

SPECIAL MEASURES FOR WITNESSES IN THE CRIMINAL JUSTICE SYSTEM: FROM ENGLAND AND WALES TO THE KINGDOM OF SAUDI ARABIA

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ABSTRACT

Without witnesses there can be no effective criminal justice system. Yet despite this clear fact, many obstacles have stood in the way of these witnesses and of achieving the best evidence they can provide, particularly with vulnerable and intimidated witnesses. In recent decades, some jurisdictions have taken legislative and regulatory steps to lower or remove these barriers, but in other countries little or nothing has been done. This thesis examines one example of the former proactive jurisdictions (England & Wales), and one jurisdiction that has yet to take any significant steps towards protecting or helping witnesses (Kingdom of Saudi Arabia).

The principal theme of my argument relates to how Saudi courts can learn from the experiences of courts in England and Wales in terms of protecting witnesses and, specifically, (i) whether there exist fundamental justifications for the implementation of special measures for witnesses from English law into Saudi courts, and (ii) whether the Saudi government can transplant the special measures for witnesses seen in English laws in order to influence further developments in Saudi law. In determining whether such justifications exist, the thesis will seek to identify the obstacles that prevent witnesses from testifying in criminal cases in Saudi Arabia, including the testimony of women and children, and will therein attempt to find in English law a cure for these problems.

In pursuance of these key research questions, the thesis will: (1) examine the special measures available for witnesses in the courts of English and Wales, (2) outline the particular challenges that witnesses face during adversarial criminal proceedings in Saudi courts, and (3) try to determine whether Saudi courts can benefit from the implementation of special measures for witnesses. The thesis concludes by arguing that the *maslaha* principle is a legitimate and appropriate means through which to consider the transfer of special measures for the protection of vulnerable and intimidated witnesses in Saudi law. With regard to the possibility of transferring specific special measures from England and Wales to the Kingdom of Saudi Arabia, I also propose a set of scholarly criteria which could be used for the systematic evaluation of the appropriateness of this transfer.

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LIST OF ABBREVIATION

| | |
|--------|---|
| ABE | Achieving Best Evidence |
| ACHR | Arab Charter on Human Rights |
| ACPO | Association of Chief Police Officers |
| BLG | Basic Law of Governance 1992 (KSA) |
| CCPD | Consolidated Criminal Practice Direction |
| CCTV | Closed Circuit TV |
| CEDAW | Convention on the Elimination of All Forms of Discrimination Against Women |
| CJS | Criminal Justice System |
| CPS | Crown Prosecution Service |
| CQS | Core Quality Standards |
| ECHR | European Court of Human Rights 1952 |
| ECOSOC | Economic and Social Council |
| HRC | Human Rights Commission |
| ICCPR | International Covenant on Civil and Political Rights 1966 |
| KSA | Kingdom of Saudi Arabia |
| LASPO | Legal Aid, Sentencing and Punishment of Offenders Act |
| LCP | Law of criminal procedure 2001 (KSA) |
| LPSC | Law of procedure before Sharia courts 2000 (KSA) |
| MG9 | CPS form contain the witness names and addresses |
| MoU | A memorandum of understanding of a formal agreement between two or more parties. |
| NGO | A non-governmental organization |
| NSHR | National Society for Human Rights |
| PACE | Police and Criminal Evidence Act 1984 |
| SJC | Supreme Judicial Council (KSA) |
| UK | Made up of England, Wales, Scotland and Northern Ireland. |
| UKHL | United Kingdom House of Lords |
| UN | United Nations |
| UNCAC | United Nations Convention Against Corruption |
| UNODC | United Nations Office on Drugs and Crime |
| VIWs | Vulnerable and intimidated witnesses |
| VOIP | Voice Over Internet Protocol |

| | |
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| WAVES | Witness and Victim Experience Survey |
| WCU | Witness Care Unit |
| YJCEA | Youth Justice and Criminal Evidence Act 1999 |

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CHAPTER 1

INTRODUCTION

Witness protection has become a long-term primary policy objective for most states in the world. This is particularly true when crime represents a cancer that threatens those states' people and their well-being. Most states in the Arab world, such as Saudi Arabia, have failed to provide sufficient protection for witnesses through the law. Consequently, examining this area is of great importance and might contribute positively to the development in the principles of criminal justice in the kingdom of Saudi Arabia. In England and Wales, special measures for witnesses emerged in order to protect vulnerable and intimidated witnesses under the Youth Justice and Criminal Evidence Act 1999.

This chapter first provides a general introduction, followed by a literature review to give context to the thesis which is divided into literature relevant to England and Wales and then Kingdom of Saudi Arabia. After this there is a statement of the problem and an explanation of the motivation for undertaking this research. It goes on to describe the significance and the anticipated contributions of the study, objectives, scope, research methodology, and structure of the thesis including the aims of each of the chapters to follow.

1.1 Setting the scene

Kingdom of Saudi Arabia (hereinafter KSA) has sought to take advantage of other countries' experiences by signing international conventions and treaties to improve its judiciary and learn from the laws of advanced countries. Learning from other countries how to improve the quality and capacity of the criminal justice system (hereinafter CJS) and its agencies is an established course of development in many countries particularly those still developing or seeking to improve their legal infrastructure. However, the KSA is still described in Freedom House's annual survey of political and civil rights as a very strict regime ranked among the "worst of the worst".¹

One country that appears to be developing close ties with the KSA in terms of criminal justice reform is the United Kingdom, something which may surprise some bearing in mind the major contrasts between the two societies. The UK's College of Policing has for some time provided courses for Saudi police and very recently a memorandum of

¹ Freedom House, *Worst of the Worst 2010 'The World's Most Repressive Societies'*, May 2010)

understanding (MoU) on judicial relations between the KSA Ministry of Justice and the Ministry of Justice for England and Wales was signed.²

The most salient points of the MoU are that both parties shall promote and extend judicial cooperation within their respective jurisdictions and in accordance with the priorities they set. Furthermore, both parties shall strengthen cooperation in a number of areas including: exchanging newsletters, publications, research and information about judicial systems, judiciary management and methods of judicial work; organising seminars and lectures to share knowledge and expertise; learning about the latest developments in judiciary; and promoting cooperation in training and sharing professional experience among legal experts in both countries to enhance their capabilities to practice law according to international standards.

This form of cooperation has drawn criticism in the UK, principally due to the widely held belief that there are major deficiencies in the Saudi CJS and that the country has a highly questionable record on human rights. For example, in a piece about the MoU and other elements of cooperation, legal commentator David Allen Green asks “...are UK ministers, civil servants and police officers helping the Saudis run one of the world’s most brutal and barbaric regimes?”³ Whatever the answer to this question it is clear that there is precedent and recent precedent at that, to show that the KSA is interested in reform, including through working with the UK. In seeking to apply English protective procedures for witnesses to the Saudi criminal law, we can make use of the signing of this MoU, which is arguably the most reliable benchmark for identifying the KSA’s intention to utilise the UK’s experience in criminal law.

