the situation in their country and that those enforcing the law have clear codes of practice.

1. Procedural Rights at the Pre-trial Stage in International Human Rights Law.

In this section, I will explore and examine international human rights treaties with regard to pre-trial procedural rights, focusing on in particular the right to liberty, the right to legal assistance, the right against ill-treatment, the right to privacy, the right to bail and the right to an effective remedy.

1.1. The Right to Liberty.

Detention is the procedure most likely to usurp a person's freedom for a period of time, especially as the principles of international law provide that the accused is innocent until proven guilty by the judgment of a court. For this reason, international treaties such as the

ICCPR and ECHR require that arrest and detention only occur when necessary, and for this to have both public and private guarantees. The public guarantees state that any person whose freedom is restricted should be treated in a manner that preserves their dignity and may not be abused or caused psychological harm (ICCPR and ECHR). The principles of international human rights law in relation to these matters will be discussed next.

Article 9(1) of ICCPR, which mirrors Article 5 of the ECHR⁴, stipulates: “Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law...” (ICCPR). In relation to the right to liberty, Art. 9 does not require complete freedom from arrest or detention. Article 9(1) of the ICCPR guarantees two distinct rights: liberty and security of person. The discussion here is concerned only with the right to liberty, as security of person will be discussed under the right against ill-treatment. Art.14 (1) of ACHR guarantees these rights, but still needs some amendments to be equivalent to the ICCPR and ECHR

In the following section, the prohibition of unlawful deprivation of liberty and the procedural safeguards designed to protect the right to liberty under Article 9 of the ICCPR and Article 5 of the ECHR are discussed.

1.1.1. The Prohibition of Arbitrary and Unlawful Deprivation of Liberty.

Article 9 of the ICCPR requires that any deprivation of liberty must not be arbitrary. Furthermore, deprivation of liberty must be reasonable, proportional and non-discriminatory. Joseph *et al* point out that, according to Article 9, depriving someone of their liberty is only allowed if it is ‘in accordance with procedures as are established by law’; and that this law and its enforcement should not be arbitrary. Hence, under the ICCPR, ‘arbitrariness’ is ‘a principle above, rather than within, the law’ (2000 pp.211-212). Article 9 does not however list permitted exceptions. This is in contrast to Article 5

⁴ Art.5 of the ECHR addressing the same rights of liberty and security of person reads: “Everyone has the right to liberty and security of person. “No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law...”

(1) (f) which provides ‘for lawful; arrest or detention of a person to prevent his effecting an unauthorised entry into the country, or of a person against whom action is being taken with a view to deportation or extradition’. It does give the state powers to detain in particular circumstances, without seeming to refer to the necessity of detention’ (Edward 2011 pp.22-23). Michaelsen notes that the European Convention permits detention on condition that it is ‘in accordance with a procedure prescribed by law’. For example, Article 5 (1) (f) specifically allows for lawful; arrest or detention (2005 p.133).

Kessler (2009 p.593) points out that detention could be deemed unlawful and arbitrary if the detainees are kept in custody over time, even with reasonable suspicion. He cites the example of the 9/11 detainees such as Khalid Shaik and Golam Rohany, who were arrested with reasonable suspicion and are still being held in detention even though the US government is incapable of finding sufficient evidence to put them on trial. This custody procedure regulation fails to adequately guard against arbitrary detention as required by Article 9(1) of the ICCPR. The US has had to answer charges of widespread human rights violations at the United Nations in Geneva. It claims that it has met fair trial standards and properly monitored its surveillance agencies. The UN Human Rights Committee had criticised the US for racial discrimination among other human rights violations at Guantanamo. (The Guardian 14, March, 2014).

The problem here is that Article 9 of ICCPR is not sufficiently explicit about which grounds are accepted for a detention, it just requires that the detention must be for a reason. With regard to illegal entry, the Human Rights Committee (HRC)⁵ has nonetheless clarified that ‘without such factors (as reasonable suspicion) detention may be considered arbitrary’ (HRC).⁶ Thus if the domestic law contains policy guidelines

⁵ The Human Rights Committee is the body of independent experts that monitors implementation of the International Covenant on Civil and Political Rights by its State parties. All States parties are obliged to submit regular reports. States must report initially one year after acceding to the Covenant and then whenever the Committee requests (usually every four years). The Committee examines each report and addresses its concerns and recommendations to the State party in the form of "concluding observations.

⁶ Human Rights Committee, General Comment 8, Para 1 (16th session (1982).

which are not adhered to with regard to detention, this can and has meant that a challenge to the detention can be made, as Article 9 does not provide the State with an automatic power to detain (Edward 2011 p. 23). Clements *et al* note that although the issue of whether detention is in breach of domestic law is mainly a question for the national courts, it is also subject to scrutiny by the European Court (1996 p.141). In *Koroleva v. Russia* (1600/09)⁷, the court stated that the applicant had not, according to national law, committed a criminal offence, that of large-scale drug trafficking. She was, however, detained unlawfully for a long time whilst the investigation dealt with her co-offender. In the light of this, her detention was a violation of Article 5 (1). Proportionality of detention refers to the duration in custody, which should be reasonable, and in the case of *Koroleva*, it was deemed not to be as her detention was simply while waiting for another to be processed.

Another problem that Kessler points out is that the meaning of the word 'arbitrary' is somewhat vague. It does not just refer to detentions that are unlawful, but also to any that could be deemed 'unjust, unpredictable, capricious or disproportionate'. Factors such as the passage of time or the lack of a warrant could turn a lawful detention into an 'arbitrary' one (2009 p.581). For this reason a clearer definition of what is meant by 'arbitrary' is established by case law. Martin (2012 p.14), comments that the wording of the list in Article 5 (1) is confusing. This has prompted much interpretation of the list, as the State Parties have understandably wanted to know all the circumstances in which a detention might be thought 'arbitrary'. She also adds Article 5 (1) (c) can be characterised, without probably overdoing it, as one of the most unfortunate of the ECHR in terms of understanding of what is set forth. Still after almost sixty years since it was drafted, there is seldom consensus as regards the exact purpose, meaning and scope of this phrase (*ibid.*).

Article 5(1) recognises that the 'right to liberty' cannot be absolute, and paragraphs (a) to (f)⁸ list situations where it is possible to detain someone in the public interest. Some

⁷ *Koroleva v. Russia*, (1600/09) ECHR 13 November 2012.

⁸ Art. 5(1) a. the lawful detention of a person after conviction by a competent court; b. the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

cases, such as the detention of a convicted criminal in a mental hospital, would fall under both sub paragraph (a) and (e). Furthermore, under Article 15 of the Convention, it is possible to derogate from Article 5 in times of emergency. It provides that the State party does not lawfully detain a person unless the reason for the detention is in the list set out in Article 5(1). These reasons include detaining someone who has been convicted by a court or has been arrested as well as situations such as the educational supervision of a minor, to prevent the spread of infection, when someone is of unsound mind or when someone is going to be deported or extradited (ECHR). As well as being a test for the legality of a detention, this Article also provides detainees with a set of procedural safeguards to ‘ensure speedy and effective judicial determination of the justification of detention’ (Starmer *et al* 2001 p.19).

Starmer *et al* comment that although Article 5(1) (b) and (c) do allow detention in order for a suspect to be brought to court when there is reasonable suspicion of a crime having been committed, the European Court has resisted a wide interpretation of this, stipulating that there must be specific and concrete reasons for detention (2001 p.95). The case of *Ghiurău v. Romania* (55421/10)⁹, shows that the intention behind the detention is important. The Court reiterated that the police should seek to obtain sufficient evidence to bring charges either at the time of arrest or when the suspects were in custody, even though the applicants were subsequently neither charged nor taken to court. It may have been difficult to obtain evidence or to produce it in court without possibly endangering

c. the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

d. the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority; e. the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

f. the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

⁹ *Ghiurău v. Romania*, (55421/10) ECHR 20 November 2012.

the lives of others. In this case, the police were deemed to have acted in good faith and in accordance with paragraph (1) (c). Starmer *et al* point out that, in contrast, there have been cases where the European Court has decided that the UK was in breach of (1) (c); for example (Ireland v UK (5310/71) (2001 p.98). In spite of noting that ‘terrorist crime falls into a special category as police are obliged to act with the utmost urgency’, the Court ruled that, in the case of *Ghiurau v. Romania*, simply detaining someone because of previous convictions for terrorism was not a sufficient basis for reasonable suspicion.

Although Article 5 (1) (c) does recognise that detention can be used to prevent a crime being committed, it does not give a general authorization for preventative detention. In a case concerning the pre-trial procedures carried out by the British in Northern Ireland from 1971-5 (*Ireland v UK* (5310/71))¹⁰, the European Court held that internment ‘simply for the preservation of peace and the maintenance of order’ did not fall within the Article’s remit unless there was some belief that an offence had been committed.

Clement *et al* consider that there is a difference between arrest and ‘helping the police with enquiries’. To some extent, what constitutes ‘deprivation of liberty’ is subjective and the personal circumstances of each suspect are relevant. Just because someone initially consents to go to the police station, this does not mean that this is not deprivation of liberty (1999 p.140). This is especially true when the suspect may not be entirely clear about why they are being taken to police station.

In conclusion, the ICCPR, ECHR and ACHR all stipulate that detention must conform to national as well as international law. However, if domestic legislation permits detention which is in breach of international human rights norms this is a violation of Article 9(1) of the ICCPR which prohibits any unlawful and arbitrary form of detention without listing specific grounds, as does Article 5 of the ECHR. The right to liberty is guaranteed in *Shari’ah* and is closely linked to the right to know why one has been arrested. The next section looks at this right.

¹⁰ Ireland v. United Kingdom, (5310/71) ECHR 1 18 January 1978.

1.1.2. The Right to Know the Reason for Arrest and What Charges are Being Brought.

Suspects need to know what the exact charges are because, at the moment of arrest, they are very vulnerable. Many people do not know their rights and may not even know they can remain silent or ask for a lawyer, let alone clarify what exact charges are being brought. It is for this reason that protective legislation has been adopted internationally.

Article 9 (2) ICCPR states: " Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him". It provides for the right to be informed of the grounds of arrest so that all persons arrested should know the reasons for being deprived of their liberty. Joseph et al argue that it is not enough, for example, to tell someone that they are being arrest for 'security reasons'; the person needs to know the reason more precisely (2000 p.219). Kessler (2009 p.582) points out that the notification of charges must be specific, to give the arrestee a chance to defend him or herself against the charges.

Similar to Article 9 (2) of ICCPR is Article 5(2) of the ECHR, also Art.14 (3) of the ACHR which requires that the arrested person be informed promptly 'in a language he understands' of the reason for his arrest, he must be told in 'simple non-technical language ... the essential legal and factual reasons for his arrest'. This is so that individuals can challenge the legality of their detention. Just being told that they are being held under the provisions of emergency legislation is not enough. In the case of *Miranda v Arizona* 384 U.S. 436 (1966)¹¹, it was held that one of the reasons a person is 'entitled to know what are the facts which are said to constitute a crime on his part' is in order to make a proper defence and not simply deny the charge. The suspect should be informed of sufficient relevant details, such as where and when the offence occurred and any facts that are said to constitute the offence. Sometimes, just stating what the alleged crime is not sufficient. Starmer *et al* point out that the police must obtain sufficient details of the case before making an arrest. However, in the case of suspected terrorism, delaying

¹¹ *Miranda v Arizona* 384 U.S. 436, 10 Ohio Misc. 9, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

the reason for arrest for a few hours may not be deemed a violation of Article 5 (2001 pp.100-1).

The ICCPR and ECHR require that all arrested persons should be informed promptly in a language they can fully understand. However, the language of Article 9(2) is vague and the provision does not state clearly if this applies to both criminal arrests and detentions which are for non-criminal reasons such as immigration or for reasons of mental health (Kessler 2009 p.596). In the case of *Kamel Rakik v. Algeria* (1753/2008)¹², the respondents' State was found to have breached numerous sections of the ICCPR. One violation concerned the fact that Kamel Rakik was arrested by plain-clothed police officers, without a warrant, and without being informed of the reasons for his arrest, or of the facts of the crime, including the identity of the victim. The Committee held that under Article 14 (3) the accused has the right to be informed promptly about why an arrest is being made against him. As this only applies to people who have been formally charged, the Committee held that Kamel's situation was in violation of Article 9 (2) of the ICCPR.

Clements notes there is some flexibility in the application of Article 5 (2) of the ECHR. If it can be shown that the accused could not fail to understand why he or she was being arrested and what the legal and factual grounds of that arrest were, then there is no absolute requirement for that to be given in writing (1996 p.146). Harris *et al* note that there is some overlapping of Article 5(2) and (4) and Article 6 (3) (a) of ECHR. The latter stipulates that a detainee must be promptly told of the nature and cause of any accusations which are being made. Because this is intended to allow the accused to prepare a defence, it requires a more detailed explanation of reasons (1995 p. 131).

To conclude, any person arrested or detained must be told promptly and in simple language the essential factual and legal basis for the detention. This will enable detainees to apply to challenge the lawfulness of the detention if they so wish. Whether the obligation is met will be determined in the light of all the circumstances of each case.

¹² *Kamel Rakik v. Algeria* Communication No. 1753/2008, U.N. Doc. CCPR/C/105/D/1753/2008.(2012).

Article 9(2) of ICCPR and Article 5(2) of ECHR applies in respect of everyone who is arrested or detained. The right to inform the suspect about the reason of arrest is recognized by *Shari'ah*.

1.1.3. The Right to be Brought Promptly Before a Judicial Officer.

Article 9, Para 3 of the ICCPR stipulates: “Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial”. The wording of Article 9(3) makes it clear that it is the obligation of the State to bring the arrested or detained person promptly before a judicial officer. One of the keys to interpretation of Article 9(3) is the meaning of the word ‘promptly’.

In the case of *Marques v. Angola* (1128/2002)¹³ the HRC found that Angola had violated Articles 9 of (ICCPR), on the basis that, *inter alia*, Marques’s arrest and detention were not reasonable or necessary; his incommunicado detention denied him the right to be brought before a judge; and he was denied counsel at an initial stage, as well as his right to *habeas corpus*. Thus, it cannot be argued, where the arrested or detained person has not been brought promptly before a judicial officer, that Article 9(3) has not been violated because the arrested or detained person did not request the review of his arrest or detention. The wording of this provision is strikingly similar to that of Article 5(3) of the ECHR,¹⁴ also similar to Art.14 (5) of ACHR which reads " Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a

¹³ *Marques v. Angola* (1128/2002) Human Rights Committee (UN Doc. A/60/40, Vol. II at 491).

¹⁴ Art.5 (3) reads “Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial”.

reasonable time or to release. His release may be subject to guarantees to appear for trial. Pre-trial detention shall in no case be the general rule".

The European Court of Human Rights in Strasbourg has decided what ‘promptly’ should mean, depending on the facts of each case. For example, in *Brogan and others v UK* (11209/84; 11234/84; 11266/84; 11386/85)¹⁵, a delay of four days and six hours was considered a breach of Article 5(3), even in a terrorism case. The applicants were released without charge after being questioned for that length of time. The Court held that this was not in keeping with the concept of ‘*aussitôt*’ (the French equivalent of ‘promptly’), which demonstrates that there is a limited degree of flexibility attaching to the idea of what ‘promptness’ consists of (Harris et al 1995 p.134).

The fact that Article 9 (3) considers detention to begin from the moment of arrest, suggests that this article applies to all deprivation of liberty for the purposes of criminal law enforcement, regardless of whether there has been a charge or not. Alternatively, ‘charge’ within the meaning of Article 9(3) is to be given an autonomous meaning similar to that of the concept of ‘charge’ under Article 14 of ICCPR, which considers a person to be charged for the purpose of Article 14 once he has been subjected to the State’s coercive powers (i.e., arrested), regardless of whether or not he is considered to be formally charged under the domestic law. This is also similar to the wording of Article 5(3) of the ECHR.

Schomburg (2009 p3.) notes that limiting the period between initial detention and appearance in court to approximately three days complies with Article 9 (3) of the ICCPR and, detention of four days or over, even in complex cases is a breach of the Article. In *Freemantle v. Jamaica* (625/1995)¹⁶ an *incommunicado* detention for a period of four days was found to be in violation of Art 9(3) of the ICCPR and in *McLawrence v. Jamaica* (702/1996)¹⁷ the Human Rights Committee explicitly referred to its General

¹⁵ *Brogan and others v UK* 11209/84; 11234/84; 11266/84; 11386/85) ECHR 29 November 1988.

¹⁶ *Freemantle v. Jamaica*, Communication No. 625/1995, U.N. Doc. CCPR/C/68/D/625/1995 (2000) (an *incommunicado* detention for a period of four days was found to be in violation of Art 9(3) of the ICCPR).

¹⁷ *McLawrence v. Jamaica*, Communication No. 702/1996, U.N. Doc. CCPR/C/60/D/702/1996 (1997) (the Committee explicitly referred to its General Comment No. 8 and found a violation of art. 9(3) due to a delay of one week before an initial appearance occurred).

Comment No. 8¹⁸ and found a violation of Art. 9(3) due to a delay of one week before an initial appearance occurred¹⁹. Such delays are also considered not to comply with the ECHR - Article 5(3) by the European Court of Human Rights. The right to be brought promptly before a judicial officer does not feature in *Shari'ah* as the pre-trial procedure at the time it was formulated was short and limited to questioning of defendants by judges. The ICCPR and the ECHR, however, stipulate that suspects must not be detained for longer than necessary. Being in detention is stressful and having legal assistance can do much to reassure the detainee. This right is examined next.

2.2. The Right to Legal Assistance.

The right to legal assistance is guaranteed under Article 14(3) (b)&(d) of the ICCPR, which states " In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing; (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it". These provisions mirror those in Article 6(3) of the ECHR. Art. 16 of ACHR guarantees the legal advice to the suspect even though it is not clear in which stage (pre-trial or in trial). Two issues will be addressed next as follows: the scope of the right to legal assistance; and the condition for the eligibility for free legal assistance.

1.2.1 The Scope of the Right to Legal Assistance.

Paragraph 14 (3) (b) of the ICCPR requires that once the accused chooses his legal assistance, he must have 'adequate time and facilities' in order to prepare his defence.

¹⁸ Human Rights Committee, General Comment 8, Article 9 (30 June 1982).

¹⁹ See also *Kurbanov v. Tajikistan* (1096/2002) (a period of seven days before an appearance before a judicial officer was found to be incompatible with the ICCPR).

Article 14 guarantees to give the accused ‘equality of arms’ to ensure a fair trial. However, ‘adequate time’ depends on the circumstances of each case. If the accused did not have enough time with his or her legal assistance, counsel can request to postpone the trial. “Adequate facilities” means that the accused and the lawyers should have access to all the evidence and materials that the prosecution plans to produce in court against the accused (Zhang 2009 p.p.40-41). In case of *Zhuk v. Belarus* (1910/2009)²⁰, the applicant was arrested for murdering two people. He was allowed to see his lawyer for just five minutes; and was executed in 2010. The HRC ruled that he was not allowed sufficient time with his lawyer in violation of Article 14 3 (d) of the ICCPR.

However, Article 14 does not give a clear and specific right to the accused of access to all the evidence and materials used in the preparation of the trial against him in a language he can understand. *V. P. (not represented by counsel) v Russian Federation* (1627/2007)²¹ case dealt with this issue. The Human Rights Committee noted that although the defence must have an opportunity to study the documentary evidence, this does not give automatic right to the accused to have translations of all the documents. It is enough that the defendant’s counsel understands the documents.

Article 6 (3) (b) of the ECHR has the same wording as Article 14 of the ICCPR that the accused has the right to be informed in the language he can understand; be given the reasons for the accusation in adequate time and facilities for the preparation of their defence, and the right to disclosure of evidence. The principle of “equality of arms” underlines the right against undue haste in prosecutions and the right to adequate facilities for preparation of a defence. An application’s access to evidence, facilities and lawyers is restricted to what is necessary for the defence (Kempen 2010 p.15). In *Penev v. Bulgaria* (20494/04)²² the applicant had not been given the opportunity to defend himself against the charge. The European Court of Human Rights considered that subparagraphs (a) and (b) of Article 6 § 3 were connected and that the right to be informed of

²⁰ Human Rights Committee, Communication No. 1910/2009. Views adopted by the Committee at its 109th session (14 October – 1 November 2013).

²¹ Human Rights Committee, General Comment No.32 (27 July 2007).

²² *Penev v. Bulgaria* (20494/04), ECHR (7 January 2010).

the nature and the cause of the accusation must be considered in the light of the accused's right to prepare his defence. Therefore, the European Court found that Article 6(3) (b) was violated.

Not giving the suspect the right to have access to his lawyer from the start of the interrogation, could be seen as an opportunity for the police extract a statement under duress. The emphasis throughout is on the presence of a lawyer as necessary to ensure respect for the right of the detainee not to incriminate himself. However, there is room for a restriction of the right of access to a solicitor during the police interrogation, but only if there are compelling reasons in the light of the particular circumstances of the case which make the presence of a solicitor impracticable. The denial of access to a lawyer from the outset of the detention of a suspect may violate Article 6 of the ECHR whether or not this has harmed the case of the defence. This has given rise, in both cases, *Salduz v Turkey* (36391/02)²³ and *Cadder v HM Advocate* UKSC 43²⁴ to the European Court of Human Rights unanimously holding that there had been a violation of Articles 6(1) and 6(3)(c) ECHR. In the case of *Salduz*, because he had not had the benefit of legal advice when he was in police custody. In the case of *Cadder*, The Supreme Court of United Kingdom held that *Cadder's* rights was not compatible with European Convention on Human Right because he had been denied access to a solicitor before he was interviewed by the police in Scotland, and was therefore unlawful in terms of the Scotland Act 1998. As a result, Scottish police must offer suspects the opportunity to consult with a lawyer, not just before they interview the suspect, but throughout the whole process of investigation should the suspect so request.

1.2.2. Legal Aid.

In some countries such as the UK, legal aid is provided in both criminal and civil cases. State funded legal aid is a right that is based in Article 14 of the ICCPR, Article 6 of the

²³ *Salduz v Turkey* (36391/02) ECHR November 2008.

²⁴ *Cadder v HM Advocate* [2010] UKSC 43, 2011 S.C. (U.K.S.C.) 13.

ECHR and Art.16 (3) of the ACHR. According to this, state-funded legal aid is awarded on the basis of means and/or merits tests and the ‘interests of justice test’ (Burmitskaya 2012 p.28). In England and Wales there have been cuts which have affected the possible quality of this legal aid and this has sparked a heated debate (See Chapter 5).

Paragraph 14 (3) (d) of the ICCPR guarantees that the accused has the right to have free legal assistance in the interests of justice; unless he or she has the ability to pay for it. In Para. 11 of the General Comment N13²⁵, the Human Rights Committee referred to the right to free legal aid envisaged in Article 14 (3)(d) of the ICCPR, pointing out that the State parties should undertake the necessary arrangements to ensure that legal assistance is available to those who are not able to pay for it. However, the accused is provided with legal aid depending on the gravity of the offence. For example, for serious crimes, lawyers must be appointed at all stages of the investigation (Zhang 2009 p.41).

Joseph noted that not all state reports to the HRC have dealt with all aspects of the right of defence as defined in subparagraph 3 (d). The Committee has sometimes lacked sufficient information about the details of how the accused was charged with the crime, such as the procedures taken to provide the accused free legal assistance. The accused and his or her counsel have the right to employ every available defence and to complain if they feel the case is not being conducted fairly. These rights are even more important if the case is held *in absentia* (2000 pp.316-317).

1.3. The Right Against Ill- Treatment.

Article 7 of the ICCPR stipulates: “no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation”. Similarly ECHR Article 3 states "No one shall be subjected to torture or to inhuman or degrading treatment or punishment". The ICCPR, the ECHR and Art.8 of the Arab Charter of

²⁵ Human Rights Committee, General Comment 13, Article 14 (21st session, 1984), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 14 (1994).

Human Rights (ACHR) prohibit self-incrimination that results from torture, inhumane and degrading treatment. Everyone is supposed to be innocent unless proved otherwise. This section will discuss the rights against ill treatment.

The prohibition of torture is codified in the UDHR (Article 5), the ICCPR 1966 (Article 7) and Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (CAT), and also in regional treaties such as ECHR (Article 3), the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (HREA) 1975, the ACHR (Article 8), the Inter-American Convention to Prevent and Punish Torture 1987 and the African Charter on Human and Peoples' Rights 1987 (Article 5). It also appears in some legally non-binding but morally authoritative instruments, including the Standard Minimum Rules for the Treatment of Prisoners 1955, the Basic Principles for the Treatment of Prisoners 1990, the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment 1988, the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (1990), and the Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1999). Torture is also absolutely prohibited by various provisions of the 1949 Geneva Conventions, in particular their common Article 3. Furthermore, the Rome Statute of ICC defines torture as a "crime against humanity" when it is knowingly committed as part of a widespread or systematic attack against any civilian population (Nowak 2005 p.90).

Protection from torture (Article 7) is one of the few absolute rights in the ICCPR; no restrictions are permitted and it is a non-derogable right. The ICCPR specifically forbids self-incrimination on these grounds, protects against arbitrary search, seizure or interference with privacy as well as torture and cruel and degrading treatment. It requires the presumption of innocence and that suspects are not deprived of their freedom pending trial unless this is necessary (Ricketts 2004 p.177).

Waldron notes that Article 7 (ICCPR), Article 3 (ECHR) and Common Article 3 of the Geneva Convention all seek to establish and enforce norms against outrages on personal

dignity (2010 p. 200). In General Comment 20²⁶, the HRC expands upon the meaning of Article 7. It confirms that Article 7 aims to protect the dignity of individuals as well as their physical and mental integrity. The State is responsible for preventing all acts prohibited by Article 7 and punishing the perpetrators whether these are acting in their official capacity or as private individuals. Article 7 extends to both acts and omissions. An example of the later could be the denial of food. It can also be breached by acts that unintentionally cause pain and suffering, although the intention to hurt must be present if the act is to class as ‘torture’. Indeed, the HRC has stated that various ill-treatments can be categorised by their purpose (Joseph et al 2006 p.157).

In *Rojas Garcia v. Colombia* (687/96)²⁷, a search party mistakenly stormed the home of the complainant at 2 am, verbally abusing and terrifying the man and his family, including young children. It turned out that the search party meant to search another house, and they had no particular intention to harm the complainant or his family. The Human Rights Committee therefore decided that there has been a violation of article 7 of the Covenant in this case. As well as intention, it is important to note the personal characteristics of the victim are relevant in deciding if Article 7 has been breached. In *Vuolanne v. Finland* (265/87)²⁸, the HRC²⁹ stated that whether an act falls under the scope of Article 7: “depends on all the circumstances of the case...the duration and manner of the treatment, its physical or mental effects as well as the sex, age and state of health of the victim”. Thus, what might be considered degrading and inhuman treatment for a child may not be considered the same for an adult.

Definitions of ‘inhuman or degrading treatment’ or ‘punishment’, which Article 7 prohibits, have not been given by the HRC. If Article 7 is found to have been violated,

²⁶ General comment No. 20: Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment) (44th session 1992).

²⁷ *Rojas Garcia v. Colombia* (687/96) Human Rights Committee HRC (16 May2001).

²⁸ *Vuolanne v. Finland* (265/87) (1989) UN Doc CCPR/C/35/D/265/1987, (1989) HRC 8, (96 ILR 649, IHR 2460 (UNHRC 1989), 7th April 1989, Human Rights Committee.

²⁹ *ibid.*

the HRC generally have not specified which part. Paragraph 4 of the HRC's General Comment 20 notes: 'The Covenant does not contain any definition of the concepts covered by Article 7, nor does the Committee consider it necessary to draw up a list of prohibited acts or to establish sharp distinctions between the different types of punishment or treatment; the distinctions depend on the nature, purpose and severity of the treatment applied' (HRC).

Article 3 of ECHR declares that "no one shall be subjected to torture or to inhuman or degrading treatment or punishment"; this is pertinent to how someone is treated at the point of investigation, detention or imprisonment. In *Özen v. Turkey* (46286/99)³⁰, the applicant complained under Articles 3 of the Convention that he had been subjected to ill-treatment while in detention in the Şırnak provincial gendarmerie command. He was stripped naked and beaten. He was also deprived of food and water and was prevented from going to the toilet. The applicant was kept in a small and dark cell. The Court reiterated that Article 3 of the Convention ranks as one of the most fundamental provisions in the Convention, from which no derogation is permitted. It also enshrines one of the basic values of the democratic societies making up the Council of Europe. The Court found a violation of Article 3 of ECHR. Thienel notes that because Article 3 includes a duty to protect persons from being tortured, it is not in a state's interests to expel or extradite a suspect to a state which might use torture, even if they believe that such an action would produce useful evidence (2006 p.361).

In conclusion the torture and inhuman and degrading treatment of detainees is a significant issue and prohibited in the ICCPR and ECHR. also in the African Charter on Human and People's Rights and the Inter-American Convention on Human Rights, also in the Arab Charter of Human Rights in Article 8. *Shari'ah* also prohibits torture of suspects, seeing this loss of dignity as a serious matter. After illustrating how ill-treatment is forbidden in the ICCPR and ECHR, the presumption of innocence while detaining the suspect is next examined.

³⁰ *Özen v. Turkey* (46286/99), ECHR (11 January 2011).

1.4. Police Conduct during interrogations.

The Police and the prosecutions have the responsibility of proving the charge beyond reasonable doubt and defendants have the right to be treated in accordance with the principle of international human rights . The presumption of innocence, the right to silence and the right against self incrimination will be discussed next.

1.4.1. The Presumption of Innocence.

Due to terrorist threats and reports of serious crimes, governments are under pressure to be seen to be addressing these issues. Ashworth points out that this can be at the expense of considerations of constitutional rights, such as the presumption of innocence (2006 p.276). As Ferzan comments, the requirement that the State treats its citizens ‘with a degree of trust unless and until they are found guilty of a crime’, leads to concerns that treating groups of people with suspicion goes against the constitution (2014 p.515). A definition of the presumption of innocence is that it is the prosecution who has the responsibility to prove that the accused has committed the elements of the offence beyond reasonable doubt (Ashworth 2006 p.258). Ferzan makes a distinction between probatory presumption of innocence whereby the jury simply starts with the assumption that there is no evidence of guilt; and material presumption of innocence where the jury begins with the assumption that the accused did not commit the act (2013 p.512).

In the case of the privilege against self-incrimination and the right to silence, these can be seen as separate to the presumption of innocence, in that the right to silence involves no negative inferences being made from the silence of the accused, where the latter concerns the need for the prosecution to prove the guilt of the defendant and not how this guilt was proved. Ashworth however, points out that if a law allows for adverse inferences being made from a defendant’s silence this can diminish the prosecution’s burden of proof. Furthermore, the defendant’s refusal to answer questions was at a previous stage of the investigation when the case against the accused was yet to be made and when there was a considerable difference in power between the suspect and the police. For this reason there is a relationship between these rules (2006 p.256)

The presumption of innocence is contained in the ICCPR Article 14(2) "Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law". The prosecution has the responsibility of proving the charge beyond reasonable doubt and defendants have the right to be treated in accordance with this principle. Mahoney comments that this acts as a procedural guideline for courts and is also important in determining how evidence is collected. It places the burden of proof squarely onto the prosecution and gives the benefit of the doubt to the accused (2004 p.120). However, as noted by the Human Right Committee in General Comment 13³¹, the concept of presumption of innocence is often accompanied by conditions that render it ineffective or expressed ambiguously. This is why it is important for States to prohibit any methods of investigation that could be construed as putting undue pressure on a suspect to make a confession or testify against him or herself. A suspect's guilt can only be presumed when the charge has been proved beyond any reasonable doubt and a final judgement has been made. It is the responsibility of the State to prove guilt and, as such, the bias is in favour of the suspect because innocent people must be protected from wrongful conviction, even if some guilty ones might escape being convicted (Naughton 2011 p.41). In matters of granting bail or remanding in custody prior to trial, European human rights law states that a presumption of the innocence of the suspect must be made and strong reasons have thus to be given for any deprivation of liberty as it is the duty of the State to acknowledge that the suspect has a legal status of innocence at every stage of legal proceedings before they are convicted (Ashworth 2006 p244).

Following from this, it appears that the presumption of innocence is not just about the burden of proof being on the prosecution, but that all pre-trial procedures should be conducted as if the suspect were innocent. Ashworth notes that it is the latter that underpins the restraints on how the suspect can be treated during the investigation (2006 p.243) Ferzan comments that as it is only at trial that evidence is weighed up so as to determine guilt the defendant, the treatment of the suspect as innocent is a fundamental part of due process (2013 p.514).

³¹ Human Rights Committee, General Comment No. 13: Article 14 (Administration of Justice), 21st session (1984).

The rationale behind the presumption of innocence has been classified by Ashworth as follows: Firstly, in the matter of censure and punishment, being wrongly convicted is ‘a deep injustice and a substantial moral harm’ (2006 p.248) and avoidance of this underlies the importance of having a fair trial. As it is impossible to remove any possibility of error, there are instead procedural procedures, including the presumption of the suspect’s innocence and the placing of the burden of proof on the prosecution. Linked to this is the fact that it is very difficult to establish what the truth is, especially as evidence is often given much later and humans are often fallible. Thus, when there is a choice between acquittal of the innocent and convicting the guilty, the justice system should lean towards the former. No one, including the victims of crime has an interest in convicting the innocent. Thirdly, the State’s respect for the dignity and autonomy of the individual should be paramount in a democratic society. Thus the State needs to show that it has acceptable reasons for interrogating someone and for charging them with an offence. It should not be the responsibility of the citizen to answer charges until the prosecution has produced sufficient evidence to make a case; nor should they be liable to conviction until their guilt is proved beyond reasonable doubt. Finally, the prosecution having to prove guilt beyond reasonable doubt reinforces the values described above. Making the level of proof ‘beyond reasonable doubt’ highlights that here must be justification for public censure and punishment, an assurance as far as possible that an innocent person has not been wrongly convicted given the fragility of much evidence (*ibid* p.248-51).

The Human Rights Commission (General Comment 13, para 7) suggest that presumption of innocence can be protected by making sure public officials such as the police, prosecutors and judges do not make statements about an individual’s guilt if he or she has not been convicted, although the public can be given the names of suspects and the facts of the case. Another way to protect the presumption of innocence is to ensure that the burden of proof is on the prosecution, in other words, the suspect should not have to prove their innocence. This is encapsulated by Article 6 (2) of the ECHR which stipulates: “Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law”. The presumption of innocence is also reflected in how a suspect is presented (Naughton 2011 p.42). The suspect or person who is accused should

be treated gently without being routinely caged or shackled, and should be allowed to wear civilian clothes. If there is a need to handcuff the suspect, for example to prevent self-harm himself or escape, then his or her right will not be violated.

Naughton points out that there is a difference between how the presumption of innocence operates in theory and what actually happens. Innocent people are convicted of crimes they did not commit as sometimes evidence which is not very reliable is allowed by the court. For example, in the case of the Guildford Four in England and Wales, four innocent people were convicted for a crime that they did not do, and their right to the presumption of innocence was totally neglected. Furthermore, because the defence is not as richly resourced as the prosecution it is not always well-equipped to fight for the accused. This situation begs the question of how wrongful convictions can be effectively avoided (2011 pp.53-4).

To sum up, the presumption of innocence is justified as it operates in a criminal justice system in which the State can exert vast powers over the individual. It is necessary in a system where the individual has little power against the State, given the great imbalance of resource and where the trial system is understood to be fallible. It is a fundamental right that the innocent citizen should be protected against wrongful accusation, conviction, punishment and censure. Individual autonomy and dignity demands that the suspect is treated as innocent until proven guilty.

1.4.2. The Right to Silence.

The right to silence is the right of a suspect to refuse to answer questions or give information to the prosecution either at trial or during the investigation (Daly 2014 p.60). The right not to be compelled to testify against oneself and the right not to confess to guilt are expressed in Article 14(3) (g) of the ICCPR. Neither the ICCPR, nor the ECHR expressly guarantee the right to silence. Rather it can be inferred from international human rights instruments in general and also from Article 6(1) of the ECHR, which deals with the right to a fair trial. However, Article 6, or indeed any of the Convention's other provisions, does not give the specific right to remain silent. In spite of this, Berger notes

that Article 6 has been interpreted by the European Court of Human Rights as including the right to remain silent as part of a fair trial; and case law has been providing principles which determine the extent to which this right will be protected by the Convention while at the same time allowing signatory nations to resolve the issue through domestic law. The European Court has thus sought to determine in what contexts the right to silence should be applied rather than establishing it as a specific provision (2006 p.342-6).

Furthermore, although the European Court of Human Rights has not explicitly said that conviction should not result from just adverse inferences from silence, this has been referred to in the case of *Murray vs. United Kingdom (1873/91)* (Dennis 2013 p.179) In this case, the applicant had chosen to remain silent during police questioning, and the Court cited the UN's International Covenant on Civil and Political Rights (1966) which declared the privilege in Article 14 (3) (g) and stated: 'Although not specifically mentioned in Article 6 of the Convention, there can be no doubt that the right to remain silent under police questioning is a generally recognised international standard which lies at the heart of the notion of a fair procedure under Article 6...' By providing the accused with protection against improper compulsion by the authorities, these immunities contribute to avoiding miscarriages of justice and securing the aims of Article 6 (Berger 2006 p. 343). Dennis comments that since the *Murray* case Strasbourg jurisprudence is clearer about when the right to silence can be applied, and goes so far as to identify in what circumstances inferences can be drawn and what part such inferences may play in convicting the accused (2002 p.37). Berger notes that just having a consensus among the Convention's signatories is however not enough to allow the Court to make an exact definition on precisely how the right to remain silent should be applied as the context in which the issue arises can be very different from the core right of not being forced to admit guilt (2006 p.346).

The right to silence encompasses only oral representations made by a person and refers to a person's right not to make oral statements to the police or any other criminal justice actor during the investigation of a criminal offense. Thus, the right to silence exists in the context of the police station when being questioned by officers and in the context of the trial. Berger comments that no matter how central to their investigation, questioning

suspects and witnesses must be through voluntary co-operation (2006 p.352). The primary right to silence is in there being no legal obligation on a suspect to talk to police, and the secondary right is contained in the prohibition of this leading to adverse inferences being drawn during any subsequent trial (Griffith 1997 p.10).

Griffiths also suggests that the right to silence during pre-trial procedures can be complicated for courts to interpret and apply. Further, that the context of the police station is very different from that of the court even though they are both part of the same process. In a courtroom, the right to silence is viewed as being part of the due process that occurs within an adversarial system of criminal justice. This can be different in the context of the police station where empirical analysis has demonstrated that this right operates within a process of negotiation and compromise (1997 p.17).

According to Jackson, most people choose to speak to the police irrespective of their right not to do so. As silence is often interpreted as non-co-operation with the authorities, pressure to speak is high as it is regarded as behaviour that does not favour a suspect in terms of their liberty or the level of charge brought against them. Silence at trial risks being penalized by the jury even if they are told not to take it into account. This being the case, it would not appear that the right to silence actually protects the innocent nor does it affect many people's decision about whether to speak (2008 p.848-9). Furthermore, in many cases of police investigation, as it is not necessary to compel suspects to give evidence the right to silence is maintained. Indeed, the suspect should have the chance to participate effectively in defending themselves (*ibid* p.582).

Neumann points out that the right to silence is recognized as absolute in many states. In addition, under the international human rights conventions, there is no limitation placed on this right. In some domestic jurisdictions, statutory provisions have been included to the effect that a person has the right to silence, but if the person does not provide information to the authorities or at trial, then adverse inferences may be drawn from the failure to provide information (2004 p.3). It should be noted that the right to silence varies from country to country; for example, in the US citizens rely on the Fifth

Amendment for their protection and no adverse inferences are allowed to be drawn. The German Federal Code is similar to the Fifth Amendment of the United States. However, in Germany adverse inferences may be drawn if the defendant selectively refuses to answer certain questions. However, even though England, Wales, and Northern Ireland have the right to not speak, adverse inferences are allowed to be drawn. In Korea, illegal evidence is not always excluded unless the illegal conduct is the direct cause of the confession. In China, the privilege against self-incrimination does not exist (2004 p.138).

According to Dennis, the rationale behind the right to silence is that it protects innocent people from being wrongfully convicted because of mistakes in the process of criminal justice. It is also an application of the presumption of innocence which places the burden of proof on the prosecution. The right also reflects a principle of respect for human autonomy and protects the individual from undue state intrusions or being forced to make cruel choices (2013 p.196). Here we see two strands to the rationale, which Jackson describes as ‘intrinsic substantive’ and ‘non-substantive’. The former refers to the principle that the accused should not be required to incriminate themselves and the latter that it is part of a fair trial in which address other principles such as the presumption of innocence and the paramount importance to avoid wrongful convictions. Jackson believes it is the intrinsic substantive rationale that is the main concern and links the right to silence with the idea that the participation of the accused should always be voluntary. However, it is not always easy to know to what extent participation has been voluntary – especially in police custody. Furthermore, given that international human rights law protects people from being tortured or subjected to cruel, inhuman or degrading treatment, it is arguably difficult to justify a separate right to silence and the privilege against self-incrimination (2008 p.864). Daly comments that this right is seen as both protection for the suspect and hindrance for the police and prosecution and that this difference of interests is seen in how civil rights groups argue for ‘the preservation of this fundamental procedural protection’ whereas the police and government usually argue for greater investigative power (2014 p.61).

On balance, the right to silence is an important part of the criminal process, not just as a

means to protect the dignity and security of the accused but also to uphold the procedural rights of the defence which have been shown to be crucial not just at trial but from the moment that criminal investigations are initiated and the suspect has to answer allegations.

1.4.3. The Privilege against Self-Incrimination.

Individuals accused of crimes have a right against self-incrimination at all stages of a criminal case or delinquency proceeding. Suspects are entitled to refuse to answer any question or produce any document that might incriminate them. It has also been suggested that the right to claim the privilege against self-incrimination may protect individuals from unlawful coercive methods used to obtain confessions (Neumann 2004 p.3). Redmayne suggests that this privilege is ‘one of the more puzzling rules of criminal procedure’ as it places restrictions on criminal investigating by stipulating that no suspect can be required to provide evidence that could incriminate him or her at trial. They cannot be held in contempt of court for not answering questions or providing documents to the prosecution (2006 p.209).

McInerney points out that the privilege is viewed as incorporating three separate though linked elements; namely the privilege against self-incrimination afforded to witnesses in criminal, civil or non-judicial investigative proceedings, the right of a defendant not to give evidence at trial and the right to silence of a suspect in the pre-trial criminal investigation (2014 p.102). He added, that the right not to incriminate oneself, is important and needed in all stages of criminal investigation as it affords a kind of ‘equality of arms’ between the State and individual suspects (*ibid.*, p138). It should be noted, however, that bodily samples, unlike testimony can be obtained by force. PACE ss.61 & 63 allow the police to take non-intimate samples and fingerprints.

Article 14, paragraph 3 (g), guarantees the right not to be compelled to testify against oneself or to confess guilt. This means that the investigating authorities must not use any undue psychological or physical pressure, direct or indirect to obtain a confession. Any

confessions acquired which violate Article 7 of the Covenant should be inadmissible under domestic law. However, such evidence can be used to demonstrate that torture or other prohibited means has been used. If this happens, the State must prove that the statements were actually given willingly by the accused. Finally, the right not to self-incriminate means that negative inferences cannot be drawn from the defendant's silence (Zhang 2009 p.42). Redmayne comments that the European Court of Human Rights (EctHR) makes this privilege an integral part of a fair trial in Article 6 but that it is not always easy to know what the extent of this privilege is in practice and that UK courts have used this uncertainty to make decisions that would seem at odds with the stance taken by Strasbourg (2007 p.210).

The right of silence is closely related to the privilege against self-incrimination, as the latter concerns the threat of coercion in order to make an accused yield certain information, whereas the former concerns the drawing of adverse inferences when an accused fails to testify or to answer questions and not specifically mentioned in the European Convention. Their close relationship to the right to a fair trial under the Convention was confirmed in the Court's judgment, citing the U.N.'s ICCPR (1966), which declares the privilege in Article 14(3)(g). The general right to a fair trial is dealt with in Article 6 (1) which also contains a short list of additional rights that are applicable only in criminal cases. That short list does not include the privilege against self-incrimination. The ECHR has interpreted the right of silence as encompassing the right not to self-incriminate, both having strong links to the presumption of innocence and underpinning the need to protect the accused from 'improper' police compulsion and miscarriages of justice (Croquet 2008 p.220).

The privilege against self-incrimination made an unexpected and faltering entry into European human rights law. In 1993 the Court heard the case of *Funke v. France* (10828/84)³². Having entered Funke's house with a warrant, French customs officers found evidence of foreign bank accounts and ordered Funke to produce bank statements

³² *Funke v. France* (10828/84) ECHR 25 February 1999.

for these, which he would not do. Funke was subsequently prosecuted and convicted for this refusal and given a fine which increased every day he continued to refuse. Funke applied to the Court, alleging that as he had been asked to produce evidence that could incriminate him, he had not had a fair trial. Ashworth comments that this was a novel claim, given the limitations of the rights stated in Article 6; however, the Court found in favour of Funke, and thus incorporated the right not to self-incriminate into its jurisprudence; finding that Article 6 (1) had been breached. The scope of this right, its rationale and origins were not discussed by the Court (2008 p.757).

The cornerstone of the protection against self-incrimination is best demonstrated in *Saunders v. UK* (1997)³³. This case explained that the right exists for the protection of the accused by the improper compulsion of the authorities, thereby contributing to the avoidance of the miscarriages of justice. Redmayne believes that ECtHR case law does show how the privilege operates in practice, also in regard to how inferences are drawn from a suspect's silence which the Court believes does not infringe the privilege but needs to be done very cautiously (2007 p.214).

The two important rationales of this right are ethics and reliability. The former is to prevent any incentive being given for using strategies involving deception, inducement, threats or brutality to extract information from a suspect. If statements acquired in this way are given credence in court, then the investigating authorities might be tempted to use them and violate the integrity and dignity of the suspect. For this reason, the right against self-incrimination acts as a limitation on the behaviour of the police during the investigation. Acquiring evidence through detection is arguably more difficult than extracting information through coercion, so putting legal sanctions on this is essential to preserve human rights (Mittal 2013 p.78).

The second rationale is that it stops a nervous but innocent person from making a false statement under duress and being wrongly suspected. The environment in which

³³ *Saunders v. UK* (19187/91), ECHR 17 December 1996

investigation takes place can be very stressful for a suspect; they may feel afraid of authority figures like the police, isolated and the suspect will be aware of the expectations of the interrogating officer. All these factors can result in a suspect yielding information which can be incriminating, prejudice their case and even be completely wrong. Even in situations where the suspect is guilty, the right not to self-incriminate acts as a protection against any possible aggravation of the offence by concealment of evidence or misrepresentation. A further protection is that the accused will not have motives read into any statements they might make (*ibid.*). It could be said then that the privilege against self-incrimination is largely based on allowing the individual to protect their personal integrity and to be protected from coercion during the process of investigation.

1.5 Non-discrimination.

Although Article 7 of the UDHR (1948) was the model for Art 14 of the ECHR, they are different. The former states, as a general principle, “All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.” The latter only prohibits discrimination which affects the rights in the Convention³⁴. Article 26 of the ICCPR states: “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law prohibits any discrimination and guarantees to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”. Article 14 of the ECHR, is similar and reads: “The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion,

³⁴ Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 177) is an anti-discrimination treaty of the Council of Europe. It was adopted on November 4, 2000, in Rome and entered into force on April 1, 2005, after tenth ratification. As of 2014, it has 18 member states and 19 signatories (from 47 CoE member states). Notably, the UK has not signed it yet.

national or social origin, association with a national minority, property, birth or other status". The non-discrimination Article (3 (1)) in the ACHR is undermined by the statement in the Preamble which discriminates in favour of divinely-revealed religions.

Scheinin & Langford suggest that Article 26 is ambitious as all grounds of discrimination, including that based on sexual orientation, nationality and age, are prohibited. It also covers discrimination by individuals; extends to all spheres of economic and social life and 'enshrines a positive right to equality' (2006 p.10). Although Article 26 itself doesn't define 'discrimination', the Human Rights Committee, General Comment 18,³⁵ 'believes that the term 'discrimination' as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms' (HRC Para.6).

Scheinin & Langford (2006 p.14).further note that there is a lack of HRC case law that relates to the obligation to actively promote equality that Article 26 seems to imply. However, the Committee's General comments (No 18) do suggest that 'the principle of equality sometimes requires State Parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination' (HRC Para.3).

Nikolovska contrasts Article 26 of the ICCPR with Article 14 of the ECHR, saying that the latter limits itself only to 'those rights embodied in the Convention and its Protocols'. This problem was addressed in the *Belgian Linguistic* (1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64)³⁶ Case where the Court stated that non-discrimination only related to the rights and freedoms set out in the Convention. Nevertheless applicants who feel discriminated against often invoke Article 14 (2006 p.24- 25). For example, Lehman notes that the Court considered whether the 'United Kingdom had, pursuant to

³⁵ Human Rights Committee, General Comment 18, Non-discrimination (Thirty-seventh session, 1989), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 26 (1994).

³⁶ *Belgian Linguistic* (1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64), ECHR (23 July 1968).

derogation, used emergency powers exclusively against the IRA, rather than against both the IRA and Loyalists (2011 p.120). In *Gillan & Quinton v UK* (4158/05)³⁷ the applicants alleged that the powers of stop and search used against them by the police at an arms fair breached their rights as nothing incriminating was found. However, the court found that the powers were provided for by law and not disproportionate, given the risk of terrorist attack in London. The Court also considered that the powers of authorisation and confirmation as well as those of stop and search under sections 44 and 45 of the 2000 Act are neither sufficiently circumscribed nor subject to adequate legal safeguards against abuse.. The Court held that the police officer had an unacceptable level of discretion. As there had been no requirement to show 'reasonable suspicion', there was a clear risk of discrimination. Michaelson notes that the ICCPR states in Article 4 (1) that derogation cannot involve discrimination 'solely on grounds of race, colour, sex, language, religion or social origin'. This is not extended to national origin, however, as this might prove problematic in times of war and the treatment of enemy aliens. In contrast Article 14 of the ECHR does include national origin as a possible factor in discrimination (2005 p141).