There is a growing recognition around the world that one important element of a fair and effective the CJS is the protection of witnesses, particularly those who are vulnerable or intimidated. However, most states in the Arab world⁴, including the KSA, have failed to provide sufficient protection for witnesses through their legal systems. Witness testimony occupies a fundamental position within the criminal process, and is relied upon by judges and juries to help unveil the truth and achieve justice. In most

² Kingdom of Saudi Arabia, Bureau of Experts at the Council of Ministers, < <https://boe.gov.sa/>>

³ Green David, 'Hidden agreements on justice and policing: UK’s appeasement of Saudi Arabia' <<http://blogs.ft.com/david-allen-green/2015/10/12/hidden-agreements-on-justice-and-policing-uks-appeasement-of-saudi-arabia/>> accessed 12 Oct 2015

⁴ Barak Ahmed, 'Inadequate Protection of Witnesses in the Criminal Legislation of Palestinian and Arab Countries' 23 January 2015) <<http://www.ahmadbarak.com/Category/StudyDetails/1050>> accessed 22 November 2015

cases, proving guilt through the participation and testimony of witnesses is an integral part of criminal proceedings, as crimes happen in the past and cannot be examined or analysed by a court without relying on auxiliary tools that replay an incident and its facts. Furthermore, the actions that constitute the elements of an offence cannot usually be proven, whether partially or fully, without referring to the people who witnessed their occurrence. So essentially an effective the CJS needs to achieve the best possible standard of evidence, particularly through witness testimony.

Witness testimony is among the most important elements in criminal law that helps the judiciary bring criminals to justice. Consequently, most countries in and outside Europe⁵ have witness protection measures. The modern trend toward making improvements for witnesses can be traced back to the United States in 1970 where it was originally concerned with protecting the lives of witnesses and their families from organised criminals, specifically the Mafia.⁶ The key legislation was the Organised Crime Control Act of 1970 the provisions of which were implemented by the US Marshalls Office. In the following decades the objectives of witness protection broadened to protect vulnerable and potentially intimidated witnesses both while evidence was being gathered and when it was being given as testimony.⁷ English law now permits the use of 'special measures', techniques by which witnesses in criminal trials can be helped to give evidence, including by allowing them to give evidence from behind a screen that shields her from the defendant, via live closed-circuit television links and pre-recorded video testimony.⁸

Although there have been undeniable improvements for witnesses in the criminal process in England and Wales, many jurisdictions have failed to give witness participation the priority and protection it needs to function properly. As a result, witnesses either refuse to appear or hesitate to appear before courts due to fears for their lives or the lives of their children and families, and for their property. Clearly, an

⁵ See appendices A and B of Saini research, which describe witness protection programmes in and outside European countries. This is also evidence that no Arabic country has witness protection in its laws. See BR Saini, 'Protection of witness under law of evidence: a comparative study' (PhD thesis, Kurukshetra 2013)

⁶ Fred Montanino, 'Unintended victims of organized crime witness protection' (1987) 2 Criminal Justice Policy Review 392

⁷ Marion Eleonora Ingeborg Brienens and Ernestine Henriëtte Hoegen, *Victims of crime in 22 European criminal justice systems* (Wolf Legal Productions 2000)

⁸ As provided for principally in the Youth Justice and Criminal Evidence Act 1999

intimidated witness is going to be less able to deliver the best possible testimony when in a state of anxiety or even fear.

One high profile case⁹ which occupied mainstream newspapers' headlines in the KSA, a husband killed his wife in order to gain her share of their funds. He had sent death threats to his wife more than once. His wife must have had reason to believe she might be killed, as she had said to her son, who was 17 years old that if anything happened to her, he must tell the police. Her husband and his brothers killed her and buried her body outside the city because they lived in desert. Her son felt that his mother's death was not due to natural causes: she must have been killed. He went to the police and told them his perception. Later, police found her grave and dug up her body. The coroner's report indicated that she had been shot in the head. Crucially, by going to the police, her son had put his own life at risk, as he was open to threats from his father and his uncles. He was so intimidated that he could not testify against his father and uncles. Such cases must encourage us to ask, what (if any) guarantees are provided by the Saudi CJS that witnesses can and will be protected and encouraged to give testimony in court?

While many jurisdictions, such as England and Wales, have improved protections for witnesses, the Saudi legal system lags behind these important developments and standards, essentially ignoring the legal protection of witnesses despite their importance to the CJS.

This chapter is intended for introductory purposes. It attempts to set the scene for the thesis itself. In the next section I provide a literature review, outlining what has been written on legal protection of witnesses, first in England and Wales and second in the KSA. I follow this by explain my motivation for undertaking this study. I describe the purpose, significance and originality of the study, and provide a statement of the problem, the objectives of the thesis, the scope, the research methodology, and finally the aims of each chapter and outline of the thesis and its limitations.

⁹ Fahd Al Ahmadi, 'The witness protection program' *Riyadh newspaper* (<<http://www.alriyadh.com/302936>> accessed 1st October 2011)

1.2. Literature review

1.2.1 ENGLAND AND WALES

A Home Office report *Speaking Up for Justice*, published in 1998 argued that the judicial system itself needed to change in order to put victims and witnesses at its heart.¹⁰ In 1999 the Youth Justice and Criminal Evidence Act (hereinafter YJCEA 1999) introduced 'special measures' at court to help vulnerable and intimidated witnesses (hereinafter VIWs) give their best evidence. These measures are discussed in detail in chapter five of this thesis.

There is much evidence about the extent to which witnesses experience intimidation and feel fearful of giving testimony. The 1994 and 1998 editions of the British Crime Survey¹¹ both contained studies regarding witness intimidation and these were further analysed in a report published in 2000.¹² The authors found that 8% of witnesses to crime reported intimidation. There was a particular prevalence of intimidation in cases involving domestic violence.¹³ Importantly, however, the number of witnesses reporting that they were deterred from giving evidence as a result of the intimidation was found to be small.¹⁴ However, the 'official' data used to assess what proportion of witnesses were VIWs is regularly challenged, with one study suggesting that 24%-54% of prosecution witnesses are VIWs.¹⁵ Burton et al. reported that 45% of witnesses self-identified as a VIW, however, when the YJCEA 1999 criteria were applied by researchers they estimated that 24 per cent of witnesses were probably VIWs.¹⁶ In their study Cooper and Roberts included the results of monitoring of the VIW population in England and Wales.¹⁷ During the monitoring period, 6,045 witnesses were identified as vulnerable or intimidated under the definition provided in the YJCE Act 1999. Of these

¹⁰ Home Office, *Speaking Up for Justice: Report of the Interdepartmental Working Group on the Treatment of Vulnerable Or Intimidated Witnesses in the Criminal Justice System* (Home Office 1998)

¹¹ Krista Jansson, *British Crime Survey-measuring crime for 25 years* (Citeseer 2007)

¹² Roger Tarling, Lizanne Dowds and Tracey Budd, *Victim and witness intimidation: Findings from the British Crime Survey* (Home Office, Research, Development and Statistics Directorate 2000)

¹³ Ibid, .20 -21

¹⁴ Ibid.

¹⁵ Mandy Burton, Roger Evans and Andrew Sanders, 'Vulnerable and intimidated witnesses and the adversarial process in England and Wales' (2007) 11 *The International Journal of Evidence & Proof* 1

¹⁶ Mandy Burton, Roger Evans and Andrew Sanders, *Are Special Measures for Vulnerable and Intimidated Witnesses Working?: Evidence from the Criminal Justice Agencies* (Home Office London 2006), vi

¹⁷ Debbie Cooper and Paul Roberts, *Special Measures for Vulnerable and Intimidated Witnesses: An Analysis of Crown Prosecution Service Monitoring Data* (London: Crown Prosecution Service UK 2005)

75% were child witnesses and 25% adults. Of the adult VIWs nearly three-quarters were female. Meaning that adult males made up only 1 in every 16 VIWs.¹⁸ This is highly significant for any study of the KSA criminal justice system as I explain later in this chapter.

Unsurprisingly, with reforms for victims and witnesses, some legal scholars have questioned whether the scales of justice have been and are being tilted against defendants. Hoyano considered exactly this and came to the conclusion that with the exception of a few doubtful cases, the majority of special measures directions are likely to be European Court of Human Rights (hereinafter ECHR)¹⁹ compatible.²⁰ Burton, Evans and Saunders²¹ consider whether protecting VIWs is really possible with the adversarial system of England and Wales. In particular, whether the principles of orality²², witness-defendant confrontation, the centrality of witness statements and cross examination which are at the heart of the adversarial system, can be reconciled with measures aimed at supporting witnesses, particularly VIWs. They examined two sets of data- one collected before the implementation of special measures and the other after. They concede that there is going to be no move away from the adversarial system in the foreseeable future and that “adversarialism will always be an obstacle to some witnesses giving best evidence.”²³ Despite this, their overall assessment is that special measures have been useful and if the process of identification of VIWs and the selection of special measures are both improved then their impact could be even more effective in terms of achieving best evidence.²⁴ My main concern with their argument that VIWs exist across a spectrum rather than in tightly defined categories is that special measures could become the rule rather than the exception across the whole witness population which would raise again the question of whether defendants were receiving a fair trial.

¹⁸ Ibid, 2-3

¹⁹ Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953). ETS 5; 213 UNTS 221 (ECHR).

²⁰ Laura CH Hoyano, 'Striking a balance between the rights of defendants and vulnerable witnesses: Will special measures directions contravene guarantees of a fair trial?' (2001) *Criminal Law Review*- London 948

²¹ Burton, Evans and Sanders, 'Vulnerable and intimidated witnesses and the adversarial process in England and Wales'

²² The principle of orality is based on the assumption that the best way for a jury to assess the reliability of testimony is to hear the spoken words directly from the witness and in their sight. See, Davies, M., et al. (2009). *Criminal justice*, Pearson Education. P 324.

²³ Burton, Evans and Sanders, 'Vulnerable and intimidated witnesses and the adversarial process in England and Wales'ibid. p. 23

²⁴ Ibid

With experience of special measures growing there was a demand for research into whether or not they were working in the opinion of key stakeholders, particularly witnesses themselves and criminal justice agencies. Hamlyn et al.²⁵ researched the experiences of VIWs before and after the implementation of special measures.²⁶ They collected data through surveys then one to one interviews and achieved significant sample sizes.²⁷ Their main findings were that there were significant variations on the levels of satisfaction expressed between different categories of VIWs but that overall VIWs using special measures were less likely to report experiencing stress and anxiety and crucially one third of VIWs who had used special measures reported that they would not have been willing and/or able to give testimony if these measures had not been provided to them. One of the main deficiencies of this study is that it was conducted before some of the special measures of the YJCEA 1999 had been implemented and as such is incomplete. Having said this, a before and after study such as this is useful in determining the effect special measures are having on end users.

Another group of stakeholders, the criminal justice agencies, were researched by Burton et al. to gain their views on the efficacy of special measures.²⁸ Similar to the Hamlyn et al. study this research interviewed subjects before and after the implementation of special measures. This time, however, the subjects were members of the criminal justice agencies – including police, the Crown Prosecution Service (hereinafter CPS), the Witness service and crown court staff. Overall the findings were positive in that special measures had been mostly effective. The detail, however, showed that some measures had been more effective than others.

One group whose views cannot be researched in this way are juries.²⁹ This gap in our understanding is significant because if juries are being influenced one way or another by the use of special measures then their use would be highly questionable. In order to

²⁵ Becky Hamlyn and others, *Are special measures working?: Evidence from surveys of vulnerable and intimidated witnesses*, vol 283 (Home Office London 2004)

²⁶ Phase 1 data collection took place between November 2000 and February 2001, prior to implementation and phase 2 occurred between April and June 2003.

²⁷ There were 552 interviews conducted for phase 1 and 569 for phase 2.

²⁸ Burton, Evans and Sanders, *Are Special Measures for Vulnerable and Intimidated Witnesses Working?: Evidence from the Criminal Justice Agencies*

²⁹ Because it is viewed as an offence under The Contempt of Court Act 1981 where s. 8 states that it is an offence to “obtain, disclose or solicit any particulars of statements made, opinions expressed, arguments advanced, or votes cast by members of a jury in the course of their deliberations.”

attempt to fill this gap Ellison and Munro analysed jury behavior in mock trials.³⁰ In sum, they found that special measures did not appear to influence juries in mock rape trials.³¹ Mock trial research can be problematic and limited in methodological terms, not least because of the short reconstructions (in Ellison and Munro's study, 75 minutes) and limited periods for deliberations (90 minutes). Other experimental studies³² have found no significant difference in how juries deliberated when presented with evidence given 'live' and that given on video. Though Cliff, in another doctoral thesis, did find that the credibility ratings attributed to witnesses giving evidence in open court by mock jurors were significantly higher than those whose evidence was pre-recorded on video.³³ Nevertheless further wider scale research is needed or dispensation needs to be given to research actual jurors' experiences.

In a 2010 doctoral thesis Debbie Cooper investigated the beliefs, attitudes and working practices of police and prosecutors and how these affected the implementation of the special measures provided for in the YJCEA 1999.³⁴ To do so she combined documentary analysis of case files, semi-structured interviews and statistical analysis of survey data. Her study focused on the use of special measures for child witnesses but was undertaken at a time when the Coroners and Justice Bill (2009) was set to change many of the very aspects of special measures as applied to children that she was researching. Nevertheless, her main contribution seems to be in warning of the negative consequences of introducing prescription to the process at the expense of discretion, something which could result in child witnesses being given special measures they would prefer not to have.

McLeod et al. researched the court experience of adults with mental health conditions and reported that the provision of special measures and proactive support through intermediaries makes a positive impact on the court experiences of this category of

³⁰ Ellison Louise and Munro Vanessa, 'A 'Special'Delivery? Exploring the Impact of Screens, Live-Links and Video-Recorded Evidence on Mock Juror Deliberation in Rape Trials' (2013) *Social & Legal Studies* 27

³¹ Ibid

³² For example Chris Fullwood, A Judd and Mandy Finn, 'The effect of initial meeting context and video-mediation on Jury perceptions of an eyewitness' (2008) *Internet Journal of Criminology*

³³ Louisa Cliff, 'New measures for witnesses: are they performing as anticipated?' (DPhil thesis, University of Glasgow 2011)

³⁴ Debbie Cooper, 'Special measures for child witnesses: a socio-legal study of criminal procedure reform' (DPhil thesis, University of Nottingham 2010)

VIWs.³⁵ Meanwhile, Charles used CPS case file reviews to explore the decisions and actions of prosecutors in regard to special measures.³⁶ He found that there was evidence that prosecutors were routinely not engaging in early discussions on special measures among themselves or with investigating officers and that this could give rise to identification problems. Of the seventy-five case files reviewed, fifty-five resulted in an application for special measures of which forty were granted.³⁷ While such methodology can uncover rich data it does rely on the assumption that case files are thorough and up to date.