In times of conflict, foreign nationals or members of groups with which the state is in conflict would be more likely to be suspected and this has implications for pre-trial procedures; however, Article 14 would prohibit this and non discrimination is also clearly prohibited in *Shari'ah*. Having looked at the rights of the suspect to be treated fairly after arrest we now move on to consider how police searches and arrest affect rights to privacy.

1.6. The Right to Privacy.

Article 17 of the ICCPR states that: "No one shall be subjected to arbitrary or unlawful interference with his privacy, family home or correspondence, nor unlawful attacks on his honour and reputation.....". Similarly Art.8 of ECHR states: "1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in

³⁷ *Gillan & Quinton v UK* (4158/05) ECHR (12 January 2010).

accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others". Also, the ACHR Art. 21 is similar to Article 17 of ICCPR and Article 8 of ECHR which guarantee the right to privacy. However, Articles 17 and 8 only protect against arbitrary or unlawful interference with the right to privacy. They also require the State to provide adequate safeguards to ensure the enjoyment of the right to privacy. This right is the focus of the following section.

1.6.1. The Right to Respect for One's Private Life.

The right to privacy and the right of the individual to control personal information was first stated in the UDHR. This was partly as a reaction to the Nazis' use of personal records in the 1930s and 40s to target certain individuals and groups. The ICCPR and the Convention on the Rights of the Child, as well as regional human rights conventions in Latin America, the Middle East, and Europe also address the right to privacy. There have been two main approaches to establishing this right. Firstly, negatively by prohibiting what is generally understood to be interference in the individual's private domain; and secondly, positively by emphasising respect for it (King 2011 p.549-550).

Cumaraswamy & Nowak suggest that the issue of privacy is directly relevant to pre-trial procedures in that suspects are usually 'subjected to surveillance, search and seizure procedures by the police or other investigating agencies in the process of gathering evidence to substantiate the suspicion'. Articles 17(2) of ICCPR and Article 8 of ECHR, so as not to be arbitrary or unreasonable, regulate these procedures. For example, there have to be guarantees in place that measures such as phone tapping or house searches are carried out legally, in accordance with regulations and are proportionate to the circumstances (2009 pp.19-20). Ballin comments that Article 8(2) allows authorities to breach the right to privacy if it is in the public interest. For example, simply registering an individual's details may invade their privacy but may also be necessary to prevent or solve a crime. However, the ECHR tries to ensure that the government cannot have 'unlimited and arbitrary' power to interfere with the privacy of an individual. The notion

of what respect for private and family life constitutes depends on the social and culture mores of a society and thus is not static. This has to be taken into account when assessing whether there has been a breach of Article 8 (1) (Ballin 2012 p.46).

Joseph *et al* (2000 pp.348-349) point out that it is extremely difficult to precisely define 'privacy'. For example, a wide definition might be 'the right to be left alone' and a narrower definition 'the right to control information about oneself'. They suggest a compromise definition 'freedom from unwarranted and unreasonable intrusion into activities that society recognises as belonging to the realm of individual autonomy'. 'Individual autonomy' being those actions, which an individual wants to do, but which do not encroach on the liberty of others. The meaning of privacy in Article 17 has not yet been thoroughly defined in either the General Comment or the case law.

Robertson suggests that giving a definition of respect for private life depends on the current cultures and customs and varies from one domestic law to another. That would explain the reason for not finding a definition for privacy in any law. He said 'as legal writers have observed, the wall around a person's private life is not identically situated with everyone' (1973 p.34). It would thus be important for individual states to decide what interpretation of the right to privacy applies when deciding on guidelines for the behaviour of the police.

Kempen explains that Article 8 specifically protects an individual's private life; family life; home and correspondence and these have to be respected during criminal investigations. The Article 'is an important guarantee against unlawful or unnecessary searches, secret surveillance, telephone tapping, examination or seizure of written correspondence and other documents or electronic data, the interception of e-mail, monitoring Internet usage ... as well as the application of such powers without serving a legitimate aim'. To a lesser extent, businesses and other organisations, although these cannot be said to have a 'family life', are also protected. The ECHR holds that these rights must be extended to the individuals within organizations (2010 p.17). This reinforces the importance of clear guidelines for how the police should behave when

going to apprehend a suspect at work or at prayer as well as at home. The situation is slightly different when looking at the right to privacy of the home and correspondence. The case of *Société Colas Est v. France* (37971/97)³⁸, which dealt with the search and seizure of documents, demonstrated that the right to respect for home and correspondence can be extended to both the individuals in their professional capacity, in the case of the former, and to the organisations themselves in the latter. There is a limitation clause in Art.8 (2) of ECHR and the equivalent Art.17 (2) of ICCPR, the fact that the state can limit such rights to protect rights of others, and that should be necessary in a democratic society. Given that international human rights law recognises the importance of an individual's home and work which is strictly protected in *Shari'ah*, the right, through bail, to be able to reasonably return to home and work life after being charged is next explored.

1.7. The Right to Bail.

Bail rights are important as the suspect may not be guilty, and it is not therefore fair to detain him or her before the trial as the case may take a long time to come to court. Also it is important to allow suspects the opportunity to gather evidence that might exonerate them. According to Article 9(3) of the ICCPR, an arrested or detained person 'shall be entitled to trial in a reasonable time or to release. Article 9(3) guarantees an arrested or detained person two distinct rights: release on bail and trial within a reasonable time. Article 9(3) states explicitly that the general rule is to release the arrested or detained person on bail, a rule that seeks to reinforce the fundamental principle that the accused is presumed innocent and must be treated, until he is proven otherwise, in accordance with law. However, prolonged pre-trial detention without bail is thus incompatible with Article 9 and requires specific justification and periodic review (de Zayas 2005 P.18).

Article 9(3) of ICCPR mentions that the granting of bail can be conditional on the accused's undertaking that he will attend trial. However, other conditions that do not aim

³⁸ *Société Colas Est v. France* (37971/97), ECHR (16 April 2002).

merely to ensure the attendance of the arrested or detained person at his trial are also listed under Article 9(3) such as preventing the accused from intimidating witnesses, or committing an offence. On the other hand, conditions that are not related to the purposes of the bail system, such as basing the amount of the financial guarantee as a condition of bail solely on the economic consequences of a given crime that the accused has allegedly committed, constitutes a violation of Article 9(3) (Alharagan 2006 pp.202-203).

The right to release to appear for a trial is covered by Article 9 (3) of the ICCPR and Articles 6(1) and 5(3) of the ECHR which states “Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial”. The latter specifically refers to detainees awaiting trial who should be given priority for an early trial, although the authorities still have an obligation to arrange the trial within a reasonable time even if they are released. Bail can be refused only if there are ‘relevant and sufficient reasons to justify detention’, such as the accused’s likelihood of absconding or a danger to public order. The length of detention is measured from the date on which the accused is charged to the date of judgement and deciding what is a reasonable time of detention until trial is not an easy matter (Clements 1999 pp.148-149). However, the ACHR does not state the right to bail in its provision.

The case of *Gault v United Kingdom* (1271/1/05)³⁹, demonstrates how Article 5 (3) can be violated. Mrs Gault was refused bail in July 2004, whilst awaiting re-trial for murder, even though there were no objections to it from the prosecution. She remained in custody until September 2004, when she was finally granted bail by the third trial judge. She was subsequently acquitted at her third trial. She brought an application alleging that her detention between July and September 2004 was a deprivation of liberty contrary to Article 5(3) of the European Convention on Human Rights. The Court decided unanimously that there had been a violation and that the question of how quickly the re-

³⁹ *Gault v United Kingdom* (1271/1/05), ECHR (20 November 2007).

trial would be held was not a factor. Given that Mrs G had been previously convicted, there was reasonable suspicion about her involvement in the crime, but this did not of itself suggest that she would not attend the trial.

To conclude, the right to bail is recognized in international human rights laws (ICPR and ECHR), the two charters stress that if suspects are charged and not deemed dangerous or likely to abscond, they should be released, otherwise their detention will violate international human rights norms. *Shari'ah* does not address the right to bail even though it is recognised these days by Muslim countries as a part of suspects' rights.

1.8. The Right to an Effective Remedy in International Human Rights Laws.

The right to an effective remedy is contained in legislation that deals with rights violations and the procedures for review and appeal that should be put in place. It is a right that is already recognised by International Law, appearing as it does in Article 2 (3) of the ICCPR; and Article 13 of the ECHR. The latter is echoed by the language of the ICCPR's Article 2(3) and the European Court has broadly interpreted its requirements. This section will focus on how the ICCPR and ECHR provide rights to an effective remedy

Article 2 (3) of the ICCPR states: "Each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) To ensure that the competent authorities shall enforce such remedies when granted". The ACHR gives the suspect the right to an effective remedy, however, only after trial. The provision does not mention if the suspect can claim for unjust accusation and harm at pre-trial as it states in Art.19 (2) "Anyone whose innocence is established by a final judgment shall be entitled to compensation for the damage suffered".

The Human Rights Committee is concerned that not only should an individual have a legal remedy if their rights are violated, but that there should be a system in place that can enforce this. The Committee is concerned that such remedies should be flexible enough to take into account the needs of particular individuals, such as children, and to be dealt with within the various domestic legal systems of the State Parties (HRC p.6-7)⁴⁰.

Furthermore, violations should be addressed promptly, effectively and impartially through independent bodies. Co-opting members of national human rights organisations can enhance this independence. Individuals who have had rights violated should be compensated appropriately. In order for justice to be properly served, it may be necessary to take such measures as public apologies, guarantees of non-repetition or even changes to particular laws and practices (Bloed et al 1993 p.37).

Fohr points out that there may be conflict between domestic law and the rules of the Covenant. It is suggested that, in some cases, where there is no domestic law to cover certain human rights violations, the Covenant should be applied directly. The Covenant could also take precedence over older domestic legislation that is incompatible with it. At present, because there is no one method of incorporating the Covenant, problems can arise when there are discrepancies between domestic laws and the Covenant (2001 p.427).

In Article 9 (5) of the ICCPR, detainees are given certain rights such as having recourse to *habeas corpus* and to be released and compensated if they have been unlawfully detained. However, because the exact nature of the remedy is not specified, this possibly leads to different interpretations of precisely what the remedies should consist of.

Article 13 of ECHR is similar to Article 2 (3) of the ICCPR, in that it gives the individual effective remedies for human rights violations. Both treaties stress that the state has an obligation to take action when such rights are violated. It is also important to

⁴⁰ General Comment No. 31 [80] The Nature of the General Legal Obligation Imposed on States Parties to the Covenant Adopted on 29 March 2004 (2187th meeting). CCPR/C/21/Rev.1/Add. 13 26 May 2004.

note that if an individual fails to have his or her claims upheld in court, this does not necessarily signify that there was no effective local remedy and so does not signal a breach of Article 13 (Wilt & Lyngdorf 2009 p.46-7).

Aurescu *et al* emphasize that the right to an effective remedy for human rights violations stems from the principle that a participating State must 'protect human rights and freedoms firstly within its own legal system' and that the European Court is addressed when 'domestic remedies have been exhausted or...are unavailable or ineffective'. Article 13 does not give a guarantee of legal protection and thus may only be invoked together with one or more articles of the Convention or one of its Protocols (2007 p.9). Clements *et al* state that Article 13 does have an overlap with other articles in the ECHR, notably Article 5 (4) and 6 (1). If these latter have been breached, then it unnecessary to have recourse to Article 13 (1999 p.212).

It can thus be concluded that the right to an effective remedy under Article 2 (3) of the ICCPR or Article 5 of the ECHR comes into play once individuals have an arguable claim that their rights under the Covenant have been violated. After illustrating the principle norms of pre-trial procedure in International human rights law, these procedures will now be examined in the context of *Shari'ah* in order to find if there is any conflict between the international human rights norms and *Shari'ah*.

2. *Shari'ah* and Pre-Trial Procedural Rights.

After a brief exploration of the idea of human rights in *Shari'ah*, the next step will be to examine the application of the most significant elements in criminal pre-trial procedure. This will correspond to the issues discussed when pre-trial procedures in the law of England and Wales were examined. The sources of information about human rights pre-trial are illustrated in part by the *Qur'an* and interpretations by Muslim scholars. The relevant Articles of the Arab Charter (ACHR) (2008) have already been discussed in Chapters 2&3. *Shari'ah* demands protection of the rights of the accused in pre-trial as follows:

2.1. The Right to Liberty.

The Holy *Qur'an* does not contain an explicit directive about liberty. However, it states: *'It is He who made the earth tame for you - so walk among its slopes and eat of His provision - and to Him is the resurrection.'* (Verse 67:15). This is reflected in Art.14 on the right to liberty of the ACHR. This however, gives no absolute guarantee as was explained in Chapter Two. The right to liberty is guaranteed by the ICCPR (Art.9 (1)) & the ECHR Art.5 (1).

Therefore, the essence of the right is that individuals are entitled to move as they please, and this is recognised by the above verse from the *Qur'an*. Furthermore, the holy *Qur'an* warned all people to avoid accusation being levelled against someone on the basis of mere suspicion⁴¹. In verses 24: 12, 13, 14, &15, Allah the Almighty condemns those who make allegations without strong evidence. That means that making unsubstantiated allegations is forbidden by *Shari'ah*. Therefore, restricting the right of an individual to liberty on the basis of mere suspicion is, by analogy, forbidden, as arresting or detaining a suspect is more harmful to him than just levelling allegations against him without restricting his or her liberty. In the next section, arrest and detention in *Shari'ah* will be discussed as a part of the right to liberty.

2.1.1. Arrest in *Shari'ah*.

There are a range of restrictions and controls on the authority of those carrying out the investigation on limiting the freedom of the accused and restricting their liberty and their rights in order to uncover the truth in the case of a crime. These restrictions are important guarantees for the accused at the time of his arrest in the event of home inspection or during his custody. However, the liberty that Islamic law gives to the accused must take into account the rights of the public to be protected from crime. (Hallay 1989 p.535); Caliph Omar was the first to interpret the shackling of a criminal by the Prophet

⁴¹ "Why did not the believers - men and women - when they heard of the affair, - put the best construction on it in their own minds and say, "This (charge) is an obvious lie"? Why did they not bring four witnesses to prove it? When they have not brought the witnesses, such men, in the sight of Allah, (stand forth) themselves as liars. Were it not for the grace and mercy of Allah on you, in this world and the Hereafter, a grievous penalty would have seized you in that ye rushed glibly into this affair. Behold, ye received it on your tongues, and said out of your mouths things of which ye had no knowledge; and ye thought it to be a light matter, while it was most serious in the sight of Allah.' (Holy *Qur'an* Verses 24: 12, 13, 14, &15).

Mohammad as a sign that this liberty could be restricted for transgressors (Alahmed 2011 p.2).

Shari'ah ensures the sanctity of the human being, this being mentioned in both the *Qur'an*, which states '*We have honoured the sons of Adam*' (Verse 17:70) and the *Hadith* (the Prophet's sayings). The Prophet Muhammad also said '*that your blood, your wealth and your honour are forbidden to be hurt*' (Al-Albany1993 p.70). This is implied in the ACHR Art.14 (1). The inviolability of the home rests on this basis of the sanctity of human beings. *Shari'ah* has developed provisions to preserve human rights and freedom in home. Permission must be sought when someone wants to get into another's house - as the *Qur'an* states: "*O you who believe! Do not enter houses other than your own houses until you have asked permission and saluted those in them. That is better for you, so that you might be admonished.*" (Verse 24/27). This highlights the importance of respect for privacy when dealing with suspect pre-trial.

Islam forbids spying and eavesdropping on other people's homes. As the *Qur'an* states; "*O you who have believed, avoid much [negative] assumption. Indeed, some assumption is sin. And do not spy or backbite each other*" (Verse 49/12). However, Hallay (1989 p.712) and Sabrh (2006 p.147) point out that the privacy of the home is not absolutely sacrosanct as there are exceptions. The maintenance of human society is paramount and a house may be searched if a flagrant breach of law is apparent and it is important to gain evidence that would help an investigation. *Verse 24/27* talks about 'asking permission'; sometimes this can only be given tacitly, for example, if it is clear there is a victim inside.

The accused may not be intimidated, nor his family terrorized, during a search of his home or during his arrest. He must be treated with respect and should not be intimidated in a way that prevents him from seeking justice. In exhorting his people not to frighten each other the Prophet Muhammad says '*It is not permissible for a Muslim to frighten another Muslim*'. This exhortation entails the inadmissibility of intimidation of the suspect or his family during investigation. Nor should searches be made at night. (Al-Albany 1985) Furthermore, behaving in violation of the rights of the accused should have

the negative effect of nullifying any evidence thus obtained (Hallay 1989 p.731). Guneam (2013)⁴² points out that what was built on wrong must be wrong and what is based on the forbidden is forbidden and that is used in Islamic law⁴³. In *Shari'ah*, nothing can be built on actions that are wrongfully done.

2.1.2. Detention in *Shari'ah*.

The Holy *Qur'an* does not contain an explicit directive about liberty. Furthermore, the words 'temporary detention or arrest' or 'detention, pending investigation' were not known as such in Islamic jurisprudence, but they correspond to the so-called: 'imprisonment in charge' or 'the imprisonment of rote'. Islam guarantees everyone his or her liberty unless there is a reason that arrest and detention could lead to the truth (Sabrh 2006 p.89). There are two central aspects of this topic; firstly, society's interest in the restoration of security, the reduction of the spread of criminal acts, and the interests of the victim; secondly, the interests of the individual and their right to live freely and safely (*ibid.*).

However, Muslim scholars have disagreed on the issue of pre-trial detention, and the confinement of the accused in a place intended as a prison. The majority of them want to legalize this, but a minority disagrees, relying on the evidence that the Prophet Muhammad did not use a prison. The idea of detaining the accused stems from *Calepha Umar* who rented a house to detain someone who had been accused (Al-Halby 1973 p.197). Hallay says that whatever the debates around the issue of imprisonment, it is part of the *Tazir* (punishment, usually corporal, administered at the discretion of the judge) (see appendix C.2), that the accused who committed a crime considered serious should remain in custody (1989 p.832). The right to detain in *Shari'ah* has an objective standard in regard to the interrogation of the accused before his incarceration. There are plenty of sayings of Prophet Muhammad about interrogation, even though it is not called by this name. The Prophet urged the extraction of a confession: he coaxed a woman accused of theft to withdraw her confession (Hallay 1989). This shows that there was interrogation at

⁴² <http://www.youtube.com/watch?v=e2LB16t609w>. [Accessed April 2014]

⁴³ see also <http://fatwa.islamweb.net/fatwa/index.php?page=showfatwa&Option=FatwaId&Id=156351>

that time; even though the Prophet always tried to avoid people making a confession otherwise he would apply *Huddud* which would always be harsh. However, the right to interrogate applies to all criminals offences. Furthermore, in order to gain sufficient evidence to prosecute it is important to detain the accused, and Muslim scholars agree that acquiring evidence is very important for the accusation (Hallay 1989 pp.828-833).

Neither the *Qur'an* nor the sayings of Prophet Muhammad are explicit about the duration of detention. There are four schools of Islam, Hanfee, which mostly applies to Egypt , Oman and Turkey, *Shafei*, which most applies to Syria, Jordan, Lebanon and the south of Saudi Arabia, *Maalikis*, mostly applied in Sudan and the north of Africa), and *Hanbali*-, which mostly applies to Saudi Arabia. They disagree slightly about rituals and ideas that are not explicitly stated in the *Qur'an* or the sayings of the Prophet. All Muslim believers rely on Muslim scholars for interpretation and there are different views among them. The doctrines of most of the *Hanfee*, some *Maalikis*, and some *Shafei* restrict remand for a specific time; and this has been identified by some scholars as being fifteen days and by others as a month. Secondly, the doctrines of some of the *Hanfee*, most of the *Maliki* and the *Hanbali* did not limit the maximum duration of detention, but considered it the role of the *Imam* or judge – to detain the defendant as long he deems appropriate. Moreover, the scholars of the four schools agree that the *Imam* can detain the accused who has committed debauchery and corruption for an appropriate term, as required by the nature of the offence (Sabrh 2006p. 99).

No period of time is specified in any of the notes of the *fuqaha*. However, suspects are occasionally kept in remand for a considerable time if they have a bad reputation or have been found guilty of crimes on previous occasions (*ibid.*,). Remand in detention is thus to prevent the suspect possibly harming the public rather than relating necessarily to the specific charge.

2.1.3. The Right to be Informed Promptly of the Reason for Arrest in *Shari'ah*.

Informing the arrestee about the nature of the accusation is essential, in order to give the accused the opportunity to defend himself against the accusation. Otherwise, the arrest will be unlawful and arbitrary and that is forbidden in *Shari'ah*. '*A man came to the Prophet Muhammad and he complained about another man, who stole his clothes. The Prophet told the thief about the accusation, and he confessed and then the prophet applied the Had on him (cut off his hand)*' (Al-Nasay 1988 *Hadith* No. 4795). This right is clearly stated in the ACHR Art. 14(3), ICCPR Art.9 (2) and ECHR Art. 5(2).

From the *Hadith* the Prophet informed the accused about his accusation and he did not apply *the Had* until he had confessed. So from this, it is known that informing the arrestee about his accusation has been regulated since the time of Prophet Muhammad. Although *Shari'ah* does not elaborate the right to be brought promptly before a judicial officer; the ACHR clarifies it in Art. 14(5) and it is guaranteed in ICCPR Art.9 (3) & ECHR Art.5 (3). Sabrah (2006 p.152) points out that Islam prohibits torturing a human being and that concealing the accusation from the suspect is considered to be a psychological torture for the suspect, so enforcement officers should inform the suspect about the arrest according to the principles of Islam. However, there is a development in the right to be informed promptly of the reason for arrest in Saudi Law, which reflects the principles of *Shari'ah* and which will be addressed in Chapter Seven.

2.2. The Right to Defence in *Shari'ah*.

People may vary in their ability to express themselves and in presenting their case before a judge. Thus, *Shari'ah* gives the plaintiff and the defendant the right to an advocate who can speak on their behalf. The Prophet Muhammad said '*I am only human so if two people came to me and asked me to judge between them and one of them could present him or herself better than the other, if I made the judgment in favour of him who speaks better and he was a liar, he will go to the fire, so knowing that, he can make his decision*' (Al-Hamad 1982p. 66).

Alharagan points out that the need for a lawyer did not arise during the early Islamic period. Initially it was just a matter of the two sides collecting evidence to lay before a judge so that the trial itself was the only criminal process. As such trials were public, legal experts would attend and any unfairness or inequalities between the plaintiff and defendant would have been identified and eliminated (2006 p.104).

However, there is a lack of information about the right to legal assistance in the texts of *Shari'ah*. This contrasts with the ICCPR (Art.14 3(d), ECHR (Art.6 (3)) and ACHR (Art.16(3&4)) which have given this right. Thus, contemporary Muslim legal writers differ about whether or not the accused has the right to have legal assistance in criminal proceedings for theft, defamation or murder (Hallay 1989 p.363).

2.3. The Right Against Ill-Treatment.

One of the most important rights of the accused is not to disrespect his or her human dignity and not to have his or her liberty unlawfully taken away. The Arab concept of 'ill-treatment' has abuse of dignity as being pivotal. A central idea in Islam is to treat every person in a manner that preserves their dignity whether they are alive or dead. Even if someone commits an offence this does not allow others to attack their dignity, compromise their humanity or torture them (Albar 2010). These ideas about human dignity are similar to those explored in Chapter Two when considering the Universal Declaration of Human Rights.

In the *Hadith*, the Prophet Muhammad says “God tortures those who torture people in life” (Albar 2010). This is because torture shows disrespect. Indeed, the *Qur'an* (15:28–29) expresses the pre-eminence of a human being’s relative position even over the angels, ‘Behold! Thy Lord said to the angels “*I am about to create man from clay, from mud moulded into shape. When I have fashioned him in due proportion and breathed into him of my spirit, fall you down in obeisance to him*”. This text, as Khatab and Bouma suggest, demonstrates that humans have been placed at the pinnacle of creation and that to affront the dignity of a single individual affronts the whole of humanity including the dignity of

the person perpetrating the affront (2007 pp.102-103). The ACHR clarifies this in Art.8. ; as does ICCPR Art.7 & ECHR Art.8.

According to Islam, man is God's representative on earth and it is from this that human dignity and status stems. In Chapter 1 verse 30 of the *Qur'an*, Allah says to his angels "*I am setting on the earth a viceroy*" and further orders these angels to bow down to Adam. Satan refused, remarking that he was the better creation as he was created from fire, whilst Adam was made from clay. This lack of respect for humankind resulted in Allah expelling Satan from Heaven and damning him and his followers for all eternity (Daneshyar and Chambers 2003 p.4).

From the above, it appears that *Shari'ah* does not make explicit what could amount to a violation of the human right to dignity. Therefore what actions are considered to be forbidden is open to interpretation. However, Muslims believe that the *Shari'ah* is complete and cannot be added to, but can be interpreted. So if *Shari'ah* forbids a simple sin, the bigger sin is forbidden as well. The *Qur'an* states: '*[O] you who have believed, let not a people ridicule [another] people; perhaps they may be better than them; nor let women ridicule [other] women; perhaps they may be better than them. And do not insult one another and do not call each other by [offensive] nicknames. Wretched is the name of disobedience after [one's] faith. And whoever does not repent - then it is those who are the wrongdoers*' (Surat l-Hujurat 49:11). If this is so, any words or indeed actions that are considered to cause harm to any human are forbidden.

It is therefore clear that the *Qur'an* upholds human dignity and extends this to all people including detainees. Measures such as regulating intimate body searches, allowing detainees access to private toilets and ensuring proper treatment in custody are in harmony with these principles.

2.4. Presumption of Innocence and the Right against Self-Incrimination.

Shari'ah law recognizes the fundamental premise of innocence until proven guilty, and the need to be found guilty through definitive evidence. As the *Qur'an* states:

'Why did not the believers - men and women - when they heard of the affair, - put the best construction on it in their own minds and say, "This (charge) is an obvious lie"? Why did they not bring four witnesses to prove it? When they have not brought the witnesses, such men, in the sight of Allah, (stand forth) themselves as liars' (Verses 24:12, 24; 13). This is the famous maxim that encapsulates the presumption of innocence (Alborno 1991 p.179). In Islam the accused is considered innocent until evidence has been brought which shows his guilt, or until he admits the charge. The basic principle is that human beings are born innocent and have the right to be treated as such (Kamali 2008 p.181). The presumption of innocence is also guaranteed in the ACHR Art. 16, ICCPR Art.14 (2) & ECHR Art.8 (1).

In Islamic law, all scholarly interpretations (*Alhanbly, Almaleky, Alhanfy and Alshafaey*) agree that a defendant cannot be compelled to give a confession, also that the accused has the right not to speak. A confession cannot be taken under force; otherwise the confession is not admissible. A confession, once given, can be withdrawn, even after the sentence has been passed or during its execution (Kamali 2008 p.183). Ibn Taymiyyah (1328) wrote that, at the time of the Prophet, a woman in Medina had a bad reputation as regards her sexual conduct, so much so that the Prophet said concerning her: *'If I were to stone anyone without evidence, I would have stoned this woman'* However, even given her bad reputation, as there was no evidence, he did not condone the punishment *Ibn Taymiyyah* also quotes a statement of the caliph *'Umar ibn Al-Khattab* to the effect that no one may be punished on the basis of suspicion and mistrust' (*ibid.*,).

In Islamic law a person who does not have full possession of his faculties cannot make a legally admissible confession. A judge must revise any confession carefully and not accept it until he/she is fully sure it is correct and lawful. For a confession to be accepted, the defendant must not only admit to the category of crime, but must provide relevant

details to support his/her assertion of guilt. The requirements are strict for the acceptance of confessions as there is a higher spiritual justice than the justice in the courts that is recognized by Islamic law. A Muslim believes that if a guilty person hides the truth and the courts cannot prove his/her guilt, he/she still would be punished by God; even if punishment by man may not be possible (Kamali 2008 p.183).

This principle stems from the following words of the Prophet: "The burden of proof is on him who makes the claim, whereas the oath is on him who denies" (Al-Hanbly 2001 p.226). In Islamic law, it is very difficult to prove a crime and, if there remains any doubt as to whether the defendant had committed the crime, it is not possible to punish him as the defendant might face a severe punishment. For that reason, it is almost impossible to prove the guilt with a suspicion. The Prophet's sayings encourage the judge to pay attention to cases of doubt: "Avert *huddud* punishments by suspicions or doubts and if the accused has a way out, release him, it is better for the judge to pardon erroneously than to punish erroneously" (Al-Hanfy 1997 p.25 No.5522).

To conclude, *Shari'ah* does not include detailed rules with regards to the right against self-incrimination. However, this right can be inferred from two principles: the principle of innocence and the prohibition of subjecting the accused to coercion to make him confess.

2. 5 Non- Discrimination in *Shari'ah*.

Islam not only recognizes absolute equality between men, irrespective of any distinction of colour, race or nationality, but also makes it an important and significant principle, a reality. The Holy *Qur'an* states:

"Mankind, we have created you from a male and female" In other words all human beings are siblings to one another. They all are the descendants from one father and one mother. *"And we set you up as nations and tribes so that you may be able to recognize each other"* (49:13). This can be interpreted as meaning that although there are social and cultural divisions among human beings which it is important to acknowledge, no one race

or culture should presume superiority over another, nor refuse them their rights. "*Indeed, the noblest among you before God are the most heedful of you*" (49:13). Superiority can only be on the basis of spirituality and moral integrity; and even this in no way justifies oppressing others even if they are perceived as 'less pure'. It is immoral to assume airs of superiority and runs counter to the principle of equality integral to this verse (A'la Maudude 1995 p.20). ACHR reflects this right in Art. 3.

This has been exemplified by the Prophet in one of his sayings thus: "*No Arab has any superiority over a non-Arab, nor does a non-Arab have any superiority over an Arab. Nor does a white man have any superiority over a black man or the black man any superiority over the white man. You are all the children of Adam, and Adam was created from clay*". A'la Madude comments that this shows how Islam holds that there ` should be absolutely no discrimination based on colour, ethnic group, nationality, gender, wealth or creed and that equality is seen as a God-given birthright (1995p.20). This reflects the ICCPR Art.26 & ECHR Art.14.

2.6. The Right to Privacy.

Islamic legal ideas value privacy very highly; in the words of the Prophet: "*Do not enquire into the affairs of others; do not spy on one another; do not outbid one another; do not envy each other; do not hate one another; do not shun one another; be as fellow-brothers and servants of Allah*" (Alsafreny 1993 p.271).

The right to a private life is strongly supported by *Shari'ah* Law, even if an offence has been committed. The command 'Spy not' in the *Qur'an* is clarified by the Prophet (P.B.U.H) who said, "*Do not be on the lookout for slips made by believers. For he who is eager to show up the shortcomings of a fellow believer will find that God shows up his faults and humiliates him before others, even though his ill deeds were performed in the secrecy of his own home*". This means that spying on someone is not permitted even if there is a strong probability that there is wrongdoing within the person's home (Daneshyar & Chambers 2003 p.13). The right to privacy is also encapsulated in the

ACHR Art.21 and guaranteed in ICCPR Art.17 & ECHR Art.8. There is no better illustration of this point than the incident involving the second Caliph Omar who committed the sin of spying on someone he suspected of debauchery. He had broken into the man's property and the man confronted him saying that this was a breach of God's commandments, upon which the Caliph apologised and left. (Daneshyar and Chambers 2003 pp.13-14). Daneshyar & Chambers comment that this incident demonstrates Islam's attitude to the right to privacy and to freedom of expression without fear of reprisals. This is in contrast to the behaviour of many Muslim States which profess to follow *Shari'ah* Law but feel that it is permissible to place monitoring devices in the homes of private citizens merely on the suspicion of the police. This is also done in nations that pride themselves with being democratic and freedom loving (2003 p.14).

2.7. The Right to Bail in *Shari'ah*.

Bail, which is called in Arabic *kafala*, is a guarantee by someone to help any person has been suspected in demanding his or her release from detention or to stop legal action against the accused. The sponsor, *kafil*, carries a legal responsibility if the offender escapes during the period of time specified by the court or police. *Kafala* could be simply a matter of providing a guarantee for the suspect or, in more serious cases, putting bail money forward as a guarantee. Therefore, the condition of bail *Kafala* must be dependent on the circumstances of the case concerned in order to prevent the accused from fleeing (Qafisheh 2012 p.498). *Shari'ah* connects the detention with proof of the accusation; thus, the accused is innocent until proven guilty in court. Also if the prosecutor states that he has no evidence, there is no reason to detain the accused if there is no material evidence. *Shari'ah* authorizes the judge to release the accused on bail if this is the case (Salamh1986 p.53).

To conclude, the ICCPR Art.9(3) & ECHR Art.5(3) guarantee the right to bail; whereas *Shari'ah* does not go into detail about bail and the Arab Charter (2008) stays silent about it and that authorizes the judges. However, regulations are stipulated in Saudi Arabia's

Code of Criminal Investigation. Therefore, the right to bail will be addressed in the light of the underlying development of criminal justice in Saudi Arabia in Chapter Seven.

2.8. The Right to an Effective Remedy in *Shari'ah*.

Under *Shari'ah* rules there are various mechanisms, which the accused could resort to when his or her rights have been violated in order to obtain a remedy. As has been already discussed in 'The Right to Self-Incrimination', the remedy for obtaining a confession in violation of the right against-self-incrimination, is the exclusion of such a confession. This applies not just to evidence obtained during a confession, but also to any evidence that has been obtained unlawfully

Islamic law entitles the accused to have compensation when it is established that he or she has suffered damage as a result of a public official's misconduct. In cases where the judge did not take appropriate time over his verdict or witnesses appeared to have lied, the accused should be exonerated and have suitable compensation (Al-Jofan 2014). As has been mentioned before, Islamic law does not allow accusations on the basis of suspicions and misgivings. Furthermore, *Shari'ah* has a principle that no punishment can be given unless there is clear proof; it seeks to enforce public accountability and the protection of the rights of the accused by prosecuting those who abuse their power or violate the rights of the accused. These rights and the types of compensation given will be addressed next.

The right of the accused, who has been affected by false accusation, to have compensation is fixed in *Shari' ah*. In Verse 21:78, the Qur'an tells of the judgement of Solomon who gave compensation to a farmer whose fields had been used by a shepherd for grazing⁴⁴ (Al-Damshgy 2002 p.355). This judgement is regarded as one of the origins of the Islamic rules for compensation. *Shari'ah* requires compensation for the accused who is innocent of the accusations against him. This maintains the dignity and rights of mankind according to Islamic law and also serves to deter people from making false

⁴⁴ The *Qur'an* states: 'And [mention] David and Solomon, when they pronounced judgement concerning the field - when the sheep of a people overran it [at night], and we were witness to their judgment' (Verse 21:78)

accusations. In Islamic law any act considered harmful to others is the responsibility of the offender, and commits him or her to making compensation for damage. The Prophet Muhammad said '*no harm on you and on the others*'. Therefore, *Shari'ah* law states 'the harm must be lifted' (Sabrh 2006 p.171). The right to an effective remedy in *Shari'ah* is divided into two kinds of compensation; civil, and criminal. The right to an effective remedy in the ACHR was vague in Art. 14 (7) and cannot be seen as an absolute right; however, ICCPR Art.2 (3) & ECHR Art. 13 stipulate this right.

Civil compensation for the accused is the money with which the accused is compensated for the physical, financial and/or emotional damage caused to him or her. This kind of compensation is divided into three parts:

A. Physical damage compensation:

The legal writers in Islam say that physical damage must be guaranteed and compensation given to the accused who suffered this damage (Bin Goodmah 1994 pp6-20). The evidence for that is identified by Aumro bin Hazm who pointed out that the Prophet Muhammad said '*in one eye fifty camels*', that means if someone pokes out another's eye he has to pay him fifty camels (Al-Asglany 1964 p.1708).

B. Financial compensation for damage:

This is for all financial disadvantages caused by false accusations and also includes damage to home, car or property as a result of the investigation or if the suspect was disabled because of his arrest and this prevented him from working. The legal writers in *Shari'ah* agreed that there should be compensation for such material damage (Sabrh 2006 p172).

C. Emotional damage compensation:

Just charging the accused is considered to have harmful effects on the dignity of the accused and his reputation, and to cause moral damage, which cannot be remedied by

money. Furthermore, insulting or intimidating him, affecting his work because others lose confidence in dealing with him, and other damaging moral implications of the accusation must be taken into consideration (Sabrah 2006 p.173). The *Qur'an* states: '*And those who harm believing men and believing women for [something] other than what they have earned have certainly born upon themselves a slander and manifest sin*' (Verse 33:58).

This is illustrated by the story that Khalifa Umar paid compensation to a pregnant woman who lost her baby as she was frightened by his accusations (Al-Sanany 1983 p.395). From this story, the legal writers agree to the paying of compensation to whoever has been caused harm by others. However, some scholars maintain the inadmissibility of such compensation, arguing that the compensation is not only monetary. As illustrated by the story above, emotional damage is difficult to evaluate financially and in such cases it is better to have a process of reconciliation and forgiveness where the victim is given emotional solace (Sabrah 2006 p.175).

Secondly, Compensation for the criminal damage to the accused:

What is meant here is compensation for the accused for deliberate physical damage, whether from the judge, witnesses or the plaintiff. The defendant can raise a lawsuit asking for his rights against whoever was the cause of this type of damage. If his claim is proven, the penalty will depend on the type of damage inflicted on the defendant (Al-Sanhory 1980). It is important to give compensation in order to prevent feuds and retaliation. The holy *Qur'an* guarantees equality before the law in *Shari'ah*, in matters of physical damage and the compensation for it⁴⁵.

Alharagan points out that *Shari'ah* makes no distinction between disciplinary and criminal offences, as any abuse of power on the part of an official will either be a sin contrary to *Shari'ah* or a violation of rules set by those governing and either of these will

⁴⁵ The *Qur'an* states: '*[Fighting in] the sacred month is for [aggression committed in] the sacred month, and for [all] violations is legal retribution. So whoever has assaulted you, then assault him in the same way that he has assaulted you. And fear Allah and know that Allah is with those who fear Him*' (Verse 2:194). Also the *Qur'an* states: '*And We ordained for them therein a life for a life, an eye for an eye, a nose for a nose, an ear for an ear, a tooth for a tooth, and for wounds is legal retribution. But whoever gives [up his right as] charity; it is an expiation for him. And whoever does not judge by what Allah has revealed - then it is those who are the wrongdoers*' (Verse 5:45).

be considered a criminal offence. (2006 p.112) This is based upon the *Qur'an* verse which states: '*O ye who are believers! Obey Allah, and His Messenger and those who are charged with authority among you*'. For the sake of clarity, however, the term 'disciplinary offence' will be used to refer to an official's misconduct which is contrary to the rules governing his job, and the term 'criminal offence' will be used to refer to criminal offences in the strictest sense.

To conclude this section, the incorporation of the *Shari'ah* into domestic criminal codes engages a number of human rights issues. Some Islamic scholars, Dacy & Koproste (2008), Al Awabdeh (2005), and Moghaddam (2012), view *Shari'ah* as consistent with the requirements of international human rights instruments. Furthermore, *Shari'ah* adds more protections which these international human rights instruments do not make explicit such as civil and criminal compensation. Most Islamic scholars argue that *Shari'ah* formalized how human life was to be respected long before this was done by Western countries. There are certain authorities in Saudi Arabia who argue that the introduction of Western imports such as pre-trial procedures would be in contravention of the principles of Islam (Alamaj 2001 & Altwojery 2013 p.15). However, as has been shown above, not only would the introduction of pre-trial procedures not be in contravention of *Shari'ah*, but it would actually be in accordance with the principles that are found in the texts of the Holy *Qur'an*.

Conclusion

International human rights law (in the ICCPR and ECHR) and *Shari'ah* guarantee the principle of the rights of the accused at the stage of criminal investigation, with which this thesis is concerned. These rights are more general principles than exhaustive explanations, which may lead to various interpretations and thus be ineffective and lose the purpose for which they were established. Generalisations are not enough and this is why monitoring bodies are important. *Shari'ah* has the added dimension of monitoring

by a God who sees all. Although this can act as a powerful agent of social control amongst believers, it needs backing up by effective state monitoring.

This thesis hopes to demonstrate that the norms of human rights contained in Islamic law (*Shari'ah*) that apply to pre-trial rights are entirely compatible with international human rights law. Thus, international human rights law can be implemented through Saudi Arabian law or that of any Muslim country. Although, there is a disagreement between *Shari'ah* and international human rights law on some points, that cannot be seen as rejection of the entire body of international human rights law. Furthermore, there is evidence that the *Shari'ah* was a forerunner in the protection of human rights in law.

As indicated previously, this thesis aims to use the example of pre-trial procedure in England and Wales as it is one of the most exhaustive set of procedures and well-regarded worldwide. In order to understand how pre-trial legislation arose, it is important to briefly explore its history and development of criminal justice in England and Wales more generally, which is the focus of the next chapter.

Chapter Four

The History and Development of Criminal Justice in England and Wales

Introduction:

Pre-trial procedures in England and Wales have passed through many stages to be as they are now and, to understand their development into the form they are today, it is necessary to understand what was happening to the legal system in England and Wales in the past. The purpose of this chapter is to outline the development of pre-trial criminal justice in England. It aims to review and investigate the history and development of pre-trial procedures such as arrest, stop, search and seizure, detention and questioning in the Law of England and Wales; in order to demonstrate how these relate to international standards of good practice. It is the contention of this thesis that the contemporary pre-trial procedures generating from this development are a sound basis for the development of good practice internationally and in Saudi Arabia in particular.

The chapter begins with the Norman period, the Marian reforms of the sixteenth century and the pre-trial development of the eighteenth and nineteenth centuries. The Judges' rules of 1912 are considered and criticised, and the chapter then comes to its main focus – the introduction of the Police and Criminal Evidence Act (PACE) in 1984. This is discussed in general as the specific articles relating to pre-trial procedures are considered in Chapter 6. Finally, the Prevention of Terrorism Act 2000 and 2006, the Serious Organised Crime and Police Act 2005 and Human Rights Act 1998 will be looked at in terms of changes made to pre-trial procedures. A historical overview shows how pre-trial procedures have gradually been refined and come into line with general principles of international human rights. Procedures that would violate human rights principles by modern standards were once commonplace in England and Wales, and it is of interest to see how these were changed, especially as this thesis contemplates such changes for Saudi Arabia.

1. Developing the concept of a pre-trial in England and Wales (The Norman period-Marian Reforms to the Eighteenth and Nineteenth centuries.)

This section explores the development of pre-trial procedures from the Norman period, which first brought regularity to the law at a national level up to the end of the nineteenth century when modern pre-trial procedures began to be introduced.

1.1. The Norman period.

William the Conqueror brought the Norman legal system, which was partly based on Roman civil law, into England and started a long process by which it was to be integrated into the native legal system, which, at the time of the Norman Conquest, was irregular and varied by region (Castellano 2009 p.1). During this era, social control was exercised not through any separate police but through the system of 'Frankpledge'. Working as a member of Frankpledge was voluntary and these individuals were not paid to do this job. These 'tythingmen' had to 'swear' to protect nine neighbours and arrest offenders. Moreover, they had to watch the suspect in custody until the time of his trial and they had to bring him to the court. 'Ironically, if a 'tythingman' failed in his work he would pay a penalty. This system continued until the 17th century' (*ibid.*).

However, at the time of the Norman invasion, the concept of pre-trial procedures did not exist. The 'ordeal' was a mechanism to find whether the accused was guilty or not, and this procedure continued after the Norman invasion. There were many kinds of ordeal for example; an accused person held a red-hot iron bar and walked three paces. His hand was then bandaged and left for three days. If the wound got better after three days, he was innocent. If the wound had clearly not got any better, he was guilty, as it was believed that God would protect the innocent (Hardaway & Tumminello 1996 p.47). There was also apparently no equality in justice. William the Conqueror gave considerably more rights to Frenchmen than to others (Hostettler 2009 p.40). It is worth noting that at this time the Arab Peninsula was undergoing a change to Islamism. The Prophet Mohammed and his companions had instituted a philosophy which paid heed to human rights and to

respect, rather than the system of bitter feuding that had existed before. (Explained in Chapter 6) Islamic law at this period was more humane than English law and did not employ such procedures as the ordeal.

In 1215, the Pope decided that priests should not help with ordeals. As a result, ordeals were replaced by trials by juries (Hostettler 2009 p.53). Even though this was far from modern ideas of a jury, there were elements of it which are retained today. For example, jurors had to swear to tell the truth and tell what they knew about the crime; but, unlike modern witnesses, these jurors were required to go out among the community and find out what had happened and then bring these findings back to the court. These investigative activities could be seen as rudimentary pre-trial procedures. These jurors in effect had to gather proofs for the trial. Holdsworth (1938 p.309), remarks that 'It was a long and gradual process that brought about the change from proof by jury to trial by jury'. However, the granting of individual rights pre-dates this in documents such as the Magna Carta 1215 (Hoffman & Rowe 2003 p.17).

The Norman Conquest made a significant impact on English law in that pre-trial procedures such as criminal investigation albeit by jurors were established. It could be argued that, at this period, jurors were acting as kind of rudimentary detectives. The stage was now set for the Marian Reforms which further developed pre-trial procedures.

1.2. Marian Reforms 1555.

The reforms (1554-5) brought in during the reign of Queen Mary are believed to have witnessed more official regulation of English pre-trial procedures in serious crime. What evolved was 'a formal system of official investigation and evidence gathering which came to be a preliminary inquiry' (Langbein 1974 p.1).

Pettys (2009 pp.208-9) points out that according to the 1554 statute, Justices of the Peace now had to question both suspect and witnesses and gather written evidence to use in the trial before deciding to release the felon on bail. In 1555 this was extended to all suspects, even those put into remand. Commenting on the statutes of the Marian reforms, Hermann & Speer (2008 p.34) believe that the statute of 1554 'represented a seismic shift in

English criminal procedure'. It reversed the previous practice in common law of allowing others to prove the guilt of the accused and allowed him to speak for himself.

Langbein (1994 p.1049) points out that 'the accused speaks' trials of the 16th century were characterised by various 'rules and practices whose purpose and effect were to oblige the accused to respond to charges against him'. He goes on to say that the accused was often unskilled at defending himself and that judges were not always rigorous in their attempts to find out the truth. The right to remain silent and against self-incrimination could not develop whilst there was pressure on the accused to defend themselves. It was not until 1848 that the accused was told that he could refuse to answer questions and provision was made to caution him that what he said could be used as evidence by the prosecution in court (*ibid.*, p.1061).

Vogler (2005 p.133) comments that in spite of these changes, there was by no means a full pre-trial scrutiny, once the case for the prosecution had been established. Indeed, only prosecution witnesses would be heard. This was to change in the 18th century.

1.3. The Eighteenth Century.

During the 18th century many pre-trial procedures were informal negotiations between the victim and the accused. If the accused was young, then his parents could be the negotiators (King 2000 p.29). King also points out that women often 'took conciliatory roles in these negotiations' (*ibid.*). It should be remembered that pre-trial negotiations came in many forms, sometimes determined by which party had the most physical force.

Henry Fielding, who set up a paid magistracy in Bow Street, recommended that the state should fund prosecutions (McLynn 2002 p.32). Before Fielding's time there had existed a system of rewards to men who brought suspects to the magistracy. They made a comfortable living out of the fees they charged for their services, the rewards they received from victims for identifying suspects, and the rewards from the state for successful convictions, that acted as some form of compensation for the high cost of prosecution. However, as King (2000 p.48) points out, this system could be open to

abuse, and the magistrates at Bow Street –Henry and John Fielding and Sanders Welch – promoted the idea that law enforcement should not rely on the efforts of the victim, and that magistrates should be involved in the cross-examination of suspects and witnesses. As Rawlings explains, ‘a criminal justice system which relied on the initiative of individual victims’ was inadequate. Thus, the Fieldings put ‘the pre-trial detection process at the heart of the system rather than the victim or the trial or punishment’ and presented it as ‘a technical, bureaucratic, apolitical process operated by full-time experts’ (1999 p.32). Beattie comments that was an important step in the ‘gradual infusion of public money into the criminal justice system (2007 p.64).

John Fielding, Henry’s half-brother, was concerned to establish an effective way of dealing with crime by encouraging the rapid reporting of crimes, apprehending the criminal and initiating court proceedings. Beattie argues that John Fielding’s work ‘had a profound effect on the nature of pre-trial procedures and on the settings in which justices managed the crucial first stage of criminal prosecution’ (*ibid.*, p.70). Although Fielding’s main concern was to gather evidence for the prosecution, he was well aware that judges were concerned that such evidence had been properly obtained. Beattie says that ‘by the 1760s the bench had adopted a rule that only confessions given freely and voluntarily would be allowed as evidence’. Two decades later, confessions obtained in pre-trial proceedings were being asked for in writing. In response to this, Bow Street produced a *pro forma* for statements (2007 p.79).

Beattie suggests that the Fieldings can be seen as having ‘expanded the pre-trial process into a more extensive search for evidence than the law required’ (2007 p.83). In using their public and well-advertised re-examination sessions as a way of attracting possible further victims of the suspect who might give evidence, Fielding ‘exceeded the authority provided by the Marian statutes by being willing to consider evidence at the pre-trial stage that might give the defendant an alibi (*ibid.*, p.89).

John Fielding was celebrated but also criticized and his fiercest critic, according to Beattie, was William Augustus Miles who thought that Fielding’s rigorous cross-examination of the accused amounted to harassment, especially as it was just a pre-trial

procedure. Mr. Justice Eyre, a high court judge at the Old Bailey, also criticized the highly publicized sessions at Bow Street, as he believed these could prejudice a jury (2007 p.98).