Overall, it is reasonable to characterise the literature on special measures in England and Wales as supportive of such measures though aware of their imperfection and need for ongoing review. Where faults were identified these tended to be matters of process and implementation rather than with the principles behind special measures. The suggestion that special measures undermine the rights of the defendant does not find a great deal of support in the English literature.

1.2.2 KINGDOM OF SAUDI ARABIA (KSA)

Despite the recognition in Islam of the importance of protecting witnesses, there are no independent studies on the topic of witness protection in the KSA. This may be attributable to the modern Saudi regime, which has left the issue unresolved until now. For example, there is no codification of judicial provisions. However, the provision of testimony and securing of witnesses has been addressed in a number of books of Islamic heritage as I will discuss in chapter three. In addition, the four Sunnh schools, in their jurisprudential books, feature a special chapter devoted to this subject and touch upon each aspect of testimony and witnessing; for example, performance, endurance, conditions, justice, perjury and the penalties assessed against those caught giving false testimony. They do not, however, explore the issue of witness protection either procedurally or substantively something which I believe marks this problem out as a

³⁵ Rosie McLeod and others, 'Court experience of adults with mental health conditions, learning disabilities and limited mental capacity' (2010)

³⁶ Corrine Charles, *Special measures for vulnerable and intimidated witnesses: research exploring the decisions and actions taken by prosecutors in a sample of CPS case files* (Crown Prosecution Service, Research Team Strategy and Policy Directorate April 2012)

³⁷ Ibid

distinctive, substantive research topic. Despite the absence of Saudi studies, the legal literature of other Arab countries may shed some light.

There are two doctoral theses that have been undertaken by researchers at Egypt universities. The first to be written was by Ahmed Alsolyh,³⁸ who summarized the position under Egyptian law on the rights of criminal protection and the security of witnesses while drawing comparisons between Egyptian and French laws. Alsolyh states that Egyptian law does not have a statute for protecting witness during the legal process but despite this the Egyptian legal system, like most Arab systems, punish those who harm witnesses after a trial. In addition, Alsolyh discusses the protections given to witnesses in the United States. His objective was to learn from France jurisdiction in terms of protecting witnesses and fill the gap in Egypt law. He concludes that a law should be introduced in that jurisdiction to protect witnesses from harm and that furthermore, sentencing should include consideration of whether there have been attempts to intimidate the witness.

The second study was by Ameen Mohammed,³⁹ whose thesis is also a comparative study between Egyptian and French law. He discusses the definition of testimony and witnesses and the conditions of witness testimony under both sets of laws, then he examines protecting witnesses' personal information, their location and identity. Finally, he discusses the punishment of those who reveal witnesses' information, whether they are government workers or individuals. The objective of this study was to draw attention to the lack of protection afforded witnesses in Egyptian law, and to offer some suggestions for law-makers on reform.

Both studies are different from the current one in several ways; they have not addressed witness protection under Islamic law as I will do in this research, they have not addressed VIWs in Islamic or in Egyptian law, they did not compare Islamic law with French jurisprudence in terms of protecting witnesses as criminal law in Egypt is based on Islamic law. However, the main difference is that my study compares Saudi law with English law in term of witness protection, whereas in the two Egyptian studies comparison was made with French law.

³⁸ Alsolyh Ahmed, *Legal protection and security for witnesses a comparative study* (Dar alnhadh alarabiyh Cairo 2006)

³⁹ Mustafa Muhammad Amin, *Legal protection for witnesses in criminal lawsuit a comparative study* (Dar al-Mattbuaat al-Jaamiyah 2010)

In general, I would describe the state of the Saudi legal scholarship as largely descriptive of Islamic law. This is because the critical thought is not a skill which is cultivated in the Saudi educational system, particularly the criminal legal system as belonging to Sharia law. I think this is one of the main obstacles preventing criminal law in the KSA from seeking to learn for the jurisprudence of other jurisdiction. However, in this thesis I will analyse Saudi law critically to highlight problems in the system as far as witnesses are concerned.

1.3 Statement of the problem: the motivation for this study

The main motivation behind this research is that, in my opinion, and in those of many international non-governmental organization (NGOs), marked deficiencies in their treatment of VIWs within the CJS. These deficiencies become clear when comparisons are made with countries such as the UK, the United States, Australia and Canada which seek to improve justice by facilitating best evidence through measures to protect witnesses from the stress, anxieties and potential for harm from being witnesses. The researcher will attempt to illustrate in what ways Saudi criminal procedures are different and outline the deficiencies in Saudi criminal procedure. The following are the most important gaps.

The first gap in the criminal procedure system is that no secondary legislation has been issued or guides to specifying substantive regulations, and procedural regulations for a clear explanation of the Law of Criminal Procedure (hereinafter LCP) to those involved with the CJS in any similar way to the English system, which leads to a problem in addressing the shortcomings of criminal law procedure in the KSA. The second gap is the absence of a legal system which incorporates children and women witnesses in the investigation and trial stage of criminal cases. Article 13 of the LCP states that: “Investigation and trial of offences committed by juvenile offenders, including girls, shall be conducted in accordance with the relevant laws and regulations.”⁴⁰ In other words, at present, there is no Saudi criminal law dealing with children or women. This is worrying, for these groups are most in need of special measures to enhance participation in criminal issues as they are likely exposed to coercion, intimidation and

⁴⁰ Law of Criminal Procedure 2001- KSA

threats, political pressure, family pressure and cultural or tribal impact. So, the CJS should take account of the psychological and social effects of these categories during the process. The third gap has to do with control resting in the hands of the men in power and lack of recourse and accountability when these men enforce laws using illegal or inhuman methods. Article 15 of the LCP states that: “All public law enforcement persons shall implement the orders of judicial entities entered pursuant to this Law, and may use any appropriate means thereof.”⁴¹

Finally, there is no witness box; all witnesses in all cases in Saudi courts testify in front of the judge, lawyers and defendant in the courtroom. There are no rules regulating listening or the entry of witnesses and defendants in the courtroom. In England and Wales, there is a specific place for each person involved in a trial, whether witnesses, defendants and lawyers. Judges in the KSA have all the decision-making power in courtrooms; lawyers have no right to correct judges, even if they make a mistake in the criminal proceedings. In England and Wales, lawyers and prosecutors can challenge violations of legal procedures during the trial.

The KSA is a relatively new state when compared to many Western countries or Arab countries. Filling the legislative gaps is possible in Saudi law, especially with respect to procedural matters. For example, the Saudi government felt that it must develop a modern judiciary that included the use of technology in its courts. The Saudi Ministry of Justice has announced that it will now allow the testimony of witnesses using live links.⁴² This is a practice inspired by courts abroad. Adoption of such a practice by the Saudi judiciary is a good indicator of the spirit behind the new Saudi legal system. Law of Procedure before Sharia Courts (hereinafter LPSC) Article 118 states,

*“If a witness has an excuse that prevents his appearance to testify, the judge shall proceed to where he is to hear it or the court shall assign one of its judges to do so. If the witness resides outside the area of the court's jurisdiction, the court shall deputize the court of his place of residence to hear his testimony.”*⁴³

⁴¹ Ibid

⁴² Al Jamaan Osama, 'Start working to hear the testimony at courts through the display screens' *Al Riyadh Newspaper* (Saudi Arabia <<http://www.alriyadh.com/717308>> accessed 20 July 2015

⁴³ Law of Procedure before Sharia Courts 2000 - KSA

This suggests that the KSA may benefit and learn from the English legal system and, if the Ministry of Justice opens the doors for legal researchers and scientists to discuss systemic gaps and possible solutions, it will signal that the Saudi regime is open to reform in the field of criminal justice. My aim as a researcher is to find the benefits and learn from the experience of England and Wales in this regard. This research will look into the details regarding special measures for witnesses in England and Wales.