Fielding's innovations attracted the participation of lawyers for both the defence and the prosecution, and questions began to be asked about the role that such people had in pre-trial proceedings. For instance, whether they attended at the magistrate's discretion; whether they could interrupt proceedings to advise their clients not to answer certain questions; whether they could cross-examine witnesses for the prosecution; whether they could take notes and have copies of depositions and other documents. Beattie suggests that such involvement by solicitors eroded what remained of the pre-trial procedures set out in the Marian statutes, and concludes that during the next half century a debate over what was to replace the old system culminated in the 1848 Jervis Acts which established a new form of magistrates' judicial enquiry (2007 p.99). However, magistrates were still not routinely conducting pre-trial hearings 'to determine whether there was sufficient evidence to send an accused felon to trial' (Beattie 2007 p.67).

Pre-trial procedures had undergone major changes during the two hundred and fifty years that stretched from the Marian Reforms to the end of the C18th. Changes had come about partly through debate about how to successfully control crime and what constituted justice and partly because of huge technological changes such as the Industrial Revolution. Vogler (2005 p.138) comments that as the counsel acquired more pre-trial instructions this led to a reduction in the role of the judge in organising the case. The dawn of the nineteenth century even saw debates about what role the press should take in pre-trial procedures, a debate which continues to the modern age.

1.4. The Nineteenth Century.

The Bow Street Runners were the precursors of the police force and were set up by Henry Fielding in 1742. Initially they were a success, according to Bateson (2004 p.2) 'but later the system became corrupt with the magistrates and Runners working with the criminals rather than putting them out of business'. However, as Hostettler (2009 p.179) remarks,

the Runners had demonstrated that crime could be controlled by a centrally operated force and they paved the way for the reforms of Robert Peel which culminated in the 1829 Metropolitan Police Act. The newly established police force began to assume responsibility for prosecutions. However, it wasn't until 1879 that a Director of Public Prosecutions was appointed. His role was slow to evolve from a mainly advisory role into the one that exists today (Manchester 1980 p.228).

The police had the powers to arrest a suspect with or without a warrant from a magistrate and also private citizens could carry out an arrest, or it could be done by hue and cry, although the latter was rarely used during the nineteenth century (*ibid.*, p.230). Regulations for the proper conduct of arrests were also drawn up. For example it became important to obtain a warrant in cases of misdemeanours. There were, however, problems with this as suspects were sometimes able to escape before warrants were obtained (*ibid.*).

It would be useful to consider the situation nationwide at the start of this century of great changes. Bateson (2004 p.2) describes how each parish had its own constable who was expected to control each breach of the law from dealing with felonies to non-attendance at church and unauthorised building works. This post wasn't very popular and Bateson reports that its duties would often be delegated to an illiterate and inefficient deputy. As a consequence, crime would often be highest in parishes where the constable and his deputy were particularly ineffective. The watchmen or 'Charlies' were also often old and unable to control crime adequately. Simmons (2007 p.923) notes that even after the 1829 Act was passed, 'private law enforcement remained dominant throughout the nineteenth century, particularly outside urban areas'.

Further problems with controlling crime were caused by a lack of consistency in how the law was applied. Manchester reports that until the middle of the century, prosecutors and judges would use their discretion as to whether a prosecution would take place and sentencing also varied greatly (1980 p.231).

With reference to the right to counsel, Bentley (1998 p.115) comments that at the start of the nineteenth century a full defence was only available for charges of treason. Prisoners were expected to speak for themselves in court even if they were illiterate, children or foreigners. The Prisoners Counsel Act 1836 did give prisoners the right to counsel, but in practice, poor suspects who could not afford representation were discriminated against. Bentley also believes that the defence 'in forma pauperise' where poor defendants could in theory apply for free representation was in practice 'a dead letter' as many defendants would not even have heard of this. Hostettler (2009 p. 208), comments that the defence counsel also did not have the final right of reply and that this 'concluding legislative step for adversariality' did not come about until 1898 with the Criminal Evidence Act.

The nineteenth century also saw changes in the administration of confessions and police interrogation. At the start of the century, judges worked under the rule that involuntary confessions were inadmissible. There was however a problem as witnesses could be bribed to say that the prisoner had confessed under duress. Bentley (1998 p.221) remarks that this was settled in 1840 when only sanctioned inducements were allowed. Debates remained about what constituted an inducement and there were calls for reforms. Many attempts were made but failed. Bentley remarks that the court's stance was that 'improper inducement' was the only ground for exclusion. Evidence was admissible even if the prisoner was drunk, in severe pain, about to go into labour or told by a priest that only a full confession would ensure divine forgiveness. It was also 'common police practice' to send an officer into a cell disguised as a fellow prisoner to extract a confession (*ibid.*, p.227). There were also problems, which still remain today, with misreported confessions and prisoners who pleaded not guilty when their co-accused pleaded guilty. In 1873 the Metropolitan Police General Orders 'stressed the need for officers to record at the time and in the prisoner's own words any statements volunteered by him' (*ibid.*, p.229).

Debate also raged about how suspects should be questioned after arrest. There was even disagreement among judges about this point. Prior to the Jervis Act of 1848, some believed that all police interrogation was objectionable; to others this was the case only if there had been no caution. The Jervis Act then 'deprived magistrates of their power to

examine the prisoner' and if they could not do it then it was even less acceptable for a police officer to engage in interrogation after a suspect had been charged. Interrogation before charging a suspect was only to be done sparingly. Bentley comments that 'of the nineteenth century prohibitions on the questioning of suspects nothing now remains. Interrogation conducted in accordance with the Code of Practice issued by the Home Secretary is recognised as a legitimate investigatory tool' (*ibid.*, pp.234-5).

According to the Jervis Act, the accused was also advised that he could refuse to answer questions during the pre-trial procedure and that anything he said could be used against him at the trial (Langbein 1994 p.1061). This Act also saw the role of the Justice of the Peace change from an inquisitorial one to that of a 'preliminary judge' (Manchester 1980 p.230).

2. Judges' Rules 1912 and the weakness of unregulated pre-trial procedures.

In 1912 the Judges in England petitioned the Home Secretary to formulate rules to be of guidance to police officers in criminal investigation. The judges of the King's Bench promulgated the first four rules, and then in 1918 the rules became nine rules. Until the Judges' Rules (1912), there were no rules relating to police officers and their treatment of suspects, thus no real control of police conduct at the police station. Questioning and interrogation to obtain evidence against suspects that would be admissible in court were therefore highly controversial issues (Paul 1980 p.2). A lack of monitoring during the questioning could potentially result in inadmissible evidence and police would be unable to obtain a conviction. It was because of this that it was considered so important to have rules which controlled the giving of evidence at police stations (Marshall 1965 p.127). The aim of these rules was to give the police permission to interrogate but make sure that all the information the police officers obtained was given voluntarily and not when the suspect was under pressure, as such evidence would then be inadmissible (Paul 1980 p.3). They gave police officers a method to follow when trying to obtain evidence from the

accused (Softly 1980 p.2). The rules were open to interpretation and because of this faced criticism from the public and had to be changed to become clearer (Marshall 1965 p.122).

The final Report of the Criminal Law Group⁴⁶ (2007 p.34) suggested that cautioning the suspect in the course of obtaining evidence under the Judges Rules was actually misleading him about his rights. They perceived a contradiction in giving the suspects the right to silence if their use of this right is later held against them in court. The caution itself warns the suspect not to self-incriminate, but it is also in the suspect's interest to answer questions (Paul 1980 p.3). The Judges Rules could put pressure on the investigating officer to make very difficult decisions. This could be the case, for example, with someone who could only be questioned by detaining or arresting him. In such a case it would be difficult to see how an officer would not have informed the suspect that he could be prosecuted even if no formal charge had been made (Marshall 1965 p.124).

Furthermore, it was not entirely clear who might be under 'reasonable suspicion' especially in cases of people who had committed crimes before. There were also decisions that had to be made about if and when to record what questions were asked or if questions could be re-iterated after a statement had been made. Marshall notes that questions could be put to the suspect if they were for 'the purpose of preventing or minimizing harm or loss to some other person or to the public' (*ibid.*, p.127) but then suggests that anything which led to the conviction of a criminal could fall under this definition. He concludes that it would have been difficult to blame the police if they found these standards 'impossibly high' (Marshall 1965 p.127). Other problems generated by these Rules, was how questioning would be conducted. The Judges' Rules did not give any clarification about it. McBarnett (1981 p.109) agreed that under the Rules, the police did not have clear criteria to follow during interrogation of the accused. She also criticized the Judges Rules, commenting that they did not work and were just legitimizing abusive police interrogation of citizens (*ibid.*, p.110).

⁴⁶ The Review Group on Balance in the Criminal Law was established by the Tánaiste and Minister for Justice, Equality and Law Reform on 1st November 2006, and was required to report by 1st March 2007.

The Judges Rules were aimed at ensuring the voluntary giving of evidence without inducement or oppression. However, this had not been successfully achieved and these concepts had to be re-defined several times. The result was that the Rules had become very confusing (*ibid.*, p.110); and relied on weak definitions which led to a failure to give clear guidance on what was and was not admissible evidence in court (*ibid.*, p111). Critics of questioning and the right to silence fell into two camps – those who were concerned with the efficacy of the police and wanted them to have more power and those who thought the police were working with ambiguous rules and wanted the rules to be clearer (*ibid.*).

There was essentially a conflict between the right to silence and the need for questioning during this period. The police were limited by not being able to ask the suspect certain questions which would lead to obtaining crucial evidence and possibly a successful conviction. It became apparent that the Judges Rules were not sufficiently complex to give the accused protection or to ensure that evidence had been properly acquired. The Judges' Rules were amended in 1964 and then were completely overturned by the 1984 Police and Criminal Evidence Act (Fat 1996 p.472), which became the law that was to cover the process of arresting and questioning the suspect. Even though the Judges' Rules had a weak and unregulated basis, they led to the development of more effective laws relating to the pre-trial process. Furthermore, the government in England and Wales was aware of their weaknesses. This will be shown in the next section, which covers the Police and Criminal Evidence Act 1984.

3. Police and Criminal Evidence Act 1984 (PACE) - a Revolution.

The impetus for PACE started in 1977, when James Callaghan's Labour government established a Royal Commission on Criminal Procedure to deal with the inadequacies of the Judges' Rules, which had been drawn up by Judges rather than professionals, such as lawyers or police officers who were in the front line of the pre-trial procedure (Fat 1996 p.472). The Royal Commission on Criminal Procedure made great advances by making recommendations which led to PACE, which replaced the problematic Judges' Rules (Dixon 1992 p.517). Dixon suggested that PACE was unrivaled in its consideration of

both sides, balancing police powers on the one hand with the suspects' rights and length of detention on the other (*ibid.*).

The Police and Criminal Evidence Act 1984 was a response to the scandals of police misconduct and malpractice, which had dogged the police since its formation in the 1820s. Planting and fabricating evidence, bribery and the covering up of serious crimes were among the police crimes uncovered. Scandals such as those of the Guilford Four, the Birmingham Six in 1975 and Carl Bridgewater meant that police malpractice had become a nationwide concern (Webb 1991 p.1). The investigation of specific police forces such as the West Midlands Serious Crime Squad showed that police officers sometimes suppressed or tampered with evidence, beat suspects and were prepared to commit perjury (*ibid.*).

Dixon suggests that PACE was also necessary to regulate police powers in a way that was nationally uniform. Before the Act, a mix of Acts of Parliament along with common law and local legislation regulated them. As a result, there were regional inconsistencies in whether the police could, for example, stop and search people for stolen goods and rules surrounding the authority of the police to detain suspects were unclear. There were opposing views about what the police powers should be. On the one hand, senior police officers were lobbying for an increase in police powers, on the other there was concern about suspects' rights. This concern was demonstrated by the case of Leighton, Lattimore and Salih where three young men (including two who were intellectually disadvantaged) had been wrongly convicted in connection with the death of Maxwell Confait. These convictions had been obtained on the basis of inaccurate confessions. (1992 p. 516)

Chaired by Sir Cyril Philips, 'the Royal Commission considered the investigation of offences in the light of police powers and duties as well as the rights and duties of suspects' (Irving& McKenzie 1989 p.1). The Commission's policy was that all evidence given to them had to be based on verified data rather than opinion and hearsay. As a result of this, several studies were conducted on the process and practice of police interrogation. These studies were to provide the Commission with evidence, which would allow it to evaluate how pre-trial investigations in police custody were being conducted (*ibid.*, p.2).

The Royal Commission proposed new legislation on police powers to stop and search, arrest, detention and questioning by giving the police more power while taking into account the rights of suspects (Powell & Magrath 1985 p.1).

Subsequently, The Police and Criminal Evidence Bill had a long and difficult passage through Parliament, and there were many amendments. The General Election also caused the Bill to be shelved and it did not receive Royal Assent and become law until 31st October 1984 (Irving& McKenzie 1989 p.1). As well as rationalising existing laws on police powers, PACE provided several new measures and provisions relating to the behaviour of the police. It also created powerful sanctions by making it a serious disciplinary offence to breach regulations. Furthermore, it granted power to the Home Secretary to issue Codes of Practice on pre-trial procedures (PACE).

PACE provides subsidiary Codes (A to H). Code A deals with the exercise by police officers of statutory powers to search a person or vehicle without first making an arrest and the need for police officers to make records of such a stop. Code B deals with police powers to search premises and to seize and retain property found on premises and person. Code C sets out the requirements for the detention, treatment and questioning of people in police custody by police officers. Code D concerns the main methods used by the police to identify people in connection with the investigation of offences and the keeping of accurate and reliable criminal records. Code E deals with the tape-recording of interviews with suspects in a police station. Code F deals with the audio-visual recording of interviews with suspects; Code G deals with statutory powers of arrest, and Code H deals with the detention of terrorism suspects (Home Office 2011). The Act has been the subject of innumerable amendments. The codes have grown from the original four to the present eight; but the nature of the PACE system is essentially the same as when it came into force (Zander 2012 p.8).

The Codes have grown in size and complexity; and the format and content of the Codes were 'very much written in a formal, legalistic style'(Zander 2012 p.9). Research on PACE has been a preoccupation not only of academics but also of police forces (Zander, 2003; Dixon, 1992: Pierpoint, 2006 and Skinns, 2010) These studies sought to find the

strengths and weakness of PACE. A thorough review would be beyond the scope of this section. However, Chapter Five will explore PACE more deeply and investigate the Codes (A-H). The purpose of this research is to determine how successfully PACE regulates search, arrest, detention and questioning. It will also consider how effectively pre-trial procedures monitor police conduct at the police station.

It is beyond the scope of this chapter to examine the whole body of discussion about PACE 1984. PACE has had ever-widening analysis since it was enacted and has encountered considerable criticism. Some of this has been taken account of by the Home Office in subsequent changes made to improve PACE. However, I have tried to show the background in which PACE was created and given a history of its development. In Chapter Five, I will investigate and critically analyse Articles in PACE that relate to pre-trial procedures.

4. Contemporary Developments.

After 09/11/2001 when terrorists blew up the World Trade Towers in the US, the issue of public safety in the UK also became more complicated. The government responded forcefully to the twin imperatives of protecting both the public and the state. As a result, the strategies of all the security services in the UK to deal with suspects or those who were involved in terror became extremely rigorous. It became a balancing act between the integrity of human rights and the need to protect the state. Anti-terrorist legislation has resulted in what Vogler (2011 p.9) identifies as a paradigm shift, whereby justice is concerned with crime prevention rather than placing emphasis on post-crime strategies. This prevention entails the targeting of particular groups of suspects including suspected terrorists; sex offenders or disruptive citizens who Vogler maintains 'can be described as having forfeited all or part of their status as citizens and consequently their rights protection'. Vogler (2011 p.1) points out that the label of 'terrorist' means that a suspect is deprived of the usual rights which a suspect accused of a commensurate crime would have as a citizen of the UK. All crimes committed by 'terrorists' are, after all covered by existing offence categories.

The Terrorism Act 2000 s.1 defines Terrorism as acts or threats of 'serious violence against a person', 'serious damage to property' or 'serious risk' to public health and safety. McKeever believes that to rely on the word 'terrorism' can have serious consequences for human rights. He also said the definition is complicated and the international communities have failed to find a proper definition for 'terrorism'. He believes that the term 'terrorism' is deployed for political reasons, and that for this reason it becomes difficult to define it clearly. Acts of terrorism might sometimes come from oppression and he cites the example of Israel and Palestine (2010 p.115).

There were however problems with this as the Terrorism Act (2000 s.41) states that the police can arrest individuals without a warrant for 'reasonable suspicion' of involvement with terrorism whether or not they have or were about to commit a crime. Feikert and Doyle (2006 p.5) suggest that the government has thus a difficult job in balancing rights and security as the ECHR prohibits detaining someone purely to prevent a crime. In the case of *A v UK* (3455/05)⁴⁷ where the appellants had been detained as possible terrorists under the UK's derogation from Article 5 under Article 15 after the 9/11 attacks. The court ruled that the detention of the appellants was a violation because it "discriminated unjustifiably between nationals and non-nationals" (ECHR 2005 Para 190)

Feikert and Doyle (2006 p.9) point out that the discrimination against black and Asian people which was shown in the police responses to the stop and search provisions of the 1984 Police and Criminal Evidence Act (PACE) continued to be shown in police behaviour under the Terrorism Acts. Under the PACE Code A (Para.1.1) discrimination against ethnic minorities was prohibited. However, it was acknowledged that ethnicity could be taken into account when dealing with international terrorism. The government and the police deny using ethnic and religious profiling, as they are anxious to reduce tensions especially in the Muslim community and do not want Stop and Search legislation to be seen as stigmatising this community as it could exacerbate terrorism. This point is reviewed later when discussing PACE.

⁴⁷ *A v UK* (3455/05), ECHR (19 February 2009)

The Terrorism Act 2000 section 44 gave senior police officers the power to stop and search pedestrians and vehicles without suspicion⁴⁸. So the 2000 Act makes the situation worse rather than protecting the people from terrorists. In contrast, under PACE 1984, as we have seen, police officers cannot stop and search without suspicion, but are empowered to do so under the 2000 Act. In other words, the problem is who defines what 'a terrorist' is. Human Rights Watch (2010 p.1) noted that between 2007 and 2009 over 148,000 people in England, Wales and Scotland were stopped and searched without suspicion and none of them was charged with terrorism. This gives impression the Act is being used improperly. The Equality and Human Rights Commission has criticised Section 44 on stop and search 'the manner in which the law is being exercised may constitute racial profiling of certain ethnic minorities, not be proportionate and therefore may be unlawful racial discrimination'⁴⁹.

Human Rights Watch (2010 p.18) suggests that the section (44)⁵⁰ should not have given the senior police officer a power to stop and search unless he obtained permission from the Home Secretary within 48 hours. This would allow time to discuss whether such actions could result in bad consequences for police relations with any community.

"S.44 of the Terrorism Act 2000 empowered a senior police officer, either verbally or in writing, to authorize random searches for renewable periods up to 28 days, where he or she "considers it expedient for the prevention of acts of terrorism". The Home Secretary must confirm the authorisation within 48 hours or it will lapse" (Vogler 2011 p.9).

What is clear is that terrorist threats have precipitated major, controversial changes that have affected pre-trial procedures. We have witnessed the battle between those concerned to maintain national security at all costs and those who believe that this concern should not mean the relinquishing of pre-trial practices that are in line with ideas about human rights.

⁴⁸ Terrorism Act 2000 section 44, www.opsi.gov.uk/acts/acts2000/ukpga_20000011_en_1.

⁴⁹ See Human Rights Watch (July 2010) Without Suspicion p.16.

⁵⁰ Terrorism Act 2000 (s44) An authorisation under this subsection authorises any constable in uniform to stop a vehicle in an area or at a place specified in the authorisation and to search (a) the vehicle; (b) the driver of the vehicle; (c) a passenger in the vehicle; (d) anything in or on the vehicle or carried by the driver or a passenger.

Human Rights Act 1998:

Another contemporary development is the Human Rights Act (1998); The HRA mirrors the rights and freedoms granted by the European Convention. These range from the right to life, to be free from torture, inhuman or degrading treatment, slavery to the right to a fair trial and free expression. These rights are extended to everyone living in the UK whether or not they are citizens (Watson & Woolf 2003 p.2). Hoffman & Rowe believe that the HRA is a piece of legislation of the magnitude of the Magna Carta¹²¹⁵, the Bill of Rights and the Acts of Union with Scotland and Ireland as it is an example of 'constitutional legislation' which has the power to affect how people see their identity as British citizens (2003 p.2).

Donald et al point out that there was controversy about the potential effects of introducing this Act. Despite being hailed as the 'beginning of the strong development of a human rights culture in this country', there were warnings that public authorities could be overwhelmed by the litigation that this Act would unleash. Furthermore as no Human Rights Commission was established by the Act, there was no actual mechanism to achieve this 'promised cultural renaissance' (2008 pp.14-15).

The HRA has added an extra dimension to the UK laws relating to pre-trial procedures, building on those rights and procedures established by PACE. It has been very specific in outlining what people's rights are in relation to arrest and detention and provided the possibility of individuals taking their human rights grievances to domestic courts instead of having recourse to the European Court of Human Rights in Strasbourg. The European Convention on Human Rights has been instrumental in shaping the HRA, which has caused some controversy, in particular relating to the amount of influence Europe should have on British law.

More detailed analysis of research in this area, and in particular the impact of the Terrorism Acts 2000- 2006, Serious Organized Crime and Police Act 2005, Criminal Justice Act 2003 and the Human Rights Act 1998 appears in Appendix B.

Conclusion:

To take an overview of the entire period covered in Chapter 4, it can be said that pre-trial procedures have become increasingly extensive and that the issue of the human rights of suspects has come to the fore. Today the rights of suspects are hotly debated in the press and torture is condemned both nationally and internationally. The behaviour of the police towards suspects is also the subject of public scrutiny. An exploration of the evolution of pre-trial procedures in England and Wales is illuminating when considering how a similarly balanced and humane system could be established in a country like Saudi Arabia. It is noteworthy that at the start of the period that has been considered, pre-trial procedures, such as they were, in England and Wales appeared to fall short of those in the newly Islamised Arab Peninsula in terms of human rights. There is now a reversal of this situation in that the pre-trial procedure in England and Wales, regulated by PACE (1984) among others, could be seen as a shining example of legislation that reflects international human rights, whereas the way that suspects are treated in Saudi Arabia is roundly criticised in the international press and by organisations like Amnesty International (see Chapter 6). One of the main aims of this thesis is to explore both why this is the case, and what can be done about it. In Chapter 6 the history of pre-trial procedures in the Arab Peninsula will be explored so that the two developments can be compared and an understanding can be gained about why the legal system in what is now Saudi Arabia has not built on the great beginnings established by Prophet Mohammed. In order to fully understand what the current situation is, there will be interviews with police officers, prosecutors and lawyers in Chapter Seven.

The history of pre-trial procedures is a dynamic one and we have seen how changes have occurred as the result of many factors:- foreign invasion; political forces such as the desire to be seen to control crime; social changes such as the Industrial Revolution and the expansion of modern technology; humanitarian philosophies and the efforts of particular individuals. The next chapter will explore in more detail how pre-trial procedures are outlined in PACE and the actual practice of implementing them at one police station in Sussex. It will also show how pre-trial procedures continue to be an area of controversy and in particular how establishing regulations and practice that serves the

both the interest of the individual suspect and the interests of the community to be protected has yet to be resolved.

Chapter Five

The Procedure of Criminal Investigation in England and Wales

Introduction:

The Police and Criminal Evidence Act (1984), (PACE), was enacted to restore public confidence in urban policing and can be seen as the most far-reaching legislation on policing after World War II. The violent confrontations between police and communities in inner cities, as well as the miscarriage of justice cases prompted this move to both regulate and strengthen police powers, including those in pre-trial procedures (Bridges 2011 pp.2-3).

PACE establishes a number of controls with regards to protecting the suspect inside and outside police stations, but might be considered vague about how police officers should implement these in practice. Some police officers, who preferred to adhere to the letter of the law, rather than its intention, may find a number of loopholes which could be exploited. Several authors, including Moston (1993) and Skinns (2011), point out that PACE can be used by the police in their own interests. For example, Sanders and Bridges' research showed that officers would sometimes read out the suspect's rights so quickly as to be incomprehensible. Thus rather than regulating the police, PACE could be regarded as facilitating and legitimating existing powers and practices. In spite of its shortcomings, PACE remains the basis for the regulations of the powers of the police and an attempt to find an effective solution to upholding the rights of the individual and giving the police appropriate powers (Zander 2012 p.5).

The purpose of this chapter is to explore how the provisions of PACE are carried out and to use empirical research to assess the balance between the interests of the whole community to be protected from crime and the rights and liberties of the individual. Dixon suggests that PACE was unrivaled in its consideration of both sides, balancing police powers on the one hand with the suspects' rights and length of detention on the

other (1992 p.517). Since it is based on empirical research in one police station in Sussex in order to observe actual practices in criminal procedures, the information acquired by this study may not be representative of general police practice. Although it is recognised that practice will vary across police stations, the results are nevertheless very revealing in determining how that balance is being achieved, and how the views and behaviours of actual police officers and lawyers reflect this.

1. The Right to Liberty.

The European Convention on Human Rights (ECHR) has no provision that deals clearly with stop and search. Article 5, which deals with arrest and detention, could be relevant in some rare cases where a person is stopped for a sufficiently significant time for it to count as a deprivation of liberty (Zander 2013 p.3). However, the ECHR is more general than specific, and that might lead to a wide interpretation of what might affect the right to liberty. The relevant case law is covered in Chapter Three.

The Police and Criminal Evidence Act 1984 (PACE) and the Bail Act 1976 introduced new legislation governing the way in which suspects were arrested, detained and interviewed by police officers. PACE was intended to provide safeguards for both suspects and police officers. For example, Code A ensured that suspects were not subjected to undue and unlawful stop or search. Also Code C ensured that suspects were not subjected to undue pressure or oppression, and made it difficult for the police to record inaccurately or invent the words used by the suspect when responding to questioning. For the benefit of police officers, the legislation was intended to make it difficult for a detained person to make unfounded allegations against the police, which might otherwise have appeared credible; this is stated throughout Code C. However, stop and search may infringe people's liberty and bodily integrity, and the constraints imposed by the PACE Act 1984 have been introduced to protect these rights. The next section will examine and explore these rights through actual observations at a police station, as well as the legislation on stop and search, arrest and detention.

1.1. The Prohibition of Arbitrary and Unlawful Deprivation of Liberty.

Prior to PACE, there were a number of malpractices involving stopping and searching without arresting and people lost their liberty without justification. The power to stop and search suspects dates back to the 1824 Vagrancy Act. This was passed to deal with public disorder and gave officers the power to search and arrest for the offence of being a “suspicious person” or “reputed thief being in or on any highway with the intent to commit a felony”. Section 66 Metropolitan Police Act (1839) also gave the police in London the power to stop and search people they “reasonably suspected” of carrying anything “stolen or unlawfully obtained”, while similar powers existed in other major metropolitan areas (Delsol & Shiner 2006 p.243).

The police stopped and searched individuals under what were known as ‘sus’ (suspicious person) laws. Although officers in urban centres were given local powers, the only national stop and search legislation was for the pursuit of drugs and firearms. Under these powers officers could stop a suspect solely on the basis of suspicion and did not require external evidence such as a witness description or crime report. It is this emphasis on officer suspicion that led to the use of the phrase “sus laws” in connection to stop and search (Delsol & Shiner 2006 p.243). The ‘sus’ provisions were eventually repealed on the advice of the Royal Commission on Criminal Procedure (RCCP) following the Brixton riots in 1981, principally due to concerns about their negative impact on the relationship between the police and the public (The Police Foundation 2012 p.1), PACE Part I, following the recommendations of the 1981 RCCP, appeared as a safeguard to protect liberty in this regard (Cape 2003 p.357). Section 1 of PACE extended the powers of the police to stop and search without warrant in a number of important respects. Firstly, all statutory stop and search powers have to be exercised in accordance with procedures laid down in the Act and in its associated *Code of Practice for the Exercise by Police Officers of Statutory Power of Stop and Search (Code A)*. Secondly, PACE united stop and search powers, to be applicable on a country-wide basis, for dealing with people reasonably suspected of being in possession of stolen articles, offensive weapons, and certain other items. Thirdly, the Act provided a codified statutory scheme for stopping traffic for road checks with the need for reasonable suspicion that the drivers had

committed an offence or were in possession of prohibited articles, for example, stopping and searching for equipment used in offences such as burglary, This was only on the basis of reasonable suspicion of carrying such articles (Feldman 2002 p.309).

Section. 1(3) of the Act requires stops and searches to be based on reasonable grounds, and the requirement of reasonable grounds and reasonable suspicion are critical to the operation of this power. In the matter of stop and search powers without reasonable suspicion, PACE in Code A, Paras. 2.12-14 require that; an officer of the rank of inspector or above reasonably believes that “incidents involving serious violence may take place in any locality in his police area” and that it is expedient to authorize such powers to prevent their occurrence or that persons are carrying dangerous instruments or offensive weapons in any locality in his police area without good reason. Such authority is given in regard to any place in that locality for a period up to 24 hours, and the period authorized should be no longer than appears reasonably necessary to prevent incident of serious violence (Code A, Para 2.13). The authority is given in written form specifying the locality, the period covered and the grounds (Code A, Para, 2.13). For example, if there is a demonstration and there has been literature suggesting that the demonstrators might use violence in some way, or that the police have intelligence that a counter-demonstration is due to take place, in such cases stop and search for weapons may be authorised even if the demonstration appears peaceful.

Zander (2013 p.6) points out that the Act gives the police power to search “any person or vehicle” and “anything which is in or on a vehicle, for stolen or prohibited articles” and to detain a person or vehicle, for the purpose of such a search (s.1 (2)). ‘Reasonable suspicion’ is not defined in the Act, but the subject is dealt with in detail in Code A of the Code of Practice on stop and search. The basic rule is that stop and search must be based on some objective evidence and not on hunches, instinct or stereotyping. Reasonable grounds for suspicion depend on the circumstances in each case. There must be an objective basis for that suspicion based on facts, information, and/or intelligence, which are relevant to the likelihood of findings, and articles of a certain kind (Code A, Para 2.2).

This was a common theme in interviews with police officers, i.e. that a police officer needs 'reasonable suspicion' as grounds for stopping and searching people. One specified that:

*"The police needed something more than just 'you look dodgy'. Police officers cannot stop and search without evidence, they cannot just approach someone on the street, but need some suspicion that the individual is up to no good."*⁵¹

The officer went on to add that either s.1 of PACE or s.23 of The Misuse of Drugs Act are used in this connection. If the police suspect that someone has either been taking drugs, or is about to take drugs, then they can search⁵². However, case law suggests that police do not always have 'reasonable suspicion' to stop someone, and that they sometimes put security and public safety over this concern as the example below demonstrates. In the case of *Austin v. The UK* (369/09)⁵³ Ms Austin was stopped by the police who had a suspicion that she had joined a demonstration. The ECHR held that there was no violation of Art.5 (1) of the convention. This was due to the exceptional nature of the case where the police cordon was used in the interests of public safety. A violation would have occurred if that measure had not been considered necessary. In the case of *Mustapha Osman v Southwark Crown Court* (2318/98)⁵⁴, the police officers tried to search Osman who had tried to enter a park peacefully. They showed no ID and gave no reason, and that led him to refuse to be searched so the police handcuffed and detained him. Bailey and Taylor consider that stop and search requires the exercise of police discretion and the issues associated with it. It is worth asking how much discretion is necessary for the power to be workable. 'With the maximum discretion given to the officer on the beat is he or she capable of being monitored and supervised effectively?' (2009 p.163).

⁵¹ (*Sussex* Police Officer1, interviewed 25 February, 2013).

⁵² (*ibid.*,).

⁵³ *Austin v. The UK* (369/09), ECHR (15 March 2012).

⁵⁴ *Mustapha Osman v Southwark Crown Court* (2318/98) Judgment of the High Court CO/2318/98; (1999) *The Times*, 1 July, Queen's Bench.

At interview Police Officer 1 stated that they would not stop and search 'willy-nilly'. An officer who has carried out a search must make a record of this as soon as practicable and give a copy to the person searched if he or she wants it. In addition, persons stopped and asked to account for themselves should also be provided with a record of the encounter (Code A Para.4). These records are provided not only for the person stopped but to allow supervising officers to monitor the use of stop and search powers and guard against, for example, inappropriate generalizations being made. The recording of police stop and search can provide a valuable insight into the behaviour and performance of the participants in a police stop and search scenario (Code A Para.5). However, if no arrest is made, police action cannot be effectively monitored. Possibly new recording technology carried by officers could rectify this problem.

Searches involving the exposure of intimate parts of the body must not be conducted during stop and search as a routine extension of a less thorough search simply because nothing is found in the course of an initial search (Code A Para.3.7). If the search involves exposure of intimate parts of the body and a police station is not nearby, particular care must be taken to ensure that the location is suitable in the sense that the search can be conducted in accordance with the requirements of the Code. Such a search may not take place in a place police vehicle. An intimate search cannot in any circumstance be carried out as part of stop and search (Para.3.7).

Police stop and search powers in England and Wales are to be overhauled with a revised code of conduct. Home Secretary Theresa May has said she told MPs “an inquiry had found 27% of searches may have been illegal”, she said that if this number was not reduced, she would seek to change the law. A recent consultation has highlighted concerns that stop and search was used too widely and unfairly targeted ethnic minorities (BBC 10 April 2014)⁵⁵. In the following section I will examine the way that police officers deal with arrestee and detainee in respect of the right to liberty and with regards to human rights.

⁵⁵ <http://www.bbc.co.uk/news/uk-27231306>. (Accessed 10 June 2014).

1.1.1. Arrest.

There was considerable variation in police practice regarding arrest in the pre-PACE period, which can be explained by regional variation in policy. Arrest involves a major restriction of someone's liberty and thus needs careful regulation as, if it is carried out unjustifiably without specific legal powers, it can be deemed to be false imprisonment, a gross abuse of human rights and liable to civil action (Fenwick 2007 p.1140). Fenwick goes on to add that before PACE, powers of arrest rested on a 'mass of common law and statutory provisions' and there was little consistency in the legislation. These powers are now covered by PACE although the common law powers remain as do many statutes which cover powers of arrest which overlap with those of PACE (2007 p.1140).

Arrest procedure was totally changed by PACE (1984 Pt IV, which explicitly granted police arrest powers and made police questioning of arrestees a routine part of investigations). The details were further refined in PACE Code C, The Act reflects the terms of Article 5 of the ECHR and Fundamental Freedoms of 1950, which states that: "No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law ... (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority of reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so..."

There are a number of elements that must be present for an arrest to be valid. There must either be an arrest warrant or a legal power to arrest without warrant. Secondly, the factual requirements of the relevant powers must be fulfilled: commonly the requirement of 'reasonable suspicion'. If the arresting officer has made a reasonable but erroneous interpretation of the law, he will not have a reasonable suspicion and the arrest will be unlawful. The reasonableness of the officer's decision is to be based on the information available to him at that time.

In some cases, arrest is clearly wrongful; and. the arresting officer may have been following the letter of the law but not the spirit. Close monitoring and review should prevent unlawful arrests. .

One such case is *Richardson v Chief Constable of West Midlands Police* (773 /2011)⁵⁶ where a teacher was deemed by the Court to have been unlawfully arrested after an unfounded allegation by a pupil. One officer commented that 'new guidelines were urgently needed to prevent needless arrests that wreck innocent people's careers'.

With regards to arrest procedure under PACE, one respondent explained that the police officer must be professional, get along with people, and have a sense of humour as well. He thought it very important to get on the side of the suspect and wondered why any police officer would want 'to wind someone up', as there seemed no benefit to be gained from it. There are, however, many instances when this is not the case (*Richardson v UK*).

“Winding someone up, then they want to kick off and then they throw them in a cell – that’s not in our interests. The police officer wants to do the job and get it done – in and out, basically” (Sussex Police Officer 1).

Section.24 of PACE now deals exclusively with the constable's powers of arrest without warrant for any offence. The constable has the power to arrest without warrant anyone who is, or whom he has reasonable grounds for suspecting to be, about to commit, or in the act of committing, an offence. But these powers are to be exercised only if the constable has reasonable grounds for believing that it is necessary to arrest the person in question for any of the reasons specified in s.24 (5), which include preventing harm to him or herself or the public or to property or to properly investigate the crime. This might perhaps encourage the arrest of the 'usual suspects' on the grounds that the police are likely to find something that would justify an arrest.

⁵⁶ *Richardson v Chief Constable of West Midlands Police* [2011] EWHC 773 (QB); [2011] WLR (D) 116

A number of officers observed that it is actually quite rare that they would obtain an arrest warrant.

*"Sometimes I don't see them at all, other weeks I'll see a couple of arrests that need search warrants, but normally it's taken care of under PACE."*⁵⁷

*"If I suspect that you are going to commit a crime, for example if I see you with a brick, just about to throw it at a window, I can arrest you at that point"*⁵⁸

PACE Code G states "the use of the power must be fully justified and officers exercising the power should consider if the necessary objectives can be met by others....". If the officer has reasonable grounds to suspect but does not believe that an arrest is necessary there are various other options to consider, such as the issuing of a fixed penalty notice, a report for summons or granting street bail. If an officer arrests someone unnecessarily, because s/he is ignorant of these other options, then it could be argued that a violation of liberty has occurred. For an arrest to be necessary it must be for one of the grounds stipulated in s.24 (5). To say that the list of arrestable offences in section 1 and Schedule 1A creates problems for the police is an understatement. There are well over 100 relevant offences. How is the ordinary officer expected to master and keep abreast of these detailed and complicated provisions? Worse, subsections (4) and (5) of section (24) extend the power of summary arrest, under certain circumstances to an ordinary citizen (Zander 2013 p.131).

Police officer 2 argued that since the amendment of PACE to include Code G, which came into force in October 2012, the arresting officer has to make the decision whether the arrest is justified, and where certain criteria have been met. The role of custody has been clarified and a 'necessity test' (Code G Para 2.9) has to be applied by the arresting officer to see whether or not detention is required. If the detention is not actually required the situation can be dealt with by other means. He added that it was not always easy to

⁵⁷ (Sussex Police Officer 2, interviewed 25 February, 2013).

⁵⁸ (Sussex Police Officer 1).

judge whether an arrest was justified⁵⁹. Another police officer asserted that arresting people with no justification might happen but very rarely. Since the introduction of the necessity test, the police officer has to be very, very careful⁶⁰.

These comments show that the police officers interviewed are aware that they need a good reason to arrest someone and that there are alternatives. However, a legal advisor commented that the police arrest many people with no justification: “because police officers are basically ignorant of the law, or they do not have the confidence to make a decision, because there is so much hierarchy, that they are not allowed to make decisions”. She mentioned situations where there are two versions of the story, and the police feel they have to make a double arrest⁶¹. Judging by this comment, there is still some way to go in training police on this matter.

A police officer argued that police officers have the authority to arrest someone purely on suspicion but with no hard evidence. He mentioned that sometimes arresting is just for investigating the crime.

“It happens a lot with domestic incidents, where the wife is fed up with the husband and he’s drunk, She calls the police ‘He’s just pushed me’, so we have to go there, we have to arrest, we have to take him away. That happens a lot”⁶².

S.24 of PACE now permits an officer to arrest without a warrant for almost any offence, whereas before this was restricted to serious offences. The reason given for this change was that officers might find it difficult to decide which offences were arrestable without a warrant and which were not. However, the response to this might be that officers should be given special training rather than making all offences arrestable without a warrant. The difference between a felony and a misdemeanour (a felony is punishable by more than

⁵⁹ (Sussex Police Officer 2).

⁶⁰ (Sussex Police Officer 1).

⁶¹ (Sussex Legal Advisor 2, interviewed 13 March, 2013).

⁶² (Sussex Police Officer 3, interviewed 25 February, 2013).

one year in jail, a misdemeanor is generally a crime that is punishable for a year or less in prison) was encapsulated in common law and used by constables for centuries and this difference, it was abolished by the 1967 Criminal Law Act until this was replaced by PACE. It seems unlikely that officers today would be any less able to make the distinction than before (Austin 2007 p.463). However, they still need training and monitoring to ensure regulations are clear to them and that they follow the guidelines. During 2010-11 the IPCC received 12,750 complaints against the police in England and Wales. This figure increased more than 8000 compared to 2004 when 4,321 complaints were received (IPCC Report 2011 p.36).⁶³ It seems that PACE fails to regulate the level of force when police need it, thus, the level of force should be clear in PACE to protect the suspect's rights while he or she being arrested or searched.

The police officer must record the arrest action; Code G 4.1 states that the arresting officer is required to record in his pocket book or by other methods used for recording information: the nature and circumstances of the offence leading to the arrest; the reason or reasons why arrest was anything said. Moreover, 4.2 states that such a record should be made at the time of the arrest unless impracticable to do so. If not made at that time, the record should then be completed as soon as possible thereafter.

To be concluded, many situations in which an arrest can be made under s.24 of PACE depend upon the concept of 'reasonable grounds for suspicion'. As PACE gives no guidance as to which facts may or may not be capable of being reasonable grounds for suspicion in the context of arrest, there are no Codes of Practice or Notes for Guidance to help here. Thus it has fallen to the case law, such as *Richardson v. The UK* and *Austin v. The UK* to develop precedents as to which grounds for suspicion are permissible; such guidelines, of necessity, are created in response to the facts of the case before the court and so lack generality; each case is to be judged on its own evidence.

⁶³ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/229007/9780108510991.pdf

1.1.2. Detention.

Part IV of PACE established a new system for police detention. It created a division of function between the officers conducting an investigation and a 'custody officer' responsible for supervision of each suspect's detention. It also provided for written records to be kept and for periodic reviews of the need for the continued detention of the suspect. Bottomley *et al* point out that safeguards involved providing limits on the length of detention and providing appropriate care for detainees as well as protecting their rights (1991 p347). The new code C clearly regulates the way that the detainee is dealt with in police custody, including the questions that the detainee should be asked by the custody officer on being booked in. Paragraph 3.5 of Code C requires the officer to ask the detainee whether they want legal advice and whether they want someone informed of their detention but, as an innovation, also requires them to ask the person whether they are, or might be, in need of medical treatment or attention, and whether they require an appropriate adult or an interpreter, to help check documentation and answer questions. This is part of a general attempt to create a more sophisticated approach to identifying suspects' needs and vulnerabilities.

Paragraphs 3.6 to 3.10 of Code C require the custody officer to initiate a structured risk assessment as to whether the detainee is likely to present specific risks to custody staff or to themselves, and to make an appropriate response if such risks are identified. A risk assessment is required to be carried out in respect of all persons entering police custody and the results entered in the custody record. The risk categories include medical and mental conditions, medication issued, special needs, violence, escape risk, suicide or self-harm, and problems with drink or drugs.

Code C requires the custody officer to go further than Para.3.5 in that it provides that they must also ask whether the person is suffering from any mental health problem or depression and whether they have ever tried to harm themselves. These provisions also have the effect of placing specific responsibility on the custody officer to determine

whether a suspect is vulnerable as a result of mental disorder or some other mental condition (Code C Para.1.4).

It was therefore clear that the custody officer has responsibility for suspects from their arrival at the police station until they are charged. During this study's interviews, Police officers (3&4) described this as 'hard work', involving decisions about whether to handcuff the prisoner, checking medical needs, calling a solicitor if required. The case could also be referred to the Crown Prosecution Service, which increases the time spent at this stage in the process.

*"They then make the decision if it is complicated; and the person is either charged, bailed, receives a police caution or it could be no further action. We act on what the supervisor recommends"*⁶⁴.

Another police officer said this procedure might take a long time and it was not that easy to give a specific time for handling the case, as it depended on the complexity of the case and how busy the station was.⁶⁵ Given that a recent report by the Independent Advisory Panel on Deaths in Custody 2014 stated that in total there were 7,122 deaths recorded for the 13 years from 2000 to 2012. This is an average of 548 deaths per year. Of these deaths, 72% were men (5,123) and 28% (1,999) were women. There were 549 recorded deaths in state custody in 2012 compared to 515 in 2011. It is essential that the mental and physical needs of detainees as well as their legal ones in police custody area are effectively dealt with. Deaths and injuries were primarily caused by self-harm or were drug-related ⁶⁶. The custody officer has overall responsibility for the welfare and fair treatment of detainees, but others, such as healthcare professionals also make an essential contribution; for example, when conducting intimate searches (Skinns 2009 p.400).

⁶⁴ (Sussex Police Officer 3),

⁶⁵ (Sussex Police Officer 4, interviewed 25 February, 2013).

⁶⁶ <http://iapdeathsincustody.independent.gov.uk/wp-content/uploads/2014/08/Independent-Advisory-Panel-on-Deaths-in-Custody-e-bulletin-July-2014.pdf>

Skinns goes on to add that solicitors and police are both important parties in the fair treatment and welfare of detainees in compliance with PACE. Although they are both concerned with the length of the detention, this is for different reasons. The police want to ensure that they comply with PACE and the solicitor has often been instructed by their client to obtain a speedy release. Police and solicitors can therefore negotiate mutually convenient times for interview, but the power to detain lies ultimately with the police and the suspect does not always benefit from such negotiations (2009 p.401).

Section.37 of PACE created a two-stage approach to deciding whether an arrested suspect should be detained without charge in a police station. Firstly, the custody officer must determine whether there is sufficient evidence to charge the person with the offence for which he or she has been arrested (s.37 (1)). If there is, the custody officer must decide whether or not to charge the suspect, and detention is permitted only for this purpose and only for so long as is necessary to make this decision. If, and only if, the custody officer determines that there is not sufficient evidence to charge, he or she must then decide whether detention is necessary in order to obtain evidence, whether by questioning or by other means. S.37 does not authorize detention in order to obtain evidence in respect of offences other than those for which the suspect has been arrested, although by s.31 the suspect must be further arrested if it appears that, if released from the original arrest, he or she would be liable to arrest for another offence or offences (Cape 1999 p.877).

Dixon et al (1990 p.130) argue that, although PACE seeks to ensure that detention is justified and cases are processed quickly, whether this happens effectively can depend on the police officers' attitudes to the suspect and to PACE itself. They believe that few custody officers challenge the arresting officer's decision to arrest and some reviews amount to not much more than an inspector making a quick check through the hatch on the cell door. They comment that "police followed the letter, but not the spirit of PACE" (Skinns 2011 p.306).

In the case of *Al Fayed and others v Metropolitan Police Commissioner* (391/2004)⁶⁷, all the suspects claimed to be detained unlawfully whilst being interrogated. The High court decided there was no case to answer. But even if the claims had been well-founded, damages for less than an hour's questioning in a police station would have been very small. The inconvenience and disruption would have been the same, whether they attended the police station for interview and finger-printing voluntarily (which the appellants say should have happened) or under arrest (as actually happened). This shows there is a difference between interrogation after arrest and detention, and when the police interrogate it cannot be counted as detention.

Under s.41 of PACE a person must not be kept in police detention for more than 24 hours without being charged, however this can be routinely extended. Reviews of detention are concerned with 'periodically determining if a person's detention, before or after charge, continues to be necessary'. Therefore the reviewing officer has to consider the details of the case and allow representations from relevant parties such as legal advisors and appropriate adults. During the review, the suspect should also be reminded of their ongoing right to free and independent legal advice and the reviewing officer is to make a note of any comments made by the suspect (s.42 (6) of PACE). Under s.41 custody officers can keep suspects in custody for more than 24 hours only for major crimes and then a superintendent could authorize custody for any period up to 36 hours; whereas anything after 36 hours has to be decided by a Magistrates' Court. The custody officer has to apply to a Magistrates' Court.

One police officer pointed out that long detentions are rare:

*"You could argue that sometimes it might be better for people to remain in custody for a few reasons, so we can deal with the case a lot more expeditiously rather than having people coming backwards and forwards"*⁶⁸

Skinns suggests that the swift expedition of cases is in the interests of both suspects and the police. The former because the experience may be unpleasant, and the latter

⁶⁷ *Al Fayed and others v Metropolitan Police Commissioner* - [2004] ER (D) 391 (Nov),

⁶⁸ (Sussex Police Officer 4).

through having pressures on their resources (Skinns 2011 p.304). To this end, inspectors carry out detention reviews at 6, 15 and 24 hours to check on progress and speed up proceedings if necessary. S.41 (6) of PACE stipulates that the 'detention clock' can only be stopped if the suspect has to be taken to hospital and any interviews conducted there are added to the detention time. Sections 34-6 of PACE allow a suspect to be detained without charge for a serious offence. If it isn't possible to bring the suspect to a Magistrates' Court within 24 hours, then this has to be done as 'soon as is practicable'. What this actually means is the subject of much debate; for instance, would an indefinite detention be possible under this definition? If the investigating officer feels the need to detain a suspect without charge for more than 36 hours in a non-terrorism case, they must apply to the magistrate's court for a warrant for further detention. There must be a full hearing of the application, at which the suspect will be entitled to be present and represented by a solicitor or barrister (s. 43 (2) & (3)).

PACE stipulates that suspects have a right not to be held *incommunicado*. This means that they may request that someone with an interest in their welfare be informed via telephone of their whereabouts as soon as is practicable and at public expense (PACE Code C, 2012: 5.1). If that person cannot be contacted, suspects can choose up to two alternatives and more, if the custody officer allows. This right can be delayed, for example, if police think that the suspect will interfere with or harm evidence; alert other suspects who have not yet been arrested; or hamper the recovery of property relevant to that offence (PACE Code C, 2012: Annexe B). The decision to delay informing someone of a suspect's whereabouts has to be authorized by a person of the rank of inspector or above.

A custody record must be opened as soon as it is practicable for each person who is brought to a police station under arrest or is arrested at the police station having attended there voluntarily (Code C.2.1). The custody officer is responsible for the accuracy and completeness of the custody record and for ensuring that it accompanies the detained person on any transfer to another station (Code C.2.3).