1.4 The purpose of this study

The purpose of the thesis is to consider whether ‘special measures’ used in England and Wales could be transplanted to the KSA. It seeks to highlight the need for witness protection in the Saudi CJS and the consequences of not having such protection, recognizing the significance and nature of witness protection and special measures for witnesses, as well as the historical perspectives of Sharia law on witness protection. The thesis will also seek to critically analyse the views of contemporary Muslim scholars on the possibility of taking advantage of English law in order to apply special measures to protect witnesses, and will further analyse the special measures for witnesses in England and Wales and discuss the advantages and disadvantages of these measures according to the viewpoints of English scholars. Furthermore, it will seek to further understand the problems related to the implementation of special measures for witnesses in England and Wales, reflecting on the challenges there may be in incorporating these measures in the KSA law. It will further attempt to determine obstacles that prevent witnesses from testifying in criminal cases in the KSA, and will try to find a cure for these problems in the laws of evidence in England and Wales.

The thesis will also seek to create a general framework for comprehensive and effective KSA criminal legislation with regard to the legal protection of witnesses and the issues that can affect it and it will consider the prospects for making use of special measures for witnesses in the Saudi courts. It will further explore the possibility of altering the text of the KSA criminal laws to include legal rules that protect witnesses from any harm.

1.5 The significance and originality of the study

There is no existing study of the place of witnesses in Saudi law. There is no existing study of the issues concerning transplanting special measures from England and Wales to the KSA. Understanding how English court proceedings work and what English jurisprudence has to say about special measures may help the KSA scholars and policy-makers develop appropriate protections in the future. Encouraging the development of a judiciary with an openness to legal research and specialists can help to bridge any shortcomings in the Saudi justice system and contribute to its future effectiveness.

The contribution of the study will be the following:

- To offer an original comparative study between English law and Saudi law in the field of measures to protect VIWs.
- To offer recommendations to bridge the gaps in the criminal legal system in the KSA law particularly with regard to protecting VIWs.
- To provide an original critical study of using the principle of *maslaha* in criminal law to bridge the gap in the criminal legal system in the KSA law, especially with regard to women's and children testimony.
- To establish a new set of criteria which could be used to evaluate the appropriateness of the transfer of the special measures for witnesses from English law to the KSA law. Which will give Saudi legal scholars motivation to build and reform criminal law in the KSA.
- To offer enhanced understanding to help decision makers in the KSA provide for the legal protection of witnesses, which may help Saudi prosecutors increase conviction rates for serious crimes and bring the KSA towards a compliance with human rights obligations.

As a researcher in the field of criminal justice and criminal procedures in the KSA, I have to explore whether the special measures for witnesses in England and Wales conflict with Saudi law; or whether they could contribute to bridging the gaps in the litigation system, particularly with regard to the protection of VIWs. To the best of my knowledge and based on the literature search conducted this thesis will be entirely original in terms of its main objectives and Saudi context.

1.6 The objectives of the study

I have set the following set of specific objectives for the study. Each objective consists of one infinitive sentence in order to draw a conclusion from within the scope of the thesis:

- 1- To identify and explain the need for special measures for the protection of VIWs in the KSA legal system and to the consequences of not having such measures.
- 2- To build knowledge of the different facets of the protection of VIWs in the CJS by means of a comparison between the KSA legal system and English legal system.
- 3- To analyse and discuss the experience of England with regards to the special measures for the protection of VIWs, particularly those included in the YJCE Act 1999.
- 4- To examine the historical perspectives of Sharia law on witness protection and the views of contemporary Muslim scholars about the possibility of taking advantage of English law in order to apply special measures to protect VIWs. Including evaluating the application of *maslaha* in the transplanting the special measures.
- 5- To evaluate the issues raised both theoretically and practically concerning the transfer of special measures and then provide a framework for testing whether the transfer of special measures is feasible.
- 6- To offer concrete recommendations both to Saudi legislators and to researchers working in this field.

1.7 Research methodology

This study adopts a comparative approach, which highlights the similarities and differences among two or more phenomena. I adopt a doctrinal method, systematically researching, analysing and critically evaluating legal rules and their inter-relationships. As one group of legal scholars has asserted "... it is the doctrinal aspect of law that makes legal research distinctive and provides an often under-recognised parallel to

‘discovery’ in the physical sciences”⁴⁴ while when a comparative dimension is added, this doctrinal analysis “... examines the relationship between doctrinal developments in different countries, tracing the transfer and spread of specific rules.”⁴⁵

The key element of the doctrinal method as used in this study is the doctrinal comparison analysis that is set out in chapters 6 and 7. In these chapters the study reaches the point where the central purpose of the thesis is met and its originality is fully demonstrated. While chapters 2 and 3 offer a substantive insight into the Saudi context in order to understanding the position of witnesses in the KSA. In chapter 4 I examine some of the main points of contrast between England, Wales and the KSA. In chapter 5 I discuss the legal development of ‘special measures for witnesses in England and Wales’ in order to have a clearer picture of their use in English law.

The current study aims to present arguments for reinforcing the right of legal protection for witnesses through legal guarantees, which are provided to them when they offer testimony to the court. Therefore, this study is analytical, critical and comparative, and it aims to examine and identify the issue in question to attract attention and interest to the problem and its dimensions and consequences, this aim can be achieved by critically examining the legal sources, research, periodical publications and releases and related decisions of judges and by comparing them with each other.

The researcher will discuss special measures for VIWs in England and Wales, under the YJCEA 1999. Regarding the KSA, it will include Islamic references that refer to witnesses because there no legal provisions for witnesses in the KSA as there are in English law.

The researcher will exclude references that refer to the security of witnesses with respect to the procedures and laws in both countries and also, exclude any law or procedures to protect any person involved in the justice system, including judges, lawyers, police officers, and the witness’ family, including providing a new identity and place of residence for witnesses. I will also exclude applications for witness anonymity

⁴⁴ Council of Australian Law Deans ‘Statement on the Nature of Legal Research’ May and October 2005 Available at <http://www.cald.asn.au/docs/cald%20statement%20on%20the%20nature%20of%20legal%20research%20-%202005.pdf> accessed 8th December 2015

⁴⁵ Robert W Gordon and Morton J Horwitz, *Law, Society, and History: Themes in the Legal Sociology and Legal History of Lawrence M. Friedman* (Cambridge University Press 2011)

which can be made pre-trial under sections 74 to 85 of the Coroners and Justice Act 2009. I will also not be considering the many reforms to *evidence* law that have been introduced in English law, such as those to hearsay and bad character evidence (in the Criminal Justice Act 2003), or to the changes to the admissibility of ‘sexual history’ evidence (in the YJCEA, s. 41).