A custody officer interviewed with regard to detention recording, considered this as an important safeguard to preserve the rights of both suspects and police officers, and said:

*“So, if a drink has been given to them, it is logged, if they ask for a solicitor, it gets logged, if they receive a phone call, it is logged. Everything is logged, meticulously. Sometimes things get missed, but that’s human nature isn’t it?”*⁶⁹

Another officer commented that this system is now computerised:

“Generally, it’s all recorded, dated and timed via the computer” (Sussex Police Officer 4).

A legal advisor agreed with the custody officers with regard to these practices. She stated that the detention was reviewed to make sure it was expeditiously dealt with. The maximum 36 hours is reserved for serious crimes like terrorism, nationwide drugs offences or serious assaults.

*“But generally, everybody is dealt with within 24 hours”*⁷⁰.

The right to liberty is guaranteed in Art.9 of ICCPR and Art 5 (1) of ECHR. A consideration of the procedures involved in detention thus involves looking at how the police behave towards the suspect. What is also important is how the suspects themselves view the detention and their right to know why they are being arrested and what charges are being brought will be addressed next.

1.2. The Right to Know the Reason for Arrest and What Charges are Being Brought.

PACE regulates the information that has to be given to arrestees, whereby a person who is being arrested must be informed of the factual grounds for the arrest either at the time

⁶⁹ (Sussex Police Officer 3).

⁷⁰ (Sussex Legal Advisor 1, interviewed 1 March, 2013).

or as soon as is practicable after the arrest (s28 (1) and (3)) This applies to anyone making an arrest, be it the police, a store detective or a civilian. The police have a duty to state the grounds for arrest even if this is obvious (s.28 (2) and (4)).

PACE Code G states that “an arrested person must be given sufficient information to enable them to understand they have been deprived of their liberty and the reason they have been arrested” (Note of Guidance 3). There is also a requirement that suspects are informed of their arrest under Article 5(2) of the ECHR. An arrest is unlawful if the person arrested is not told the ground of arrest in compliance with s.28 (3); however, the arrest becomes lawful once the grounds are given. Bailey & Taylor note that an arrest is not rendered unlawful if no grounds are given at the time of arrest, because this was not practical, so long as the grounds are given as soon as it is practical to do so. Also, the arrest can be carried out by one officer and the grounds for arrest given by another (2009 p.206).

In the case of *Taylor v Chief Constable of Thames Valley Police* - (3155/2004)⁷¹, the claimant was seen on video throwing rocks in the direction of a farmhouse. He was arrested and allegedly was told that this was on suspicion of violent disorder at the farmhouse. He was detained for 7 hours. The court ordered that he be paid compensation as he said he had not been properly informed about the reasons for arrest. The chief constable appealed against this, and the Court of Appeal found that the trial judge had been wrong to find that the arrest had been unlawful as the arresting officer had stated the reasons for arrest. The question then arose as to the period of unlawful detention. As the arrest was lawful it followed that the period of time following the arrest and arrival at the police station was not to be regarded as a period of unlawful detention. The arresting officer had informed the claimant of the ground for the arrest within s. 28(3) of the 1984 Act in compliance with the Human Rights Act, in particular the requirements of Article 5(2) of the ECHR. He was told both the essential legal and factual grounds for his arrest. On the basis of this case, it would appear that the test has been satisfied to make

⁷¹ Taylor v. Chief Constable of Thames Valley Police [2004] 1 WLR 3155

the arrest lawful. However, it highlights the importance of informing a suspect of the facts and grounds for an arrest.

As mentioned in the section on detention under Code C, when a person arrives at a police station under arrest, or is arrested there, the custody officer must tell him clearly of (1) his right to have someone informed of the arrest, (2) his right to consult privately (see legal advice section in this chapter) with a solicitor, and the fact that independent legal advice is available free of charge, and (3) his right to consult the codes of practice. He must be given (1) a written notice setting out these rights, his right to a copy of the custody record, the terms of the caution, and the arrangement for obtaining legal advice; and (2) an additional notice setting out his entitlement while in custody (Code C.3.1-3, 2). Special arrangements apply where the person appears to be deaf, or there is doubt about his hearing, or he is juvenile, mentally handicapped or suffering from a mental disorder, is blind or seriously visually handicapped or unable to read (Code C 3.12-C.3.20). These normally require the involvement of an independent third party such as an interpreter, an approved social worker or an 'approved adult' as the case may be. Arrests must be regarded as the possible first step in a criminal process and detaining someone in order to question them when an arrest has not been made is unlawful (Bailey & Taylor 2009 p.206).

Feldman notes that not only does improper delay render an arrest unlawful, if the wrong grounds are given, the detention is also unlawful. Only limited delay is permitted before the information is given, and s.28 of PACE is clear that delays can only be justified if it is truly impractical to give the suspect grounds for arrest and might impede the police operation. Merely being inconvenient is not a sufficient excuse for a delay (2002 p.345).

Clearly, PACE does satisfy the basic principles of the relevant International Human Rights provisions. However, the question as to whether it creates the right balance between the interests of the community to be protected from crime and the rights of the individual is a vexed one. It is essential that justice remains impartial. Clearly, the police need to protect society, but until a suspect is proven guilty they have a right to be treated as

innocent. Furthermore, criminals also have the right to humane treatment. It seems that if human rights are to be upheld for both the community and the suspect, the police need to protect the former and use the powers they are given to do this. However, they also need to carry out these powers in a way that conforms to the standards of International Human Rights. The right to know about the reason of arrest is clear in Article 9(2) of ICCPR and Article 5(2) of ECHR.

1.3. The Right to be Brought Promptly Before a Judicial Officer.

PACE provisions regulate the right to be brought promptly before a judicial officer, in accordance with Article 5(3) of the ECHR and Article 9 (3) of ICCPR , which also states the suspect is entitled to trial within a reasonable time and that release may be conditioned by guarantees to appear for trial. Once a person has been arrested for an offence at any place other than a police station, he must be taken to a police station by a constable “as soon as is practicable” after the arrest (s.30 (1)). It should generally be a “designated police station” to which he is taken (s.30 (2)). However, there is a major exception; s.30 (10) allows a delay if the suspect’s presence elsewhere “is necessary in order to carry out such investigations as it is reasonable to carry out immediately”. So, if an element of surprise or the existence of evidence might be lost in the time involved in taking the arrestee immediately to the police station, an exception may be made by the police officer, but a record of this fact and the reasons behind it must be kept (PACE s. 30(11)). In the present study, police officers considered that a delay occurs very rarely, except in cases where there is violence or suitable transport is not available.

In the case of *O’Hara v. The UK* (36555/97)⁷² the defendant was interrogated about IRA membership and suspected involvement in murder on 34 occasions in 1985. He was detained for six days and 13 hours in custody before being released without charge. The ECHR found there was a violation of Article 5 (3) of the Convention as O’Hara had not been brought promptly before a judicial officer. This shows that it is important to send

⁷² *O’Hara v. The UK* (36555/97), ECHR (16 October 2001).

the suspect in good time for a trial if there is strong evidence against him or her. The fact the law allows so much time in custody without being brought before a judicial officer under anti-terrorism legislation is problematic.

S.46 of PACE clarifies the law as to when a person must be brought before a court after he has been charged. Broadly, it provides that he must be brought before a court within 36 hours. The basic provision is subsection (2), which states that he must be brought before a court “as soon as practicable” but this hallowed phrase is amplified by the additional provision “and in any event not later than the first sitting after he is charged with the offence”. If there is no sitting arranged for the day when he is charged, or the next day, the custody officer must inform the clerk to the justices, so that a special sitting can be arranged (sub.3). If the suspect is to appear at a court in a different part of the country, he must be taken there as soon as is practical and must similarly be brought before a court there as soon as is practicable; and in any event not later than the first sitting in that area after his arrival (sub.4). Subsection (5) requires the police to inform the justices’ clerk if there is no sitting scheduled for the day or the next day. When the clerk to the justices has received information under subsection (3) or (5), he is under a duty to arrange a special sitting of the court for the day after the charge (Zander 2013 p.224).

In conclusion, PACE gives police officers a responsibility to show reasonable grounds for delaying suspects being taken to the police station, “as soon as practicable after arrest” (s. 30 (1)). However, the reality is that, the police officer can justify the delay for any legitimate reason (transport, violence or search for evidence). Although, such delays must be recorded, there are still problems. A superintendent cannot be both in a police station and monitor directly whether the police officer started recording delays in taking the suspect to the police station, only the paperwork can be checked. On the whole, however, PACE makes an effort to prevent delay by requiring the police sergeant to review the case before taking the suspect into custody.

In order for the suspect to be brought promptly before a judicial officer and not be detained longer than necessary, police actions need to be closely monitored. One effective way of doing this is through a third party who has the rights of the suspects at heart. In the next section the importance of legal assistance for the suspect during this process will be explored.

2. The Right to Legal Assistance.

The Royal Commission recognised that the law, as it stood before PACE, was unsatisfactory in granting a suspect the right to legal advice. It recommended that anyone arrested should have unlimited access to a private legal advisor and that the police had a duty to inform the suspect of this right. PACE was enacted more or less in accordance with this recommendation (Shorts & Than 2001 p.62).

S. 58(1) of PACE provides that the detainee is entitled, if he so requests, to consult a solicitor privately at any time. When a request is made, it must be complied with as soon as practicable and the custody officer must act on it without delay except so far as a delay is authorized in accordance with the section (s.58 (4) of PACE; Code C, Para.6.2). Where the person detained is a juvenile, or a mentally disordered or mentally handicapped person, either the detainee or the 'appropriate adult' (if one is present) is entitled to request legal advice, and any such request should be acted on immediately (Code C, Para.3.13 and note for Guidance 3G).

Compared to some countries such as Saudi Arabia, the right to legal advice is better provided for in the law in England and Wales. However, its impact in due process terms should not be under-estimated. Solicitor 2 was asked if the police in England and Wales follow procedure correctly, she answered "I don't think they are always followed correctly, sometimes the police don't make the necessary enquiries". So this section will examine the operation of the right to legal advice at the police station.

2.1. The Scope of the Right to Legal Assistance.

Suspects may be ignorant of this right or they might be inarticulate or illiterate, so the right to legal advice is a safeguard for those who cannot express themselves. For example, they may not fully understand the legal complexity of their situation. However, police officers are authorized by PACE to delay or withhold legal advice in exceptional circumstances, for example where waiting for a solicitor or where it may interfere with the investigation or the administration of justice. In circumstances such as these, detention may become a frightening experience (Skinns 2011 p.20).

In this study, legal advisors commented on the scope of legal advice and said that legal advice protects the detainee and the police:

*“If they do their job properly, then they are not going to get a case chucked out of court because of procedural irregularities. The fact that the client did not have an appropriate adult when they should have done; or, did not have access to a solicitor when they should have done. Perhaps there are mental health issues, things like that. The legal advisers make sure the police do their job properly.”*⁷³

They added that in the past there have been instances where good cases have been dismissed because the police have not acted properly. So the legal advisors are there just as much to clarify the law, so that procedures are followed. Moreover, it is possible that sometimes the police are just as glad to have a solicitor there, so they cannot be criticized for procedural irregularities, and also to remind clients that in some cases it may be in their interests to admit the crime. So far as the client is concerned, the presence of a legal adviser gives them a friendly face at the police station. They are able to give good legal advice, as solicitors have more access to what is happening with the case than the suspect has:

“If they have a solicitor, the solicitor is told prior to the interview taking place, whatever evidence is against the client. They can go in and talk to the client and give them advice on the basis of that

⁷³ (Sussex Legal Advisor 1).

evidence. So that is a warning for the detainee; otherwise, they do not get that warning, they do not know what is going to hit them”⁷⁴.

2.2. Legal Advice.

Given that there is concern about whether legal advice to suspects is to remain of a high standard, as a result of recent cuts, many of rights described in the following section might, in practice, only be a right for those who could afford them. Suspects who can afford a highly experienced and qualified solicitor will be at an advantage over someone who is allocated a less experienced professional. This will be discussed later in more detail. PACE, s.58 (1) provides that “A person arrested and held in custody ... shall be entitled, if he so requests, to consult a solicitor privately at any time.”. Code C provides that all people in police detention must be informed that they may at any time consult and communicate privately, where in person, in writing or on the telephone, with a solicitor and that independent legal advice is available free of charge from the duty solicitor (Code C.6.1). The term ‘solicitor’ includes a solicitor with a current practicing certificate or an accredited or probationary representative included in the list of representatives by the legal advice, which must be prominently displayed in the charging area of every police station (Code C.6.3). The right to legal assistance is guaranteed in Article 14 (3)(b) of the ICCPR and Article 6 (3) (b) of ECHR.

Where a person is permitted to consult a solicitor, who is available when the interview begins or is in progress, the solicitor must be allowed to be present at the interview (Code C.6.8). The solicitor may only be required to leave if his conduct is such that the investigation officer is unable properly to put questions, and on authority of an officer not below the rank of superintendent (if readily available), and otherwise an officer not below the rank of inspector who is not connected with the investigation (Code C.6.9, C.6.10). A non-accredited or probationary representative is to be admitted to police station to provide advice on behalf of a solicitor unless an officer of the rank of inspector or above considers that such a visit will hinder the investigation of crime and direct otherwise; that

⁷⁴ (Sussex Legal Advisor 2).

officer should consider whether the non-accredited or probationary representative's identity and status have been satisfactorily established, whether he is of suitable character to provide advice, and any other matters in any letter of authorization sent by the solicitor, the solicitor and the detained person must be informed if access is refused (Code C.6.12A-6.14). Under Code C, paragraph 6.9, the police can refuse to admit the solicitor to a police station only if an officer of the rank of inspector or above decides that their visit will hamper the investigation of crime. Moreover, as the right to a solicitor is designed as a protection for people being interviewed, nothing prevents police from taking a breath specimen from a drink-drive suspect while waiting for a solicitor, as the process involves no interview and is not included in paragraph 6.3 of Code C.

If the suspect is in police detention for an indictable offence, s. 58(8) allows an officer of the rank of superintendent to authorize delay on reasonable grounds. If both these conditions are fulfilled, access, if requested, can be delayed for up to 36 hours. Delay is permitted where the detainee has benefited from the offence, and it is considered on reasonable grounds that recovery of the benefit would be hindered if the solicitor were contacted (Fenwick 2007 p.1217).

In the case of *John Murray v UK* (18731/91)⁷⁵, the applicant was arrested and access to a solicitor was delayed for 48 hours. The ECHR held that even terrorist allegations don't justify holding a defendant without access to a lawyer beyond the designated period. This case shows that the improper denial of the right to legal advice is likely to lead to exclusion of a confession under s.78 of PACE; although, in this case, the domestic court did not take a particularly strict line on the exclusion of evidence for refusal or delay regarding legal advice. Also in cases of suspected terrorism, if the suspect is exonerated, the deprivation of legal advice can be cause for compensation. Murray's lack of early access to a lawyer was incompatible with the concept of fairness as it had placed the accused in a situation where his rights might be irretrievably prejudiced. Mr. Murray was awarded £15,000 towards his costs and expenses.

⁷⁵ *John Murray v UK* (18731/91), ECHR, 8 February 1996.

In the case of *Magee v. The UK* (28135/95)⁷⁶, Mr. Magee was arrested under s.12 of the Prevention of Terrorism Act (PTA) 1984 in connection with an attempted bomb attack on military personnel, and was taken to the Castlereagh police station. He twice requested to see his solicitor, but that was refused. However, he was found not guilty and claimed for compensation. The Court concluded that there had been a violation of Article 6 Para.1 taken in conjunction with Article 6 Para. 3(c) of the ECHR as regards the denial of access to a solicitor.

In the present study, a police officer commented that the investigating officers always give the suspect access to legal advice, unless there is a very good reason not to and this occurs only rarely.

*“I was a custody officer for three and half years and I cannot remember doing it. I would authorise the detainee’s rights to have the forms, and I would delay that, but not their right to legal advice. It is pretty strong stuff doing that and would have to be a serious offence – terrorism, that sort of stuff.”*⁷⁷

He went on to add:

*“Yes, we do interview without a solicitor, but it is with the consent of the detainee.”*⁷⁸

A legal advisor commented that the police might stop an interview if the solicitor was interrupting.

*“They can ask us to leave but we would not. If you started answering the questions for the client, they might get the inspector to have a talk to you. I’ve never known, and I do not believe they can deny the client the solicitor of their choice. The client would like the fact that you are interrupting the interview. The client isn’t going to sack you. That is quite rare I would say”*⁷⁹

Legal advice is often given on the telephone rather than in person. Where a duty solicitor provides advice, the Legal Service Commission requires initial advice to be given by telephone, but the duty solicitor must then attend any subsequent interview or identity parade, the legal aid costs claim will not otherwise be paid. When an advisor does attend

⁷⁶ *Magee v. The UK* (28135/95), ECHR (6 June 2000).

⁷⁷ (Sussex Police Officer 5, interviewed 26 February, 2013).

⁷⁸ *ibid*

⁷⁹ (Sussex Legal Advisor 1).

a police station, the detainee is usual entitled to consult the advisor in private (Code C, Notes for Guidance 6B).

There is a lack of privacy when the suspect has the right to have a legal advice though the telephone. Telephone conversations may take place over a two-way intercom in the cells. The conversations between the suspect and the solicitor may be audible to staff, and conversations could also be picked up by the microphones associated with the CCTV system. However, suspects and legal advisors are both concerned about the lack of privacy for telephone legal consultations, particularly when suspects were only eligible to receive advice over the telephone. Moreover, this lack of privacy is unlawful because it violates human rights legislation guaranteeing suspects a right to a fair trial (Skinns, 2011 p.37). Code C (6J) stipulates that detainees have the right to legal advice in private. If this is ‘overheard, listened to, or read by others without the informed consent of the detainee, the right will have been effectively denied’.

In spite of it being a serious offence for the police to listen to telephone conversations, one legal advisor interviewed said that she suspected that the police do listen in and put pressure on the suspect if they have heard anything incriminating⁸⁰. Although this is not the same as recording the conversation it is still a breach of the right to privacy.

According to Skinns, if advice is inadequate or poor in quality, it is particularly unfortunate for suspects; and it might mislead the accused, ‘as it has a bearing on the acceptability of police evidence in court and thus the outcome of the case’ (2011 p.33). Recent cuts to legal aid will add to this problem. Bowcott (2014), points out Government plans for cutting criminal legal aid by £220 million have been thrown into confusion after the high court ruled that the Ministry of Justice consultation process was so unfair that it was illegal. The decision is a significant setback for Chris Grayling, the justice secretary, who was in charge of negotiations with the legal profession that led to 17.5% cuts in fees and reductions in the number of duty contracts for solicitors to attend courts and police

⁸⁰ (Sussex Legal Advisor 2).

stations. Mr. Justice Burnett ruled that the process was "so unfair as to amount to illegality".⁸¹

Legal Advisor 2 pointed out that telephone advice could be given at any time. "Every single time you have a person, you get a call from the Defence Solicitors' Call Centre and you can give telephone advice". However, she thinks a solicitor would not be acting in accordance with their duty to the detainee if they just gave telephone advice and didn't go down to the police station. She would rather go in person and did not think it was enough to give telephone advice, unless it was a professional criminal who is simply going to make a 'no comment' interview. She normally recommends a solicitor go to the station every time there is a detainee.

However, the importance of face-to-face contact with a legal advisor cannot be minimised. A suspect might be relieved to see a friendly face in the police station, in part because police stations can be depressing, isolating and frightening places, even for the initiated (Skinns 2011 p.36). The advisor needs to be present to know if the suspect is suffering from any physical condition or mental problem. Thus, attending at the police station could allow legal advisors to see if the suspect is ready to be interviewed. Finally, face-to-face contact between suspects and their legal advisor at the police station probably would help the legal advisor to defend their client in the police interview, where the legal advisors might ask his client to not comment (*ibid.*)

Skinns believes that some suspects do not care about the longer-term consequences of refusing legal advice and are ready to be put at risk, just to be released as soon as possible. Some of them have an addiction that exacerbates this. For instance, smoking is not allowed at the station and that can be one of the most frustrating things in custody, so they want to be released for this reason (Skinns 2011 p.24). The present study also shows that suspects are concerned that consulting with a legal advisor is likely to prolong detention. Legal Advisor 2 mentions that suspects sometimes decline legal advice because they don't want to stay long-term at the police station. Some suspects are just

⁸¹Bowcott, O (2014) Plans to cut criminal legal aid in doubt after court Ruling available at <http://www.theguardian.com/law/2014/sep/19/criminal-legal-aid-cuts-illegal> (Accessed 9-12-2014).

keen to leave custody as quickly as possible; either because of the environment at the police station, because they have work or for a social reason.

*"Moreover, some suspects think, or may be encouraged by the police to think, that the solicitor might be late or that it takes a long time to arrive to the police station and that is unpleasant for them"*⁸².

Skinns argues that suspects sometimes decline legal advice on police recommendation. The police may mislead suspects that staying in custody might be for longer if they have legal advice (2011 p.25). But in reality, as one of legal advisors mentioned in my interview, sometimes detention does not take longer if a suspect requests a legal advisor, although this can be as much to do with legal advisors as the police.

*"...when I first started out, it happened all the time. One of my clients was arrested and the officer said 'She is not going to be very pleased with you if you call her because she is on the beach and it is a sunny day and she won't want to come off the beach.' And they did not even phone me even though he had asked for me, because they said I would be sunbathing on the beach. They used to be like that a lot, but that was 27 or 28 years ago"*⁸³.

However, a police officer argued that legal advice cannot be given by them, as the role of the police is simply to inform suspects about their rights. He added:

*"We cannot advise them to have a solicitor; they are just given that right. If an inexperienced person comes into custody, and says 'What do you think?' we say, 'We cannot advise you but it is free. OK'"*⁸⁴.

Legal Advisor 1 commented:

"A taxi driver, who was fighting with another person for the payment did not ask for a solicitor, it was a member of the custody team that said to him 'Look, you are innocent, I think you should

⁸² (Sussex Legal Advisor 2).

⁸³ *ibid.*,

⁸⁴ (Sussex Police Officer 3).

have a solicitor. In fact, the police encourage people to have a solicitor, particularly the more serious offences.”⁸⁵

Cape notes that sometimes solicitors do not always serve their clients adequately in a number of ways. They may be slow to respond, and many firms do not provide a 24-hour police station service and make use of unqualified or untrained staff. This can be a problem if the accused only wants a specific solicitor. They may give advice over the phone when this is inappropriate. Most significantly, they may not act adversarially on behalf of their client. The research study *Standing Accused* showed that this applied to all aspects of criminal defence work and notes that, “the nature of criminal defence practice...is overwhelmingly reactive in character and incorporates methods which parallel and even mock those of the police and prosecution”. Lack of resources and the organisation of criminal defence provision was not the problem (Cape 2004.p83).

In commenting on the police-solicitor relationship, Skinns believes that the police and solicitors blame each other in order to avoid responsibility for delays. They were in reality both to blame for delays for practical reasons and a lack of resources. However, from the suspect’s point of view, the end result was longer waits at the police station, which might cause confusion as to why the delay was occurring and increasing the experience of detention as ‘frightening, uncomfortable and uncertain’ (2011 p.33). However, in interview, Legal Advisor 1 argued that in the police station custody suite, the relationship between the solicitors and the police was very good indeed. *“I’m not saying they like every single solicitor that comes in there, but the cooperation is very, very good: it is unusual to find somebody who is hostile, a police officer who is hostile to you”*. This advisor believed the relationship worked very well and got good results.

Another legal advisor added,

“There are some police stations, however, where things are very different. It is literally ‘us and them’ and we are called ‘the enemy’, particularly London.

⁸⁵ (Sussex Legal Advisor1).

*Brighton, to a certain extent is a very unfriendly police station towards solicitors.”*⁸⁶

Another comment by a legal adviser was that some police officers were not cooperative because they were “a bit elderly and old-fashioned”, but that relations with the younger generation of police officers was usually very good⁸⁷.

This section has considered the factors affecting access to legal advice. Some of these factors are connected to the suspect such as their haste, the seriousness of their offence, their self-defined guilt or innocence and their prior experience of the police and legal advisers. Other factors are those relating to the police and what they tell the suspect about legal advice, or solicitors and their availability, experience and competence. There is concern that the latter will be affected by recent legal aid cuts.

Lord Neuberger, President of the Supreme Court criticised the legal aid reforms in 2013, asserting:

"It is a mistake to have a new legal aid regime with a costs structure which will drive out the best lawyers. Good lawyers save money, because they are less likely (i) to waste time in and out of court, (ii) to be responsible for miscarriages of justice, and (iii) to engender appeals and retrials. It is also a mistake to structure legal aid costs so as to reward lawyers for doing long trials... lawyers should be rewarded for cases lasting less time, not more". (Cited in James 2013, p.8).

The way that suspects make decisions about whether to have legal advice is thus a complex weighing-up of their situation, influenced by what they are told by the police as well as any previous experience of detention they may have had. Previous experience could sway the suspect into requesting or refusing legal advice making their decisions highly subjective. One of the reasons that suspects are given the right to legal advice is because it is psychologically important for them to feel that there is someone on their side

⁸⁶ (Sussex Legal Advisor2).

⁸⁷ (Sussex Legal Advisor 2).

in what can be a very traumatic experience. The right to be treated humanely both physically and psychologically will be reviewed next.

3. The Right Against Ill-Treatment.

Police officers have to protect the suspect's rights and liberty, while allowing the investigation to continue expeditiously. PACE modified the powers of the police following arrest, by introducing administrative and bureaucratic safeguards requiring records to be kept and copies to be provided to the suspect, with reviews and monitoring of the process being provided by more senior police officers (Feldman 2002 p.349). So this section also aims to examine the right against ill-treatment established by PACE, as ill treatment can arguably lead a suspect to say anything in order to get away.

Section 39(1) of PACE states that a custody officer at any police station must ensure that all persons in police detention are treated in accordance with PACE and the Codes of Practice, and is also responsible for recording all required matters in custody records. If any detained person is transferred to another police station or to the custody of a person outside the original police station, then these obligations are transferred to the officer who becomes in charge of that person under s.39 (2) of PACE. If a superior officer gives orders in relation to the treatment of a detained person which conflict with any PACE or Codes of Practice rules, or go against a decision which the custody officer would have made himself, then the custody officer has a duty to refer the matter to an officer of at least the rank of superintendent.

Zuckerman argues that the provisions of PACE and Code of Practice act as a guarantor and safeguard for the right treatment of suspects in custody and for 'the reliable recording of their statements during interrogation'. Breaches of these provisions may rob the suspect of their rights and also mislead the court (1990 p.501).

In the case of *Price v. The UK* (33394/9656)⁸⁸ Ms. Price was disabled and subjected to degrading treatment partly because her disability was not adequately catered for. She was sentenced to 7 days of imprisonment, and got no help in the police station, and the court found there was a violation of Article 3 of the ECHR. This highlights the importance of police custody making proper provisions for the comfort of people with disabilities. It may be the case that detainees with special needs may require more careful monitoring.

Detailed rules govern the conditions of detention: for example, cells must be adequately heated, cleaned, ventilated and lit; bedding must be of a reasonable standard and in a clean and sanitary condition; access to toilet and washing facilities must be provided; at least two light meals and one main meal must be offered any period of 24 hours; brief outdoor exercise must be offered daily if practicable (Code C.8), detainees should be visited every hour (every half an hour if drunk) (Code C.9.3). Any complaints must be reported to an officer of the rank of inspector or above not connected with the investigation (Code C.9.2). There are also detailed provisions governing the medical treatment of person in custody (Code C.9.5-9.14).

According to one police officer, detainees generally received very good treatment in custody; being given hot drinks, blankets and medical treatment. Drunken detainees are provided with low bunks and samples may be taken. Juveniles are put into a separate wing (Sussex Police Officer 3) Another police officer argued that people that are in custody at this stage of the process are suspected of involvement or having committed an offence, so they are not actually guilty of an offence and must be treated accordingly⁸⁹.

According to one legal advisor:

“They are treated very well. They have regular food, regular drinks, access to the telephone; they have toilets and access to a shower. That’s not to say that it’s a great place, because they are locked into an airless room with no windows and they can’t smoke, all the time they are down

⁸⁸ *Price v. The UK* (33394/9656), ECHR (10 July 2001).

⁸⁹ (Sussex Police Officer 4).

there. But it's not at all unpleasant. They have access to books and magazines if they want as well."⁹⁰

Intimate and strip searches must be conducted in accordance with Annex A to Code C. A strip search is a search involving the removal of more than outer clothing, and may take place only if the custody officer considers it to be necessary to remove an article, which the detained person would not be allowed to keep (Code C Annex A.10). Statistics must be kept of intimate searches under s.55 and published in annual reports of chief officers of police (s.55. (15)).

The custody officer authorizes the strip search. There will be two same-sex officers;

*"Unless detainees are violent, then there may be people to hold them down and they will be strip searched by force. So the officers will take them to a secure room, which will have CCTV for their protection, and then they are searched in there. That is the procedure – one item of clothing will be removed, that part of the body will be searched and then given back to them, so it is all done with dignity. Then the lower half of their clothes, and given back"*⁹¹.

He added that an intimate search couldn't be carried out at the police station, but would be done at a hospital with the consent of the detainee.⁹² These are important safeguards for the right to be free of inhuman or degrading treatment in police custody; it corresponds to Article 7 of ICCPR and Article 3 of the ECHR. The presence of a solicitor during the interrogation may go some way to ensuring the proper observance of the Code of Practice. After illustrating the right to against ill-treatment, the presumption of innocence will be discussed.

⁹⁰ (Sussex Legal Advisor 2).

⁹¹ (Sussex Police Officer 4).

⁹² *ibid.*,

4. Police conduct during interrogations.

PACE regulates the police conduct during interrogations inside the police station. The presumption of innocence, the right of silence and the right against self-incrimination will be discussed next.

4.1.The Presumption of Innocence.

The Presumption of Innocence is a long standing principle at the heart of the criminal justice system in England and Wales. Brookman & Pierpoint point out that both the Criminal Justice system of England and Wales and the European Convention on Human Rights hold that the presumption of innocence safeguards the rights of suspects, as until guilt is proved beyond reasonable doubt anyone accused of committing an offence must be considered innocent (2003 p.452). In the ICCPR Article 14(2) and the ECHR Article 6 (1), it is clear that the presumption of innocence is required in pre-trial procedure.

Before the enactment of PACE, there were many cases where successful appeals were made against criminal convictions which involved the police violating the principles encapsulated in the presumption of innocence. The famous example of this being the cases of the Birmingham Six and the Guildford Four where suspects made false confessions under police torture and convicted of Irish Republican Army (IRA) bombings that injured hundreds and killed 26 people in England (Naughton 2011 p.42). To stop these malpractices, PACE requires the suspect to be considered innocent till proven the guilt. Code G of PACE requires that facts and information relevant to a person's suspected involvement in an offence should not be confined to those which tend to indicate the person has committed or attempted to commit the offence. Before making a decision to arrest, a constable should take account of any facts and information that are available, including claims of innocence made by the person, that might dispel the suspicion (Code G 2).

Police officers wanting to make an arrest must give sufficient information to enable the suspect to understand they have been deprived of their liberty and the reason they have been arrested, as soon as practicable after the arrest; i.e. when a person is arrested on suspicion of committing an offence they must be informed of the nature of the suspected offence and when and where it was committed. The suspect must also be informed of the reason or reasons why arrest is considered necessary. Vague or technical language should be avoided (Code G 3). An officer who believes that it is necessary to interview the person suspected of committing the offence must then consider whether their arrest is necessary in order to carry out the interview. The officer is not required to interrogate the suspect to determine whether they will attend a police station voluntarily to be interviewed but they must consider whether the suspect's voluntary attendance is a practicable alternative for carrying out the interview. If it is, then arrest would not be necessary. Conversely, an officer who considers this option but is not satisfied that it is a practicable alternative, may have reasonable grounds for deciding that the arrest is necessary at the outset 'on the street'. Without such considerations, the officer would not be able to establish that arrest was necessary in order to interview (Code G 2F).

A police officer (1) interviewed asserts that they treat suspects as an innocent 'we treat them very well; they are innocent and have not been charged yet'. He added: we do not detain the suspect if they is not strong evidence against him or her and whoever arrests the suspect must bring a strong evidence within a tight limit of time or release him or her'. A legal advisor argues that the police sometimes arrest innocent people and lock them up in the custody cell. A police officer (3) addressed that, saying: 'yes sometimes we arrest a group of people in the fight scene, we need to make sure who started that fight -who is the suspect'. It appears from this that the police in England and Wales give the presumption of innocence to the suspect till proven guilty.

However, Naughton suggests that police investigations can breach the principles contained in the presumption of innocence in ways other than violations of the codes of conduct and guidelines contained in PACE (1984) (2011 p.43) .

4.2. The Right to Silence.

This study discovered that the law relating to the right to silence was not adhered to as silence was often taken to be an indication of guilt, and the detainee was not always regarded as innocent. The 1994 Criminal Justice and Public Order Act (s. 34) gave prosecutors the right to invite negative inference from a suspect's refusal to answer questions. Seidmann had pointed out that the right to silence only seems to benefit those who are guilty but this assumes that innocent suspects would not exercise this right and that only the exercise of this right would give the suspect an advantage (2005 p.593).

PACE and the Code of Practice (Code C) gives certain rights to suspects being held at a police station in relation to the circumstances in which interviews may take place. Unlike in Saudi Arabia where the Code of Criminal Procedure (2001) only applies to prosecutors, the Code applies to constables, and to those charged with the duty of investigating a crime. Code C provides that when there are grounds to suspect someone of an offence, the person must be cautioned before being questioned regarding his involvement in that offence and told that his answer or silence may be given in evidence to a court in a prosecution. Dennis notes that these grounds could just be an anonymous tip off and not necessarily admissible evidence and that in many instances the caution is given at the start of an interview (2013 p.173). A person must be cautioned upon arrest for an offence unless it is practicable by reason of his condition or behaviour or he has already been cautioned under Para.C.10.1 (Code C.10.3). The caution is "You do not have to say anything. But it may harm your defence if you do not mention when questioned something, which you later rely on in Court. Anything you do say may be given in evidence." (Code C.10.5). Regarding cautions, a police officer commented that detainees were cautioned and reminded of their rights at every stage of the procedure⁹³.

It was this principle that underlay the traditional police caution to a suspect in England and Wales until 1994 when inferences were allowed to be made from a detainee's silence. The suspect was not obliged to say anything, but anything said would be recorded and

⁹³ (Sussex Police Officer 5).

might be used in evidence. In deciding whether there is a case to answer and whether the accused is guilty; Section 34 of the Criminal Justice and Public Order Act 1994 allows a court or jury to draw inferences about the silence of the accused during questioning about information which he or she could reasonably have been expected to divulge given the circumstances at the time (Dennis 2013 p.175). Thus, a person's right to remain silent is guaranteed by PACE, but applies in full measure only when one is not suspected of an offence (Feldman 2002 p.385).

A solicitor should not only make the suspect aware of the right to silence, but may also advise if the suspect seems unable to cope with the interview or unsure about how to answer a particular question that he or she should say nothing (Fenwick 1993 p.388).

“The right to silence should not merely remain a vital part of the criminal justice system of England and Wales; it should be strengthened. This is because its removal could increase the chances of innocent people being wrongly convicted with no obvious gains for law enforcement and insufficient protection is currently provided in order to avoid this risk” (Greer 1990 p.708).

However, remaining silent can be a strategy that professional criminals can use to their advantage. They are experts in criminal procedure, and can remain silent to avoid a charge, and keep the prosecution searching for the truth until time runs out without the prosecution having sufficient evidence to charge them (Greer 1994 p.103). At interview, Police Officer 5 believed that refusal to answer questions and state 'no comment' depended on the person's circumstances. Solicitors would often advise first offenders to admit the offence and just get a caution, whereas they would advise silence if their client was guilty and it would be up to the police to prove the crime. This view was echoed by Police Officer 3 who said it was 'recidivists' who would plead 'not guilty' and this was frustrating for the investigation as the suspect would often admit the crime in court. Such comments indicate that police officers may have lost sight of the fact that the law requires the prosecution to prove its case.

Legal Advisor 1 also believed that the 'professional criminal' was most likely to make no comment at interview, whereas it was the innocent or those who would just get a caution

who gave the fullest answers. Another legal advisor disagreed with the police view that silence wasted police time; she believes that remaining silent does not affect the interview.

“Obviously, the interviewer will want to make sure the questions are put to the detainee, so that they can then turn round and say, “Well, I asked all these questions and he didn’t answer. So, if the detainee then gets to the Magistrate’s Court or the Crown Court and says, “I’m not guilty,” there will be an adverse inference drawn. So far as the interviewer is concerned, it does not matter whether he answers the questions or not, he will still go ahead and ask the questions.”⁹⁴

In their dealings with the State, there are many situations where ordinary citizens are lawfully required to give out information. The right to silence in a criminal context may well provide protection for both the innocent and the guilty, and although many of those questioned in this study believed that it was of more benefit to the guilty, this has yet to be demonstrated.

4.3. The Right against Self-Incrimination.

Except as provided by PACE s.63, a non-intimate sample may not be taken from a person without the appropriate consent. However, s.63 (2A) A non-intimate sample may be taken from a person without the appropriate consent if two conditions are satisfied.(2B)The first is that the person is in police detention in consequence of his arrest for a recordable offence. (2C)The second is that (a) he has not had a non-intimate sample of the same type and from the same part of the body taken in the course of the investigation of the offence by the police, or (b)he has had such a sample taken but it proved insufficient.. In *Saunders v UK*, as I mentioned in Chapter Three, the ECtHR excluded breath samples blood samples, urine samples and bodily tissue from the scope of the privilege against self-incrimination. Choo notes that this may be a reason why procedures for obtaining statements from suspects at police stations have been the subject of tight regulation (2013 p.257).

⁹⁴ (Sussex Legal Advisor 2).

PACE Code C (2012) states that answers to questions and statements should not be obtained through the use of oppression (Para. 11.5), which was defined in the case of *R v Fulling* 1987 2 All E.R. 65. by the Court of Appeal as “the exercise of authority or power in a burdensome, harsh or wrongful manner; unjust or cruel treatment of subjects, inferiors, etc.; or the imposition of unreasonable or unjust burdens, as well as involving impropriety on the part of the police interviewer through the use of bullying, intimidating and discourteous practices and lengthy interviews”. Skinns comments that this definition might mean that night interviews could be construed as “being on the cusp” of oppression as suspects might be more vulnerable at this time (2010 p123).

Feldman comments that interviews conducted in this way risk breaching s. 76 whereby the courts have to exclude any confession obtained through oppression or any means, which might render the confession unreliable. Also, s. 78 allows the court to exercise discretion about any such evidence that might compromise proceedings (2002 p349). Zuckerman notes that because police interrogation is part of the criminal trial process and can determine the outcome of the trial, procedural fairness is crucial. The decisions taken by the Court of Appeal recognise that there is a close relationship between fair treatment at the police station and fairness at the trial (1990 p.500). Clearly, as long as the privilege against self-incrimination and the interests of law enforcement remain in conflict with each other, the rights of suspects will not remain secure.

In the case of *R v Paris & Miller*, (1993)⁹⁵, the appellants were convicted of murdering a prostitute. The appellants were threatened and bullied at interview, and the whole course of questions was such as to render their admissions unreliable and inadmissible under s. 76(2) of PACE. The Court of Appeal heard the tapes and found that Miller had been intimidated. The court was of the opinion that the confessions obtained would have been unreliable even with a suspect of normal mental capacity. This reveals the importance of not extracting confessions through inducement or threats, as otherwise may falsely extract confessions which are then no use in court whether the suspect is guilty or not. It

⁹⁵ *R v Paris & Miller* (1993), 97 Cr. App. R. 99; [1994] Crim LR 361, CA.

is impossible to estimate the frequency of such practice. However, it is likely to happen out of the police station where there is little monitoring.

At interview a police officer presented his view after being asked if pressure was put on the suspect to obtain a confession. He said:

“We are not necessarily seeking a confession. What we are seeking is the truth. So, if on the rare occasion that they arrest someone who is completely innocent, and I have to say that as an investigating officer I have done that, I am not in the business of drilling a confession out of someone. What I need to know is what is their version of the truth as far as they are concerned..”

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This officer went on to recall when a suspect had not committed the crime he was accused of and the information the police had been given was incorrect. On that occasion the suspect told him everything to establish his innocence. Then the police officer could go away and check those facts. If the police officer had used oppression to get a confession out of the suspect, and they had charged him and taken him to court, the case would have crumbled. “I would have probably lost my job”. The police can exert pressure; there is nothing wrong with using robust questioning, or challenging someone if a suspect is lying.⁹⁷

Recording the interview is one of the measures regulated by PACE to ensure the rights of the suspect are protected. An accurate record must be made of each interview, whether or not the interview takes place at a police station. The record must state the place of interview, the time it begins and ends, any interview breaks and, subject to Para 2.6A, the names of all those present; and it must be made on the forms provided for this purpose or in the interviewer's pocket book or in accordance with the Codes of Practice E or F. Any written record must be made and completed during the interview, unless this would not be practicable or would interfere with the conduct of the interview, and must constitute

⁹⁶ (Sussex Police Officer 5).

⁹⁷ *ibid.*,

either a verbatim record of what has been said or, failing this, an account of the interview which adequately and accurately summarizes it (Code C Para.11.7).

In this research, a police officer described the way they now recorded the interview electronically and the circumstances when paper records were still kept:

*“However, there are some occasions, when someone has not been brought into custody – what we call contemporaneous interviews. They can be recorded in a pocket notebook or on a special form. The police officer would ask a question and write it down and then record the suspect’s answer and write that down. At the end, they get the opportunity to read it, sign it and initial it after their answers to make sure it has been recorded correctly. The whole point of it is to ensure the integrity of the interview, to make sure that no words came to the suspect’s mouth by the police.”*⁹⁸

Thus, the presence of a solicitor will help the suspect who will then be fully aware that he can keep silent. The solicitor may sometimes advise silence and may help the suspect to maintain silence where advice alone might not be enough. It should be recognized, however, that the key question is not whether the presence of a solicitor means that the detainee remains silent but whether it means that he is unlikely to make an unreliable confession. Moreover, this highlights the importance of the presence of a legal advisor when the suspect is being questioned. It seems that the right to silence and the right to legal advice are intertwined and impact on each other. If the suspect had no right to silence it would be much more difficult to establish this causal relationship.

Choo comments that there are many statutory provisions in England and Wales which allow the police to demand information and that not only can this information be used in criminal prosecution, but that the suspect could be prosecuted for not providing the information (2013 p.239). It could thus be argued that there needs to be a more careful evaluation of what kinds of information could be reasonably and legally demanded from suspects.

⁹⁸ (Sussex Police Officer 5).

5. Non- discrimination.

All pre-trial police procedures such as arrest, detention, search and treatment could be subject to discriminatory practice, and this is especially true of the powers that do not depend on purely objective factors. On the face of it, stop and search, for example, is allowed on subjective interpretation of what might be reasonable grounds for doing so.

In common with experiences in many parts of the world, the relationship between the English and Welsh police and minority ethnic communities has not been a happy one.

The racist behaviour of some police officers was highlighted by the Judicial Inquiry into the way the Metropolitan Police Service (MPS) handled the Stephen Lawrence murder. This inquiry, led by Sir William MacPherson, took place four years after the murder and after years of campaigning by Stephen Lawrence's parents. The report concluded that the MPS and other police services were affected by institutional racism. Seventy recommendations were made aimed at "the elimination of racist prejudice and disadvantage and the demonstration of fairness in all aspects of policing." (The House of Commons Home Affairs Committee, 2009 p.4).

Macpherson recommended that all stops as well as stops and searches should be recorded, that the recording requirements be extended to 'voluntary' stops and searches, and that the records should be monitored and scrutinized and the results published. The Home Office revised Code A included a requirement that police 'stops' which require a person to account for themselves should be recorded, with a copy of the record being given to the person at the time of the stop (Cape 2003 p.358).

Another example of police discrimination occurred in the London neighbourhood of Brixton in 1981, the Brixton riots were triggered by 'Operation Swamp '81'. For a week, 120 plain-clothes and uniformed police officers patrolled Brixton with specific instructions to stop and question anyone who looked 'suspicious'. They stopped 943 people in four days and were targeting black people (Bowling and Phillips 2003 p.4)

Bowling and Phillips point out that this is not to say that since then nothing has changed. On the contrary, the face of the England and Wales police service has been changed

radically by the recruitment of police officers from Black and Asian minority ethnic communities (2003 p.25). However, this still has to be improved.

In their report 'Ten Years after Macpherson', The House of Commons Home Affairs Committee concluded that the police had improved in their treatment of ethnic minorities and in combating racism in their workforce. Sixty-seven out of Macpherson's seventy recommendations have been fully implemented. (Twelfth Report of Session 2008-9 p.4)

"We were impressed by the evidence we heard about improvements in the investigation of race crimes and of critical incidents involving members of ethnic minority communities. Police leaders have shown a clear commitment to increasing awareness of race as an issue throughout the service." (House of Commons Home Affairs Committee p.9).

In spite of this, the report found that it was still the case that black communities were disproportionately targeted for stop and search and over-represented on the DNA database and this had increased since 1999. By 2009, the police still hadn't met its target to employ 7% of officers from ethnic minorities. These officers were less likely to be promoted and more likely to be subject to disciplinary procedures (House of Commons Home Affairs Committee p.9).

The Equality Act 2010 built on the Race Relations Act (2000) which was introduced in response to the Lawrence enquiry. It has two main purposes, to harmonize discrimination law and to strengthen the law to support progress on equality. The Act places a 'general duty' on public bodies, who 'must have due regard to the need to; eliminate unlawful discrimination, harassment and victimization; advance equality of opportunity and foster good relations'.

Cape argues that pre-PACE research mostly showed that searches were unlawful. The stop and search powers contained in Part I PACE, following the recommendations of the Royal Commission on Criminal Procedure (the Phillips Commission), were designed to provide a national power that was subject to strict safeguards. However, much of the

research on the PACE powers ‘has questioned the efficacy of the provisions’ (Cape 2003 p.357).

This study was unable to establish the extent to which if any, discrimination exists at the police station against any type of minority or majority. It was hard to ask a question about discrimination in the interviews because of the ethical implications. There have however been other studies on this, which are referred to later in the section. It is also worth exploring PACE and analysing provisions that seek to prevent any discrimination such as Code A.

Code A Para.1.1 states that stop and search powers must be used “fairly, responsibly, with respect for people being searched and without unlawful discrimination”, together with a reminder that the police are now covered by the Equality Act 2010. Further, consent will no longer be sufficient to provide grounds for a search so that, other than where a search can be conducted with consent as a condition of entry to sports grounds or other premises, a “person must not be searched unless the necessary legal power exists” (Code A Para.1.5) and not just because the officer has negative attitudes towards that type of suspect. It should be noted that the Equality Act 2010 simplified things considerably, by having a single legislative framework (replacing the numerous Acts and Regulations in existence) that provides a strengthened statutory basis for tackling discrimination whilst demonstrating a level of parity across all equality groups. The Act protects people from discrimination by government departments, local authorities and the police.

Cape (2003 p.358) believed that Code A Para.1 of the Equality Act is likely to result in a decrease of stops and searches. With regard to the former, there is yet another attempt to define what may constitute reasonable grounds for suspicion: “There must be an objective basis for that suspicion based on facts, information, and/or intelligence which are relevant to the likelihood of finding an article of a certain kind ...” (Code A para.2.2). Stop and search on “some level of generalisation stemming from the behaviour of the person”, even if the police have no specific information or intelligence. Recent evidence

cited by Teresa May⁹⁹ shows that disproportionate stops and searches of ethnic minorities have continued despite the legislation, and that the regulations do not by themselves prevent discriminatory behaviour by the police. This is illustrated by the *Gillan v UK* case which was discussed earlier in the section on International Human Rights.

Skinns suggests that evidence points to discrimination against ethnic minorities. Even when taking age, sex, reason for and outcome of arrest into consideration, Afro-Caribbeans were twice as likely to be strip-searched. Furthermore, the subsequent Home Office report states that “the issue of racial discrimination has not yet been adequately addressed by the police.” *Skinns* also points out that there is the issue of detaining ‘terrorist suspects’ for up to 28 days without charge, as many of these will be from ethnic minorities (2011 p.38).

The recording requirement has been strengthened so that a record of a stop and search must be made at the time “unless there are exceptional circumstances that would make this wholly impracticable” (Code A para.4.1). Recording the cases that police handle is a safeguard for both police officers and suspects, in terms of preventing discrimination.. In other words, PACE formalized the way that the police officer should deal with the suspect and protects their both rights by recording stop and search a person.

PACE Code A has attempted if not succeeded in preventing discriminatory police behaviour happening in England and Wales. However, there is doubt about the number of people who have been stopped and searched without any justification, and it is difficult to satisfy both citizens and police officers. If the police officers did not prevent crime before it happened, the citizens would blame them; if the police officers stop and search under any circumstance, they would also be blamed for unjust deprivation of liberty. Non- discrimination is prohibited in the ICCPR Article 26 and the ECHR Article 14. The right against ill-treatment thus encompasses many areas of police behaviour and requires them to be aware of the suspect's right to silence as well as the importance of not discriminating against suspects on grounds such as their

⁹⁹ <http://www.bbc.co.uk/news/23148088>.

ethnicity. The police need to be trained and monitored so that their behavior does not unnecessarily interfere with the lives of citizens. The next section addresses the right to privacy which is another important aspect of this.

6. The Right to Privacy.

Fenwick argues that the common law in the UK before PACE did not provide full protection for the citizen when police officers use their power to search and enter properties. However, PACE came as safeguard to address this by placing powers of entry, search and seizure on a clearer basis and ensuring that the person whose premises are searched understands the basis of search and can complain as to its conduct if necessary (2007 pp.995-996). However, this section seeks to furnish a brief introduction to the PACE 1984 treatment of Part II and the Codes of Practice in order that it can present a context within which one can then view the development of domestic law in England and Wales with regard to the right to privacy.