1.7.1 LIMITATIONS OF THE STUDY

Research into many aspects of the KSA society and certainly the legal domain carries with it some unavoidable limitations. Firstly, access to information that would be easily obtained by a researcher in, for example, the UK cannot be found or may not even exist. Case records, guidelines issued by criminal justice agencies, statistics related to the CJS and similar documentation are not available. Secondly, there is not a significant scholarly tradition of research which critically analyses existing Saudi laws and criminal justice practices. Hence there is almost no existing literature to draw on, compounding the lack of ‘official’ information and documentation. Therefore, for the Saudi side of the comparative doctrinal analysis this thesis is heavily reliant on the holy texts of Islam, published primary legislation of the KSA, the published opinions of Saudi and other Arab legal scholars both historical and contemporary and those relevant cases that are reported in the media.

The fact that in the KSA Sharia law is based on interpretation of holy texts and that there are multiple interpretations places limitations on (or perhaps more accurately adds complexities to) the use of the doctrinal analysis method compared to those contexts with more systematic formulations of the law or what is sometimes referred to as ‘black-letter law’.⁴⁶

⁴⁶ Paul Chynoweth, ‘Legal research’ (2008) *Advanced research methods in the built environment* 28

1.8 Outline of the thesis

The thesis consists of nine chapters, each of which will work towards the final goal of determining how the KSA courts can learn from the experiences of courts in England and Wales in terms of protecting witnesses. Seven of the chapters will contain substantive analyses, with the remaining two providing introductory and concluding remarks. Following this introductory chapter, subsequent chapters proceed as follows.

Chapter 2: The Position of Witnesses in the KSA Criminal Justice System

Chapter 2 outlines the importance of witness testimony in Islam in order to demonstrate that not only is there a problem regarding the protection of VIWs in the KSA criminal law, but that this is a problem that is worth addressing because of the importance of witness testimony to the CJS in that jurisdiction. In doing so, the chapter undertakes a doctrinal analysis that draws on primary legislation, case law and commentary from academics and practitioners. The chapter will be stating the problem to establish why it is important to protect VIWs, this problem being that the quality of the KSA justice system is being undermined by the absence of protection for VIWs. Next I consider a major issue that is amplifying this problem: the lack of status in law of women and child witnesses. Here I will consider evidence from those considered unacceptable as witnesses under the KSA criminal law. Why does Islamic law treat women and children testimonies in criminal cases differently to adult men? What guarantees are provided by the KSA criminal law that can stand as a barrier against any harm that might be inflicted on these witnesses due to their testimony?

Chapter 3: Contextualising the position of Witnesses in the KSA Criminal Justice System

In Chapter 3, I examine three parts to understanding the position of witnesses in the KSA. In part one, I present an overview of the KSA legal system as it relates to criminal law. It includes an overview of the sources of the KSA law, the basic principles of Sharia and the four Sunnah schools which are acknowledged by Muslims to be the legitimate interpretations of the Divine texts. I then turn to the essential elements of crime and punishment, including the three types of crimes and their associated punishments. Following this, I outline the structure of the KSA courts both pre- and post-reform. The importance of these summarised explanations of the KSA law and

criminal justice is that it is into these principles and structures that any new measures to protect VIWs will have to take their place. The chapter assesses whether the KSA procedures and law enforcement meet the standards of procedural law for witness protection during trials.

Chapter 4: Key Differences between the Legal Systems of England & Wales and the KSA

In Chapter 4, I examine some of the main points of contrast between the English and the KSA law and CJSs. This is by no means intended to be taken as fully comprehensive as this is beyond the scope of this thesis and could constitute an entire thesis in itself. Furthermore, the contrasts in the role and treatment of witnesses are deferred until the following chapter which focusses on this question. The aim of this is, therefore, to describe and discuss the points at which the two legal systems differ in order to carry this forward to the further evaluation of the viability of the transfer of special measures for VIWs as operated in England and Wales to the KSA, with the key question being: Do any of these contrasts rule out, inhibit or facilitate such a transfer?

Chapter 5: Special Measures in England and Wales

Chapter 5 utilises a doctrinal approach to examining special measures for witnesses in order to have a clearer picture of their use in England and Wales as well as describing the most relevant provisions of the key piece of legislation, the YJCEA 1999. Thereafter one can move on to evaluate whether there are any problems with these measures and to discuss the advantages and disadvantages of the measures in the YJCEA 1999. Thus, this part examines the following issues: the legal basis for special measures for VIWs, testimony and witnesses in English law, the concept of witness protection, the protection of victims of sexual violence and how this provides impetus for special measures and, finally, the benefits and drawbacks of the special measures in the YJCEA 1999.

Chapter 6: Transplanting Special Measures into the KSA: The principle of *Maslaha*

In Chapter 6, I discuss the concept of al *maslaha* ‘public interest’ in Islamic law because this is the key principle in evaluating the transfer of special measures for VIWs.

I will outline three categories of *maslaha*, firstly the recognised type, secondly the ‘nullified’ category, and thirdly the unrestricted category which lies between the first two types and neither agrees nor disagrees with the Quran, Sunna or *ijma* of the *fuqaha*. In this chapter, I will highlight the conditions for valid *maslaha* to analyse whether or not these conditions are aimed at preventing *maslaha* from becoming a tool for inserting individual preferences, and providing a counter argument to opponents who see the *maslaha* doctrine as a means for self-interested parties to arbitrarily create Islamic law. The chapter assess whether transferring special measures to the KSA is possible by using this principle.

Chapter 7: Transplanting Special Measures into the KSA: Specific Special Measures

The aim of this chapter is to develop the arguments emerging from the previous chapters concerning special measures for witnesses as codified in England and Wales and their potential transfer to the KSA law. There are two sections to this chapter. In the first section, I discuss a set of scholarly criteria which could be used for the systematic evaluation of the appropriateness of the transfer of the special measures for witnesses. In the second section, I examine specific special measures and their potential to be transplanted within KSA courtrooms; these include screens, live television links, evidence in private, video recording of evidence in chief, and removing the Bisht. In this chapter, I discuss the concept of *maslaha* in Islamic law as the starting point to transplanting the aforementioned measures and, furthermore, their own potential for being transplanted within Saudi courtrooms. I also acknowledge the challenges to importing special measures that are likely to come from Sharia scholars and I argue that those challenges can be rebutted and overcome.

Chapter 8: The KSA, Special Measures and Human Rights

In this chapter, I address the human rights critique of the KSA, its laws and its CJS. I explore to what extent there have been steps undertaken to improve these rights, in particular the right to a fair trial. The chapter assesses whether the Saudi CJS meets the standards of Human Rights for witness protection during trials. Whether the guarantees in Saudi procedures for testimony in court can protect witnesses’ rights is also considered.

Chapter 9: Summary and Conclusion

This chapter seeks to identify the key conclusions that should be drawn from the thesis and will propose some specific policy suggestions and recommendations for Saudi politicians, scholars, judges, and lawyers about the feasibility of importing special measures for witnesses into the KSA law, and the best measures to be applied in Saudi courts that do not conflict with Islamic law. To conclude the thesis, I will (1) examine the special measures available for witnesses in the courts of England & Wales, (2) outline the particular challenges that witnesses face during adversarial criminal proceedings in Saudi courts, and (3) try to determine whether Saudi courts can benefit from the implementation of special measures for witnesses. Each chapter will explore this overarching theme, each from a different perspective.

1.9 Summary

To summarise, the thesis will consider the position of witnesses in the CJS of the KSA and contextualise the position of witnesses by stating the problem addressed in the thesis as well as discussing the four schools of Islamic thought, the position of women and children in the CJS of the KSA and, therein, comparing and contrasting the experiences of vulnerable witnesses at the criminal cases in the KSA with those in England. It will then analyse the main differences between the legal systems of the KSA and England. This is by no means intended to be a fully comprehensive analysis of all aspects of the CJSs, as this is beyond the scope of this thesis. Next it will present an overview and discussion of the special measures provided for VIWs in England and Wales under the YJCE 1999 in order to have a clearer picture of their use in England and Wales. After this, the thesis introduces and discusses the principle of *maslaha* as the key tool with which to evaluate the appropriateness of the transfer of special measures for VIWs to the KSA. From there, the thesis applies *maslaha* and a framework of criteria devised specifically for this purpose to the question of the transfer of these special measures. Lastly, the doctrinal analysis is then reviewed in the context of human rights and the critique of the KSA in this regard. The final chapter in this thesis summarises this study, and its main findings and makes recommendations for further research.

CHAPTER 2

THE POSITION OF WITNESSES IN THE KSA CRIMINAL JUSTICE SYSTEM

2.1 Introduction

Many prospective witnesses in the KSA who submit testimony in court giving their eyewitness accounts of events at crime scenes find themselves put under pressure and subject to potential intimidation by the accused. Such pressure can be psychological but also may include threats of death or bodily harm. These circumstances arise from a lack of priority given to witness protection in the Saudi CJS, a disregard for the rule of law by those engaging in witness intimidation, and the length of criminal procedures in which complainants must participate. The longer proceedings take, the more opportunity for the accused to identify witnesses and take some form of intimidating action against them. Consequently, many witnesses in the KSA prefer to keep silent, not reveal what they saw and avoid submitting testimony before judges in order to avoid this intimidation from the accused.

In this chapter the position of the witness in the CJS of the KSA is considered. To begin, I establish that witness testimony is fundamental to the CJS in Islamic law and in the CJS of the KSA. Pursuant to this I set out the problem to establish why it is important to protect VIWs, this problem being that the quality of Saudi justice is undermined by the absence of protection for VIWs. Next, I consider a major issue that is amplifying this problem: the lack of status in law of women and child witnesses and the particular controversy concerning complainant witnesses in sexual offence cases where I draw comparisons with the provisions in England. I then move on to a brief analysis of what the four schools of Islamic thought have to say specifically about witness protection. The second half of the chapter aims to provide an understanding of the experience of witnesses through the KSA criminal justice process and again I draw comparisons with England by setting out the rights and protections afforded to witnesses and victims under non-statutory standards derived from the Witness Charter and Victims Code.⁴⁷

⁴⁷ Ministry of Justice, *The Witness Charter 'Standards of care for witnesses in the criminal justice system'* (Ministry of Justice December 2013)

2.2 The importance of witness testimony in Islam

The purpose of this section is to demonstrate that not only is there a problem regarding the protection of VIWs in the KSA, but that it is a problem that is worth solving because of the importance of witness testimony to the CJS in that jurisdiction. Hence to commence I establish that witness testimony is fundamental to the CJS in Islamic law and in the CJS of the KSA.

Islamic law gives substantial attention to the role of witnesses. The Quran states “And neither scribe nor witness should be harmed”⁴⁸ meaning that in order to protect one’s own rights and benefits, one should not disturb the rights and benefits of others. This also tells us that causing harm to a witness is illegal. From Sunni we read, “Honour the witnesses, God has extracted their rights and pays their injustice.”⁴⁹

In addition, the KSA law has confirmed, that witnesses must be protected during the giving of the testimony, article 169 of the LCP stipulates:

*“Testimony shall be given at the court session, and each witness shall be heard separately. Where necessary, witnesses may be kept apart and confronted with each other. The court shall refuse to direct any question intended to influence the witness, or if it is a leading question, the court shall not allow the directing of any indecent question, unless it relates to material facts, or leads to a decision in the case and shall protect the witnesses against any attempted intimidation or confusion during the testimony.”*⁵⁰

This article has given the court the authority to take all necessary measures to achieve the protection of witnesses.

Witness testimony is, indeed, crucial to the CJS of the KSA. Together with confession it is the preeminent form of evidence. Indeed, for most Muslim scholars, these are the two

⁴⁸ Holy Quran, surat Al-Baqarah, verse 282

⁴⁹ Bahooti Mansour, *The Explaining of the Hanbali Figh of Islamic sects* vol 2 (6 edn, Dar Al-Fikr 2010), 443

⁵⁰ LCP 2001

main forms of evidence.⁵¹ For a judgement to be reached in *hudood* and *qisas* cases the consistent evidence of two witnesses must be heard by the judge.⁵² In cases of adultery four male witnesses are required.⁵³ Furthermore, not just any witnesses evidence will be considered acceptable, however consistent it is. To be accepted the witness must be Muslim (some schools accept the evidence of non-Muslims when the case only concerns non-Muslims, but not when required to testify against a Muslim), an adult male (some schools accept the evidence of two women as equivalent to one male)⁵⁴ of sound mind, someone who can speak (dumb people are not accepted, even if the judge can understand their sign language), who has a good memory and reliable character.⁵⁵ As to who decides who is acceptable as a witness, this is in the hands of the judge.⁵⁶ In many cases crimes are not witnessed by two 'qualified' witnesses and it is particularly unusual for four witnesses to be able to provide testimony in the case of adultery. This means that often a judgement cannot be arrived at on the basis of witness testimony.

In a crucial difference from English law, in the KSA courts if the client cannot prove his claim in civil court⁵⁷ he has the right of offering swearing oaths to the defendant. The oath can be about his own deed or another person's deed in a positive or negative way. For example, he might say, "I swear by God that I have not sold or bought it, or I have sold it or bought it" (in the case of a property matter). Therefore, this oath is regarded as evidence to end the dispute in civil cases.⁵⁸ Where the point is reached that neither complainant nor accused have presented convincing evidence from the appropriate number of witnesses the oaths mechanism is triggered. Under this mechanism the judge decides which party has the opportunity to issue the first challenge to the other to take an oath as to the truthfulness of their testimony.⁵⁹ If the challenge is accepted and an oath is sworn then the challenged party wins the case.⁶⁰ Alternatively, the challenged may refer back the challenge to the original challenger. If they swear the oath the case

⁵¹ Abu alfaraj Maha, 'Evidence in Islamic law: reforming the Islamic evidence law based on the federal rules of evidence' (2011) 13 Journal of Islamic Law and Culture 140

⁵² Ibid, 147

⁵³ Ibid, 147

⁵⁴ I will explain the arguments later in this chapter.

⁵⁵ These conditions are defined in the second source of Islamic law (Sunnah) and are mandatory for Saudi judges to apply it in the court.

⁵⁶ Maha, 'Evidence in Islamic law: reforming the Islamic evidence law based on the federal rules of evidence', 146

⁵⁷ This oath is not acceptable in *Hudood and Qisas* crime under Islamic law.

⁵⁸ Mansour, *The Explaining of the Hanbali Fiqh of Islamic sects* , 450

⁵⁹ LPSC 2000, chapter 3 Oath, articles 107-111.