Invasions of the right to private life could occur by police action, such as conducting a search of persons or property. The search warrant underpins police powers when they conduct a search and respects, to a degree, a person's right to private life. PACE restricts the power to search in order to respect the individual's rights and, to a limited degree, their privacy in public spaces. However, a particular problem with UK law and the governance of policing action has been its piecemeal approach (Taylor 2003 p.87).

Part II of PACE outlines the power to search a person in properties: (1) new general power to search for evidence (ss.8-14 and Sch.1); (2) provision generally to search warrants (ss.15.16); (3) general powers of entry (s.17); (4) a power to enter and search after arrest (s.18). PACE, s.8 provides for the police to seek a warrant to enter and search premises. A Justice of the Peace must authorize the warrant. It must be established that there are reasonable grounds to believe that an indictable offence had been committed (Bailey & Taylor 2009 p.184). The power to search can be exercised under s.17 to: execute a warrant of arrest arising out of criminal proceeding; where an officer wants to

arrest a person suspected of an indictable offence; to recapture someone unlawfully at large (such as, for example, an escapee from a prison, court or mental hospital); to save life or limb or prevent serious damage to property. This provision regarding criminal proceedings allows an entry to be made to search for someone wanted under a warrant for non-payment for a fine. Apart from saving life or to prevent serious damage, a constable can only exercise the powers if he or she has reasonable grounds for believing that the person in question is on the premises (PACE 1984 s.17 p.16).

Mead notes that Section 17 seeks to place entry by consent of the suspect on a statutory footing, so that it may be regulated in the same way as entry by warrant or after an arrest. Regulations prior to PACE were vague and unclear and did not sufficiently demonstrate how entry by police officers is different in concept to trespass by a private citizen, so merely developing common law ideas about public law trespass would not be sufficient to ensure clarity on this matter (2012 p.99). Under s.18 (1), the premises must be controlled by a person who is under arrest. There is a missing definition and vague judicial guidance as to what degree of control is necessary (Bailey & Taylor 2009 p.190). Under section 18 (1) (b), after an arrest, a constable may search for and seize anything which relates to some arrestable offence which is connected to, or similar to that offence. Although the Act provides no precise definition of 'connected to' or 'similar', searching for drugs when a person has been arrested for stealing a sandwich would not be justified. (Shorts & Than 2001 p.130).

In the present research, a police officer was asked how important it was for a police officer to obtain a search warrant, and he replied surprisingly that it was quite rare, as PACE allows the police to carry out those searches, in any event. He went on to say that if the police officer wants to search premises there was no problem.

"If we have specific intelligence about drug dealing in particular premises, then we would go to a Magistrates' Court and ask them to authorise a search warrant. But, if we suspect a criminal activity has taken place, if we've received information, we can go the address and we would be able to search it under PACE, after arrest"¹⁰⁰.

¹⁰⁰ (Sussex Police Officer 5).

The powers which the police exercise in this area seem very broad and permit considerable interference with private life. Furthermore, if the information that the police have been obtained was totally wrong or malicious; what is the justification for the unlawful invasion, which might affect the occupants, particularly vulnerable people such children or the elderly?. In the case of *S and Marper v. The UK*(30502/04, 30566/04)¹⁰¹, Mr. S & Mr. Marper were arrested and charged with attempted robbery, and their fingerprints and DNA samples were also taken. The police retained the samples under s.64 of PACE. The applicants believed that it was a violation of their right to respect for private and family life under Article 8 of the ECHR. However, s.64 is far less precise. It provides that retained samples and fingerprints must not be used by any person except for purposes related to the prevention or detection of crime, the investigation of an offence or the conduct of a prosecution. The ECHR held that the retention of the applicants' fingerprint and DNA samples was in violation of Art.8 of the ECHR. The United Kingdom is the only member state expressly to permit the systematic and indefinite retention of DNA profiles and cellular samples of persons who have been acquitted or in respect of whom criminal proceedings have been discontinued.

Recording is required when the police search a person, but the police officer can easily avoid recording his misconduct and the supervisor can hardly supervise the manner in which searches are being carried out. Moreover, failure to properly record the search would deprive the person concerned of their rights while they are being searched (*ibid.*, p.319). The subsequent revised versions of Code A do not unambiguously provide that consensual searches, where there is a power to search, must comply with the recording provisions of PACE, and Code A. However, many officers are still not recording searches, notwithstanding that this is an action which would protect the suspect's rights and give a proper picture of the frequency with which searches are taking place and their success rates (*ibid.*).

¹⁰¹ *S and Marper v. The UK* (30502/04, 30566/04). ECHR (4 December 2008).

In the interviews that were conducted, an officer was asked about the circumstances in which it is necessary to obtain the consent of the accused to search their property, their person or their vehicle. He said:

“We can use consent to search property and vehicles, but not the person. They cannot consent to it. We need to have grounds for searching a person”¹⁰².

He added that signatures were needed for consent to search property and vehicles.

Some limits on the extent and manner of the search are accordingly imposed by PACE and Code A; which give examples of what might or might not constitute ‘reasonable suspicion’, thereby limiting the discretion of the police. Feldman points out that there are difficulties with defining ‘reasonable suspicion’ as Code A does not give sufficient guidance. This means that the police may not use the standard of ‘reasonableness’ in practice. Officers often act on ‘hunches’ without consciously thinking about whether their grounds for suspicion are ‘reasonable (2002 pp316-7).

Code B, Para. 2.9 provides that written records required under Code B which are not made in the search record must, unless otherwise specified, be made in the recording officer’s pocket book (‘pocket book’ includes any official report book issued to police officers) or on forms provided for the purpose. PACE acknowledges that searches should be made as far as possible without interfering in a person’s private life. This kind of regulation would totally be acceptable if it provided stricter criteria on the manner in which the search of a property was conducted. Police officers questioned in this study all agreed that they faced no particular problems when they wished to search premises, because PACE gives them the power to enter a house with or without a search warrant. Clearly, police officers can produce justifications for why they have ‘reasonable suspicions’ in order to make searches they feel are needed.

The right to privacy highlights the importance of a person’s home and how this significance is recognised by PACE and international declarations of human rights such as ECHR Art.8 and ICCPR, Art.17. The suspect should not be deprived of their private

¹⁰² (Sussex Police Officer 4).

domain more than necessary and bail can be given so that, once charged, the suspect can continue their private lives. The next section addresses this right.

7. The Right to Police Bail.

Releasing a person who has not been charged with an offence before trial is by no means new, the right having existed for a long time. The issue of police bail is more recent in origin, and has developed considerably. However, the powers that the police have been given to grant bail could be construed as a restriction of liberty, particularly if the suspect has not been charged with an offence. Some have argued that this restriction might breach the right to liberty under Art.9 (3) of ICCPR and Art.5 of the ECHR and, is also breach of s.34 of PACE (Cape & Edwards 2010 p.529).

PACE 1984 permits the police to bail a person without having charged them with an offence. S.34 (5) allows custody officers to grant bail to persons they were required to release under s.34 (2) because the grounds for detention did not have any justification. S. 34(1) provides that detention of arrested persons in a police station must be in conformity with the provisions of the Act. Subsection (2) states that the custody officer must order the release of anyone whose continued detention by the police cannot be justified under the Act. Subsection (3) holds that only a custody officer has the authority to release a person from police detention. S. 37(2) permits the custody officer to release a person on bail or without where, having been arrested and brought to the police station, the officer did not have sufficient evidence to charge them with the offence for which they had been arrested, unless the officer believes the ground is needed. S. 37(7) enables a custody officer, having determined that there was sufficient evidence to charge, to release a person on bail as an alternative to charging them. This is in addition to the power of the custody officer to release a person charged with a criminal offence on bail pending their first court appearance.

However, an arrested person who is not in a fit state to be charged or released under s.37 (7) may be kept in police detention until fit (s.37 (9)). The person may not be kept in

police detention without charge for more than 24 hours even if still unfit (s.41 (1)). The person would have to be released then since there would be on grounds for continued detention (s.41 (6, 8)). Section.41 (9) requires a 'fit state', but the Act does not define what is meant by a 'fit state', and it is open to interpretation (Levenson & Fairweather 1990 p.115).

In this study, a police officer described how the police deal with a suspect from arriving at the police station until they are charged or released. He said that subsequently:

“It could be that the police can authorize that they are charged; or it could be that we refer the case to the Public Prosecution Service, for lawyers to make the decision. That tends to be for serious stuff – domestic violence and hate crimes. Once that’s decided on, what ‘the disposal’ is, we call it ‘the disposal’, a charge or caution, we make a decision about bail i.e. they are released to go to court. We trust that they are going to turn up, or we can put bail conditions on, or we can keep them in custody until they go to court”¹⁰³.

Cape & Edwards believe that the enlargement of police powers as regards bail afforded when PACE came into force “has considerable constitutional and human rights implications (and) was simply surreptitiously slipped on to the statute book” (2010 p.539). People who have been granted police bail can now be arrested if they fail to surrender on the due date or if they fail to comply with any of the conditions imposed and there are no time limits imposed on street bail or pre-charge bail. There are also no limits on the number of times someone is bailed and released. There were proposed amendments to the Police and Justice Bill to limit street bail to 72 hours, but this was rejected by Parliament (*ibid.*, p.547).

Street bail is carried out in an unsupervised environment and the police officer is in a powerful position over suspects, not least because it is a custody officer and not a magistrate that the suspects have to apply to in order to have their bail conditions reviewed (Cape & Edwards 2010 p.555). It is, however the case that they can appeal to the court for this. A custody officer may grant a suspect bail at the police station,

¹⁰³ (Sussex Police Officer 5).

requiring him to return to the station or to the court at a designated time unless he should subsequently be informed that such attendance is no longer required. The police may also impose conditions upon the bail, such as requiring the suspect to hand over his passport; to pay a surety, to report regularly to the police station, to live at a specified address or keep away from particular people. Either a custody officer or the court may vary bail conditions. If the suspect fails to keep to the rules of his bail, absconds or fails to appear in court, then the police have a power to arrest him without a warrant and take him to the police station at which he was supposed to report (s.47 of PACE).

A legal advisor was asked whether bail gives the professional criminal a chance to flee from justice. She remarked that this rarely happened as criminals needed to maintain a good bail record:

“The ones more likely to jump bail are the kids, who do not realise the importance of getting up and going down to the police station to answer their bail. Having said that, you know I have a client now who has been on bail for 12 months. It is getting longer and longer and longer, it is getting ridiculous.”¹⁰⁴

She also commented that, bail was understandably withheld in cases of rape, domestic violence or paedophilia. If bail was given

“Then you hear the nightmare stories in the press, where people have been kept in at the police station, got bail at court then gone on to kill lots of people.”¹⁰⁵

Sections.34-37 of PACE allows custody officers to grant bail to persons they were required to release, when they are deemed to be in a ‘fit state’ for release. The Act does not, however, define the mean of ‘fit’ and thus the situation in which bail can be given is somewhat vague. However, the recent study showed that bail is given in appropriate cases, and less likely to give a professional criminal a chance to flee from his crime. The right to an effective remedy to be discussed next.

¹⁰⁴ (Sussex Legal Advisor 2).

¹⁰⁵ (Sussex Legal Advisor 2).

8. The Right to an Effective Remedy in England and Wales.

Complaints against the police in England and Wales are handled in different ways, depending on how serious the case is. At local level, the police can resolve the complaint themselves by Local Resolution. The police's Professional Standards Department (PSD) allows for local investigation by the police, whereas under Supervised Investigation the complaint is dealt with by the PSD under the supervision of the Independent Police Complaints Commission (IPCC). The IPCC investigators investigate independently only in serious cases or on issues of particular concern to the local community (Waseem 2005 pp.7-8).

The IPCC was inaugurated in 2002 under the Police Reform Act (PRA) and set up in 2004 following public consultation. It was intended to replace the PCA and, along with local police forces, is how complaints against the police are dealt within England and Wales. The PRA also replaced Informal Resolution by Local Resolution, whereby third parties, like witnesses, can also make complaints. Under Local Resolution, a complainant cannot ask for formal investigation once they have given consent to the Local Resolution process¹⁰⁶. This study will explore and examine – without going deeply into the IPCC, which is beyond this study, the approach adopted in England and Wales when investigating police misconduct.

The IPCC deals with appeals against police handling of complaints and serious cases such as deaths in custody or police shootings, police corruption and so on. It was established to increase confidence in the police complaints system and to set standards for police conduct; as well as being the source of valuable information to the police on the needs and concerns of local communities and what positive changes in policing could be made. It should be noted that it is the individual police forces that are responsible for any

¹⁰⁶ (The Briefing – Police Complaints 2011 p.3).

disciplinary actions that follow IPCC rulings and that the IPCC can also refer case to the Crown Prosecution Service (CPS) ¹⁰⁷.

The Home Affairs Committee points out that the main purpose of the IPCC is to increase public confidence in policing by ensuring that justice is done where the police are accused of this kind of wrongdoing (2013 p.5). It does this by: overseeing the functioning of the police complaints system; considering appeals where people believe that a police investigation has got it wrong; and lastly by conducting its own investigations into the most serious matters, referred to it by the police or under its own initiative (*ibid.*, p.5).

The Home Affairs Committee criticized the IPCC, as not yet being capable of delivering the kind of powerful, objective scrutiny that is needed to inspire that confidence (2013 p.4). Waseem (2005) points out that the IPCC “is woefully under equipped and hamstrung in achieving its original objectives”. It is not large enough to adequately cover all 43 police forces in England and Wales, as it is even smaller than the Metropolitan Police’s Professional Standards Department and does not have binding authority. Therefore it struggles to effectively investigate all complaints and all too often the police are left to investigate themselves.

The Police and Criminal Evidence Act 1984 (PACE), which established the Police Complaints Authority, introduced an increased degree of independent investigation and supervision and established a two-tier system whereby formal investigation was carried out in the case of serious complaints and less serious ones, such as police incivility and minor assaults, through the new process of Informal Resolution. This was supposed to afford the complainant a speedy resolution by means of a meeting with the officer complained about and an investigating officer, usually an inspector. Complaints could then be dealt with informally and usually ended by an apology or explanation from the officer or force concerned. Section 85 of PACE and section 69 of the Police Act 1996 allowed the police to use Informal Resolution if a chief officer considered the complaint

¹⁰⁷ (*ibid.*, p.2).

suitable (in practice a chief officer normally referred to an inspector or above), if the complaint would not lead to disciplinary or criminal action if proven, or the complainant gave their consent (Herrington et al 2007 p.1).

At interview, Legal Advisor 2 was asked about assaults by the police and replied that the procedure was to get the injuries photographed, have the allegation noted in the custody record and a statement made to the senior officer, which would go to Police Complaints Authority. Legal Advisor 1 added that this would precipitate a charge and that this deterred a lot of people, even if they were 'black and blue' so it was usually better to wait for the outcome of the case.

Despite the 1984 reforms, the police complaints system continues to be criticized for its failure to command popular support. Due to the system being largely governed by the police, there was also criticism from a number of commentators, including the police themselves, about the system's lack of independence (Herrington et al 2007 p.2). Fenwick comments that although the 2002 Act introduced the Police Complaints Commission in order to establish independent external investigation of complaints against the police, the police themselves mainly deal with complaints. This is largely due to lack of resources (2007 p.1315).

Herrington et al argue that past reforms of the (PCA) and IPCC have been largely unsuccessful; the complaints process has always tended to be viewed with unease and has never particularly enjoyed the confidence of complainants or officers. However, redressing this situation is one of the IPCC's core objectives. They believe that if Local Resolution is to work, the complainant must participate voluntarily and that all concerned should have realistic expectations about what the process involves and what the likely outcomes will be. Both the IPCC and local PSDs are committed to reduce delays, preferably within 28 days, whilst recognizing that the outcome of a complaint is nevertheless more important than the time it takes to resolve (Herrington et al 2007 p.35).

Tort damages will be available as a result of some breaches of PACE and other relevant statutes. For example, if a police officer arrests a citizen where no reasonable suspicion arises under s. 24 of PACE, an action for false imprisonment will be available. Equally, such a remedy would be available if the Part IV provisions governing time limits on detention were breached or if a detention review failed to occur for a period of limit. Malicious prosecution will be available where police have abused their powers in recommending prosecution to the Crown Prosecution Service (Fenwick 2007 pp.1303-1304).

Police Officer 2 stated that, in his opinion, the police generally do a great job without breaching the PACE Codes they deal with and this was also believed by Police Officer 3, who said that although police behaviour was not ‘right every time’, usually procedures were done ‘by the book’

A legal advisor’s answer supported the officer:

“They do follow procedures. So far as interviewing is concerned, they have a crib sheet, which tells them exactly what they have to say at the beginning of the interview. They have a custody sergeant making sure they sign for everything. It’s all very procedural, and they are well-trained.”¹⁰⁸

Clearly, the police itself and the IPCC monitor the way that police officers conduct pre-trial procedures in several ways. However, as the first step in making a complaint is to address it to the chief constable, complaints can stay within the police. Although this may lead to the problem being dealt with quickly, assaults can be denied, as was shown in one interview. Moreover, suspects do not like to make a complaint due to threats or being afraid of future actions by the police. Establishing a new commission or closer regulation of supervision to prevent assaults of people in public or at the police station may go some way to protecting communities, however, it is also possible that the police could evade such measures if they wanted to.

¹⁰⁸ (Legal Advisor 2).

Conclusion:

A review of the pre-trial procedures covered by PACE has shown that issues of regulation and practice between the interests of the whole community to be protected from crime, and the rights of the individual are contentious, as the case law cited in this chapter reveals. The interviews as well as the literature demonstrate that the police do not always follow the letter of the law, and careful training and monitoring of police is crucial as well as having an effective remedy when rights are breached. The research discovered that there were some areas where PACE was not properly implemented. The suspect may well be read their rights, but too quickly to be properly understood. They are allowed to see a lawyer, but told that this will slow the process of their investigation. It has been suggested here that there is sometimes competition between the solicitors and the police officers, and that there is evidence that the police officers try to mislead the suspects by saying their solicitor might be late and that might affect the length of their stay in custody. It is difficult to properly monitor the process of stop and search in the street. The fault seems to lie less in the actual legislation contained in PACE but in how officers are monitored and made accountable.

Although PACE is impressive in its codification of pre-trial, it has had its teething troubles, and as a result there have been amendments to clarify definition (as mentioned in Chapter Four), and much has been learnt over the 30 years of its existence about proper implementation. There is a speedy redress if an individual wishes to make a complaint against police officers. However, as long as police action on the street is not closely monitored, it is always possible for officers to falsely deny accusations. Discrimination is more likely to occur during stops and searches, highlighting the importance of effective training, monitoring and review.

The right to privacy in Saudi Arabia relies on the culture and not the CCP - as we will explain in next chapter-however, PACE protects the suspect's private life through a code of practice. Moreover, the right to bail is being ignored in Saudi Arabia's criminal procedure. PACE, however, allows the police to release the suspect if there is no strong evidence against him and even if the suspect is charged, bail can be granted. Finally,

PACE does not accept any misconduct from the police and gives the suspect rights to claim for compensation - a right which is totally non-existent in Saudi law. Saudi Arabia, should take into account and adapt these elements from PACE in order to comply with the principles of *Shari'ah* and international human rights norms. In the next chapter the pre-trial procedures in Saudi Arabia are explored with a view pinpointing the problems there. The chapter will also suggest how PACE could usefully be explored by Saudi Arabia in establishing a pre-trial system which is fair, effective and in keeping with the human rights principles contained in *Shari'ah* and international human rights laws.

Chapter Six

The History and Development of Criminal Justice in Saudi Arabia

Introduction:

This chapter will consider the history and development of criminal justice in Saudi Arabia from pre-Islamic times in the Arab Peninsula to the birth of Islam in AD 610 and trace the changes that have happened from then up to the present day. It will look at how Islam introduced a system of criminal justice into what was a system of tribal law, and how this new system incorporated ideas about human rights, at a time when this was still very undeveloped in Europe. The chapter will also explore the current reforms to the Saudi Code of Criminal Procedure (2001), which will be further examined in Chapter 7. There will be a discussion of human rights in Saudi Arabia on both a national and international level. It will argue that Saudi Arabia is aware of issues of human rights in that it has signed and ratified a number of treaties. However, in practice there is still a long way to go before Islamic principles of human rights are reflected in both legislation and actual practice.

1. Criminal Justice in the Arabian Peninsula before Islam.

There is a lack of information about the history of criminal procedures in the Arab Peninsula and most of the resources have been taken from: the writings of Arab historians; books of the Torah and some Jewish books; the writings of ancient Greeks, Romans and Assyrians and ancient monuments in the Arabian Peninsula. Most of the writings of Arab historians relied on Jewish and Christian books and some superstitions that were conveyed from one generation to another (Razwy 1996 p.13). Thus, all the information about pre-trial procedures in the Arab Peninsula is uncertain in its details. Nevertheless, poetry was a great resource for evidence about culture in the Arab

Peninsula. The works of the poets were the only indigenous source of information about the rudimentary forms of justice that existed at this time that was not Jewish or Christian (*ibid*). The Arab Peninsula is less than 2500 km in length and approximately 2000 km in width, most of it desert, plateaus and mountains. The climate is very hot and dry with a lack of rainfall. Moreover, it never seemed to flourish from an economic point of view during that period. This protected the Arab Peninsula from invasion by the Roman or Persian empires (Al Awabdeh 2005 p.31). Therefore there were no significant external influences on how the law worked at this time.

Arab society before the birth of Islam had particular characteristics. For example, a harsh life, a strong respect for social dignity and freedom, and a family's reputation and dignity were of paramount importance (*ibid.*, p.33). Moreover, strong loyalties to family and tribe led to a robust social solidarity, even though some customs are now considered unacceptable such as, killing sons if they were considered to have cowardly characters. Thus, a tribal law sprung from nepotism and a system of blood relations such that a tribal member could do anything to protect and prevent the threat to his family or tribe. This overrode considerations of whether such actions were right or wrong in themselves and the tribe thought it a sort of bravery. Al- Awabdeh argues that this 'bravery' for Arabs was only another name 'for vicious acts and savage practice, the members of that society were engrossed in all sorts of vices and evils which were both deep-rooted and universal in nature' (2005 p.34).

Khoary points out that all communities in that period in the Arab Peninsula had different degrees of sophistication, and had their own laws, which applied to offenders and outlaws. These laws put the defence of dignity and reputation above religious values, but all had their system of punishing crimes such as murder and theft. These sanctions were often private and when a person was considered a killer, they were handed over to the relatives of the victim. But what is of concern here is not law enforcement but the extent that these customs were harbingers for that group of laws that existed before Islam and continued their existence thereafter (Khoary 2007 pp.129-130).

The most remarkable feature of the criminal justice of the Arab Peninsula in pre-Islam was the total absence of criminal justice organization in any form or any regulated law. The people of the Arab Peninsula had not experienced any government to dominate them except the chief or the leader of tribe who had the authority to rule the tribe. The authority of the tribal chiefs, however, sprung from, in most cases, ‘their character and personality, and was moral rather than political’ (Schacht 1982 p.8-9).

A system of customs based on blood feud and compensation was the norm in the Arab Peninsula. The point here is that no generation tried to change the methods of criminal justice, as it was part of their culture, thus no law was formalized into a system. However, in the event that a crime was committed, the injured party took the law in its own hands, and tried to administer ‘justice’ to the offender. That system led very frequently to acts of cruelty. Moreover, most of the tribes had autonomy over justice issues. There were no police or courts to make a complaint to and they knew if they over-reacted against the perpetrator, his or her tribe would declare war and the war would not stop for a long time (Razwy1996.p.9). See Appendix C.4 for a description of the Albswas War which illustrates this point.

However, there was a way to avoid all the feuds or war that could result from a tribe member committing a crime against another tribe. This was a process of making peace or conciliation which is called *sulh* and which usually ended in compensation. Certain people could play an indispensable role as arbiters in all disputes within the tribe or between rival tribes such as the chieftains who are called *sheikhs*, soothsayers and healers who are called *Araf*, and influential noblemen. The decision or *hokam* was made according to customary law or tribal law. Thus, the decision was not legally enforceable but binding on all the parties. ‘The effectiveness of tribal mechanisms in containing disputes can be attributed to a complex system of special customs and regulatory procedures within each group’ (Al-Ramahi 2008 p.12).

“Tribal law is built upon two basic principles: (1) the principle of collective responsibility; and (2) the principle of retribution or compensation. The objective of tribal law is not merely to punish the offender but to restore the equilibrium between the offending and the offended families and tribes” (Al-Ramahi 2008 p.3).

Lippman suggests that Arabs did not encourage the growth of individualism as they had a tribal life, a tribal mind and tribal culture. If a member of a tribe committed a crime, the tribe would deal with him or her according to their customs. Otherwise, if the tribe did not punish or react against the criminal, this sometimes resulted in bloody controversies that often took a long time to settle, Arbitration was the only way to end the feud between the tribes, and usually a man took the punishment instead of a woman and a slave would be punished instead of a freeman (Lippman 1989 p. 29-30).

“Pre-Islamic societies had their own methods of dispensing justice, based on custom and usage. The centrepiece of their archaic judicial system was their belief in blood-ties and the concept of clan loyalty attached to it. Notions of discipline and authority could only exist by the means of blood relationship. It was impossible for them to conceive both vice and virtue outside the tribal context” (Al Awabdeh 2005 p.36).

Torture and flogging in order to extract confessions were not commonplace in pre-Islamic tribal culture. Al-always comments on this, saying that torture was only permitted and practiced if there was societal agreement. There were some kinds of torture that were used as a pre-trial procedure to make a suspect confess. Examples include putting the suspect on the sand on a sunny and hot day, then putting a large stone on the suspect's chest, denying water to the suspect for a long time and flogging harshly. The suspect was unlikely to be tortured, unless there was consensus from his or her tribe to the use of torture to extract a confession. If this consensus were not obtained, the suspect's tribe would take the revenge and declare the war (Al-alway 2008). Taking the oath, which is still called *qasam* was a way to prove the innocence of a criminal if there were no witnesses at the scene (Hursh 2009 p.1405).

To conclude, the Arab Peninsula had been remote from ancient civilizations and that affected the regulation of their methods of criminal justice. Loyalty to the tribe was a barrier to the development of regulated methods of criminal justice. Islam focused on improving the social and legal standing of everyone, especially of the weaker members of society by introducing some concept of authority and respect that was not purely based

on blood ties and clan loyalty but traditional human values. Thus, next section will examine the effectiveness of Islam on criminal justice in the Arab Peninsula.

2. Criminal Justice after the Birth of Islam.

One of the most important features of *Shari'ah* is that 'every true Muslim obeys the Commandments of God and feels pleasure in the very act of obedience. Obedience to the word of God comes from within, spontaneously, and without external compulsion. In the light of this civil and criminal law is seen as a means of returning people to the proper path, rather than as a deterrent' (Walker 1993 pp. 863-864). Hursh points out that Islam does not have an effective legal system. as the holy *Qur'an* does not sufficiently lay out an adequate legal system in the eighty verses or so with legal content; he believes it was written for purely practical reasons that related to the time of Prophet Muhammad, so that means it is unreliable as a guide to contemporary regulation (2009 p.1404).

Vogler (2005 p.106), comments that claiming a divine source for a code of law is unique to Islam 'amongst major systems of law'. He agrees with Hursh that the legal content of the *Qur'an* is indeed sparse, and that out of 6,300 verses 'only 30 verses directly and unequivocally touch on criminal law and only 20 on procedure', although up to 500 can be said to refer to legal matters. In spite of this, the Islamic criminal justice system was an advance on the blood feuds that preceded it and offered a speedier resolution for dealing with offences.

Alexiev (2011 p.28) also agrees with Hursh, suggesting that the Prophet Muhammad took his ideas from Bedouin culture and he did not institute a new system of legal administration, rather he was simply a religious reformer. The Bedouin were without any written code of law, and relied on a custom (*aurf*). Hence, he believes that *Shari'ah* is a mixture of Bedouin customs and Prophet Muhammad's attempts to codify them. Hursh and Alexiev's arguments seem to suggest that Islamic law is insufficient as a system of criminal justice for this reason. However, arguments about whether *Shari'ah* may or may not contain elements of Bedouin culture is not an argument against its effectiveness

Furthermore, whilst it is clear that the Saudi criminal justice system might well be improved by closer regulation of pre-trial procedures, this in itself does not suggest that *Shari'ah* is incapable of incorporating such measures.

During Prophet Muhammad's lifetime there were no police (described in Arabic as *shurta*). The Prophet was the judge and he received his commandments from God. During the *Abbasid* and *Umayyad* periods, the system of justice administration became the *shurta* (police tribunals). These *shurta* controlled the law, each place had at least two courts, and the *shurta* was aiming to achieve the aims of *Shari'ah* (Alexiev 2011 p.33).

Although, the Ottoman Empire had little effect on the Arab Peninsula, it is interesting to note that there were important changes to *Shari'ah* in Arab countries within the Ottoman Empire. Being a desert, the Ottoman rulers had little use for the Peninsula and so did not institute legal changes there (Alexiev 2011 p.37).

Gravelle (1998 p.2) makes a distinction between different kinds of Islamic state and the application of *Shari'ah* law. Some states, like Turkey, are purely secular, others, like Morocco, apply *Shari'ah* only to family matters. There is a third category of states such as Qatar and Yemen, where there is a modified form of *Shari'ah* and certain punishments are excluded; whereas states such as Iran, the Sudan and Saudi Arabia attempt to impose *Shari'ah* in a classical form.

3. Contemporary Criminal Justice and Human Rights in Saudi Arabia.

The process by which the Saudi government enacts new laws and makes changes to procedure are not a matter for public debate. For this reason, it is difficult to speculate why certain changes in legislation occurred or why they occurred when they did. The Saudi Arabian government has announced that *Shari'ah* is the supreme law of Saudi Arabia. Article One in the basic law of Saudi Arabia says, "The Kingdom of Saudi Arabia is a sovereign Arab Islamic state with Islam as its religion; Allah's Book and the

Sunnah of His Prophet, Allah's prayers and peace be upon him, are its constitution, Arabic is its language and Riyadh is its capital'' (Royal Decree Number (A,90)1992).

As a result of this, it would be obvious that for any new regulations, laws or systems to be issued, they must comply with the rule of *Shari'ah*, even those about human rights. Nevertheless, the Saudi government alleges that they apply *Shari'ah* as the law of Saudi Arabia, and as I mentioned earlier in section 2.3, *Shari'ah* can be suitable everywhere and to anyone; and criticising the *Shari'ah* would be a criticism of the divinity. However, criticising the application of *Shari'ah* does not criticise the law itself. Vogler (2005 p.120) has pointed out that *Shari'ah* has been 'amalgamated into a bureaucratic and highly repressive police hierarchy'. In order to explore that, questions will be raised as to whether the Saudi government respects human rights at a local level and whether people feel that the legal practices actually follow *Shari'ah*. It is one of the main aims of this thesis to examine this issue, so this section will explore Saudi Arabia's role and position with regard to human rights at both the national and international level.

3.1 National Level.

Shea (2004 p.3) believes that depriving people of their rights and freedoms is part of 'the fabric of society' in Saudi Arabia due to its practicing the *Wahhabi* [an ideology stemming from Mohammed Ibn abd Al-Wahhab] as part of Islam. She thinks the *Wahhabi* ideology causes the lack of human rights in Saudi Arabia as it asserts its rejection of the Western model and other Islamic legal schools of thought. The origins of this choice of ideology are in the period 1744-1818 when Muhammad Bin Al Sa'ud (the leader of Dir'iyyah, a small town in central Saudi Arabia and original home of the Al-Sa'ud family) was in alliance with Muhammad bin Abd al-Wahhab, (his methodology today is known *Wahhabism*), in insisting on the importance of monotheism and the relationship between God and believers (Al-Rasheed 2002 p.16). This represented the starting point for the establishment of the reputation of Al-Sa'ud because most of the tribes in the Arab peninsula were difficult to control unless they were presented with an ideology that they perceive as having a divine origin (*ibid.*).

King Abdul-Aziz, who united the Kingdom of Saudi Arabia in 1932, was engaged in wars to control the whole of the kingdom between 1902 -1932. As a result, he was not able to devote time to creating a law for criminal procedures. There was no police except in Mecca, Medina and Jeddah; the police force there was just to carry out the commands received from the governor and there were no proper regulations (Alalmy 1982 p.29).

Saudi Arabia is dominated by a monarchy that makes all the ultimate legal decisions; as a result, there is a diminution of democracy, so the people cannot express their own will to choose their leader. Meanwhile non-governmental organisations such as Human Rights Watch have concluded that 'overall human rights conditions are poor' (Human Rights Watch 2008). Walker argues that Saudi Arabia has neglected human rights in particular issues. The treatment of women is one of the most important issues over which Saudi Arabia has been criticised; also that its government does not sufficiently attend to human rights. Saudi Arabia is still practicing the death penalty and juveniles as young as 15 can be executed. There are also serious concerns about 'the deficiency of official accountability, arbitrary detention, mistreatment and torture of detainees, as well as restrictions on freedom of expression' (2009 p.2).

Echagüe & Burke (2009 p.9) believe that Saudi Arabia infringes human rights with such practices as arbitrary arrest by *al-Amn al-Aam* (the public security police), *al-Mabahith al Amma* (General Investigations) and the activities of the religious police known as *al-Mutawaeen* or *Hay'at al-amr bilmaruf wan nahi an almunkar*, (the Committee for the Propagation of Virtue and Prevention of Vice (CPVPV)). The government issues laws that cannot be easily understood and can have a wide interpretation. They also argue that in criminal cases, the government does not provide the lawyers with full information about the accused and the lawyers cannot therefore provide the correct legal advice, even though the Criminal Procedure Law of May 2001 ostensibly protects the defendant's rights and gives lawyers the right to have full information about their clients. Also the government can detain the accused for more than five days until they have a confession, although, the previous law stipulates that no one can be detained for more than five days. However, the letter of the law often differs from actual practice in Saudi Arabia (*ibid.*).

This will be discussed at length in Chapter Seven. It is intended to establish, in Chapter Seven, that the government can be criticised for its failure to establish a strong monitoring system. The government is making a mistake by given each state organization authority without accountability. It will be argued that the government is doing that because of the first Article of the constitution which says, “*Shari’ah* is the supreme law of Saudi Arabia” and which means that everyone should know that God is watching their movements and that they are responsible for all their wrongdoings. It will be argued here that this is insufficient.

Between 1990-1993, NGOs in Saudi Arabia were not allowed to have access and monitor human rights. Moreover, international human rights organizations were unable to visit Saudi Arabia to assess the level of human rights protection. That gave a bad impression about human rights in Saudi Arabia, and the government failed to give any justification for their decision (Alhargan 2012 p.602).

Alhargan (2012 p.605-606) pointed out that after Saddam Hussein attacked Saudi Arabia in 1993, there were attempts by some people to present themselves as freedom-fighters, i.e. the so-called ‘Committee for the Defence of Legitimate Rights (CDLR), which was considered a human rights NGO’. It criticised the government constitution and oppression in Saudi Arabia. The CDLR believed the government does not practice *Shari’ah*, and its founders sought to counter the apparent injustices, reform the country’s political system, modify certain internal policies and pave the way towards more public participation in decision-making and politics. They demanded freedom and asked for reforms in the country. However, the government did not accept their claims, and some people who signed up to the CDLR lost their jobs and some lost their passports. The founders (Sa`d al-Faqih and Al Mas`ari) fled to London and established a new TV channel as a protest against the Saudi government; because they concluded that the best way to affect the Saudi government was through the media (*ibid.*).

There are, however, two legal human rights organisations now present in Saudi Arabia. On March 9 2004 the first organization for human rights The National Society for Human Rights (NSHR) was formally approved by royal decree., interestingly, at the same time as

the second Arab Charter This started badly, with the organization stating that it believed that the death penalty and amputation of the hand or any kind of *huddud* penalty was not torture. This was hotly debated within the United Nations Human Rights Commission Zuhur comments that unfortunately, ‘the practices of regimes like the Taliban, the Islamic Republic of Iran, and Saudi Arabia have eroded elements of moderation’ (2005 p.35).

The NSHR monitors rights recognised by Islam and it visits prisons together with other human rights organisations. Saudi citizens can send their complaints to the NSHR, which has the power to act on their behalf. The NSHR also acts as a pressure group on the government, demanding that their agencies receive human rights training and that Saudi Arabia adheres to and ratifies more international treaties that relate to human rights (NSHR).¹⁰⁹

The NSHR also compiles reports on human rights in Saudi Arabia. Its first report was in 2007 and stressed the government’s responsibility to adhere to the international agreements it had signed as well as establishing regulations which allowed the freedom to form organisations without fear of reprisals. In 2009 a second report was issued. It urged the government to establish an elected *Shura* Council, implement judicial reforms more speedily and criticised power abuses by the CPVPV. It also called for cases of torture and lengthy detention to be investigated (Echagüe & Burke 2009 p.13).

The Human Rights Commission came into force on 12 September 2005 to ‘protect human rights and spread awareness about them [...] in keeping with the provisions of Islamic law.’ (HRC) The commission has 18 members who are appointed by the king for a period of four years. The commission stated its aim was to act as a safeguard from oppression; it deals with over 4000 complaints on average per year. ‘The Commission has branches throughout Saudi Arabia, with two established specifically for women, and it seeks to enshrine Arab and Islamic concepts of human rights’ (*ibid.*, p.13). The problem with this kind of human rights commission is that the government mostly

¹⁰⁹ Available at <http://nshr.org.sa/en/> (Accessed 1 Dec 2014).

controls it, because each member must be appointed by the government. As a result, it is thought not to have sufficient independence and authority to regulate government organisation. Furthermore, this can contravene The Paris Principles which state "The key elements of a national institution are its independence and pluralism"(Paris Principles)¹¹⁰.The Human Rights Commission in Saudi Arabia does not conform to this as it cannot be said to have independence.

Alhargan (2012 p.602) suggests that Saudi Arabia has made an effort to present itself as practicing human rights without relying on any outside assistance, either cultural or financial. As Saudi Arabia is not in receipt of foreign aid, it is not under economic pressure to improve its human rights. However, in recent years Saudi Arabia has made significant changes in its law, issuing many laws that are intended to protect human rights. One example is the Code of Criminal Procedures of 16 October 2001 which tackles many of the legal issues surrounding the legal safeguards against arbitrary arrest and secret trial proceedings, and guarantees defendants the right to legal assistance throughout the judicial process. Under its provisions, no violence can be used to gain confessions from detainees. In order to monitor how detainees are being treated, members of the Bureau of Investigation and Prosecution have access to prison. Since 2000, there have been several new laws introduced in Saudi Arabia that regulate the judicial system. The Law of Procedure Before *Shari'ah* Courts stipulates the process by which pleas, evidence and experts are accepted by the court, and the Code of Law Practice establishes the qualifications necessary to become an attorney, the rights and duties of lawyers and attorney-client privileges (Alhargan 2012 p.616)

Alharagan (2012 p.616) points out that Saudi Arabia has hosted many international organizations for human rights such as Human Rights Watch, in order to show them how human rights are respected in practice. Saudi Arabia admittedly had little interest in human rights until recently. However, after the establishment of the CDLR and pressure from international organizations such as the United Nations Committee Against Torture, which criticized Saudi Arabia over the amputations and floggings it carries out under

¹¹⁰ Paris Principles A/RES/48/134 85th plenary meeting 20 December 1993.

Shari'ah, the government realized that there was a need to introduce specific laws concerning human rights and not to just rely on customs or traditional understandings . It has made some basic laws in criminal procedure that will be examined later to establish whether the government has implemented them effectively

3.2. International Level.

At a regional level, Saudi Arabia ratified the Arab Charter on Human Rights (ACHR) in February 2008. (See Chapter 2 for an explanation of its significance) However, the Charter, which came into force on the 30th of January 2008, has encountered some criticism from people who think that it is not capable of fulfilling the principles of international human rights. In particular, Louise Arbour, the High Commissioner for Human Rights, has stressed that ‘the Charter is incompatible with the international standards for women’s, children’s and non-citizens rights’ (Walker 2009 p-3).

At an international level, Saudi Arabia has been one of 194 members of the UN, who have engaged in debate and shared its ideas on human rights since its establishment. Saudi Arabia has objected to signing charters and conventions on human rights, which it considered contentious. For example, the government did not agree with some Articles that contravened Saudi Arabia’s religious and cultural principles such as Articles 18 and 19 in the ICCPR and as a result did not ratify or sign the ICCPR (OHCHR 2014).

Saudi Arabia could not accept 18 and 19 of the ICCPR; Article 18 deals with the right to hold any religious belief, and Article 19 deals with freedom of expression. Alharagan comments that Saudi Arabia has consistently objected to joining the ICCPR because of Articles 18 & 19 and because the ICCPR guarantees the freedom to change faith. Unable to ratify the ICCPR, Saudi Arabia formed a coalition with several other Muslim states in order to devise a human rights document that would conform to *Shari'ah*. This has resulted in a number of ‘Islamic’ human rights documents (2005 p.67). The most recent of these were the CDHRI 1990 & the ACHR 2008 which were explained in Chapter 2.

Saudi Arabia neither signed nor ratified the Covenant. Currently, 168 states are party to the ICCPR, while 17 UN member states have not yet ratified or acceded to the ICCPR¹¹¹ (OHCHR 2014). However, Kuwait and Bahrain have signed and ratified the ICCPR and they are culturally and politically similar to Saudi Arabia. In refusing to acknowledge the universality of these documents.

Saudi Arabia's objection to Article 18 was religious. The Article states 'this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance'. Although Saudi Arabia was happy to recognise all people's rights to freedom of thought, conscience and religion, they want to delete the phrase about having a right to change one's religion, as apostasy is forbidden according to the majority of Islamic doctrines. To date, Saudi Arabia still hasn't ratified or signed the ICCPR as this principle is so central to Islam. Although, Art. 30 (1) of the ACHR, becomes more flexible toward the right to freedom of thought, conscience and religion as it states "Everyone has the right to freedom of thought, conscience and religion, and no restrictions may be imposed on the exercise of such freedoms except as provided for by law." Al-Baodry¹¹², however, concentrated on arguing technical points about how other religious freedoms were accorded less importance than the right to change one's faith and how the HRC had omitted to hold consultations with Islamic countries on the matter. He also suggested that such measures could be compared to missionaries' efforts to convert people for political reasons and might result in conflict (Alwasil 2012 p.1073). This demonstrates how, if any reforms and improvements in pre-trial procedures are to be introduced in Saudi Arabia, it will have to be shown that such reforms are not in conflict with religious precepts.

¹¹¹ Antigua and Barbuda, Bhutan, Brunei, Burma, China, Comoros, Cuba, the Federated States of Micronesia, Fiji, Kiribati, Malaysia, Marshall Islands, Nauru, Oman, Palau, Qatar, Saint Kitts and Nevis, Saint Lucia, São Tomé and Príncipe, Saudi Arabia, Singapore, Solomon Islands, Tonga and the United Arab Emirates. In total, these 24 states are home to over 20 per cent of the world's population.

¹¹² Jamil Al-Baodry was Saudi ambassador to the UN in 1948.

On 27 June 2012, a Memorandum of Understanding was signed between OHCHR and the Kingdom of Saudi Arabia, represented by the Saudi Human Rights Commission. Within the framework of enhancing cooperation between the Kingdom of Saudi Arabia and OHCHR, the Office will develop a three-year plan to enhance national capabilities for the promotion and protection of human rights in Saudi Arabia. The programme will be developed in cooperation with the Saudi Human Rights Commission and relevant partners, including civil society organizations and United Nations agencies (OHCHR).

Al-Sharif *et al* point out that Saudi Arabia has welcomed human rights organizations, namely, Human Rights Watch and Amnesty International to assess violations of human rights and particularly discrimination against women, non-Muslim religion practices and prisoners of conscience. They argue that there is still need to improve human rights practice in Saudi Arabia and ‘to establish institutions specialized in training, monitoring and protecting human rights’ (2008 p.3). However, Saudi Arabia conforms to certain international human rights instruments. It acceded to four core human rights instruments and became legally bound by the guidelines set out in those four treaties out of seven of the United Nations’ conventions including the Convention on the Rights of Children (CRC) (1996), the Convention on the Elimination of Racial Discrimination (CERD) (1997), the Convention Against Torture (CAT) (1997), the Convention on the Elimination of Discrimination Against Women (CEDAW) (2000), Convention on the Rights of Persons with Disabilities (CRPD) (2008), Optional Protocol to the Convention on the Rights of the Child on the sale of children child prostitution child pornography (CRC-OP-SC) (2010), and Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (CRC-OP-AC) (2011) (OHCHR).

Alharagan notes that Saudi Arabia was keen to avoid any shame that might accrue to the Kingdom should it be accused of human rights violations. In particular, it wanted to demonstrate to the international human rights network that both national and local Islamic laws and regulations in Saudi Arabia complied with all ratified human rights conventions (2012 p.607).

In conclusion, Saudi Arabia's involvement with the UN human rights organisations has shown that it wishes to be seen as endorsing internationally recognised standards of human rights. Saudi Arabia was elected to the UN HRC in 2013; Peggy Hicks of Human Rights Watch was more specific and said: "members of council that are committed to human rights will need to redouble their efforts on a number of problems" (Aljazeera 2013).

Furthermore it wants to show that Islamic *Shari'ah* is compatible with these. This has been an important first step towards Saudi Arabia's socialisation into making human rights a national concern. As a result of the 'Arab Spring' popular risings against governments in the Middle East, the Saudi government has become more open to developing human rights in Saudi Arabia in order to avoid outright revolts on the part of disgruntled citizens. The growth of the Internet and Social Networking has also meant that criticisms of the government and debates about human rights have become more open and the government is keen to respond to this. It could be argued that these factors make this an excellent time to introduce reforms in pre-trial procedures. Having discussed international human rights in relation to Saudi Arabia, the next section addresses how the rights are or are not upheld with regard to pre-trial procedures in the Code of Criminal Procedures that was introduced in 2001.

4. Current Reforms in Saudi Arabia at the Stage of Pre-trial.

As stated in the previous section, King Abdul-Aziz issued a command in 1930 to determine the functions and duties of the police, and establish a police force in each city in the kingdom, even though the regulations he made were very basic. A chief of police had the power to deal with any case when he felt it was necessary. For example, if someone did not attend in the mosque during prayer time, smoked cigarettes, or behaved badly in public, the chief was allowed to detain him for one day to three days and administer 15 lashes to deter the person from doing it again (Alalmy 1982 p.31). In 1950 the Public Security Directorate (PSD) was established to regulate criminal procedure followed by the establishment of the Code of the Investigation and Public Prosecution Commission (CIPPC) in 1989. The significance of this is considered in the next section,

before the implications of the adoption of the new Code of Criminal Procedure in 2002 are examined in more depth.

4.1. Investigation and Public Prosecution (IPPC) Establishment.

The IPPC was established by Article 1 of the Code of the Investigation and Public Prosecution Commission (CIPPC) issued by Royal Decree No. M/56(30 May 1989). The IPPC was established as the only service for criminal procedures; and to take the responsibility of investigating and prosecuting criminals from the police and giving it to an entirely new institution. Although, the CIPPC was issued in 1989, it was not until October 3, 1993 that the IPPC started its work. The CIPPC played a key role from when it started to exercise its function in 1993 until 2001 when the CCP came into force. However, the argument made here is that it is insufficient and still does not deal with most criminal cases (as will be seen in Chapter Seven). For example, thefts, bad behaviour and drinking alcohol are still being dealt with by the police. The IPPC just attend to cases of assault, drugs, rape and financial crimes. This complicates the situation when a suspect is alleged to have committed several crimes. It should be noted however, that to date, the IPPC has not fully assumed all its functions. The main reason for this is logistical, as the IPPC still does not have the manpower and the resources to exercise all the functions assigned to it by the CIPPC (1989), which are enormous. Despite this, one officer interviewed in this study stated that the intention seems to be that the IPPC will assume its responsibilities gradually, whenever it is ready to discharge them¹¹³.

It should be noted that the IPPC is not a judicial body; Article 5 of CIPPC declares that "members of the IPPC Committee shall enjoy full independence and, in their work, they shall be subject only to the provisions of the Islamic law (*Shari'ah*) and the laws in force. No one shall interfere in their work". The supervision of the IPPC is entrusted to the Minister of the Interior in accordance with Article 26 of the CIPPC. Moreover, the Head of IPPC is appointed by a Royal Decree on the advice of the Minister of the Interior. It

¹¹³ (Riyadh Investigating Officer, No.3, interviewed 26 July, 2013).

seems that the Minister of the Interior has power over the IPPC. In Chapter Seven, interviews with prosecutors, police officers and lawyers will be reviewed in order to observe the actual function of the IPPC.

4.1.1. Code of Criminal Procedure CCP (2001).

In 2001 Saudi Arabia enacted the Code of Criminal Procedure (CCP) 2001 which regulates the relations between the accused and the investigators. Until that time, there was no systematic criminal procedure law in Saudi Arabia. Criminal procedures mostly relied on individual edicts that were issued by royal decree, and the Ministry of the Interior, which regulated legal and criminal procedures. Furthermore, the Public Security Directorate (PSD) system (1950) was the only system with edicts that were issued by the Ministry of the Interior to regulate investigation procedures. Thus, this section will not discuss the PSD, because it was abolished, along with the Ministry of the Interior's regulations. Moreover, as Chapter Seven will examine and explore the CCP (2001) in-depth, it will just be briefly outlined here.

The CCP (2001) has two hundred and twenty five Articles divided into nine chapters; the first chapter regulates general provisions, the second deals with the initiation of criminal action, the third regulates procedures relating to evidence, the fourth describes investigation procedures, the fifth outlines criminal jurisdiction, the sixth regulates trial proceedings, the seventh chapter defines ways to appeal judgments, the eighth chapter deals with sentencing and appeals and the ninth regulates enforceable judgments (Umm Al-Qura 2001 No.3867). These will be explored in more depth in Chapter Seven. However, some general observations are worth making at this stage to provide an indication of the significance of this instrument, as well as some of its limitations.

Arfah (2001) argues that the CCP can be considered a great transformation with regards to human rights in criminal procedure in relation to individual private life. He argues that the CCP regulates criminal procedures according to *Shari'ah* instructions, with respect for human dignity. The CCP, it is argued, is totally compatible with *Shari'ah* since they

both seek to guarantee the accused's rights in the pre-trial period. Dufyer (2011) considered that the CCP is the best guideline with which to apply criminal justice.

However, the CCP suffers from a lack of implementation and needs to be augmented at some points. Dufyer argues that the CCP does not regulate the length of time within which the complaint must be made, even though legal writers such as *Almalkey* and *Alhanafy* (*Sunni* scholars) suggest that is this dealt with in *Shari'ah*. Moreover, in ordinances dealing with criminal procedures, a time-limit for complaints is usually stated (2011 p.25).

Al-Hyjlan (2006 pp.182-183) suggests that the CCP needs rewording because there are some Articles which do not guarantee rights to individuals who are not actually accused of anything. For example, under; Article 41 of the CCP "A criminal investigation officer may not enter or search any inhabited place except in the cases provided for in the laws, pursuant to a search warrant specifying the reasons for the search, issued by the Bureau of Investigation and Prosecution. However, other dwellings may be searched pursuant to a search warrant, specifying the reasons, issued by the Investigator. If the proprietor or the occupant of a dwelling refuses to allow the criminal investigation officer free access, or resists such entry, he may use all lawful means, as may be required in the circumstances, to enter that dwelling...". Meanwhile Article 54 provides that "No person other than the accused and no dwelling other than his shall be searched, except where there are strong indications that such a search would help in the investigation". Thus, Alhyjlan argues that, as long as there is a strong indication, which is enough to search the house because the person is being accused, Article 54 does not guarantee rights to anyone not accused nor protect the privacy of home (2006 pp.182-183).). This point will be explained in-depth in Chapter Seven as many of the Articles have problematic wording. There are, for example, problems in the CCP in that there is no formalizing of lawyers' rights to read the initial investigation papers before the interrogation of the accused. Thus, it is necessary to give a lawyer permission to prepare his client's defence, as it is a right of the accused. Also Al Zahrany points out that the CCP needs to be augmented to require that the accused has legal advice for a serious

offence, and that if he does not have money, the government should provide him a free legal advice (2008).

The CCP has also attracted some external criticism. For example, Human Rights Watch (2008 p.4) has noted that the CCP does not incorporate all international standards pertaining to the basic rights of defendants. It does not, for example, guarantee that a detainee will have timely access to a counsel and makes no provision for legal aid. A detainee cannot challenge the lawfulness of the detention even though the CCP allows prosecutors to issue arrest warrants and detain suspects for up to six months without any judicial review and there is no requirement to provide a particular standard of evidence of the suspect's guilt.

Although torture and maltreatment of the suspect are not allowed, statements made under duress are still admissible evidence and officials who coerce suspects are not sanctioned. There is no statement about the presumption of innocence and the detainee is not protected against self-incrimination. Finally, Human Rights Watch points out that it is often the case that judges do not follow the procedures laid out in the CCP. It is one of the main aims of this thesis to discover to what extent the current procedures for criminal proceedings are being followed. This will be fully explored in Chapter Six when the actual practice of pre-trial criminal procedures in Saudi Arabia will be examined.

Notwithstanding these critiques, the CCP has an important role in Saudi criminal procedure and will be examined in more detail in Chapter Seven. Here the CCP will be examined and criticised in order to understand what changes are necessary for it to be a practical and effective system for Saudi Arabia. These changes will be in harmony with *Shari'ah* and the religious principals which underpin it.

Conclusion

This chapter has demonstrated how the ideals of Islam have not been adhered to in practice, and the initial human rights principles introduced by Islam have not been

developed as was the case in England and Wales. As a relatively new and undeveloped country, Saudi Arabia's criminal justice system is still a work in progress. As a result Saudi Arabia has been widely criticised by international organizations for not reaching the threshold standards of human rights practices as set out in the international human rights conventions. However, it has made an effort to participate in International Human Rights by signing four charters.

However, criticisms that are coming from these organisations may well be justified in terms of actual police practices in Saudi Arabia, which can be construed as miscarriages of justice. However, to suggest that the fault lies with Islam, the *Qur'an* or the system of *Shari'ah* law on which it is based is erroneous. The problem is that the law is not always clear or unambiguous. Furthermore, it is not being carried out properly, with due care to the welfare of those who come under its aegis. Introducing proper regulations which would cover all aspects of pre-trial procedures would go a long way to answering such criticisms

Saudi Arabia has issued some laws to regulate criminal justice, and the CCP was such a law. However, Saudi Arabia has been criticised by the Human Rights Watch and Human Rights against Torture for detaining people without trial and torturing them. Chapter Seven will explore the application of the CCP in Saudi Arabia and actual police practices.

Chapter Seven

The Procedure of Criminal Investigation in Saudi Arabia

Introduction.

This chapter will explore pre-trial procedures in theory and practice to determine to what extent Saudi law follows the precepts of international human rights law and the pre-trial procedures outlined in PACE. This will be done by examining the Code of Criminal Procedure (CCP) which will be analysed in relation to evidence from interviews with Saudi police officers, prosecutors and lawyers about how this code is enforced in practice.

Despite the government's insistence on the high standards of Saudi law and the recent legal reforms described in Chapter Six, there are many violations of the rights of individuals within the Saudi criminal justice system. A Human Rights Watch (HRW) (2013 p.3) report revealed that people can be arrested and detained for behaviour that is not ostensibly criminal or is an unwitting breach of some vague prohibition. Subsequently, these detainees may be subjected to many forms of ill-treatment, such as being put into solitary confinement. Furthermore, they are kept in the dark about why they are in detention and what evidence there is against them. Typically, people who are accused have to wait a long time before trial without access to a lawyer and abused if they refuse to incriminate themselves. At the trial they are thus unable to examine witnesses or properly present a defence. Shifting charges and being presumed guilty exacerbate this situation. (HRW, 2013).

Human Rights Watch (2013 p.9) has pointed out that despite some attempts to improve the legal system, Saudi Arabia has been slow to make progress and defendants criminal justice system are still being deprived of their rights. The King has earmarked \$1.8 bn of government funding for new courts and training for judges (AL-Subaie 2013 p.1). Furthermore, in 2007 the Law of the Judiciary and the Law of the Board of Grievances were amended to improve judicial independence and specialized courts dealing with personal status, commercial, labour and traffic disputes were set up.

Although Saudi Arabia promulgated the CCP, it does not permit detainees to challenge the lawfulness of their detention before a court and fails to guarantee access to legal counsel in a timely manner. The code also permits pre-trial detention of up to six months without judicial review and fails to make statements obtained under duress inadmissible in court. Judges routinely ignore provisions of the CCP. Moreover, authorities have failed to investigate alleged abuses by security forces. The aim of this chapter is to examine which Saudi pre-trial criminal procedure laws and practices comply with international rights standards, and to highlight the lack of balance between perceived public interest and citizens' rights. This thesis will demonstrate that the police are able to exercise their powers to the point of breaching the existing regulations as set out in the CCP, and often at the expense of suspects' rights.

1. The Right to Liberty.

There are two Codes in Saudi Arabia that ensure the right to liberty. Article 2 of the Code of Criminal Procedure (CCP) states that "no person shall be arrested, searched, detained, or imprisoned except in cases provided by law." This is clearly compatible with Article 36 of the Basic Law of Government (BLG), which reads "The State shall provide security for all citizens and residents on its territories. No-one may be confined, arrested or imprisoned without reference to the Law". It seems, however, that there is vagueness in the two Articles, Art. 36: 'reference to the Law' and Art. 2: 'except in cases provided by law' (Dufyer 2011 p.122). The question that arises is which law the Articles are referring to. The Articles prohibit the deprivation of someone's liberty, on the other hand, the police and the investigating prosecutors appear to be given the power to arrest and detain a suspect without these powers being clearly codified in any law. This can be seen as similar to the Arab Charter (ACHR) Art.14 on the right of liberty, (although there is no absolute guarantee as explained earlier in Chapter Two); a right guaranteed by ICCPR Art.9(1) & ECHR Art.5 (1).

In the following section, the arrest and detention of a suspect under the CCP laws will be discussed on the basis of interview data obtained from police officers and prosecutors, with a view to exploring the extent to which the liberty of citizens in Saudi Arabia is unlawfully curtailed.

1.1. The Prohibition of Arbitrary and Unlawful Deprivation of Liberty.

Prior to the CCP, there was widespread malpractice in police stations. Nevertheless, the Public Security Directorate (PCD) system (1950) was the only government institution with regulations that were issued by the Ministry of the Interior to regulate investigation procedures. The PCD was abolished, in 2001, as explained in Chapter 6 and thus will not be discussed here. However, the attack on the New York Twin Towers in 2001 had a profound impact on Saudi Arabia, which took extreme steps to protect the country from terrorist attack. These included the arrest of thousands of people without any regard for the CCP (Almajed 2011 p.1). Almajed argues that the methods which the government used were entirely unacceptable. Protection should have been carried out in a measured and proportionate way but the government announced that there was no other feasible way to protect the country (*ibid.* p.2).

There are practices which involve restricting the freedom of citizens who have not been arrested, purely as a precautionary measure. For example, police officers never work on the street only in their offices, they leave this task to the police soldiers who have very limited education and training and stop and search people on the street. The CCP makes no mention of this and there are no guidelines for police officers on stop and search. This is unlike stop and search in PACE (1984) s.1 (3) where suspects cannot be stopped or searched unless it is based on reasonable grounds, and reasonable suspicion. Breaches of this are unlawful. However, the CCP does not grant enforcement officers the right to detain suspects *incommunicado* in order to merely clarify who someone is, or what they are doing or their intended destination. Article 35 states that anyone detained should 'be advised of the reasons of his detention and shall be entitled to communicate with any

person of his choice to inform him of his arrest' However, as this study and cases from Amnesty show, this does happen.

An example is the case of Khaled al-Johani, the only person to attend a planned “Day of Rage” protest in Riyadh on 11 March 2011, and was arrested. He remained in custody at the end of the year, charged with supporting a protest and communicating with foreign media. For the first two months he was held *incommunicado* in solitary confinement in Ulaysha prison; he may have been tortured. He was then transferred to al-Ha’ir prison in Riyadh, where he was allowed access to his family (Amnesty Organization 2011). This shows how an innocent person can be detained without being charged in spite of Art. 35, which will be discussed later.

Interviewees were asked if the police had the authorization to arrest and search without strong suspicion. It became apparent that there was a problem with this. Arresting Officer 5¹¹⁴ said that the police soldiers often carried out arbitrary arrests and searches because of their lack of experience and Prosecutor 4 said that as 'suspicion' was open to a wide interpretation, there was a need for clear regulation, as the CCP gives no definition of 'reasonable suspicion' or examples of such. Lawyer 1¹¹⁵ commented that suspects arrested by police soldiers who were ignorant of the proper procedures would fare badly.

These answers reveal how suspects were arrested without warrants or reasonable suspicion. According to the interviewees, this is due to the lack of monitoring and training of police personnel. In the following section, the aim is to identify gaps in the application of the Law of Criminal Procedure which need to be filled in order to strengthen the guarantees for the accused and prevent the violation of the suspect’s rights specifically in terms of arrest and detention. When suspects are arrested or detained, this is done on the grounds of 'reasonable suspicion' which must be objective and testable. The absence and insufficiency of these regulations will be explored next.

1.1.1. Arrest.

¹¹⁴ (Riyadh Arresting Officer No.5, interviewed 23 August, 2013).

¹¹⁵ (Riyadh Lawyer No. 1, interviewed 11 July, 2013).

Articles 33, 35 and 107 of the CCP regulate the arrest of a suspect. The CCP gives the police officer the power to arrest a suspect found at the scene of the crime. Art. 33 states that "Where a crime is in the process of commission, the criminal investigation officer shall arrest the suspect present at the scene of the crime where there is sufficient evidence for his implication. A record of that shall be made and the Bureau of Investigation and Prosecution shall be immediately notified. In all cases, the person under arrest shall not be detained for more than twenty-four hours, except pursuant to a written order from the Investigator. If the accused is not present, the criminal investigation officer shall issue an order for his arrest and a note to that effect shall be entered into the record" (CCP). The CCP does not monitor or review unlawful arrest and so many arrests do not conform to the requirements of the CCP. The question which arises is whether an unlawful arrest is admissible when the case is taken to court.

Those interviewed answered this question, saying:

*'The IPPC accepts that kind of violation. We review all cases coming to us, and if we find out that the procedure of arrest has been violated or the arrestee has been injured by the police, we usually open another case and inform the head of police about what happened. However, we do not release the suspect -we keep the cases as normal and interrogate him about the accusation.'*¹¹⁶

Another Prosecutor asserted that:

*"I check the indictment document, and the reason which brought the accused to the IPPC, but as to the procedure of arrest, I don't look at it at all. It is the responsibility of the police."*¹¹⁷

This demonstrates that unlawful arrests are still admissible when the case is taken to court or prosecution. This is because the CCP makes no provision for the procedure to be

¹¹⁶ (Riyadh Prosecutor No.2, interviewed 12 July, 2013).

¹¹⁷ (Riyadh Prosecutor No.5, interviewed 19 August, 2013).

monitored. Another Article in the CCP regulating arrest is Article 35, which states that "in cases other than *flagrante delicto*, no person shall be arrested or detained except on the basis of order from the competent authority. Any such person shall be treated decently and shall not be subjected to any bodily or moral harm. He shall also be advised of the reasons of his detention and shall be entitled to communicate with any person of his choice to inform him of his arrest". Article 35 deals with two types of arrest: *flagrant delicto* and someone arrested by the competent authority. Article 35 mentions 'the competent authority' but does not explain or specify the nature of the competent authority that can make an arrest. However, Article 103 of the CCP states: 'In all cases, the Investigator may, as the case may be, summon any person to be investigated, or issue a warrant for his arrest whenever investigation circumstances warrant it' (Alhargan 2009 p.227). Thus, under the CCP 2001, only the members of the IPPC specialist teams are authorized by the law to issue arrest warrants. In contrast, s.24 of PACE (1984) addresses the constable's powers of arrest without warrant for any offence. This gives officers the power to arrest suspects without a warrant as long as there are reasonable grounds for suspecting that a crime has been or is about to be committed.

Article 107 of the CCP gives the investigator the power to issue an arrest warrant to bring in the suspect in three circumstances. First, if the accused fails to appear without an acceptable cause, second if it is feared that he may flee and, third, if there is no doubt that the suspect has committed the crime as he has been caught *in flagrante delicto*. It allows the investigator to issue a warrant for his arrest and appearance even if the incident is of such kind for which the accused should not be detained- such as fear of flight.

According to Article 107, the legality of an arrest warrant rests on whether there are reasonable grounds to believe that the person to be arrested has been perceived as having committed a crime. By not stipulating the nature of what behaviours merit an arrest warrant, enforcement officers can justify arresting people simply because they deemed it necessary. Moreover, if the suspect refuses to appear, the investigator apparently has the right to arrest him forcibly to appear without charge. This might well happen because of the vagueness of Article 107 as to what exactly are arrestable offences. The CCP confers

on the IPPC the power to issue arrest warrants just to the police; however, the problem is that other enforcement officers, namely, officers in the religious police and national security officers (*Almbaheth*) do arrest without warrants. The question arises as to how warrants could be more effectively issued by the IPPC to these bodies so as to regulate arrests across the board. PACE 1984 s.24, on the other hand, clearly expresses a number of elements that must be present for an arrest to be valid. Firstly, the arresting officer has to either have a warrant or a legal power to arrest without. Secondly, the arresting officer must have 'reasonable suspicion'. The arrest will be deemed unlawful if the officer's interpretation of the law is erroneous, even if it could be considered 'reasonable'. One solution for Saudi Arabia would be for judicial warrants to be available electronically.

I will argue that such powers are missing from this Article and they need to be inserted. All enforcement officers need to be issued with the power and required to ask for appropriate warrants to be able to arrest and detain in all cases where it is reasonably suspected that a crime has been committed and not just in cases of *flagrante delicto*, as is stipulated in Art. 33 of the CCP. Furthermore arrests and detentions should be properly monitored to ensure adherence to this procedure.

Article 35 clearly states: 'In cases other than *flagrante delicto*... '. However, Almajed points out that people can be arrested in front of their doors and offices, sometimes forcibly by executive power. He adds that if people ask for the reason for the arrest, the answer is only 'you will know soon' or 'please just come with us' (2011 p.4). Many times this is done without informing the suspect of why and by whom the order to arrest was issued. He believes that this constitutes unacceptable vagueness and that absolute transparency is necessary in arrest procedures (*ibid.*).

Police Officers questioned confirmed that technically the IPPC had to issue an arrest warrant but that officers would just arrest people suspected of theft or caught *in flagrante delicto*. Riyadh arresting officer No.1 admitted:

*“The arrest warrant is a safeguard for the enforcement officers. If something goes wrong during the arrest procedure, the police, soldiers and officers would be legally covered”*¹¹⁸

Police officers were asked under what circumstances arresting officers were allowed to arrest:

*“The suspect can be arrested if he is charged with a crime by any department of the government even if it is not the kind of crime we deal with. Also whenever the country is in a state of civil unrest or any kind of disorder such as, wars, drug dealing or riots, the police focus more and make a plan and are given wide authorization to arrest in order to maintain control.”*¹¹⁹

Others admitted that arrest warrants were not usually obtained, or obtained verbally, Arresting Officer 3 said:

*“However, as an arresting officer, I rarely issue an arrest warrant, I am talking with you honestly, if you like to can go and inspect all the files you will not find any issued for arrest. The most important factor for us is to not to lose the suspect.”*¹²⁰.

Arresting Officer 4 asserted that;

*“Yes, it is true we get an arrest warrant verbally from the head of police or from the investigator officer - not all the time but when we want to arrest the suspect as quickly as we can, even if we need to arrest forcibly.”*¹²¹

This further demonstrates how the lack of accountability leads to lax practice.

1.1.2.Detention.

In questions of custody there are two interests: firstly, the accused’s right to not be deprived of freedom unless he has been sentenced; secondly, the society’s right to

¹¹⁸ (Riyadh Arresting Officer No.1, interviewed 5 July, 2013).

¹¹⁹ *ibid*

¹²⁰ (Riyadh Arresting Officer No.3, interviewed 17 July, 2013).

¹²¹ (Riyadh Arresting Officer No.4, interviewed 13 August 2013).

deprive the accused of freedom before charging him, in the interests of the investigation. Alhejlan believes that Saudi legislation gives society more priority, without forgetting the accused's right. The legislation regulates many rights in an attempt to make a balance between the two interests (Alhejlan 2006 p.273). However, there are substantial problems when it comes to the rights of the accused, both in terms of the Code itself and in its implementation.

Article 113 of CCP sets out a number of circumstances in which the suspect can be detained. This can take place if the suspect has been interrogated, to prevent him fleeing, if there is sufficient evidence against him; if the crime is a major crime or if the interrogation requires the suspect to be detained.

According to Article 114 & Article 123 of the CCP, six months is the upper limit for the detention of a suspect without trial before he is returned to court for the accusation to be considered. This can be in situations where there is no charge, merely some evidence, and occasionally when there are merely suspicions. This detention can be carried out at police station. Consequently, this has to be before the expiry of six months so that the suspect can be sent to trial, and then the court will decide to carry on his or her detention or release him or her. If the case is not ready to be looked at by the court, then the suspect should be released.

It should be noted that, there are two types of crimes in Saudi law. Article 112 of the CCP reads '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'. It specifies 14 crimes as major crimes in Decree no.1245 of September 30, 2002. These major crimes include: murder; rape, kidnapping, drug and intoxicant abuse or dealing, theft involving forced entry, using implements or weapons, forming a criminal gang; fighting; firing weapons resulting in the grievous injury of persons; impersonating security officers; forgery; bribery; and embezzlement. People suspected of these crimes are detained if the investigator in charge of the case decides that there is some basis for suspicion. This procedure for deciding whether an arrested

suspect can be detained without charge is much simpler in PACE (1984) s.37. This stipulates that the custody officer must determine whether there is sufficient evidence to charge the person with the offence for which he or she has been arrested.

In practice, police officers and prosecutors said, they detain just 24 hours and then ask the IPPC to look at the case. If nothing is found against the suspect, he or she is released. If the prosecutor needs more time to interrogate, authorization can be given by the department head, to extend the detention by up to five days. If the prosecutor needs more time to interrogate the suspect, he can ask permission from the Chairman of the branch of the Bureau of Investigation and Prosecution to detain the suspect for a further 40 days. If he needs more, he can direct his request to the Director of the IPPC to extend the detention for 35 more days. The total detention must not exceed 6 months. Similarly, police officers have authority to extend the detention to five days, and can ask the Director of Police for a further extension of 35 days. The Administrative Governor also has the authorization to extend the detention to 35 days and up to six months. All of them must clarify the reason for the extension of detention (Articles 114 & 123). The length of detention stipulated by Articles 114 and 123 is untenably long, and a violation of human rights by international human rights laws standards (ICCPR Art.9 & ECHR Art.5). It is also arguably unnecessary if the pre-trial procedures are carried out effectively.

However, the researcher believes that if the detainee stays in custody 24 hours before being referred to the IPPC, he could be in custody for that period of time unlawfully as he might be innocent. The time limit in Article 35 of the IPPC should be amended to 6 hours, which is the time stipulated by PACE s.41, since 24 hours is an excessively long period to detain someone without having sufficient evidence to make a charge and also gives inexperienced police soldiers the power to detain whoever they want for 24 hours. Only officers who have been properly trained and who are properly accountable should be able to do this.

A prosecutor pointed out that police soldiers often detain innocent people 24 hours or more with no reason, and are neither trained nor accountable:

*"Those who carry out this sort of arrest are groups of soldiers who are not officers and have no practical or legal experience, and are not qualified, and, unfortunately, also some members of the IPPC and the police do not know the system."*¹²² Prosecutor 5 added that this problem was due also in part to the lack of IPPC staff delaying the procedure for the release of detainees. Lawyer 3¹²³ commented that there was no monitoring of the IPPC who were often insufficiently trained and given overwhelming caseloads. This shows that there is no culture of 'duty of care' in the treatment of suspects in that they are often kept in detention far longer than necessary.

Another type of crime where the suspect may be detained is non-major crime. The suspect cannot be detained if he is not being charged unless the investigator deems that the investigation requires the detention of the suspect to prevent him committing a crime or to protect the detainee, the public or to prevent him escaping (Art.113 of CCP). This is done purely on the decision of the prosecutor; for example, if they believe someone is dangerous because they are shouting, they can decide to keep them in custody. The detainee is not referred for psychiatric assessment. Suspects who are not charged with major crimes, in most cases, are automatically released under Art.120 of the CCP. However, this is not always the case. Once such case *inter alia*, was that of Dr. Matrouk al-Faleh, an academic and human rights activist, who was detained without charge or trial at al-Ha'ir Prison in Riyadh, and denied access to a lawyer, following his arrest in May 2009. The authorities gave no reason for his arrest but it occurred shortly after he wrote an article criticizing the harsh conditions in which two brothers were detained (Amnesty Organization 2009).

Furthermore, Art.108 gives the investigator power to detain a suspect who does not have a fixed address. In Saudi Arabia, the government needs to institute a postcode system as currently there is no post coded or proper address system. There are no plans to introduce such a system, although this may change. Therefore, in practice, this Article cannot be

¹²² (Riyadh Prosecutor No.1, interviewed 16 July, 2013).

¹²³ (Riyadh Lawyer No.3, interviewed 18 July, 2013).

applied; and unless the suspect can get a guarantor, they cannot be released. For this reason, most investigators rely on the right to bail by guarantor (which I will explain later in the section on the right to bail). An investigator officer No.5¹²⁴ commented on this, saying:

*“For this reason, most police officers ask for a guarantor to release the suspect rather than release him according to his address. We cannot apply Art.108 of CCP as the suspect might flee and we might not find him.”*¹²⁵

Alhargan (2009 p.253) points out that Article 113, which gives reasons for detention is not clear and is also given two interpretations. Firstly, the detention can be mandatory if after the interrogation there is sufficient evidence against the suspect or if there is likelihood he could flee. He can be detained if the investigation requires it and if the crime is a major crime but there was not sufficient evidence against the suspect. The second interpretation is a misinterpretation, but in practice this is current procedure in Saudi Arabia. Here, the suspect can be detained if there is sufficient evidence against him or her after the interrogation or he can be detained if the investigation requires that to be effective whatever the crime. Another disputed area is in the second part of Art. 113 'if the interests of the investigation requires his detention', which gives the investigator wide powers to detain a suspect under his discretion. This clause could potentially be abused and the onus of giving sound reasons why releasing the suspects was inadvisable should rest with the prosecution. Otherwise the detention may be arbitrary, which is against the principles of the goals of the Saudi government and the presumption of innocence.

At interview, prosecutors were asked if the suspects were detained for other reasons than those given in the CCP. A prosecutor commented:

“Yes we do detain innocent people more than a month, just to protect them from others. As you know, we live in a tribal society, if someone from a tribe has fought someone from another tribe but his crime is not major, the law says I must release

¹²⁴ (Riyadh Investigating Officer No.5, interviewed 23 August, 2013.)

¹²⁵ *ibid.*,

him. However, we cannot if others are waiting for him outside the IPPC and they might kill him or hurt him, it is better to remand him until the situation settles down. Also with family problems, we do it, but we get permission from the Administrative Governor.”¹²⁶

Given the nature of Saudi society, it is important to ensure a suspect does not flee as this can endanger him as there may be retribution. However, it should also be noted that this can be open to abuse.

Human Rights Watch points out that Saudi law does not protect the right to challenge the lawfulness of one’s detention, but merely obliges the prosecutor to obtain a progressively higher level of authorization within the prosecution service to prolong detention beyond the initial five days, initially by instalments of any length up to 40 days, and then by instalments of up to 30 days for up to six months from the date of arrest. At no time is a judge involved which is in breach of international standards (2008p.36).

Detention should be seen as an exceptional procedure and should not be resorted to unless there is an interest in preventing the suspect from fleeing or destroying evidence, or when the suspect is exhibiting extreme behaviour which might constitute a danger to the public. However, the CCP Articles in the current contexts cannot be entirely interpreted within the aims and principles I mentioned above. The defects in the CCP Articles might be addressed by careful elaboration of the regulations. These amendments are currently being worked on, but have yet to be issued. Amendments to the CCP by themselves are not enough to ensure that pre-trial procedures will be carried out lawfully and humanely. Lawful monitoring, staff training and the idea that officers have a duty of care are also essential, and the regulations themselves need to address these. PACE is clear in that in s. 37 and Code C.

¹²⁶ (Riyadh Prosecutor No.3, interviewed 12 August, 2013).

1.2. The Right to Know the Reason for Arrest and What Charges are Being Brought.

Saudi law echoes international law, ICCPR Article 9 (2), at least on some procedural requirements. Article 116 of the CCP gives the arrested person the right to “be promptly notified of the reasons for his arrest or detention” and the investigator (in Saudi Arabia, this is also the prosecutor) must inform the detainee of the charges “when the accused appears for the first time for an investigation”. Also Article 35 of the CCP requires that ‘he shall also be advised of the reasons for his detention’. PACE (1984 s.28) gives this more importance as arrestees must be informed of the factual grounds for the arrest either at the time of arrest or as soon as is practicable afterwards. This right is clearly stated in the ACHR Art. 14(3), ICCPR Art.9 (2) and ECHR Art.5 (2).

Human Rights Watch (2008) points out that Saudi Arabia has not codified its criminal offenses, with the result that the criminal law in this respect is neither accessible nor reasonably predictable. This deficiency in Saudi criminal law hinders the ability of law enforcement officials to inform detainees of the substance of the complaint. The head of the prosecution department, Ibrahim Juhaiman, told Human Rights Watch, “You will never find out the exact crime until the end of the investigation. Then you can determine the crime. No charges are filed until after the investigation.” (Human Rights Watch 2008, p.36). This admission underlies the essential unfairness of a system that does not clearly state what the charge is from the start.

Almajed (2011 p.5) points out that the serious systemic breaches committed by members of the detention authorities in Saudi Arabia are in the arrest of the accused and subsequent custody in the detention centre without informing the accused of the charges under which they were arrested. He adds that the common answer the detainee receives is ‘you will know soon’. He believes that this is a kind of threat, which is intended to intimidate detainees and is in flagrant contravention of Article 35 of the CCP. Overriding this right may be due in part to the lack of formal qualifications required for enforcement officers who carry out such arrests. It is also a systematic abuse of human rights.

Evidence from the research suggested that arresting officers routinely fail to inform the suspect about the reason for his or her arrest. IPPC members do however say they try to inform the suspect of the reason for their arrest:

“No we do not inform the suspect about the reason for his arrest, I am ordered to arrest him, I just say, ‘you are under arrest and in the police station you will know the reason for the arrest.’”¹²⁷

“We do not have this kind of procedure we are not in the US or Europe, our job is just to arrest the suspect and then bring him in to the police station. However, it is the police investigator who is responsible to inform the suspect about the reason for his arrest.”¹²⁸

This shows how arresting officers are clearly ignorant of Article 116 which says the suspects must be told when they are being arrested.

IPPC members said that they informed the suspect about the reason for his arrest; otherwise, they could not talk with him and present him with the evidence against him. However, one of the IPPC investigators said:

“Sometimes it is hard to inform the suspect about the reason of his arrest, basically when the police bring him from place to place and bring him in to the IPPC to interrogate him. There is a lack of communication between us and the other enforcement departments, and the suspect is the victim of this.”¹²⁹

One serious problem in detention centres is the lack of awareness detainees have of their guaranteed rights. Unfortunately, in many cases, those with the power to arrest and detain conceal these rights, and the accused has only a vague notion about them. This is an explicit violation of the rules (Articles 33 and 34), an exploitation of the weak and a serious violation of human rights. The government should require the executive authorities to respect the law and to make those who violate it accountable (Almajed 2011p.6). One arresting officer also believed that informing the suspects of reason of arrest was actually inadvisable and that there was no regulation on this:

¹²⁷ (Riyadh Arresting Officer No 4).

¹²⁸ (Riyadh Arresting Officer No.3).

¹²⁹ (Riyadh Prosecutor No.1).

“There is no law which states that I should inform the suspect when I arrest him, but that totally depends on the officer, if he sees that informing the suspect about the reason of arrest might lose evidence, he should not do it. Also sometimes if I inform the suspect I might face overreaction from the suspect so it is best not to do it.”¹³⁰

“I prefer to keep the reason for arrest vague to find out more information; I might discover another crime.”¹³¹

A question which was asked to all the enforcement officers and the prosecutors was why the CCP does not formalize a caution as in PACE. Some police officers welcomed that, saying they wished something like that was in place, so at least people would start to be aware about their rights. One police officer emphasized that the Ministry of Interior and the Ministry of Justice should set that up as soon as possible and make it part of the law.

Saudi law is at variance with international standards such ICCPR Article 9 (2) and ECHR Article 5 which stipulate that formal charges have to be filed promptly and the defendant must be told what these charges are. There is no specific requirement in Saudi law for charges against a suspect to be formally written down nor that the accused should be told how evidence was used to establish whether he or she committed the crime (HRW p.36).

1.2.1. The Right to Inform the Family.

According to Article 35 of the CCP, the arrestee/detainee has the right to inform his/her family once he/she is arrested or detained. The reason for that is to assure the family that there has been no kidnap or accident. The aim of the arrest, detention or interrogation of the suspect should be simply to get to the truth or to know who has committed a crime. For this reason, the government is entirely responsible to limit any unnecessary and deleterious effect on any member of the suspect’s family or his or their lives (Alharagn 2009 p.237). The reason that this issue is focussed on in this section but not elaborated in the other sections, is because it is a basic principle of human rights in pre-trial procedure

¹³⁰ (Riyadh Arresting Officer No.2, interviewed 9 July, 2013).

¹³¹ *ibid.*,

which is really neglected in practice in Saudi Arabia. However, the CCP does not elaborate on this point and it is open to interpretation. This section will reveal the actual implementation of the right detainees have to inform their families of their arrest.

Of particular concern is a provision in Article 119 that gives prosecutors the right to keep suspects in *incommunicado* detention for up to 60 days. It does not define “communicate,” and leaves open the possibility that prosecutors may restrict a detainee’s contact with his or her lawyer either written or by telephone. Human Rights Watch points out that Article 35 of the CCP fails to set a time frame, specifying only that such communication should occur promptly after arrest or after the transfer between holding facilities (2008 p.48).

In practice the arrestee is often not allowed to inform his family, and that may be deemed inhumane and is against Saudi law. The present research found that arrestees are hardly ever allowed to communicate with relatives or someone who needs to be informed him of the arrest. At the police station, the arrestees remain in custody without their phones, as custody procedures stipulate that these must be taken away. Arrestees are then at the mercy of the police soldiers. If they like, they will give arrestees a chance to call relatives to inform them about the arrest, but that cannot be said of all police stations in Saudi Arabia. At the police station at which the research was conducted, most of the officers did not allow the suspect to speak with anyone. Moreover, IPPC members alleged that the right to give the suspect a chance to inform his family was not part of their job, even though it is.

*“Yes, there are rights for the suspect but we do not apply them, I know it is the law, but it needs to be activated to ensure the suspect gets his rights. The fault is ours; we do not respect the law. Of course the government seeks to get every suspect his rights but we do not.”*¹³²

Another Riyadh investigator officer No.2, interviewed on 9 of July, 2013 commented:

¹³² (Riyadh Investigating Officer No.5. interviewed 23 August, 2013).

“No, we do not give the suspect the right to speak with anyone. What if the person he calls is involved in the crime; even his family may be involved with the crime. In any case, we have orders from the head of police to not allow anyone to speak with anyone at least in the first few hours.”¹³³

Investigating Officer No.3¹³⁴ said that although he gave suspects the right to speak to their family he knew that this was not always the case. Prosecutor 2¹³⁵ also admitted that this right was denied and that he sometimes wrote letters to the police asking them to allow suspects to speak to their families. Lawyer 2¹³⁶ confirmed that suspects had trouble contacting a solicitor at the police station.

Prosecutor No.5 was not happy to give suspects their rights because of his overwhelming workload:

“We do not have these kinds of rights; we do not have time for them. I mean, I am so busy and I have an overwhelming caseload which needs to be finished. I do the work of four people, and write, type up and hand the papers to my manager, and issue letters; most of us work like that, we do not have the time for these rights.”¹³⁷

It appears that many officers and prosecutors do not allow suspects to inform their families or call a lawyer even though the CCP gives this right, and that this is due to the lack of accountability. It is clear that there is ambiguity and conflict between Articles 119 and 35. Article 119 gives the investigator the right to prevent communication between the suspect and others, and gives the investigator the discretion to decide who the suspect can contact, which is a deprivation of liberty. On the other hand, Article 35 requires the executive authorities- and the investigator is one of them- to allow the suspect contact with his or her family. Thus, the CCP gives

¹³³ (Riyadh Investigating Officer No 2).

¹³⁴ . (Riyadh Investigating Officer No.3)

¹³⁵ (Riyadh Prosecutor No.2, interviewed 12 July, 2013.)

¹³⁶ (Riyadh Lawyer No.2, interviewed 14 July, 2013.)

¹³⁷ (Riyadh Prosecutor No.5).

the suspects rights and also takes them away. The government still has chance to change that in the regulation explanations and define the word 'incommunicado' making it clear from whom, when it applies and for what reasons. PACE sets that in Code C para.5.1. The ACHR gives suspects a right to contact their family in Art.14 (3); however, it is not found in the ICCPR.

1.3. The Right to be Brought Promptly Before a Judicial Officer.

Fair trial standards set by international Human Rights law, such as the ICCPR Article 9 (3), require that defendants receive a speedy trial. The prosecution must not unduly delay bringing a case to trial, and the court must not unduly delay adjudicating a case on its merits. Excessive delays in adjudicating a detainee's case in court can render his or her continued detention unjustified and therefore arbitrary. Saudi law sets an absolute limit of six months on pre-trial detention before a detainee's case must reach the courts, but does not provide legal guidance on what may constitute unreasonable delay either during those six months or once a trial has begun. The fieldwork interviews aimed to determine just how promptly, or otherwise, detainees are brought to trial.

Human Rights Watch argues that Saudi law does not give detainees the right to challenge the lawfulness of their detention before a court and obliges prosecutors to meet only administrative, but not substantive or evidentiary, requirements for issuing orders for the continued detention of suspects for periods of up to six months. Rather than protect the right of suspects to seek relief from a judicial authority, Saudi Arabia effectively places their detention at the discretion of the prosecution service (2008 p.48). Section 46 of PACE, by comparison clarifies the law as to when a person must be brought to trial 'as soon as practicable' after he has been charged. Generally, the suspect must go to court within 36 hours. This right is stipulated in ACHR Art. 14(5), ICCPR Art.9 (3) and ECHR Art.5 (3).

Articles 109 and 34 of the CCP which apply to hearing the testimony of the accused require the arrested person to be interrogated. If the accused fails to establish his innocence, the officer shall, within twenty-four hours, refer him, along with the record of the Investigator who shall within 24 hours, interrogate the accused under arrest and shall order either that the accused be detained or released. One prosecutor claimed that the detainees are usually sent to the IPPC in the last hour of 24 hours. Of course, the detainees might be innocent and they have been detained for 24 hours or more without reason, if they are not charged. Here a question arises as to why the police officer did not refer the suspect to the IPPC in the first or second hour. A Riyadh prosecutor No.4, interviewed on 12 of August, 2013, said that the detainees always came to him in the last hours of the 24 hours. This shows how detainees are, in practice, treated as if they are guilty even though they have not been charged and this is a breach of the principle of the presumption of innocence.

Aljomiah (2006) considers that there are a number of prisoners detained in custody for periods ranging from months to years, without any checks by the Bureau of Investigation and Prosecution, and this delay may continue in the disposition of their cases before the courts. This procedure is contrary to Article 114 of the CCP which holds that 'the detention shall end with the passage of five days, unless the Investigator sees fit to extend the detention period...' so this behaviour can be described as explicit statutory violation. One case exemplifies this breach. A detainee had been arrested with seven of his relatives in a murder investigation. The murder had happened two years and eight months before, but he was not sent to trial. This was unlawful and in contravention of Article 114. The killer fugitive and four of his uncles had been arrested, two cousins, as well as his father who confessed in front of the security authorities that his son was a murderer. The inquiry was with the Bureau of Investigation and Prosecution for multiple sessions and exceeded the CCP's requirement that the accused, if charges were not proven after a maximum period of six months, be released. Finally, the investigator gave his opinion, and referred the case to the Court which acquitted the uncles of the charge of murder after more than two years and eight months and dismissed the case. The original detainee added "I am still here waiting but the question is until when?"(Aljomiah 2006).

Article 120 of the CCP requires 'the release of the accused on bail if the IPPC member finds that the arrest has no justification that the accused undertakes to attend when asked to do so'. Even if we consider crimes which are not major crimes, there are still many people who are being detained for these in prison cells. One of the major reasons for this is that the IPPC have delays in the process of investigation due to excessive caseload. Another reason is that there are long delays in the court with carrying out the required paperwork. Thus, prisoners are going to stay long time in the prison.

Aljomiah (2006) considers that the IPPC apply part of the law and violate the other part. He claimed that the IPPC alleged that there were sufficient investigators to deal with what is clearly an overwhelming caseload that comes every day to the IPPC. Moreover, investigators, he claims, lack qualifications and do not understand the principles of investigation. He adds that the evidence is that all the investigators just repeat the police officer's interrogation without adding any new information or uncovering any circumstances that serve the interests of the investigation. Of course it is unacceptable to detain innocent people for a long period because of the deficiency of employees (*ibid.*).

Prosecutors commented on that, saying:

*“, the problem is that most IPPC investigators have graduated from Islamic universities and do not know anything about the law, and for that reason, the law cannot be applied effectively. ”.*¹³⁸

Prosecutor No.3 disagreed and said:

*“The real reason is not about qualifications, the reason is the overwhelming caseload. We work as fast as we can, also for that reason we cannot apply the law as it stands, we are only human beings.”*¹³⁹

One police officer responded to Aljomiah's argument by saying that the reasons for the delay were due to the investigator being faced with obstacles, such as the late arrival of the medical reports and laboratory technical reports for one of the parties, or to the late arrival of the criminal record, or the absence of the parties who required interrogation in

¹³⁸ (Riyadh Prosecutor No.5).

¹³⁹ (Riyadh Prosecutor No.3).

his presence. Possibly the injured person did not arrive or issue his final report, or some of the parties escaped and there was a need to look for them, along with the late arrival of some of the evidence relating to crime at the scene.

From these comments we can see that prosecutors tend to blame inefficiencies in the system both in terms of a lack of appropriate legal training and an unreasonable caseload. As a result, detainees are held for excessive periods and are not brought to trial, purely because of bureaucracy. This means that they are serving a sentence for a crime which has not been given any judicial scrutiny, and this is contrary to the rules and basic human rights, and in breach of rights established in the ICCPR.

2. The Right to Legal Assistance.

Saudi Arabia has only recently begun to give serious consideration to the role of defence lawyers. The CCP and the 2001 Attorney Law (AL) sets out a number of rights and duties for the legal profession. Furthermore, there are a rising number of legal (including *Shari'ah*) consultants. Alharagan (2006 p. 225) believes that the CCP is the first codified law in Saudi Arabia to recognize the suspect's as well as the accuser's right to seek legal advice. It should be noted that in early Islamic times, criminal cases had just one stage, which was the trial. The judge took on the roles of lawyer and investigator as well as judge. In this the judge was assisted by 'prophet companions'. They were scholars who were able to identify any defect or misunderstanding, and apply the moral judgments impartially (Alharagan 2009 pp.132-137). However, there were developments in the Islamic world that required a more systematic way to ensure the protection of the individual and society. Although there were not any explicit provisions in *Shari'ah* giving the suspect the right to legal advice, this right can be implied from the principles of the Islamic criminal justice system¹⁴⁰ (*ibid.*).

¹⁴⁰ See more information in Chapter Six.

The CCP refers to the right to legal counsel in a number of Articles, notably Article 4, while Article 70 also contains an important safeguard for defendants who have been able to retain legal counsel to prepare an effective defence, the relationship between the defendant and his lawyer must be confidential and Article 70 specifies that under no circumstances may the investigator exclude legal counsel, once the defendant has hired one. Articles 35 and 116 give the arrested person the right to communicate with any person of his or her choosing. This can be compared with the ICCPR (Art.14 3(d) ECHR (Art.6 (3)) and ACHR (Art.16 (3&4)) which have given this right.

However, in practice, the investigation stage is considered as starting from the time that the suspect, along with case file, has been referred to the IPPC, that is to say within 24 hours following the arrest of the suspect. There are a number of problems in the aforementioned Articles and how they operate in practice, which will be discussed in the next section.

2.1. Legal Advice.

Article 4 of the CCP fails to provide the right to legal counsel from the moment of arrest, while stipulating that a first interrogation may take place within 24 hours, possibly before any right to legal counsel can be invoked. Once suspects are transferred to the IPPC they do have a right to legal advice; however, this right does not apply to the police enquiry stage which can be the most important time for suspects who need someone to explain their rights and whether or not their crime is *in flagrante delicto*. Moreover, at this stage in the police have extensive powers over the suspect (Alharagan 2006 p.255). On the other hand, s.58 of PACE and Code C par.6 entitles the detainee, if he so requests, to privately consult a solicitor. Once a request is made, the custody officer must act on it as soon as is reasonably possible, except when as a delay is authorized. An example is the case of Majed Nasser al-Shummari, who completed a three-year prison sentence in 2005 but remained in jail. He was convicted after a secret trial in Riyadh, during which he had no legal assistance, of charges related to a visit he had made to Afghanistan (Amnesty

Organization 2009). This case was clearly conducted in breach of Articles 35 and 116 of the CCP.

This research found that the police do not accept the presence of a lawyer for many reasons: a lack of understanding the law; a belief that they are not doing anything wrong and a belief that lawyers in Saudi Arabia do not understand criminal procedure. Investigating Officer 1¹⁴¹ said that he did not think there was any need for a lawyer at the stage of police investigation as all that was being done was hearing the suspect's testimony. He did not tell suspects of this right, however, if they asked for a lawyer he would not mind. Investigating Officer 3 added that the police often did not let lawyers into the police station as they didn't understand what they were doing there. This demonstrates the lack of police knowledge and training about the role of a legal representative.

A number of Lawyers presented their experiences of visiting suspects at the police station, they said, that generally they could not go to the police station, they were not welcomed, the police were not cooperative and there was a level of competition between lawyers and police that could almost be considered animosity.

A Riyadh lawyer No.4, interviewed on 21 of July, 2013 pointed out that:

*“The police officers have authority. If they feel they are in danger of losing this authority, of course they will mistrust us, as for this reason we are like enemies for them. In any case, the situation is much better in the IPPC than at the police station”.*¹⁴²

There is a significant defect in Articles 35 and 116, which gives the suspect the right to contact anyone he or she wants, but does not explicitly state that the suspect has the right to contact a solicitor. However, the suspect's right to contact a solicitor can be implied from Article 35 which states that the suspect: 'shall be entitled to contact any person of

¹⁴¹ (Riyadh Investigating Officer No1, interviewed 5 July, 2013).

¹⁴² (Riyadh Lawyer No.4).

his choice to inform him or his arrest'. This should not be interpreted as referring only to 'informing' someone of the arrest and not requesting defence.

Human Rights Watch (2008) points out that Article 116 grants the defendant the right to communicate with any person of his or her choice, provided it is "under the supervision of the criminal investigation officer." Saudi law lacks provisions reflecting international human rights standards that allow for lawyer-client consultations to be "within sight, but not within the hearing, of law enforcement officials". Although defendants often spend protracted time in detention beyond the periods permitted by law, in that time they do not have adequate means to prepare their defence.

Article 70 raises questions as to what legal advice, if any, the lawyer may give a client during an ongoing interrogation, and seems to impinge on the right of confidentiality between lawyer and client. Saudi law only protects the confidentiality of written communication. Under Art. 84 of the CCP verbal communications are not protected.

Solicitors in the Saudi system encounter obstacles from the CCP regime and also from the AL, which does not help the solicitors to do their job properly. Article 19 of AL 2001 requires that lawyers are facilitated, but that should be under certain criteria. For example, Article 19 (1, D) does not give the lawyer permission to copy papers from the file and, if he needs to read them, the reading must be under supervision. Saudi law appears to ignore the fact that lawyers and the investigators should seek justice and not create competition between them.

A number of prosecutors commented on giving the suspect right to have a lawyer: Prosecutor 3 said that he allowed suspects to have a lawyer if they asked for one but that not all prosecutors did this. He felt that lawyers were a waste of money and sometimes did not know the law. He felt that he knew the law so he could be the one to give the suspect legal advice. Prosecutor 4 explained how lawyers were often kept waiting despite being legally allowed access to their client.

Such attitudes demonstrated a disregard for the importance of legal representation for the suspect. Lawyer 6¹⁴³ explained the problem they face with the IPPC who felt they knew the law better than lawyers

"IPPC members are jealous of us, because we earn good money, for one case, we earn double of an investigator's wage"¹⁴⁴.

These show the competition and lack of respect between lawyers and the IPPC.

Another obstacle the lawyers in Saudi Arabia encounter is that Article 20 of the AL requires a Deed of Origin, which is a certificate given through a notary that the suspects consents to be represented by a specified lawyer. The Deed of Origin may be hard to obtain, because the suspect must go the court and present him or herself in front of the notary who issues the Deed of Origin. The Deed of Origin is not required by PACE or any international human rights norms in pre-trial procedures. The question arises as to how long this procedure may take and why the suspect cannot just give the attorney verbally permission in the police station or during the investigation.

In practice, if the suspect wants to have a lawyer he must go to the notary in handcuffs. Notary services are free but not available after 2 p.m. Lawyer 1¹⁴⁵ commented that he could not understand why there could not just be a verbal agreement between the suspect and the lawyer and that sometimes the police and judges did not accept the Deed of Origin. Lawyer 2 said that these were often ignored and if a lawyer wanted to get in to the police station, it was more important to know someone there, saying "Friendship is more important than the law". Lawyer 6 mentioned a case where he accompanied a client, but was not allowed into the interrogation by the judge. Requiring suspects to attend the notary's office in handcuffs is possibly damaging the reputation of a suspect who may be innocent. This requirement is also not necessary as a verbal declaration could easily be made at the police station.

¹⁴³ (Riyadh Lawyer No. 6 interviewed 6 August, 2013).

¹⁴⁴ (Riyadh Lawyer No.6).

¹⁴⁵ (Riyadh Lawyer No1, interviewed 11 July, 2013)

The CCP omits two important aspects of the right to legal counsel. First, it contains no provision for the right to be informed of the protections guaranteed under the law. Second, it does not protect the right to have legal counsel provided free of charge to those who cannot afford to hire one. Thus, in reality there seems to be no entitlement for the suspect to have legal advice either at the police station or the IPPC. Investigating officers do not inform the suspect of any right to legal advice and this cannot be obtained free of charge. There are two further factors which prevent people having legal advice at the stage of criminal investigation. Firstly, lawyers do not like to engage with criminal cases for financial reasons, as well as the law itself. Secondly, some of the lawyers interviewed pointed out that there was little awareness in Saudi society about the right to have legal assistance, and that suspects were unlikely to be informed of that right at the police station and the prosecution.

In practice, the research found that lawyers, police officers and IPPC members agreed that the law at the stage of criminal investigation is vague and not clear and can be interpreted in many ways.

"As lawyers we do not know who to refer to, the Ministry of Justice is not our reference; we do not yet know who we belong to. There is no Bar Association in Saudi Arabia, we do not have any organisation to complain to, for this reason no one respects us." ¹⁴⁶

He added that because there is no Bar Association in Saudi Arabia, this makes it difficult to find criminal lawyers. There are only about 1,200 qualified lawyers in Saudi Arabia and the majority of these are not interested in criminal cases. There are unqualified *muaqb* (advocates) who can keep track of cases for clients.

Investigator 2 added that this lack of clarity and the fact that some judges did not accept lawyers in court was off putting for lawyers who mainly preferred to go into commercial law. Prosecutor 4 pointed out that lawyers could earn millions in commercial cases and lawyers did not want the 'moral problem' of defending 'criminal types'. Prosecutor 2 did

¹⁴⁶ (Riyadh Lawyer No.1).

not even believe that legal advice should be provided Lawyer 5¹⁴⁷ agreed with this saying that he preferred commercial cases as he did not like engaging with criminals, that the Attorney Law and CCP was 'vague and complicated' and that he would have no respect at the police station or IPPC. Lawyer 4 also concurred, saying that, apart from problems with the police and IPPC, there was social ignorance about the work of criminal lawyers who were seen as helping criminals avoid justice. He added:

*"We suffer major conflicts everywhere we go; even the Lawyer Code and the IPPC do not protect us. Can you believe that according to the explanatory regulations of the Pleadings Code, a judge can detain a lawyer for 24 hours; so you see there is no difference between me and a criminal, it is really frustrating."*¹⁴⁸

These comments show that there are many factors involved in preventing effective legal representation. These range from lawyers themselves finding difficulties in performing their duties, to negative attitudes towards lawyers, and a lack of clarity about procedures as well as a lack of qualified lawyers who are prepared to take on criminal cases..

Khnean (2011) also argues that there are many difficulties and obstacles that prevent the lawyer being effective; there is no duty rota, for example. However, these obstacles are not confined to the systems in Saudi Arabia that still need further development and modernization, if they are to keep pace with basic human rights standards

3. The Right Against Ill-treatment.

In the Saudi system, detainees spend pre-trial detention, which could last up to six months, in the police detention facility until they are either charged and transferred to the general prison or released. If the accused is aged less than 17, he is detained in the observation house which comes under the authority of the Social Services. If the detainee is female she stays in prison because there is no custody facility in the police stations for women. If under 17, she is detained in the Social Services facility for women. (CCP

¹⁴⁷ (Riyadh lawyer No.5,interviewed 22 July, 2013)

¹⁴⁸ (Riyadh Lawyer No.4).

Article 114) This section discusses whether Saudi detainees are treated in accordance with humanitarian principles found in *Shari'ah* and international human rights laws.

It should be remembered that in the police station there is no 'Custody Officer', there are just police soldiers who open and close the gates and search the suspect before he is placed in custody. However, as part of the research, two police station heads and other police officers were asked where detainees are put at the police station and they reported that all detainees are put into a single cell. This can create a number of dangers for a suspect - if he is put in a cell with someone abusive, with someone who has an infectious illness or simply if there are not sufficient provisions for hygiene. As custody can be for long periods of time, having everyone in one cell is a serious deprivation of privacy and may also lead to some more naive detainees being corrupted. This begs the question as to why there is no cell for every detainee as in most Western countries. Custody officers are made responsible by PACE s.39 (1) to ensure that all persons in police detention are treated in accordance with PACE and the Codes of Practice, and for recording all required matters in custody records. This is stated in the ACHR Art.8, ICCPR Art.7 & ECHR Art.8.

There were some attempts to justify this practice:

*"We are human beings and by our nature we love to be engaged with others; we do not like to be remote from others as we like to talk to someone. If we detain everyone in their own cells, we will deprive them of their right to engage with others, it would be a kind of punishment".*¹⁴⁹

And some explanations:

*"We just put the detainee in a small cell if he behaves badly, and the small cell is just one meter wide and two meters in length. However, if the suspect has committed a major crime he is put in a prison and not in the custody cell, which in the police station."*¹⁵⁰

¹⁴⁹ (Riyadh Custody Sergeant No1, interviewed 5 July, 2013).

¹⁵⁰ (Riyadh Custody Sergeant No2 interviewed 12 July, 2013).

The CCP does not provide any guidelines for dealing with suspects in custody, such as, providing a blanket, meals, visitors, lights and general hygiene as well as healthcare. Custody Sergeant 3¹⁵¹ pointed out that a custody officer does not exist at this stage of criminal procedure. There are no regulations for dealing with sick prisoners, in practice; officers simply carry out procedures as they were taught to by their predecessors. He sometimes opens the cell if he feels that there is a problem inside the cell. The cell is not for one person, but for many people and sometimes there is overcrowding and detainees cannot sleep properly. The police soldier just follows the commands that come from the officers and does not even review the case. The provisions of PACE and the Code of Practice safeguard the right treatment of suspects in custody, and provide for 'the reliable recording of their statements during interrogation'.

However, it should be noted that food and drink always come from the general prison. Every morning three meals will arrive and are handed out to the cell guard to feed the detainees. It is often difficult for the prison to know how many detainees they have in the custody, and there will no doubt be a shortage of food. Those interviewed gave an idea of cell conditions:

"Most of the detainees do not like our food, and most of them receive food from their relatives, also blankets as no one likes to sleep on a used blanket. In any case, there is a small canteen in each police station where detainees can buy what they want. I wish we had a nice and reasonable custody cell, but, as you know, we have contracted companies to clean the cells and look after the whole of the police station, but they do not do their job properly. I have made many complaints to the head of the police station but the station is still as it, it is bureaucracy and we cannot be blamed."

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Two lawyers agreed:

¹⁵¹(Riyadh Custody Sergeant No.3 interviewed 13 August, 2013).

¹⁵² (Riyadh Custody Sergeant No.2).

“The detainees are treated badly in the cell. Who would find it acceptable to stay in this kind of cell, which is not even fit for animals? It is disgusting- dirty blankets and food.” (Riyadh Lawyer No.6).

“Believe or not, there are no beds, all the detainees sleep on the floor, the custody cell is not suitable for humans. I was working as a manager in the IPPC and I told them about that many times, but it is just ink on paper.” (Riyadh Lawyer No.3).

These conditions exist because there are no regulations about detainees' food or sleeping arrangements.

Article 37 of the CCP (Art. 37) stipulates merely that a member of the IPPC should visit the custody cell every day simply to check the number of the detainees and the reason for detaining them but he does not regulate anything about their conditions.

However, the question arises that if the IPPC member takes the complaint seriously, what will happen next? For example, if there are no lights in the cell and the detainees make a complaint about it, the IPPC member cannot do anything for them according to the law. Those who deal with the suspect should do this according to their faith as a Muslim, and Islam encourages all its members to respect humanity (See Chapter Four). Thus, only giving people the most basic conditions when they have been deprived of their liberty is completely inadequate and must be regulated. Moreover, the Saudi courts have not intervened at all in the problem of unsatisfactory detention conditions, so detainees cannot complain about it anywhere (Alhargan 2006 p192).

During the research I found that the police officers deal with the suspects according to the Prison and Detention Law 1989 (PDL). Article 8 states that 'anyone imprisoned must be searched before entering prison or detention centres and existing money or things of value taken from him, and then deposited securely in the prison or detention centre to be delivered to him upon release or given to anyone who is appointed by the prisoner'. The PDL does not regulate the conduct of intimate searches, and that might give the officers or soldiers an opportunity to violate the detainee's dignity. In practice, the detainees are

searched by the cell guard, and the search is very basic, consisting of simply frisking the detainee. All personnel at police stations are male only male detainees are accepted. Female detainees are sent straight to a female prison and are searched by a female guard. The researcher could not find anyone prepared to discuss intimate searches.

*“The cell guard searches the detainees with his hands as nothing is allowed inside the cell. We take everything out and put it in a locker; once the suspect is released we give it back to him. The cell guard searches the cell three or four times a day, and if he feels something is wrong, he goes inside the cell and then searches the detainees.”*¹⁵³

Human Rights Watch (2013) in Saudi Arabia noticed that some prison staff punished some of the prisoners inside the prison, and meted out punishments without having the jurisdiction to do so. These punishments included cleaning toilets; solitary confinement beyond the periods permitted by the system; not allowing the prisoner out of their cell; sleep deprivation or handcuffing to the window frame or aisle etc. HRS also identified some encroachment on the detainees’ rights in the detention centres and prisons either in forcing them to confess or when obtaining information that may be useful to the investigation. They also received some complaints from some of the detainees who claimed they were beaten and insulted by the secret police (HRW 2013).

A breach of the principle of international human rights norms is that a former detainee who had been held in Riyadh’s ‘Ulaysha prison as a security suspect in 2007 and 2008 told Amnesty International that he had been kept handcuffed and shackled for 27 days following his arrest before the handcuffs were removed and he was allowed to take a shower for the first time. He said that he had been interrogated during the night for more than a month and that this was routine for security suspects (Amnesty Organization 2012). This case shows a lack of monitoring and accountability that leads to ill-treatment.

¹⁵³ (Riyadh Custody Sergeant No1).

Alanand (2007) has suggested that in order to protect detainees' rights from being infringed by bad treatment, regulations should be included in the provisions which authorize the defendant or his counsel or one of his relatives to claim a medical examination immediately. However, defendants are in a difficult position as they may well be told that if they go to court and report that they have been tortured, they will be tortured again if they return to custody. The Office of the Ombudsman needs to take this into account, and investigate if prisoners are being threatened in this way and forced to remain silent in court.

The research found that suspects were not being treated humanely, neither in accordance with the terms of the principles of *Shari'ah* nor international human rights norms. Again, the lack of monitoring and accountability are at the heart of this problem. The government could go some way to rectifying this by introducing a law which makes officers accountable for unlawful behaviour towards detainees and by appointing specially trained custody officers who must protect suspects in their care.

4. Police conduct during interrogations.

The CCP is intended to operate as a safeguard for people who engage with the police and the IPPC. The presumption of innocence, the right to silence and the right against self-incrimination will be discussed next.

4.1. The Presumption of Innocence.

The use of physical coercion was allowed in the Saudi system to obtain a confession from the suspect if there was sufficient evidence against him and he refused to speak. Permission had to be issued by the governor of each region (*Emara*) (Alhargan 2006 p.160). Articles 2 and 102 regulate treatment during arrest and interrogation. The research has gathered information to discover whether Saudi detainees have rights against self-incrimination and if they are being treated as innocent until proven guilty. The CCP

does provide some opportunity to monitor any misconduct that might occur during investigation, as abuses can be referred to the IPPC who can refer it to the Court.

The presumption of innocence should be the starting point of the initial investigation; a human is considered innocent until proven guilty. This principle is upheld by and international human rights laws¹⁵⁴. The prime principle is to protect the rights and freedom of individuals (Mohyey Aldean 2011 p.284). This section addresses current Saudi law and practice on the presumption of innocence. Article 103 of the Saudi CCP allows law enforcement officers to arrest suspects only pursuant to a prosecutor's arrest warrant, unless the suspect is caught while committing a crime. Article 34 of the CCP gives law enforcement officers the power to determine whether to hold or to release suspects during initial interrogation. However, Art. 34 also reverses the principle of presumed innocence, requiring the suspect in effect to dispel the law enforcement officer's suspicion that he or she has committed an offense, by demonstrating his or her innocence. Only if that is achieved must the arresting officer release him or her. In a memorandum to the Saudi government commenting on the CCP, Human Rights Watch (2008) pointed out that this provision, in reversing the presumption of innocence, is incompatible with international human rights law. PACE and the Code of Practice (Code C) regulate the circumstances in which interviews may take place. Suspects must be cautioned before being questioned and told that their answers or silence may be given in evidence to a court in a prosecution. This caution should be given on arrest or as soon as possible. Furthermore, answers to questions and statements should not be obtained through the use of oppression. Interviewees commented on this:

*"I do not believe anyone brought into the police station is innocent. Why else would they bring him in, of course he has done something wrong."*¹⁵⁵

Arresting Officer 2 asserted that:

*"We do not arrest anyone for no reason, we follow the law perfectly."*¹⁵⁶

¹⁵⁴ See Chapter 3- section on presumption of innocence.

¹⁵⁵ (Riyadh Arresting Officer No. 3).

However, prosecutor No.2 disagreed with the police officer, saying that daily there are many people who are really innocent and had been taken to the police with no sufficient reason.

“For this reason, our job is to review all cases to see why the arrestees have been brought to the IPPC. We always have problems with the police statements, they are often illegible, we always return them to be written well, and sometimes we ask the suspect about the reason for their arrest. If it is not a major crime, we send him back to the police station to release him after bail.”¹⁵⁷

Article 2 of the CCP states that “No person shall be arrested, searched, detained, or imprisoned except in cases provided by law. Detention or imprisonment shall be carried out only in the places designated for such purposes and shall be for the period prescribed by the competent authority. An arrested person shall not be subjected to any bodily or moral harm. Similarly, he shall not be subjected to any torture or degrading treatment”. It prohibits physically hurting someone during arrest. This refers to any hitting, wounding or damaging the integrity of the body. It also prohibits damaging the suspect psychologically through insults or humiliation. In general, Art.2 prohibits the arrestee being subjected to any kind of tort, whether the tort is psychological or physical.

Evidence from the research respondents would suggest that the government should enact a law for the presumption of innocence; and that the police must be trained to understand this principle. People cannot be arrested and detained just at the discretion of the police or their assistants. The police should know to deal properly with human beings and the government would be better if they set out a clear law to monitor police practice. This should be done by a third party, not by the police itself.

4.2. The Right to Silence.

¹⁵⁶ (Riyadh Police Officer No.2).

¹⁵⁷ (Riyadh Prosecutor No.2).

Suspects have the right to remain silent and refuse to answer any question at the stage of interrogation, and this principle is underlined in the ECHR and ICCPR, but not Saudi law which says nothing about this. But if the suspect does not answer the questions put to him and prove that he is not guilty, that silence might be against his or her interests (Alanezy 2010 p.126). Mohyey Aldean argues that remaining silent cannot be taken as evidence against the suspect, as silence is one of the manifestations of freedom of the suspect to defend himself. Thus, there are two arguments regarding the right to remain silent, one for and one against the right to remain silent. Upholders of the latter point out that remaining silent obstructs the truth and uses the resources of the police and the IPPC who have to find more evidence against the suspect. However, the job of the police and the IPPC is to protect individuals and society not to criminalize innocent people, force them to speak, and possibly make a false confession under duress (Mohyey Aldean 2011 pp.302-307).

The CCP remains silent about the right to remain silent, and this gives the police and the IPPC an opportunity to force innocent people to speak and incriminate themselves. Alhargan (2009 p.124) argues for the explicit enactment of this right in the CCP. He adds, that does not mean the CCP doesn't recognise the principle of the right to remain silent, as Saudi Arabia applies Islamic law within its law and that supports the principle of innocence. Islam puts the burden on the prosecution, and the defendant will be innocent until it is shown that he is guilty or there is evidence against him.¹⁵⁸ I would take issue with Alhargan's argument, as applying Islamic law is not enough to regulate criminal procedure. If this were so, there would be no need to have introduced the CCP in the first place. The right to remain silent should be added to the CCP as one of the human rights that should be respected in criminal investigation.

Through interviews, the researcher found there is no right to remain silent in practice. Because the CCP does not regulate it, the police and the IPPC have assumed a wide discretion in this matter. At the police station, some officers accept the right to silence if

¹⁵⁸ (See more information in Section Four).

they have strong evidence, but often they use their authorization to make the suspect speak. IPCC practice was similar to police practice when the suspect remained silent.

“If the suspect does not speak, his remaining silent will be evidence against him. Furthermore, if the suspect makes no comments, we will use our authorization to extend his detention. If he insists on remaining silent, after using every positive encouragement, we refer the case to the Emara and then they decide whether to release him or not.”¹⁵⁹

In the IPCC, the prosecutors use their authorization to force the suspect to speak:

“There is no dealing with someone who remains silent - no solution. After I present the suspect with the accusation, if he does not defend himself, I will remand him in custody until he speaks. At the end of the authorized period, I will send him to the court to deal with him. Remaining silent confuses the case and slows it down. Whosoever remains silent is always a professional criminal.”¹⁶⁰

In the interviews, lawyers were very critical of the way the police and IPCC members operated in this respect. They believed strongly that the suspect had the right to remain silent. However, the police and prosecutors did not care about this right, as they believed that if the suspect remained silent he was guilty and that was evidence against him to be sent on to the court. This shows how some prosecutors regard a silent suspect as guilty. There is no presumption of innocence and no right to remain silent. This was supported by the lawyers interviewed who said that the suspect cannot remain silent (Lawyers 1 and 4).

In practice, recent research found it difficult to establish whether police or IPCC members routinely force the suspects to speak or harm them. However, a number of police officers confidently maintained that forcing suspects to speak no longer occurs.

¹⁵⁹ (Riyadh Investigating Officer No.5).

¹⁶⁰ (Riyadh Prosecutor No.2).

They said that in the past some officers used to do it but not now and that confession is not the basis of evidence any more.

“, "Forcing people to speak means they might confess to something they have never done in their lives."”¹⁶¹

This shows that there is, at least, awareness that the use of force is unlawful. It should be noted that these officers were being recorded and unlikely to admit to breaching the regulations. Also, 'not using physical force' does not exclude the use of threats or shouting at the suspect. However, awareness does not guarantee that this ideal is followed in practice.

Investigating officer No.1¹⁶² commented

“If the officer uses torture or forces the suspect to speak to obtain a confession, he isn't qualified to be an officer at all. Why would he need that as long as he has evidence against him? We seek justice to protect society, not to harm innocent people. We just collect the evidence and send the suspect to the court or to the IPPC.”¹⁶³

4.3. The Right against Self- Incrimination.

Article 102 of the CCP deals with interrogation in the IPPC and does not mention hearing the testimony of the accused, which is conducted in the police station. The CCP treats the hearing in the police station as an initial procedure and does not guarantee the suspect rights at that stage in the way it guarantees it at the interrogation. Article 34 states that 'the criminal investigation officer shall immediately hear the statement by the accused'. However, if the police use pressure to obtain a confession from the suspect, the question arises as to whether the confession will be admissible in the IPPC or not. In practice, the police use such powers to interrogate the suspect, and that is totally unacceptable. There are serious problems with abuse by untrained police soldiers and officers carrying out the initial hearing as the quote below suggests.

¹⁶¹ (Riyadh Police Investigator No.5).

¹⁶² (Riyadh Investigator No.1, interviewed 5 July, 2013).

¹⁶³ *ibid.*,

*“Many times I received cases where the hearing testimony was not clear and in the end the suspect was innocent. Police soldiers are the problem.”*¹⁶⁴

Another prosecutor commented how even in cases where malpractice is sufficient to warrant a letter to the Head of Police, the case is still accepted (Riyadh Prosecutor No 4).

The question arises here as to whether informing the head of police about what has happened is effective. Evidence from the research suggests that this is not the case and that the Saudi criminal procedure needs a third party to protect suspects. Alhargan (2009 p.218) considers that any confession obtained forcibly from the suspect must be inadmissible because that is entirely against international and local, Islamic law, and that whoever wrongs a suspect will be held accountable – as stated in Royal Decree No. 43 (1958).

However, it should be noted that the Royal decree is now no longer in force, does not appear to have ever been applied, and did not mention who should conduct the application. I would argue that if there was misconduct by police during a criminal investigation, then the prosecutor should monitor them and refer them and their malpractice to the court. However, the question arises as to whom the prosecutor is accountable if he is guilty of misconduct during an investigation. Article 5 of the CCP states that 'commission members enjoy full independence, and, except for the provisions of Islamic law and regulations in force, no one shall interfere in their field'. It is obvious that the Saudi system gives the IPPC wide powers to use at the stage of criminal investigation and that might lead to someone's deprivation of liberty. This issue will be further discussed in Section 6 - the right to an effective remedy.

¹⁶⁴ (Riyadh Prosecutor No.3).

Nonetheless, even after the introduction of the CCP, in practice there are still widespread allegations of torture. Almost in every case where a confession is used as evidence against the defendant, the defendant alleges that he had been subjected to torture in order to make him confess. How many of these allegations are true cannot be verified as it is not possible to investigate them. This is evidenced in a recent Amnesty Report, which included the case in March 2009, of three Chadian men – Muhammad Hamid Ibrahim Sulayman, Hassan Bashir and Muhammad Salih – who were reported to have been convicted of theft and sentenced to have their right hands amputated on the basis of confessions allegedly made after they were beaten while held in prolonged *incommunicado* detention (Amnesty Organization 2009). The lack of monitoring leads inevitably to breaches of the law and that may have been happened in the case above.

The interviews also yielded statements which show that not all officers respect the official guidelines:

*“Usually we do not force people to speak, but sometimes if we believe the suspect has committed the crime we use high pressure to make him speak or lead us to the evidence. I sometimes use sleep deprivation to make the suspect speak.”*¹⁶⁵

Investigating Officer 2 agreed that using pressure was effective and that even though threatening suspects was unlawful it was 'well-known' at the police station. Prosecutor 4 said that it was necessary to 'put the suspect under pressure...for the sake of justice'

Thus, the research found conflicting statements about the issue of forcing a suspect to give evidence. Some officers denied it whilst others considered it 'very effective'.

Under Article 102 of the CCP, the suspect must be interrogated inside the relevant IPPC Branch, except where the investigator considers it necessary to do otherwise. Alhargan suggests that investigators usually carry out interrogations at the police station whether this is necessary or otherwise so that they can behave with impunity. As police are subordinate to, and often friendly with, IPPC members, ill-treatment of suspects is highly unlikely to be reported (2006 p.163).

¹⁶⁵ (Riyadh Arresting Officer No.4).

The research found that the lack of monitoring and judicial review led to the police and IPPC disregarding the CCP. Detainees were routinely deprived of the right to silence and pressured into giving evidence by enforcement officers. The government should take action by setting up a department dedicated to reviewing cases to see if the law has been breached, as described in PACE s.39. (See ACHR Art.8.; ICCPR Art.7 & ECHR Art.8.)

Not covering the right to silence in CCP leads to a contradiction in Saudi criminal procedure. Most of the enforcement officers and their assistants expressed a belief that confession is not important, and evidence was the only thing they needed to obtain. On the other hand, they remanded the suspect in the custody until he spoke, which is against the principles of *Shari'ah* and international human rights norms. Clarification of the CCP and proper training is therefore required.

5. Non- discrimination.

The CCP does not have regulations about discrimination in the treatment of suspects, and that also gives the police in the IPPC wide powers to interrogate people differently. However, PACE in Code A Para.1 states that stop and search powers must be used “without unlawful discrimination”, and reminds officers that they are now covered by the Equality Act 2010, which protects people from discrimination by government departments, local authorities and the police. It should be noted that Saudi Arabia has over 45 tribes and using tribal influence (*wasta*) is a commonplace, every member of a tribe helps other members, or at least tends to be on their side, if they are not totally breaking the law. This explains discriminatory practices towards Saudis, but there is also evidence of discrimination against foreigners and non-Muslims. Discrimination (see below) could exist because the CCP remains silent about it. None of the core Islamic sources speak about discrimination in depth, only in general. However, this right is a key requirement of international human rights law, notably the ICCPR Article 26, also in treaties that Saudi Arabia has ratified such as the UNCRC, CEDAW and the Arab Charter. The ACHR reflects this right in Art. 3. This can be compared with the ICCPR Art.26 & ECHR Art.14.

In October, 12 Filipinos and a Roman Catholic priest were arrested in Riyadh by religious police who raided a religious service being held in secret; accusing them of proselytizing. They were released on bail the following day (Amnesty Organization 2012). This shows that there is still discrimination against non-Muslims. However, as has been said earlier, *Shari'ah* and Islam stress that such discrimination is wrong.

Alanad (2007) points out that there are many complaints from foreigners as well as from Saudi citizens about the police and the IPPC, who are accused of using power against them for other interests, or treating them aggressively just because they are foreigners. He notes that the principle of equality before the law, regardless of gender, nationality, race, colour or religion is a right guaranteed by Islamic law and international conventions. *Shari'ah* has approved equality among all people, regardless of ethnic differences, assets and human values and there should be no prejudice in favour of Arabic people over people of other nationalities¹⁶⁶ This shows that there is a contradiction between *Shari'ah* and the CCP, while the Prophet states that Allah does not prefer according to colour or language, but only looks at what is in someone's heart. (Prophet's Sayings)

In the recent research, discrimination was hard to verify.

*“We deal with all suspects in the same way. However, a woman should be interrogated along with one of her guardians, we cannot interrogate her alone, it is breaking the law and Shari'ah as well. We also interrogate anyone under 17 in front of his father or guardian. If there is no guardian, we ask for a member of the religious police and a member of the police station. In general, there is no discrimination at all during the investigation.”*¹⁶⁷

The Commission of Human Rights in Saudi Arabia noted that the practices of some segments of society, including the distinction between citizens of the state on the basis of region or tribe, creed or origin, threatens the unity of the people and adversely affects the concept of belonging to a nation. These discriminatory practices cause friction between

¹⁶⁶ See chapter three and six for more information.

¹⁶⁷ (Riyadh Investigating Officer No.1).

ethnic and regional groups, despite the best efforts of the state to end these practices, which are incompatible with the values of the Islamic religion. The treatment of detainees first, requires an awareness of the extent and seriousness of practices that are inconsistent with the values of the Islamic religion and second requires the creation of anti-discrimination regulation in the CCP that applies penalties to those who discriminate adversely against particular detainees either in word or deed (2008).

6. The Right to Privacy.

The CCP was not the first code in Saudi law which regulated the right to privacy since Islamic theology covers all aspects of the respect for privacy for both the individual and for their premises¹⁶⁸. The Basic Law of Government 1981 came to reflect some of the principles of Islam in this respect. Art. 37 states that 'homes are inviolable, and may not be entered without the owner's permission, or inspected, except in cases specified by the law'. Also, Art.40 states that 'telegraphic correspondence, mailing, telephone calls, and other means of communication, are protected, and may not be confiscated, delayed, viewed, or listened to, except in cases specified by the law'. PACE's Code A deals with this issue in a clear way. The right to privacy is guaranteed by the ACHR Art.21, ICCPR Art.17 & ECHR Art.8.

The CCP sets out a number of Articles which regulate any necessary deprivation of privacy or search of homes (see Article 40 of the CCP). However, their impact was questioned during interviews conducted in three police stations in Riyadh, discussed below.

The purpose of an inspection is to search for crime-related evidence. In the initial stage, the aim of this is to find evidence about a specific crime and not just to go looking for evidence of crimes at random. Any inspection of premises has to be occasioned by a specific crime which has occurred. There should be sufficient evidence to justify the

¹⁶⁸ (See Chapter Four- the privacy section- for more information).

violation of the sanctity of someone's home (Dufyer 2011 p.115). This section addresses the issue of the right to privacy to see if the law is upheld in practice.

There are two types of inspection, firstly, the accusation inspection (known as criminal inspection), which is conducted by enforcement officers to search for evidence related to a crime in a specific location - place or person- according to the provisions of the law. The inspection can be of premises or individuals, and cannot be carried before a crime is suspected. This kind of inspection is regulated by the CCP, which will be further discussed below. The second type is administrative inspection, a kind of procedure conducted by administrative authorities. Here, officers are not searching for criminal evidence but ensuring the safety of society, maintaining security and preventing leakage of secrets (Dufyer 2011 p.125: Alquhtany 2007 p.312). However, the CCP does not regulate the way to conduct administrative inspections (as I mentioned earlier in section 1.1), and it needs to set out a new Article to clarify the law on how enforcement officers practice the inspection. Part II of PACE, in contrast, clearly outlines the power to search a person in properties. It also requires a Justice of the Peace to issue a search warrant and outline exceptional circumstances where a warrant is not required.

The CCP regulates the right to privacy in three ways; individual inspection, inspection without a search warrant and inspection with a search warrant.

6.1. Individual inspection.

A search of a person inside his premises can be carried out without a warrant as long as the police officer finds indications that the suspect is carrying evidence which might be useful for the investigation. Furthermore, a criminal investigation officer may search the accused when it is lawful to arrest him, which may include his body, clothes, and belongings. If the accused is female, the search shall be conducted by a female assigned by the criminal investigation officer (Articles 44 & 42 CCP). The reason for that is that when a police officer has the authority to arrest someone, it is obligatory, to search him or her so as not to lose the evidence or give the suspect time to hide it or destroy it

(Alhargan 2009 p.185). The question arises, what if the police officer found something illegal or related to another crime on another individual?

Interviewees commented:

*“If the enforcement officers violate the law we accept the violation and, the case will be considered as separate from the original case. For example, if the enforcement officer entered a house without search warrant and they found drugs, we accept that against the suspect and we present him with an accusation. As to the violation, we just make a note about it to the head of police and we are asked not to do it again.”*¹⁶⁹

This shows how monitoring in the Saudi system is very weak. If any officer violates the law, he should be brought to justice not just given a note.

Prosecutor no.3 pointed out that violations only arise if there is proved to be no evidence against the suspect and the suspect complains. It seems that the courts in Saudi Arabia, accepts violation of the law if there is a need to protect society against crime. I think they believe that it is unfair to not arrest a suspect who is found to be doing something illegal, because the procedure indicates that it is a violation of law. To resolve this issue, the CCP could add a new Article with this wording: ' an enforcement officer who enters premises without a search warrant will be accountable in law. However, the evidence found will be acceptable against the suspect, as well as the officer being held accountable.' This would be a strong basis for providing for accountability but would need to be monitored to ensure it was carried out in practice. In practice, it would mean that that search warrants would have to be issued efficiently and that police breaches would have to result in effective sanctions.

6.2. Inspection of Premises.

The CCP gives the police officer the right to enter premises without a warrant if he is needed there to help. Thus, a dwelling may be entered in the case of a request for help from within, or in case of a demolition, drowning, fire, or in hot pursuit of a perpetrator

¹⁶⁹ (Riyadh Prosecutor No.4).

(Article 41 of the CCP). Saudi law is very strict about entering premises without a search warrant, unless there is a necessity to do that, for example, to help someone in the case of an SOS. In the case of privacy, PACE is not dissimilar, and the reasons and procedures for entering premises is regulated in detail, also in s.17, entry by consent of the suspect is regulated in the same way as entry by warrant or after an arrest. Officers are, after all, often called on to come in and help with a situation. However, unlike in Saudi Arabia, these procedures are closely monitored to ensure that practice follows the lawful procedure.

These restrictions exist for two reasons: Firstly, *Shari'ah* emphasizes the individual's privacy, and warns people to not disrespect it, otherwise, God will punish them. Secondly, Saudi culture values the family and its privacy, so any law that allowed interference with individual private life would create animosity against the government. The CCP gives IPPC members the power to issue search warrants, as provided for in Art (41) of CCP. However, other dwellings may be searched pursuant to a search warrant, specifying the reasons, issued by the Investigator. If the proprietor or the occupant of a dwelling refuses to allow the criminal investigation officer free access, or resists such entry, he may use all lawful means, as may be required in the circumstances, to enter that dwelling', while the standards of International Law require that a search warrant should be issued by an independent judiciary in order to ensure the safety of this procedure and the presence of legal justification. At interview, police officers and IPPC members asserted that enforcement officer cannot enter any premises unless someone asks for help, otherwise, if entry was made without such justification, they would encounter problems with the law. However, Almajed (2011) points out that enforcement officers routinely ignore the need for arrest or search warrants.

A search for the accused without a warrant is a blatant encroachment on privacy rights guaranteed by the law and *Shari'ah*. Some enforcement officers do not respect Article 41 of the CCP, which emphasizes that the private life of the accused cannot be violated on the whim of criminal investigators. Criminal investigators in Saudi Arabia lack specialist

training and experience in this regard, they imagine that if they obtain a search warrant, this grants them the right to tamper with everything (Almajed 2011).

The only department that has the authorization to issue a search warrant is the IPPC (CCP Article 41). The police have this authorization only in the case of thefts. Prosecutors have the right to issue search warrants and the police officers may search and arrest after having permission from the head of police. Alhargan (2006 p.277), points out that Art. 41 does not identify the person within the IPPC who has the authorization to issue the search warrant to search private premises. Thus, in practice officers sometimes make an arrest and search premises without a search warrant so as not to lose evidence. Sometimes there is no time to wait for the IPPC's permission.

Arresting officer no.3 commented:

*"If there was a mistake during the search of premises, that can be justified if we found something illegal. This is not the case every time, only when there is a necessity. In any case, it is important to conduct searches."*¹⁷⁰

Arresting Officer 1 asserted that:

*"A search warrant is very, very important, for me as an arresting officer, I cannot get into any premises without a search warrant, and also if I get into premises without a written search warrant, just a verbal order from the head of police or the head of investigation, and something went wrong I would be in trouble, so it is better to have a search warrant."*¹⁷¹.

Having search warrants issued speedily and effectively by the judiciary might resolve this issue. It is evident that the CCP gives authorization to IPPC members to issue the search warrant without bearing in mind that the police is the first department which deals with crime. Firstly, the IPPC only works from 8 am to 2:30 pm, but the police work 24 hours, so if the police need to enter premises urgently, they cannot do it, otherwise, they will break the law. Secondly, it is the police which initially deals with the crime and goes to

¹⁷⁰ (Police Officer No.3).

¹⁷¹ (Riyadh Arresting Officer No.1).

the scene to investigate the crime and sometimes it is necessary to enter premises to search and arrest. Article 41 of the CCP should be changed to set up an effective system, and warrants could be requested from an appropriate judiciary authority and sent expeditiously over the phone or PC. Urgent entry should be available on other grounds and not need a warrant.

Article 45 of the CCP gives an explicit description of the inspection mechanism, and states that premises 'may be inspected only to find things related to crime, to collect evidence'. If any other evidence, not relating to the crime is discovered, the investigating officer may also collect that evidence but a note must be made to that effect. There needs to be clear and explicit regulations about what happens in regards to the finding of evidence unrelated to the stated crime.

Almajed (2011 p.7) argues that infringement of the private life of the accused has become the usual behaviour of officers involved in criminal investigation. Inspection records often reveal that the criminal investigation officer was found in the house of the accused opening sealed documents or violating the privacy of the accused by interfering with mail and other communications; taking advantage of the absence of a sergeant and ignoring Article 55 of the CCP. Although it is required by Article 56, the enforcement officer often does not inform the IPPC about the plan that they intend to carry out (*ibid.*, p.7).

He adds that there is a gap between theory and practice with regard to the guaranteed rights of the accused. For example, criminal investigators conduct inspections of homes and offices at night, contrary to the provisions of the Criminal Procedure Code, (Art. 51) which stipulates that inspections - in cases other than *flagrante delicto* – must be carried out during the day (*ibid.* p.7).

It should be noted that in Saudi Arabia, criminal courts do not engage in reviewing the legality of procedures taken during the pre-trial stage of the criminal process, with the exception of confessions and evidence obtained by torture. This lack of monitoring can, of course, lead to chaos. During an interview, one of the prosecutors mentioned that the

courts never cared about the violation of law or the procedure of criminal law; they just read the case and gave the decision depending on what they believed.

*"We never write to them and mention the CCP articles to them; they would not understand it or care about it."*¹⁷².

Alanad (2007) points out that the Human Rights Commission observed that some enforcement officers stormed houses, or searched without permission of the owners or written permission from the competent authority as the law requires. The HRC did not know, if any action was taken or if there was implementation of specific sanctions against people who exceeded the law to stop them from working or whether any other administrative penalty had been given. However, the HRC noted that if someone violates the law and enters houses without permission, a complaint is made to a high- ranking government official who will require those who violated the law to answer to and justify the violation.

This research concluded that breaches of the right to privacy are seen as acceptable if they protect society from crime. However, if such breaches are not regulated by law and officers not made accountable for their actions, Saudi law will never satisfy standards expected by international human rights laws and *Shari'ah*. Reforms are needed both in terms of clearer CCP regulations about search warrants, adequate police training and a system of sanctions against enforcement officers who breach the regulations.

7. The Right to Bail.

The CCP sets out the right to bail, but it should be noted that in the earlier times of Islam, four Muslim scholars emphasized that the governor should not detain a suspect for a long time, but prove that the suspect is guilty or release him or her. Fundamentally, detention is just a temporary procedure during which the truth may be discovered. If the suspect is

¹⁷² (Riyadh Prosecutor No.1).

found to be guilty, he will be sent to the judge or be released, if there is nothing against him or her (Dufyer 2011 p.110).

The CCP allows investigators to release detainees if this does not impair the case. However, in cases other than those where the release is mandatory, the accused should not be released until he has designated a residence acceptable to the Investigator (Articles 120 and 121 of CCP). Furthermore, an order for the release should not stop the Investigator from issuing a new warrant for the arrest or detention of the accused if evidence against him becomes stronger, or where the accused violates his undertakings, or where the circumstances of the case require such action (CCP Article 122).

These Articles seem clear and understandable, and also can work well, but in practice this is not the case. The regulations should reflect the principles of the 1976 Bail Act where there is a presumption in favour of release. The reasons why the Articles cannot be applied in criminal procedure will next be discussed. This section explores to what extent current practice grants suspects the right to bail.

Mandatory release in Saudi criminal procedure requires the release of the detainee once he or she ends the period of custody ordered, unless it is renewed by the competent authority or if the detainee has been detained six months and not sent to court. The detainee must be released if the case is closed or the detainee is not charged with a different criminal offence; or if the period of his or her arrest is over the minimum penalty of his or her offense; or if the detainee has concluded all actions required by any civil lawsuit, and the crime was not murder, corruption or theft. If the detainee has spent more time than or equal to his sentence; or if the judge issued a dismissal of the case then the detainee must be released (Articles 120 & 216 CCP) (Dufyer 2011 p.111). However, the CCP does not mention the right to bail in its provision; Article 121 only states that 'In cases other than those where the release is mandatory, the accused shall not be released until he has designated a residence acceptable to the Investigator'. In contrast, PACE (1984) clearly establishes the right to bail and in ss. 34&37 outlines all the

circumstances and procedures in which bail is to be given. The ICCPR Art.9(3) & ECHR Art.5(3) guarantees the right to bail, however the ACHR does not contain the right to bail neither does *Shari'ah*.

Duyfer points out that detainees can be legally kept in custody for unnecessarily long periods of time, and that Art. 113 gives the prosecutor powers to detain someone if there is no sufficient evidence. He cannot release the detainee without approval from the head of branch of the IPPC. Furthermore, if the crime is considered as one of the major crimes, even the head of branch cannot release the suspect, even if he does not have sufficient evidence, he must have approval from the Chairman of the Bureau of Investigation to release the suspect according to Article 124 of CCP. This can be considered a deprivation of liberty (*ibid.*, p.113). This practice amounts to a breach of fundamental rights to liberty enshrined in both *Shari'ah* and the ICCPR.

Almajed (2011) expresses his anger about the restrictions on the right to bail in criminal procedure in Saudi law. Although arrest is not considered as limitless, as is currently practiced by criminal investigators, it is a procedure to allow them to question the accused, only to decide whether to charge him or her or not. The interrogation is just to discuss with the accused extensively, and to charge if there is strong evidence or otherwise release the detainee. Therefore, it is assumed that this stage will be very short, just to enable the authorities in the criminal investigation to hear the statements of the accused about the charges against him. While Article 33 of the above states: "... In all cases, the arrestee may not be detained for more than 24 hours, without a written order from the investigator ..."; in some cases the detainee remains in custody for days. People can be detained who have not been charged with any offence, or sometimes when an amount as little as SR 200 is in dispute. Accordingly, individuals can remain for three months or more in jail just for the sake of a small debt, which is treated as criminal offence in Saudi Arabia (*ibid.*,). Sometimes detention is for months without the detainee being questioned ' the article is clear but, so it is alleged, officers do not want to apply it' (*ibid.p.3.*).

A police officer interviewed as part of the research project said that it was sometimes very hard to apply Article 121 of the CCP. In cases other than those where the release is mandatory, the accused won't be released until he has a designated residence acceptable to the Investigator. As indicated previously, in Saudi Arabia addresses are not always clear as we do not have post code to know exactly where the suspect lives, so there is no fixed address.

“So when the IPPC investigator issues a release letter according to Article 121, we cannot act on it and usually we keep suspects until they bring a guarantor (kafeel) or a letter of guarantee from a company, otherwise they stay for a long time.” (Investigating Officer No.5).

According to the research conducted in Riyadh, there were many cases which did not need bail (*Kafila*), and the investigator issued a release letter. However, the police officers did not release the suspect even though there was no justification for holding him. An investigator officer no.2 was asked why bail was required if there was nothing against the suspect. He said: *‘Any person entering custody is an accused so we need to be sure 100% that he will attend the police station when we needed even if there is nothing against him.’*¹⁷³.

This is clearly untenable and Saudi criminal procedure should more clearly set out the bail regulations. It should be emphasized to the enforcement officers that they should release the suspect once they receive the release letter from the prosecutor, and that they are actually acting outside the law as it stands. A police officer 3 was asked, if they work to a particular law or Codes.

He said: *‘Sometimes we follow the CCP and sometimes we follow precedent. This means we are used to doing something, because our predecessor used to do it and we do not know if it is a law or not.’*¹⁷⁴. This latter procedure is clearly neither acceptable nor lawful.

¹⁷³ (Riyadh Investigator No.2).

¹⁷⁴ *ibid.*,

Saudi criminal procedure law needs reform in this area and the government should take into account the right to bail so as to release those who have not been charged with a crime or have been released by the prosecutor. The IPPC or whoever can arrest a suspect should have the same authorization to release him. Moreover, the IPPC members should extensively monitor the custody centres after investigators have issued a release letter to ensure that the law is applied. The government should regulate the right to bail in the police stations and not give the officers discretion to release or detain who they want. PACE covers the right to bail in ss.34 & 37. When suspects have been assaulted by the police there should be a way that they can claim compensation and that will be discussed next.

8. The Right to an Effective Remedy in Saudi Arabia.

The CCP has no regulations about the right to an effective remedy, except Art. 25 which states: 'Criminal investigation officers shall, in conducting their duties as provided for in this Law, be subject to the supervision of the Bureau of Investigation and Prosecution. This Bureau may ask the competent authority to consider any violation or omission by any such officer and may request that disciplinary action be taken against him, without prejudice to the right to initiate criminal prosecution'.

In England and Wales complaints against the police are handled either locally by police forces, or by the Independent Police Complaints Commission (IPCC). S. 85 of PACE and s. 69 of the Police Act 1996 allow the police to use an Informal Resolution. This is in stark contrast to Saudi Arabia where victims of human rights abuses at pre-trial have little legal recourse. Furthermore, the right to an effective remedy in the ACHR, Art. 14 (7) is vague and cannot be seen as an absolute right; whereas the ICCPR Art.2 (3) & ECHR Art. 13 stipulate this right.

Article 8 (1.)(B&C) of the Office of Ombudsman Code 1982 (OOC) gives the Ombudsman the right to challenge administrative decisions, and to overrule decisions which are erroneous, or violate rules and regulations, or are wrong in their application, interpretation, or an abuse of power. Moreover, claims for compensation against government departments and independent public figures, form part of its business.

This study found difficulties in finding any sources, which talk about the right to an effective remedy. There is no clear law or regulation about compensation in criminal procedures except Article 8 of the OOC. Supposedly, there are four ways for the accused to have compensation or an effective remedy after being assaulted by enforcement officers. This is through application to the Chief of Police, the IPPC, the *Emara* (Council) or the Ombudsman. However, the question arises as to whether these four ways work properly in Saudi law, in practice. The research found that they are not as will be shown below.

In Saudi legislation on criminal procedure, it should be remembered that the criminal courts do not review the procedures that have been conducted by enforcement officers; the courts just address the evidence or the confession, which may have been obtained by torture. A question was asked in the interviews, whether the criminal courts in Saudi Arabia review the criminal procedure to see if it has been violated and whether the prosecutor informed the court that the police have violated the law:

*“The court does not care about that, and, to be honest with you, they do not believe in the CCP or the other laws. Yes, it has the right to review all cases to ensure the procedure has been conducted properly but it does not.”*¹⁷⁵.

I argue that judges in criminal courts in Saudi Arabia cannot review the criminal procedure for the major reason that they are not qualified to do it. According to Judiciary Law 2005 Article 31 (d): 'Whoever handles the judiciary must hold a certificate of Islamic law or its equivalent...' However, in the opinion of some lawyers, judges often do

¹⁷⁵ (Prosecutor Investigator 1).

not know anything outside Islamic law, and ignore government regulations such as the right to legal advice.

Lawyer 2 explained that, in his opinion, only few judges understood the regulations. Police Officer 3 believed that suspects who had been assaulted by the police could go to the Director of the Police Department or the city governor in the *Emara* (Council). The case would be investigated but there would be no compensation. Police Officer 2 on the other hand thought that if the complainant showed a medical report, there would be compensation. Prosecutor 4 believed that suspects injured by the police should be sent to hospital and a report made, but admitted that he had no idea about what happened after that. He did not know of any way that the injured suspect could apply for compensation

It seems that police officers and the investigating prosecutor do not have any idea about the procedure for the right to an effective remedy. In another words, there is no regulation about the right to an effective remedy, only interpretations. Only lawyers appear to know how to apply for compensation after an assault by enforcement officers. Lawyer 1 had a client who was in custody for 81 days before being released without charge

“I made a complaint to the Ministry of the Interior and then after the investigation, he got compensation for being detained - he got SR 90000 (around £13000) -that was not bad, but that was for a long detention”¹⁷⁶.

Lawyer 2’s client was detained for 13 days without reasonable suspicion but the accuser was a relative of the head of the police station. In this case, the lawyer complained directly to the Ministry of the Interior, as he thought it was a waste of time to go to the *Emarh*, and the police officer was sent to the Disciplinary Board but no compensation was granted. Lawyer 7 had a different strategy:

“The only way is just to apply to The Ombudsman’s Office but it takes ages, sometimes it takes two years and four sessions, and then there is no guarantee to receive compensation. Frankly, I do not like to soil my hands with criminals, also there is no

¹⁷⁶ (Riyadh Lawyer 1).

clear law to follow, so I do not defend or accept any criminal cases, it is really a headache and it takes ages.”¹⁷⁷

It should be noted the Ombudsman’s Office (OO) does not now accept any case that is against an enforcement officer any more, in breach of Article 8 of the OOC. In 2011, the Supreme Administrative Court of the OO took the decision to not receive certain cases against some government offices, particularly the Ministry of Interior and the Commission on Financial Contributions, and forwarded these to the relevant department for consideration without giving reasons. (OO Decision 87) This means that the OO referred all cases against enforcement officers to the Ministry of Interior, and of course that is unacceptable as the executioner cannot be the judge.

This decision also means that requests for compensation for any mishandling of those actions, including expired arrest warrants or arrests lasting more than the prescribed period are no longer dealt with. Plaintiffs are still pursuing compensation for their imprisonment in criminal cases where they were found innocent of what was attributed to them; or were given sentences of prison terms less than their remand in prison had been. This is because of the delay in sending the cases to the courts or slow administrative procedures, and these claims for compensation include those where suspects had been subjected to physical pain or psychological distress as the result of the use of physical or verbal violence, and so on by enforcement officers (Alkholy & Almasry 2012 pp.191-195).

It seems that the only hope for innocents to have their rights after being assaulted by enforcement officers was the Ombudsman. But now this is no longer the case. Undoubtedly, Saudi Arabia has faced a big problem with terrorists and had to protect the country, for this reason, most of the plaintiffs who had lawsuits against the Ministry of the Interior’ The Head of the Ombudsman’s Office, in a press statement (Medal East Newspaper in 2010 No.11668), confirmed that there was a lack of relationship with the Ombudsman’s Office in view of the issues or cases related to terrorism, whatever its

¹⁷⁷ (Riyadh Lawyer No.7).

shape or size¹⁷⁸. However, to hinder justice for those seeking compensation is totally against the principle of Islam, and the government should establish an Independent Police Complaints Commission (IPCC). Furthermore, that would facilitate the right to an effective remedy in criminal procedure.

Conclusion:

This chapter has shown that there are fundamental differences in pre-trial procedures in England and Wales and Saudi Arabia, not just in terms of the actual details of the legislation that governs procedure, but in the ethos that underpins it. In ensuring that the suspect is treated humanely and accorded human rights, whilst at the same time being arrested and detained, the system in England and Wales is able to protect individual rights without hindering the role of the police to protect the community.. In Saudi Arabia however, the rights of the individual suspect seem to fall far below that of the society. Although the CCP stipulates that suspects should be released if there is no strong evidence and no charge, there is nothing about detainees being considered innocent till proven guilty and so they are treated almost as though they are already criminals.

This attitude is starkly reflected in the practices and attitudes of the police that this study discovered, in the human rights violations uncovered by organisations like Amnesty and the attitude of many lawyers that contact with 'criminals' is somehow demeaning to their reputation. The sub-standard condition of custody cells, a code of practice that allows some suspects to remain detained for 6 months without charge and cumbersome and delaying regulations such as the need for a Deed of Origin are all signs of this 'guilty till proven innocent' ethos. The Code of Practice actually states that it is the suspects that must prove their innocence (see Article 34 of CCP). Furthermore; the CCP does not make adequate provision for bail, for the right to a legal remedy and for close and efficient monitoring and recording of police procedures. For these reasons it falls far short of coming up to the standards expected by international human rights laws. The legislation

¹⁷⁸ <http://www.aawsat.com/details.asp?issueno=11700&article=594345#.Uk6R4EdwYeF>.

in England and Wales, on the other hand, has as far as possible, clearly regulated pre-trial procedures in accordance with these standards and established training and monitoring to ensure compliance.

Saudi Arabia's legal system falls far short of both *Shari'ah* principles and international human rights law, and measures should be taken to rectify this. Detainees should be given the right to challenge the lawfulness of their detention and a penal code enacted which prevents the practice of detaining someone purely for having debts. The police and the Bureau of Investigation and Public Prosecution should make changes in its practices when arresting and interrogating a person to ensure greater transparency and prevent ill-treatment of detainees. The police should have a clear code of practice when they deal with suspects. The rights of the defendant should be strengthened by the Ministry of Justice and the Supreme Judicial Court who could establish the principle of access to legal advice and that this advice is available *gratis* to indigent defendants. This would allow defendants to effectively challenge any evidence against them and ensure a fair trial. The criminal courts should review all the cases and the procedures carried out by the police and the IPPC, and not just rely on the evidence and confession.

Furthermore, the Saudi government should remove responsibility for prosecutors from the control of the Ministry of Interior and give to the Ministry of Justice, because complaints against the police and the IPPC are neither investigated nor prosecuted by an independent and impartial authority; at present, police officers and IPPC members cannot be subjected to disciplinary or criminal investigation without permission from the Ministry of Interior. The government should remove the power to arrest, detain, and release suspects from the prosecution and confer it on the judges. That is to say, whatever changes are made in Saudi law at the stage of criminal investigation, they will not materialize in practice unless the judiciary are prepared to enforce them and that can be done only if the judges have proper education and training to deal with the provision of law in Saudi Arabia.

The solution to the problems that have been described in this chapter is that Saudi Arabia adapts the pre-trial regulations modelled on those set out in PACE. This research has uncovered much confusion and lack of understanding about pre-trial procedures among police officers and prosecutors who would be much clearer about what they were required to do if they had unambiguous set of regulations to follow. This, done in conjunction with the mentoring, reviewing and training suggested would bring the Saudi pre-trial system into line with the principles outlined in *Shari'ah* and international human rights laws.

Chapter Eight

Conclusion

This thesis has examined human rights at the stage of criminal investigation in international human rights law and *Shari'ah*. It has been argued that there is a mutual harmony between them. It has been suggested elsewhere that the idea of international human rights has been based on the natural rights theory, which has roots only in countries with Western cultures, and cannot apply to Eastern countries with Muslim cultures. *Shari'ah*, so it is argued, has a different approach to human rights in that its norms derive from religious teachings which may conflict with international human rights law. However, this thesis has shown that the assumption that international human rights cannot apply to Muslim countries, is entirely false if we are exploring the effective regulation of pre-trial procedures. Furthermore, this thesis has also shown that these rights are enshrined in the Arab Charter (2008). Although, the Charter is not backed up by a Court, the fact that it sets out human rights in pre-trial demonstrates that these rights and the procedural law that would uphold them are in no way a contradiction of *Shari'ah*.

In regard to procedural rights in both international human rights law and *Shari'ah*, this thesis has pointed out that both are expressed in general terms. The ICCPR & ECHR are worded in ways which can be open to different interpretations. Also, *Shari'ah* is uncodified and mostly relies on the Holy *Qur'an* and the Prophet (peace upon him) and his companions' sayings. It has been interpreted in many different ways by Muslim scholars, that is to say, without codification. Interpretations are more a matter of history and culture and modern interpretations such as those put forward Alhargan (2006), Almageed(2011) and Alanad(2007) are more consistent with principles of international human rights *Shari'ah*. As this thesis has shown, most judges and IPPC members in Saudi Arabia have been educated only in *Shari'ah* without even being aware of or understanding the norms of international human rights laws and this has led to a lack of respect for human rights law in Saudi Arabia that will be elaborated later. It is therefore imperative that commonly shared values regarding pre-trial procedures, which are held by both international human right law and *Shari'ah*, are focused on. This will further the

advancement of human rights in Muslim countries, and Saudi Arabia (now a member of the UN Human Rights Council) in particular which, at present, is being advocated largely by Western non-governmental organizations such as Human Rights Watch and Amnesty International as well as human rights scholars.

By adopting this approach, Muslim countries would prevent arbitrary governments from violating human rights, in particular those which apply to pre-trial procedures. It should however be pointed out, that this measure does not solve, or attempt to solve conflicts between *Shari'ah* and international human rights law, merely that it encourages the adoption of those human rights norms that are common to both. Applying the ideals of international human rights law to pre-trial procedures will help to establish a new culture in Muslim countries that will be more open and respectful of human rights norms; and which will create a system that benefits both the interests of the community and upholds citizens' rights.

Pre-Trial Procedures: Lessons from England and Wales

The laws of England and Wales have evolved over a long period. This thesis has shown how England and Wales formalized its law, by going back to the Roman and Norman periods. Ordeals and torture were used to obtain confessions from suspects at that time. However, pre-trial procedures were set out for the first time in the Marian Reforms (1554-5), which gave the suspect the right to defend him or herself. In the 18th & 19th centuries, England and Wales established many legislative changes, and pre-trial procedures started to be organized in legislation such as the Metropolitan Police Act (1829). However, it was in the 20th century that England and Wales issued a fundamental Act, PACE 1984, that regulated pre-trial procedure in a clear and systematic manner.

This thesis has argued that in England and Wales the implementation of the law seeks to be compatible with the principles of international human rights law and guarantee the suspects rights. It is evident that after examining the legal system and interviewing a

number of officers and lawyers in England that human rights are thoroughly considered by PACE and that officers are trained to know what the procedures are at the stage of criminal investigation; how they should be carried out and the consequences of breaching the regulation. Although there are still gaps (e.g. 'reasonable suspicion' is not defined in PACE) and some defects in its operation (see Chapter 5), it is clear that criminal procedure in England and Wales is generally applied in a manner that makes the exercise of the guaranteed rights practical and effective and that PACE is one of the most powerful means of control over pre-trial practice.

PACE has ensured as far as possible that essential human rights relating to pre-trial procedures are embedded in its provisions and that the actions of the police are closely monitored throughout the process of arrest and detention of suspects. By limiting the length of detention and granting bail, PACE encapsulates the idea that it is a serious matter to limit the freedom of an individual in the name of society. However, in practice, PACE regulations and attention to human rights are not always followed. This research has demonstrated that, in spite of a clear understanding of PACE, some officers do not always follow it to the letter. For example, innocent people can be arrested when it is not always clear who has committed a crime.

Similarly, PACE grants detainees the right to legal advice, but interviews revealed that officers sometimes mislead suspects by suggesting that waiting for a lawyer would prolong their detention. This research has also shown that some police officers still regard lawyers advising their clients to remain silent as obstructive, rather than as an exercise of their right against self-incrimination. Furthermore the current controversy over cuts in spending on legal advice means that poorer suspects could end up being discriminated against. However, the treatment of detainees in England and Wales contrasts sharply with that of detainees in Saudi Arabia. Saudis are not given adequate cell facilities, for example. It should be noted here that the researcher was given a short tour of a police station in the Sussex region; the cell and the kitchen he saw were clean and the atmosphere at the police station was similar to that of a hospital. Whilst it is easy to monitor the physical conditions of detention, it is not so easy to monitor arrests or

searches, which is why recording these as well as the subsequent interrogation is so important. Even with all these safeguards in place, there remain loopholes. For example, this thesis has pointed out that police can easily fail to record stops and searches if they are unsupervised, and some critics point to the wide interpretations given to 'reasonable suspicion' as serving police interests.

Also very difficult to monitor are police attitudes. PACE aims to prevent any discrimination in Code A; however, case law shows that discrimination does exist at police stations in England and Wales, and the controversy about racism in the police continues to rage (see Chapter 5, Teresa May's comment). The experience in England and Wales demonstrates how difficult it is to eradicate discrimination that is part of the culture of an institution; and this too will be a significant challenge in Saudi Arabia.

The pre-trial procedures outlined in PACE 1984 are highly recommended as tried and tested practice which for three decades has operationalised the principles contained in international human rights law in a clear and comprehensive way. These could be usefully referred to by Muslim countries and by Saudi Arabia specifically. This would be preferable to adapting Egyptian law, as has been done by Saudi legislators or using the existing Code of Criminal Procedure (2001) CCP which is too vague. PACE 1984 is compatible with international human rights law, and international human rights are compatible with *Shari'ah*, so, there is no reason why the regulations in PACE could not usefully inform Saudi Arabian law. There is a fear that importing anything from Western cultures will be detrimental to the Muslim way of life and that, in particular, Western laws such as PACE would be in contravention of *Shari'ah*. There is an argument that says that Western ideas of human rights are based on Western values which make them incompatible with *Shari'ah*; furthermore, because *Shari'ah* is seen as God's law that there is no need for any codification. However, this research has shown, that far from being the case, adapting some of the procedures contained in PACE would be in keeping with Muslim ideas of justice and human rights. Codification would enhance the principles of justice encapsulated in *Shari'ah* and make them easier to implement.

Progressing Pre-Trial Procedure Rights in Saudi-Arabia:

When Islam started in Saudi Arabia, the law, which had till then rested on blood feuds and retribution, was regulated and made to include issues such as dignity, privacy, liberty, presumption of innocence and compensation. All this showed that a respect for humanity as well as justice is of great importance.

In spite of having made a number of declarations about the high standards of the Saudi justice system and the number of legal reforms made in recent years, it appears that, in practice, Saudi Arabia neither lives up to these standards nor has made reforms which are sufficient. The safeguards against arbitrary detention, ill treatment and to make sure defendants get a fair trial need further strengthening.

Saudi Arabia has been criticized by non-governmental organizations such as Human Rights Watch and Amnesty for not respecting the suspect in pre-trial procedures. So, this thesis has examined why the implementation of pre-trial procedures in Saudi Arabia does not reflect the principles of *Shari'ah* law, and why Saudi law does not appear compatible with international human rights standards. The answer to that is that Saudi Arabian laws and practices are far from the principles of *Shari'ah* which Saudi Arabia alleges to be applying. With regard to Saudi law, as opposed to its practice, this thesis has shown that Saudi law, as represented in CCP, and police practice fails to reach both the principles of international human rights law and *Shari'ah* ideals of human rights in many respects. In establishing the right to liberty, the CCP prohibits unlawfully depriving someone of their liberty but fails to be explicit as to how. The CCP remains silent when enforcement officers stop and search someone in the street. It has also been pointed out that in practice the police cannot control their soldiers who lack education and training about the law or dealing with suspects. The Saudi government should create a new article that prohibits stop and search in the street, unless there is a reasonable suspicion, and the types of suspicion should be listed to ensure that citizens' rights will not be breached. Moreover, recording must be carried out by enforcement officers when someone is being stopped or searched.

Arrest does not seem to be properly regulated in the CCP; also, in practice there is not sufficient evidence that the accused committed an offence. The IPPC is granted authority to issue the arrest warrant but in practice it is the police who carry that out. Also the police do not require an official letter to issue an arrest warrant they mostly rely on a verbal order. Furthermore, the suspect's right to know the reason for the arrest is mostly disregarded in practice. The main dilemma that this thesis has demonstrated occurs for the IPPC members who accept that arrest regulations are violated, but then do not find that this makes the case inadmissible in court and they accept such cases routinely. Clearly, the CCP gives the police the power to deprive suspects of their rights. However, were the courts required to dismiss cases where there was inadmissible evidence, this would go a long way to ending this practice. Thus, the courts should review the case and decide if there is no violation of the law, if there is, compensation should be granted to the suspect. Steps need to be taken to ensure that the police and the IPPC will be aware when they arrest someone unlawfully.

It has been demonstrated that detention procedures in Saudi Arabia are far from the principles of international human rights and *Shari'ah*. Saudi law not only prohibits unlawful detention but paradoxically allows it. By allowing custody of up to six months without trial, Saudi law is contravening basic human rights. No Saudi law requires that detentions be reviewed. This thesis has shown that many suspects are detained unlawfully and without being sent to a trial within a reasonable time. Moreover, the Saudi laws remain silent about the right to silence and give enforcement officers and IPPC members the power to force the suspect to speak or remain in the custody until he speaks. The Saudi government should amend the power that has been given to the IPPC member to detain a suspect up to six months, that should be referred to the court or to a third independent party. The CCP should be changed in order to include the right to silence and to prohibit forcing the suspect to speak.

Furthermore, it has been pointed out that suspects receive bad treatment when in custody. There are no individual cells, no provision of sufficient food and no proper beds or

blankets. That is to say, custody centres in Saudi Arabia are not compatible with standards set by international human rights. Also, in practice, the presumption of innocence seems not to exist in Saudi law; every person who enters custody is considered guilty in the eyes of the police. Lawyers who were interviewed confirmed that conditions in custody centers in Saudi Arabia are such that suspects often become sick and make a false confession to get away. Referring to procedures laid out in the detention section of PACE Articles 34& 36 and the presumption of innocence Code C 10.1 &10.3., would allow the creation of clear regulations.

This thesis has shown that the right to legal advice is granted in Saudi law when the suspect is interrogated; however, the interviews revealed that this is just ink on paper. Lawyers do not have the power to defend a suspect or to give legal assistance. The CCP remains totally silent on the right to legal advice when the suspect is being taken to the police station and giving testimony. In practice, this research uncovered that the police rarely allow the suspect to meet a lawyer; moreover, IPPC members also ignore the need to inform suspect of their right to see a lawyer, which is in breach of the law. Moreover, judges do not allow the lawyers to defend the suspect even though the law grants lawyers that authority. Therefore, in order to make the law compliant with the principles of *Shari'ah* and international human rights; the Saudi government should oblige enforcement officers, IPPC members and the judicial system to give the suspect the right to legal advice, and lawyers should attend the interrogation in order to ensure there is no violation. Having said that, the lack of accountability leads to ignoring the right to legal advice and the other rights as well, and suspects are often unaware of their rights. Furthermore, the Saudi government should establish a Bar of Association to support lawyers.

Privacy in Saudi Arabia is protected by both cultural values and by law, as this thesis has showed. Enforcement officers are not allowed to enter any premises without permission unless they receive a search warrant from the IPPC. The problem here is that the CCP gives the IPPC power to issue the search warrant, which should be granted to judges. In practice, this thesis has pointed out that the police do not wait to receive the search

warrant, but make their own decision to enter premises, which is a violation of the law. The IPPC always accepts these violations and charges the suspect even if the police entered his or her house without a search warrant. That is to say, the lack of monitoring and accountability allow the police to violate the law. The Saudi government should make an immediate change to refer the issuing of search warrants to the judiciary, and make those who violate the law accountable. It is important that search warrants are issued as speedily as possible and this could be done by using modern technology.

The procedure for releasing the suspect on bail is not working properly in Saudi Arabia. It has been pointed that the right to bail is granted by the CPP, except for major crimes, but in practice procedures are not properly followed. The IPPC members entrust the police to bail the suspect but fail to check if the suspect is actually released. This thesis has shown the police always ask the suspect to bring a guarantor even if he has not been charged with committing a crime. Furthermore, the CCP grants bail according to the suspect's address which does not work in Saudi Arabia's postal infrastructure, under which many people have no official postal address. The Saudi government needs to create a new Article to comply with the international human rights and *Shari'ah*. The Article should require the police and IPPC members to give a suspect the right to bail if there is no sufficient evidence even in cases of major crimes. At present, even people who are proven innocent are required to provide a guarantor and given bail. However, the suspect should be released without any condition if he has not committed a crime. The IPPC members should ensure that the suspect is released or granted bail properly.

Saudi Arabia should tackle the fundamental shortcomings of its judicial system by reforming its laws and its criminal procedures, from arrest through to imprisonment, to ensure that they comply with international human rights standards. At present, the shortcomings in Saudi Arabia's criminal justice system are so pervasive as to leave grave doubt that Saudi courts have established the guilt of sentenced prisoners in a fair trial and that law enforcement officers detain untried defendants on a sound legal basis.

Saudi Arabia has some fundamental problems with its pre-trial procedures, starting from the police, passing through the prosecution and ending with the judges. The police hire soldiers in its stations and they practice the law without studying it which impacts on the justice system in Saudi Arabia, especially on pre-trial procedures. Also police officers themselves lack education and knowledge about treating suspects under *Shari'ah* or the CCP. IPPC members are just graduates from Islamic departments, which do not teach anything about law. Judges are similar to prosecutors in that they must be graduates from an Islamic department to have their positions; which means that judges may also be ignorant about laws the government has issued such as the CCP; and they also seem unable to know how to apply the provisions of the laws in practice. For that reason, the CCP requirements are not complied with in practice. However, as long as poor education and training specifically in pre-trial procedure exists, suspects will continue to be deprived of their rights.

The Saudi government should insist that a qualification in Law is mandatory to be a member of the judiciary. The Saudi government should also be more open to the principles of international human right laws; otherwise, Saudi pre-trial procedures will not ever make progress in approaching the aims of *Shari'ah* and international human rights law.

The second problem is that the Saudi pre-trial system suffers from a lack of monitoring. It has been pointed out that at the police station there is no review of each case to ensure that the suspect has not had his or her rights violated. The IPPC should be the body which conducts the review and supervises police action; however, this thesis has shown that the IPPC is not at present effective in its supervision of the police and the exercise of judicial functions, including the issuing of arrest warrants. Most IPPC members blame the workflow system which they say prevents them doing their job properly, this problem would be partly solved if warrants were issued directly by the judiciary as well as the review and supervision of police action. The introduction of modern technology into these systems would also make these processes more efficient. Furthermore, the judiciary

do not review cases referred from the IPPC, the reason for that being poor education which leads judges to ignore the reviewing stage.

The Saudi government should overhaul the reviewing system in pre-trial procedures. The police should give the custody sergeant the authority to review the case before take someone into the custody. The IPPC should review the case from the time the suspect was arrested until he is brought to the IPPC centre. The judges should review the case from the beginning and exclude the case if the enforcement officer has broken the law. The government should computerize the system rather than just using the old fashion system in pre-trial procedure, which would make it more difficult for enforcement officers to procrastinate. Electronic communications automatically record the date that communications are sent out and replied to and this would make it obvious if there had been unreasonable delays. It would be more effective if search warrants were to be issued by judges, rather than authorized by the IPPC.

The third problem that the Saudi system suffers from is lack of accountability. The police and IPPC members both work under the Ministry of the Interior; and this thesis has shown that there is a good relationship between them. The police back up the IPPC and *vice versa*, so the suspect becomes a victim between them. Poor education leads to poor reviewing and all of it leads to less accountability. It has left the Saudi legal system paralyzed in responding adequately to the challenges it faces, including the need to provide effective protection to the suspect. It is therefore ironic that the IPPC was entrusted with investigative and judicial functions in order to improve accountability. This thesis has shown that there has never been an accountability case against the IPPC or the police, and it seems that the judges turn a blind eye when rights have violated; thus, the IPPC and the police still remain unaccountable.

The Saudi government should split up the IPPC and the police; the former should be under the Ministry of Justice and the latter remain under the Ministry of the Interior. That would lead the IPPC to achieve its principal objectives rather than uncritically supporting the police because they both work for the Ministry of the Interior. In addition, the

structure of the existing system needs to change so as to incorporate an independent body that monitors the behaviour of the police and the IPPC. It has been pointed out that the IPPC has been given more work than it can adequately deal with. Prosecutors complained about an overwhelming workload which meant that it was difficult to do their jobs properly. At present, the IPPC has the authorization to take full measures against suspects, except in cases of theft. The IPPC carries out the criminal investigation, the supervision of the police, the prosecution of criminal cases and the lodging of appeals against judgment.

Agencies involved in pre-trial procedures would become more accountable if powers were taken from the IPPC. The police should take responsibility for investigating crimes and deciding whether a suspect should be charged. The IPPC's role should be supervisory; their job should be to check that the police have carried out pre-trial procedures correctly. The role of the judiciary should be to review the case overall and check that the IPPC and police have acted in accordance with regulations.

This thesis has shown that many judges are unwilling to review the case to ensure that the suspect has not been subjected to torture or other mistreatment. So, it would be better if the Saudi government established a new department in the court with the sole job of reviewing all the cases referred to it, to ensure that suspects' rights in pre-trial procedures have not been violated. Moreover, this new department would have the authority to offer the suspect compensation when a breach of the law was found and impacted on his or her rights. It should be noted that relevant education and training in understanding and implementing the law would be an essential requirement to be a member of this department. These provisions, along with better education and training for the police and the IPPC, will go a long way to ensuring that the law is rigorously upheld and those violating it are made accountable; otherwise, there will be no progress in establishing a fair and humane system of pre-trial procedures.

Although these recommendations are very radical and their implementation may take some time, it would make sense to implement them now; whilst the IPPC is currently

under review. Delaying making these changes would only serve to make the resolution of the problems more difficult and costly.

The final problem that this thesis has revealed is the lack of monitoring. Saudi laws are silent about the importance of monitoring to prevent enforcement officers violating the law. This thesis has shown that there is no monitoring in theory or practice. As a result, the police or IPPC could violate the law and allege that they did not, as long as the suspect could not prove it.

The Saudi government should establish new articles in each section of the CCP to oblige the police and IPPC members to record every single incident from when they arrest suspects until they bail or release them, in whatever way is appropriate and efficient. A copy of this recording should be given to the suspect. Recording will guarantee the enforcement officers' rights if there are malicious accusations against them, as well as guaranteeing that the suspect's rights are not violated.

This thesis has suggested that the problems that Saudi Arabia suffers from in its pre-trial procedures are related to each other. The lack of education and training leads to the lack of reviewing, and the lack of reviewing leads to unaccountability. The Saudi government should take all of these into account and tackle them to ensure that the system of justice is working properly. If the recommendations made here are acted on, the criminal procedure system and practice should fall into line with the principles of international human rights law and *Shari'ah*. Furthermore, adoption of a humane and efficient pre-trial system may not only find support among many citizens of Saudi Arabia, but also enhance the cultural credibility of Saudi Arabia in the eyes of the international community.

Conclusion

This thesis has demonstrated that the assumption that Saudi Arabia cannot apply international human rights law or adopt any law from the West compatible with international human rights is simply false. Applying both *Shari'ah* and international

human rights law to the pre-trial stage of criminal investigation aims to guarantee that suspects are treated in a dignified and fair manner, whilst preserving the interests of the whole Saudi community in effective law enforcement. Furthermore, the underlying values and principles of Islamic law will be reinforced rather than undermined by these measures.

Close study of different international human rights laws, has allowed this researcher to gain the knowledge and perspective needed to propose some recommendations that Saudi Arabia needs as a starting point for changing its criminal system. Moreover, an exploration of different international laws has highlighted the common ground between *Shari'ah* and international human rights law and *Shari'ah*; demonstrating that Saudi Arabia could adopt the principles of international human rights law or any laws compatible with the principles of international human rights laws such as PACE 1984, as long as there is no confliction with *Shari'ah*, and that this would lead to create a system that benefits both the interests of the community and upholds citizens' rights.

Appendix A

Contemporary Development of Criminal Justice in England and Wales

Terrorism Acts 2000- 2006.

Terrorism is a crime which has a political aspect in that it seeks force others to concede to demands often in a way that creates an over-reaction. Sondhi believes that it can result in the undermining of those governments and institutions that the terrorists consider enemies. In the cause of pursuing a political or religious cause, terrorism can stir up deep hatred and desire for revenge which can encourage others to engage in terrorist behaviour. (2000 p.1)

Counter- terrorism strategies have become more draconian in an attempt to deal with what is seen as an international issue. There is concern that these strategies will be abused and there is much debate how terrorism is defined.

The Terrorism Act 2000 s.1 defines Terrorism as acts of violence against person or property and threats of such action. The Terrorism Act 2006 did not provide a clear definition, but it was wider than the 2000 Act.

“ The UK Terrorism Act 2006 amends this definition slightly, but broadens rather than limits the scope so as to encompass also threats actions aimed at influencing an international organisation” (McKeever 2010 p.115). .

Many countries that have been facing a problem with their security system or receiving terrorist threats from abroad or inside the state have issued new laws for protection. However, although enacting laws may make a good impression on the citizens initially, but after enforcing the law it creates a different impression when people see that it affects issues of liberty and civil rights (Neal 2010 p.1).

One such example is in Peru where in 1992 the then president Alberto Fujimori introduced two laws [Law 25475 and Law 25659] in the aftermath of a coup d'état. These laws purported to combat terrorism but were in violation of human rights. Detainees were

offered release for informing on ‘subversive individuals’ and many innocent people were wrongly imprisoned. These laws exist to this day (Wieland 2003 p.1).

Dorling (2007 p.4) believes that anti-terrorist legislation that was passed in the UK between 1973 and 2000 needs to be viewed in the context of the campaigns of public violence, which resulted from the situation in Northern Ireland. The Northern Ireland Emergency Provisions Act (EPA) was passed in 1973 section (2) and among other things removed the right of trial by jury as well as giving the police and the army extensive rights to arrest and search. This was done because it was felt that ‘the actions of terrorist groups left the ordinary criminal justice system unable to function’. Neal (2010 p.5) points out that the 1973 Act was built on the 1922 Civil Authorities (Special Powers) Act which was revised and made permanent in 1933.

The 1974 Birmingham bombing resulted in the Prevention of Terrorism Act (PTA) in the same year. This Act gave the police the power to detain anyone suspected of terrorism for up to seven days. Neal (2010 p.5) is convinced that such British laws relating to terrorism are ‘rushed, reactive and repetitive’ and that the 1974 legislation is a case in point. The then Home Secretary, Roy Jenkins, who actually introduced the Act famously said of it “I would have been horrified to have been told at the time that it would still be law nearly two decades later” (*ibid.*,).

Neal (2010 p.5) also notes that there was a similar reaction to the events of 9/11 and the Anti-Terrorism Crime and Security Act (2000) was rushed through, followed by further legislation in 2005 and 2008. Neal comments that both these pieces of legislation were counter-productive as they bred resentment in the ‘suspect’ communities.

The Terrorism Act 2006 was drafted after the July bombings in central London in July of 2005 and Rahman believes that this parallels the 2001 Act which followed the events of September 11th. Both Acts were hurried responses to tragic events and the 2006 Act

significantly extended the time that the police could detain a suspect for questioning prior to being charged from 7 to 28 days (2009 p.2).

Rahman (2009 p.2) adds that the subsequent Crime and Security Act 2001 contained ‘a clear breach of the individual’s right to privacy’ by section 92 as it gave police the right to search, fingerprint and photograph suspects against their will. This included the police’s right to remove any headwear and face-coverings worn by the suspect for this purpose.

Both the EPA and the PTA were replaced and superseded by the Terrorism Act of 2000. This Act was created as the result of an enquiry conducted by Lord Lloyd into the need for permanent anti-terrorism legislation (Rahman 2009 p.1). It was supposed to strike a balance between the need to both restrain terrorism and protect the rights of the ordinary people and should have been compatible with the Articles of the Human Rights Act 1998.

Rahman comments that there was further controversy about the Act’s definition of what constituted terrorism. He believes that ‘the definition was so wide’ that the government could use the Act against virtually any group it wanted. The definition was extended to include, for example, even people campaigning against genetically modified crops (2009 p.2).

Derogation of Article 5 of the ECHR had to be used to retain the powers of lengthy detention which, despite criticism, rose from 48 hours in 2000 [under Section 41, Schedule 8] to 14 days in 2003 [CJA] and 28 days in 2006 [Terrorism Act]. Horne and Berman point out that the Government had initially pressed for a 90-day period, but this was rejected in the House of Commons. Furthermore, there was to be new procedural protections for suspects and the detention limit was to be subject to yearly review. Thus, at present, anyone arrested under suspicion of being a terrorist can be detained for long periods of time without any charge being made. This is in order that the police can ‘preserve, analyze or examine evidence for use in criminal proceedings’ (2011 p.1)

Under the 2006 Act, the initial 48 hours is reviewed by a judge and then reviewed every seven days until the last 14 days, which a senior judge has to review. These judges have to be satisfied that detention will result in relevant evidence being obtained and that the investigation is properly conducted. Controversially, detainees may be prevented from consultation with a lawyer or informing others of their detention during this period.

Article 15 of the ECHR allowed for derogation in times of 'war or public emergency'. Dorling (2007 p.11) notes that this had to be used in relation to Article 5 which stipulates that a suspect should be brought 'promptly' before a judge, although what constitutes 'promptly' has to be assessed in each case.

The Prevention of Terrorism Act (2005) section (1) established the controversial Control Orders. These could be used for suspects of any nationality, specifically to prevent acts of terrorism. There were two types of Control Order – the non-derogating and the derogating. The latter had to be approved by the Secretary of State and made through an application to the High Court. There was a preliminary hearing, which could happen without notifying the individual concerned who was thus deprived of the possibility of making representations to the court. The Control Order could impose bail conditions, probation, electronic tagging, curfews and restrictions on communication such as use of the Internet or communicating with certain individuals. The suspect could also be required to stay at a particular address or be relocated; be subject to work restrictions, surrender their passport and accept searches and phone tapping. If they contravened the Order, they could be arrested without a warrant and receive fines or prison sentences of up to 5 years (*ibid.*).

According to Feikert and Doyle (2006 p.11) these Control orders constituted 'the biggest threat to civil liberty of British citizens for over 300 years' particularly because the suspect could lose their liberty without even being aware of what evidence was being presented against them. The government was not prosecuting individuals for existing offences because it would not remove the restrictions on intercepted evidence as they felt that presenting such evidence in court would jeopardise national security.

These Orders were so controversial that a ‘sunset’ (or last minute) clause had to be introduced to enable the legislation to be passed. According to this the Act had to be reviewed by the Secretary of State every three months and be brought before Parliament after a year (*ibid.*, p.12).

Vogler (2011 p.6) suggests that these Control orders can be seen as an infringement of the rights of unconvicted individuals and as such, to be an infringement of Clause 39 of the Magna Carta of 1215 whereby a person should not have their freedom restricted unless convicted.

In July 2010, the Macdonald review called for abolition of the Control Orders as it said that the security services had superseded the police in the management of these with the result that the due process of investigation and prosecution had been undermined. The government decided to abolish Control Orders by the end of 2011 and replace them with Terrorism and Prevention and Investigation Measures which would reduce curfew times and permit time to be spent away from home (*ibid.*, p.9).

The 2006 Terrorism Act was passed as a reaction to the London bombings of July 2005 and, in part, was concerned to target the glorification of terrorism. In this, the Act went further than US legislation in curbing civil liberties including that of freedom of speech. The Act allows the government to prosecute individuals for encouraging terrorism or for disseminating terrorist publications as well as targeting organisations that are seen to promote terrorism. The House of Lords rejected the ‘glorification’ sections of the Act twice but passed it at the third vote with the proviso that the Home Secretary would review all legislation relating to terrorism the following year (Parker 2007 p.713).

Walker (2009 p.21) comments that the subsequent analysis carried out by Jonathan Evans, Director of Security Service, showed that although there were nearly 2,000 suspects identified as posing a threat to national security, only 15 Orders were in force by the end of 2008. ‘The absence of custom is not for want of customers, but because these

executive measures are neither cost-effective nor legally certain compared to criminal prosecution’.

Vogler (2011 p. 10) believes that the power to stop and search suspects have been used in ways that have little to do with stopping terrorism and more to do with the social control of certain groups such as demonstrators.

The nature of the perceived terrorist threat in the UK has shifted from problems with organisations such as the IRA which many people in the UK understood and for whom a few had some sympathy, to problems with groups such as Al-Qaeda. Breau, Livingstone & O’Connell suggest that there is international agreement that strong action should be taken against such groups and one would imagine that any legal measures introduced to deal with these groups would be welcome. The Human Rights Commission agreed that, according to secret evidence, there was a serious threat to the nation and that given this factor detention without trial was an acceptable solution. The Commission could also not have overturned a legislative measure (2011 p.6).

The UK government is using unnecessarily strong measures in legislation against terrorism, as we have seen, most arrestees were from ethnic minorities and most of them were released without charge (As Theresa May pointed out -see Chapter 5). There is a need for a clearer definition of what constitutes terrorism. In my opinion, terrorism is not just threats to the state by bombing people. Terrorism is terrorising the people by any kind of crime such as, kidnapping, looting property and so on. There is no difference between a gunman who fires on people in the street and a person who carries a bomb to kill some people, even though they have different aims. The UK government should take into account that most terrorists are working in groups and organizations. Their behaviour sometimes stems from religious beliefs or oppression and it is important to address these in the fight against terrorism.

Serious Organized Crime and Police Act 2005.

In the new millennium the UK has attempted to address the problem of organized crime by issuing new legislation in order to give the police more power. This came in the form

of the Serious Organized Crime and Police Act 2005 (SOCPA). In this section I will review the background of the Act without examining the changes made on PACE, which will be examined in chapter four.

The changes introduced by SOCPA follow the outcome of the *Report of The Joint Home Office/Cabinet Office Review of the Police and Criminal Evidence Act 1984* (2002), and have regard to responses received by the Government following publication of its Consultation Paper “*Policing: Modernising Police Powers to Meet Community Needs*” (Fortson 2004 p.3).

March 2004 saw the publication of the White Paper ‘One Step Ahead: a 21st Century Strategy to Defeat Organised Crime (Cm 6167). This paper envisaged ways to reduce the profits that organised criminal enterprise could make, affecting their activities and improving detection and prosecution. Royal Assent was granted to SOCPA on 7th April 2005. The new Act was designed to achieve the aims envisaged in the White Paper and included new rules for police powers¹⁷⁹.

From January 1, 2006, police powers were substantially altered by SOCPA – particularly in relation to arrest and those powers available to constables following an arrest. These changes introduced by SOCPA were to have considerable practical effects on all policing (Fortson 2004 p.2).

The anticipated benefits of the changes to the powers of arrest were summarised by the authors of the team who prepared the Serious Organised Crime and Police Bill Summary Regulatory Impact Assessment:

“Arrest: Should result in improved police efficiency and effectiveness in terms of the police investigative process and raise the level of successful outcomes to investigations. Enables police to determine on a case by case basis whether or not a person needs to be taken into custody – potential savings on police time and related accommodation issues” (*ibid.*, p.3).

¹⁷⁹ See Memorandum to the Home Affairs Committee Post-Legislative Assessment of the Serious Organised Crime and Police Act 2005 p.1.

Notable changes which SOCPA made include the extension of the powers of Community Support officers (CSOs) and other individuals accredited by the provisions of Part 4 Of the Police Reform Act (2002)¹⁸⁰.

According to sections 110-114 and Schedule 7, the police had new powers of arrest. The justification for arrest was now to be judged according to necessity rather than how serious the alleged crime was. Powers to search premises and seize evidence were extended and warrants could be issued which covered more than just one location. Under Schedule 7 the term 'indictable offence' replaced 'arrestable' and 'serious arrestable' offence¹⁸¹.

Under Section 12 the police can arrest an individual without a warrant if they fail to leave an exclusion area when told to by a police officer. These exclusion requirements are imposed on adult and juvenile offenders as part of a community sentence, suspended sentence or a licence condition when released from custody. According to the Home Office Circular 29/2005 these new powers began on July 1 2005¹⁸².

The sections of SOCPA (120-1), which introduced staff custody officers, were repealed in 2010 as the result of the Police Federation of England and Wales, the Police Superintendents' Association, Liberty and the Law Society raising concerns about custody being handled by non-sworn police staff¹⁸³.

The PACE Review published 4 March 2010 believed that SOCPA had achieved its aim to provide police with the power to effectively deal with crime. However, Frotson is doubtful that it was necessary for a definitive list of arrestable offences to have been enacted. The problem when dealing with minor crimes was usually to do with whether an

¹⁸⁰ see Memorandum to the Home Affairs Committee Post-Legislative Assessment of the Serious Organised Crime and Police Act 2005 p.7.

¹⁸¹ See Memorandum to the Home Affairs Committee Post-Legislative Assessment of the Serious Organised Crime and Police Act 2005 p.7.

¹⁸² *Ibid.*

¹⁸³ *Ibid.*

arrest was appropriate rather than whether the powers of arrest existed. Arrests can be both time-consuming and costly and deciding whether to proceed with an arrest can therefore be complex. He believes that the new framework, rather than ameliorating matters, is an additional burden on police officers (Fortson 2004 p.4).

When the House of Lords debated the Bill that was to become SOCPA, there was concern that the police might be accused of using their powers of arrest inappropriately. Lord Dholakia made a point that they might be seen to be using their powers too frequently. The Government, however, was adamant that the police should 'have access to effective and proportionate powers to tackle crime when it occurs' and that the Codes of Practice would make it clear what constituted 'necessity' (*ibid.*, p.10).

It is important that anyone arrested knows that the officer arresting him or her has done so legitimately. Similarly it is of paramount importance that arresting officers have a clear understanding of their powers. This is to prevent accusations of the harassment of particular individuals or groups that could be levelled at arresting officers (*ibid.*).

There is a great deal of implied criticism levelled at PACE by the provisions of both SOCPA 2005, and so Chapter Five will cover most of these arguments. It was necessary to mention both these Acts just to give an idea about them before going on to deeply examine PACE.

Criminal Justice Act 2003.

The Criminal Justice Act 2003 (CJA) is one of the most important pieces of legislation issued in England and Wales after PACE 1984 that deals with pre-trial procedures. The Criminal Justice Act 2003 deals with many aspects of criminal law, but in this section I will review it in a nutshell and concentrate on the part that relates to pre-trial procedures.

In July 2002 the UK government issued a White Paper on criminal justice procedures called '*Justice for All*', specifically dealing with criminal law 'on reforms to courts procedures and sentencing'. The purpose of this was to accelerate the trial and reach a

clear case to the court¹⁸⁴. Two documents were instrumental influences on this White Paper; ‘Review of the Criminal Courts of England and Wales’ by Sir Robin Auld (2001) and ‘Making Punishment Work’: a report on the sentencing framework of England and Wales (2001) by John Halliday.

Keogh suggests that the Law Commission also contributed significantly to *‘Justice for All’* ‘notably through the reports it delivered on hearsay (LC 245). Double jeopardy (LC 267) and bad character (LC 273). He believes that the latter two subjects in particular, along with that of jury trials were controversial and the passage of the CJA was contentious in spite of its being commonsense in the main and simply there ‘to make practical changes to the way in which the criminal justice system works (2004 p.1).

The opposition to the Bill was reflected in the speech that Matthias Kelly made when he became Chairman of the Bar Council. In it he said that far from being ‘tough on crime, tough on the causes of crime’ -to paraphrase Blair’s election promises-, the Bill tampered with people’s rights to a fair, jury trial, with the presumption of innocence and made it easier to convict the wrong person. Those opposed constituted a strong lobby.

“We are working closely with Justice, Liberty, The Legal Action Group and the Law Society for change to the Bill. We have already lined up a powerful coalition in the House of Commons against the Government’s proposal” (*ibid.*,).

In spite of this, the Bill survived with only the proposals relating to trial by jury partly enacted. Keogh comments that these ‘are unlikely ever to be implemented’ (*ibid.*, p.2). The (CJA) was issued for England and Wales and contains fourteen parts. The first part of the 2003 Criminal Justice Act (CJA) aimed to amend PACE with the objective of reducing police paperwork and speeding up procedures. It provides for a greater role for support staff than did PACE and gives the police wider powers of arrest. They are able to this, for example, in relation to crimes relating to passports and the possession of cannabis. Suspect aged 14-17 can be tested for class A drugs as long as an appropriate adult is present (section 38 and 63B of PACE 1984). The Act also allows the taking of

¹⁸⁴ *Explanatory Note Criminal Justice Act 2003, These notes refer to the Criminal Justice Act 2003 (c.44) which received Royal Assent on 20th November 2003.*

samples from suspects without consent and the issuing of street bail (PACE 1984, s.36C 93) (Keogh 2004 p.4). This is so that the suspect need not necessarily go to the police station. Detention reviews can also be conducted over the phone, or preferably by video conferencing (section 40A A and 45A of PACE) (*ibid.*). More discussion about these points will be reviewed in chapter four.

Part 1 of the Act extends the range of articles which the police can stop and search people for (section 1 of PACE). Detention without charge has been extended to any arrestable offence, terrorism offences and recording what suspects have on them is at the discretion of the arresting officer.

Keogh points out that the CJA seemed to be moving away from the founding principles of PACE. For example, Section 7 is an amendment of Section 42(1) of PACE and allows detention of up to 36 hours for all arrestable offences as opposed to serious arrestable offences. The Philips Commission (1981) thought that a court process or independent visitation should be necessary for detention of more than 24 hours (2004 p.14).

In a similar way, Section 306 of the Act amended the Terrorism Act 2000 (Schedule 8) so that people suspected of terrorism could be held for 14 days without charge. However, extensions beyond 7 days only applied if 7 days had already been granted. The extension was only 3 days for the first application but could be extended subsequently (Keogh 2004 p.15)

The CJA also took into consideration the progress that had been made in technology. Section 9 amended Section 61 of PACE to allow for fingerprints to be taken electronically and for the acquisition of DNA samples. These could be done on anyone arrested; charged with; or notified that he or she would be reported for a recordable offence provided that no fingerprints had been previously taken during the investigation (Keogh 2004 p.16).

The way that codes of practice are established and amended is changed under the Act. Consultation and parliamentary investigation is less extensive. As I analysed PACE

extensively in Chapter 5, I will not compare to the CJA in great detail here. It is however, interesting to note here a number of criticisms of the CJA legislation. Qureshi (2007 p.467) believes that the CJA gives the police enormous powers of stop and search. They can now do this if the suspect that someone is carrying a can of spray paint or even a marker pen. Qureshi notes that the CJA was implemented at the same time as the Anti-Social Behaviour Act. Qureshi believes that these Acts were generated by the notion that visible minor crimes engender fear in the community, encourage a decline in that community and therefore increase the likelihood of major crimes occurring. These laws thus show how the state has assumed responsibility for crime control. However, widening police powers of stop and search can have an adverse effect on police relations with ethnic minority groups, as it is often members of these communities who are stopped and searched.

If the CJA is to work, the public must be informed of changes in stop and search legislation and the police have to be properly trained in conducting searches in line with the 2005 European Code of Practice (*ibid.*, p.478). Another critic of the CJA, Ashworth (2004 p.9), suggests that there is complete lack of a 'human rights culture' in the Home Office and that the CJA 'seemed to have been put together either in defiance or oblivion of the Convention'. He goes on to say that the CJA and the Antisocial Behaviour Act can encourage 'disproportionality' where there are 'disproportionate responses to behaviour that is relatively low on the scale of seriousness' and that this goes against the recommendations of the Council of Europe 1992 which stipulate appropriate penalties for offences (*ibid.*, p.10).

Ashworth (2004 p.11) remarks that the focus on public protection, which is clearly at the heart of the 2003 legislation is important but that it should not be at the expense of other values such as that of public liberty. He also suggests that creating a feeling of public protection by spurious means such as giving higher sentences is disingenuous. The public need to feel safe, but they need to know what will make them actually safer – measures such as improving detection rates, for example. He concludes that there should be

‘greater transparency and less posturing about the proper means and the most effective means of achieving that’ (*ibid.*, p.13).

To summarise, The Criminal Justice Act 2003 was intended to reduce paperwork for the police, give a more active role for support staff and to extend the powers of the police in terms of arrest and detention. However, many argue that the CJA went beyond what the situation required. People want to understand their rights and what needs to be done in order that they are protected. Many such as Ashworth feel that it was not in the interests of the public to have promoted a new Act under the pretext of protecting the state and society. PACE could have been amended in order to deal with the criticisms that were levelled at it.

The Human Rights Act [HRA] 1998.

In order to gain a complete perspective of human rights in the UK, it is necessary to explore the HRA. A brief history of its introduction into the UK, including the arguments for and against its introduction, will be given before explaining what the Act consists of and how it is implemented. Hoffman and Rowe point out that, before the HRA there was no single human rights document. The concept of ‘human rights’ as being ‘natural rights’ that applied to all first appeared in the C18th in Tom Paine’s ‘The Rights of Man’. However, the granting of individual rights pre-dates this in documents such as the Magna Carta¹²¹⁵ (2003 p.17).

Lord Irvine introduced the Human Rights Bill to Parliament on October 23rd 1998. His aim was to incorporate human rights into domestic law to avoid UK citizens having recourse to ‘the long slow road to the Court in Strasbourg’. Also to protect ‘the individual citizen against erosion of liberties’ and ‘develop a process of justice based on the promotion of positive rights’ (1998 p.221). Royal Assent was obtained in November of that year and the Act came into force in October 2000. It implemented the human rights encapsulated by the European Convention into domestic law and made it unlawful for public authorities to contravene the rights established by the Convention (Donald et al 2008 p.1) These public bodies include ‘local authorities, government departments and the

National Service as well as some charities and private companies' (Watson and Woolf 2003 p.2).

“The Human Rights Act is a revolutionary document. Quite apart from its important subject matter, the mechanics of the Act are unique in constitutional terms. However, the Act is only a few pages long and is very much a skeleton which must be fleshed out by reference to the case-law of the commission and Court of Human Rights” (Coppel 2003 p.8).

Lord Irvine emphasizes that the Act means that a person's rights are clearly stated as positive entitlements. An example of this is 'Everyone has the right to liberty and security of person' (Article 5). All exceptions to this are then expressed as specific, justifiable situations. If an authority wants to arrest or detain someone, they have to show how this justified according to the terms of the Act (1998 p.224). Article 5 will be specifically focused on in this section, as it is the part of HRA, which is most pertinent to a consideration of pre-trial procedures in UK law.

Furthermore, Article 5, which sets out in detail what it means to be 'free' and the specific conditions by which that freedom can be curtailed i.e. arrest and detention, is by no means new to UK law. Indeed, Section 24 of PACE addressed the procedures for arrest and detention. It specified that summary arrests (arrests without a warrant) should only be carried out if there was 'reasonable suspicion' that an arrestable offence had been committed. Detainees were not to be kept in a police station for more than 24 hours without charge, although there were provisions to extend this. Article 5 simply adds the stipulation that the state carried out these procedures in line with the European Convention and act with 'fairness and proportionality' (Hoffman and Rowe 2003 pp. 132-3).

Hoffman and Rowe believe that the HRA does respect Parliament's sovereignty and has not changed the constitutional relationship between Parliament and the courts. Unlike the Supreme Court in the USA, which can decree that a law is invalid if it is shown to be unconstitutional, British courts can only rule that specific legal provisions contravene the

human rights of particular individuals or groups by issuing a declaration of incompatibility under s. 4 HRA. Judges cannot over-rule Parliament (2003 p.39).

The HRA has altered the mechanism by which an individual can complain to the courts about human rights violations. Before the HRA was passed, many cases from the UK came before the Court in Strasbourg. These cases were brought by people who felt that the domestic courts had not recognised their rights or suitably rectified what they believed were human rights violations (Watson and Woolf 2003 p.111). They were entitled to do this as the complaints mechanism of the European Convention, as I discussed in chapter two, allows applicants from countries who have signed up to the Convention to bring their cases the Court.

Hoffman and Rowe suggest that the UK's record before the European Court was not satisfactory and that individuals would have to exhaust domestic legal remedies first. This was often costly and time-consuming. Only if the European Court decided that there was a violation would the UK have to change its laws and procedures. Even after the passing of the HRA, individuals may still have recourse to Strasbourg if they are unsatisfied that domestic courts have protected their human rights. (2003 p.134) However, now they have a direct course of action in domestic law if they consider that a public authority has acted incompatibly with one of their Convention rights. This is because Section 2 (para A of the HRA states that 'A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any judgement, decision, declaration or advisory opinion of the ECtHR' The HRA also requires legislation to be 'read and given effect in a way that is compatible with Convention rights (Section 3 Para 1).

It should be noted that, section 134 of the CJA (2003) partially adopts the rights outlined in the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1997) It was this which was cited in the House of Lords' decision to extradite General Pinochet to Spain (Watson and Woolf 2003 p.114). Hoffman and Rowe note that the international treaties to which the UK is a signatory can

usefully be referred to 'where the law is ambiguous or uncertain' especially when considering the rights of particular social groups.

Appendix B

Miscellaneous

1. Law of Criminal Procedure, Issued by Royal Decree Number (M,39) Date 16/10/2001, The *Shari'ah* Procedure Law, Issued by Royal Decree Number (115) Date 15/08/2000, Lawyer Law, Issued by Royal Decree Number (119) Date 02/10/2001. Organization of Human Rights Commission, Issued by Royal Decree Number (207) Date 14/01/2005. Law of investigation Commission and prosecution, Issued by Royal Decree Number (140) Date 12/03/1989. Basic Regulation of Kingdom of Saudi Arabia, Issued by Royal Decree Number (A, 90) Date 02/03/1992. Regime Commission to Promote Virtue and Prevention of Vice, Issued by Royal Decree Number (M 37) Date 28/08/1980.

2- "Tazir crimes are less serious than the Hadd crimes found in the Qur'an. Tazir crimes can and do have comparable "minor felony equivalents." These "minor felonies" are not found in the Qur'an so the Islamic judges are free to punish the offender in almost any fashion. Mohammed Salam Madkoar, who was the head of Islamic Law at the University of Cairo, makes the following observation (Ministry of the Interior, 1976, p.104): "Tazir punishments vary according to the circumstances. They change from time to time and from place to place. They vary according to the gravity of the crime and the extent of the criminal disposition of the criminal himself. Tazir crimes are acts which are punished because the offender disobeys God's law and word. Tazir crimes can be punished if they harm the societal interest. *Shari'ah* Law places an emphasis on the societal or public interest. The assumption of the punishment is that a greater "evil" will be prevented in the future if you punish this offender now." (Saint Group ND)¹⁸⁵.

3." Hadd crimes are the most serious under Islamic Law, and Tazir crimes are the least serious. Some Western writers use the felony analogy for Hudud crimes and

¹⁸⁵ www.saint-claire.org/.../Islamic%20Law%20-%20SHARIA%20AND%20.

misdemeanour label for Tazir crimes. The analogy is partially accurate, but not entirely true. Common Law has no comparable form of Qesas crimes.

Punishments are prescribed in the Qur'an and are often harsh with the emphasis on corporal and capital punishment. Theft is punished by imprisonment or amputation of hands or feet, depending on the number of times it is committed". However, Qesas Crimes (revenge crimes restitution). Qisas, in Arabic, is defined as 'equality in crime and punishment', whereby the punishment is commensurate with the offence. This punishment has its roots in the Quran: 'And we prescribed for them in it. The life for the life, and the eye for the eye, and the nose for the nose, and the ear for the ear ...' (Verse 5:45).

4. Two tribes the *Taglab* and *Bakar* had lived together for long time and they had even inter-married. The war started when the leader of the *Taglab* killed Albswas's camel. She asked her nephew *Jasas* to take her revenge on the leader, and *Jasas* killed him and fled to his tribal territory. Then, the leader's brother *Alzer Salam* requested *Jasas*' head along with others but *Bakar's* leader turned that down. He was afraid of losing *Jasas*' dignity and freedom or life even though he had committed a murder. It was considered shameful to extradite a member of one's tribe who would then be tortured by another tribe (Bakther 1990).

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