⁶⁰ Ibid

will be won by them. Hence the role of the judge in selecting who to offer the first challenge to is highly significant.⁶¹

Any witness that knowingly gives false testimony at any stage of the court proceedings will have committed the offence of perjury.⁶² Beyond this and regarding the oath, lying under oath is among the most serious sins that a devout Muslim man can commit.⁶³ Under the oaths process the court effectively assumes that a devout Muslim is incapable of lying under oath, which is a major assumption to make as the life or liberty of the person concerned could be at stake. Conversely, the absence of oath before giving testimony may be perceived by some witnesses as a license to make untrue statements.

There are, however, three safeguards in place to mitigate against the possibilities of false evidence. First, is the *Adalah* 'good character' test whereby the judge evaluates whether the witness is sufficiently known to "Adhere to the Islamic religion, righteous, leaving the insistence on minor sins; and known to avoid all the *kabair* ⁶⁴ such as committing adultery or undertaking any act punishable by fire in the hereafter"⁶⁵ to ascertain a person's trustworthiness as a witness; second is the safeguard from the stipulation in the Sharia that should a potential witness have any interests in the case which are adverse to the person against whom he is to testify his testimony will be ruled inadmissible, for example, if a witness would benefit financially through the conviction of the defendant they may not testify; thirdly is the aforementioned sanction of perjury.

To sum up, witness testimony is crucial to the CJS in the KSA but a number of procedural issues (the inadmissibility of women and children as witnesses, the other criteria for being classed a 'qualified' witness, the requirements for a given number of qualified witnesses, and the absence of cross-examination of witnesses) are likely to be preventing the achievement of best evidence. These deficiencies are returned to later in the chapter.

⁶¹ M Baroody George, 'Sharia Law of Islam' (*Aramco World*, 1966) <<http://archive.aramcoworld.com/issue/196606/sharia-law-of-islam.htm>> accessed 23 March 2013

⁶² LCP 2001

⁶³ George, 'Sharia Law of Islam'

⁶⁴ The major sins in Islam

⁶⁵ Ahmed E Souaiaia, *Contesting Justice: women, islam, law, and society* (SUNY Press 2010), 157

2.3 The problem stated: lack of protection undermining quality of justice

Prospective witnesses in the KSA who give testimony in court can find themselves put under pressure and subject to potential intimidation by the accused, by criminal justice agencies or indirectly through the media or the community. Such pressure can be psychological but also may include threats of death or bodily harm.⁶⁶ These circumstances arise from a lack of priority given to witness protection in the Saudi legal system, a disregard for the rule of law by those engaging in witness intimidation, and the length of criminal procedures in which complainants must participate. The longer proceedings take, the more opportunity for the accused to identify witnesses and take some form of intimidating action against them. Consequently, many witnesses in the KSA prefer to keep silent, not reveal what they saw and avoid submitting testimony before judges in order to avoid this intimidation from accused.⁶⁷

Quantifying the effect of the absence of witness protection measures in the KSA, (how many witnesses fail to testify, how many give false testimony under duress, how many crimes are not reported etc.) is highly problematic, especially in a country where the research and official recording of such matters is not an established practice. The issue tends to raise itself in the form of high profile cases reported in the media either in the KSA or the wider Arab region.

Clearly, witnesses can face stress and anxiety, especially not just from the accused but also from the media and attitudes of the public towards the alleged crime, the specific case or the accused, which can cause them to refrain from testifying or to lie to the competent authority. One case of non-appearance of witnesses due to such stress and anxiety involved the Qatif unrest which took place in 2012 and 2013 and had been subject to intense media scrutiny.⁶⁸ From the same place, the Qatif rape case will discuss in this chapter is another example of indirect intimidation whereby women

⁶⁶ As reported on MBC News, 'Inhabitants of this region in the forefront of "threat" issues at Saudi courts' 17 March 2015) <<http://www.mbc.net/ar/programs/mbc-news/articles/سكان-المنطقة-هذه-سكان-تهديد-دفع-ضاي-في-المحاكم>> accessed 17 October 2015

⁶⁷ Hayek Shaden, 'Absence of witnesses' delay the trial of the accused for the fourth time!' *Al-hayat newspaper* (<<http://www.alhayat.com/Details/527064>> accessed 20 February 2016)

⁶⁸ Al Shaya Khalid, 'Qatif court looking into riots issues next week, after being postponed due to non-attendance of witnesses' *Al-Arabiya news* (<<http://www.alarabiya.net/ar/saudi-today/2013/06/14/مدكمة-المنطقة-بل-السبوع-الشغب-لم-تُبري-اقضاي-4-ت-بحث-القطيف>> accessed 18 Feb 2016)

victims of rape learn of the treatment of the victim in this case and fearing the same fail to report the crime. All these matters contradict the natural course of justice and can easily cause a miscarriage of justice. Therefore, Saudi legislators should create statutes that protect VIWs from the charging of the defendant till the conclusion of the case and take other procedural steps to address stress and anxiety such as creating Witness Care Units similar to those operating in England and Wales.⁶⁹

The problem of intimidation clearly arose in the case of Mohammed Ahmed Hussein, an Egyptian who was the only witness in the Maspero case, where 27 Christians were killed as a result of the Maspero protest.⁷⁰ The witness explained that he was summoned to testify before a military court against Major General Hamdi Badean, the head of a military unit, along with two captains, one from the Internal Ministry and the other a marine. The witness testified that the first shot against the demonstrators came from the direction of Shubra⁷¹, towards Maspero square where the marine captain was. The internal ministry captain shot people from a military tank at gate 15 of the television and radio building. In addition, the witness stated that Badean shouted out at his soldiers of lower rank, "Those protestors are coming to kill you! You should defend yourselves against them. If you do not kill them, they are going to kill you all".⁷² The witness repeated his testimony before Tharout Hammadi, the government's justice adviser and the investigating judge of the case. The witness reported that he was threatened many times to change his testimony by persons including a military officer. He received another threat inside the investigative office of Hammad, who was then the judge in the investigation. After presenting the testimony, the witness was involved in a car crash that broke his leg, and a police officer at the Mansoura station refused to open a file about the accident. The witness's relative discovered that the other car involved in the crash had fake registration numbers and was not in the police's traffic registration office.⁷³

⁶⁹ Witness Care Units are in place across England and Wales and are jointly staffed by the police and the Crown Prosecution Service. The aim of WCU is to provide a single point of contact for victims and witnesses for information about the progress of their cases from the charging of the defendant(s) through to the conclusion of a case, to minimise the stress of attending court.

⁷⁰ Jamal Mintalah, 'Masbero witness: I was subjected to attempted murder because of my testimony' *Alwafd* (<<http://alwafd.org/السياسي-الشارع/492142-يديرو-شاهد-بمحاولة-تعرضت-لما-سد-بيرو-شاهد-يديرو-492142>> accessed 29 November 2014

⁷¹ Shubra is one of the largest districts of Cairo, Egypt.

⁷² Mintalah, 'Masbero witness: I was subjected to attempted murder because of my testimony'

⁷³ Ibid

This is one high profile example of the intimidation of witnesses in the Middle East, but there are most likely many other instances that have gone unreported. The experience of England and Wales, that I will discuss in detail in chapter five is there to be learned from and could form the basis of future development of the LCP in terms of the protection of witnesses.

In the end, Islam does not prevent Muslims, scholars and judges from thinking about and discussing this sort of issue or from taking action to ensure that there is no impediment to helping witnesses. It should not, in theory, be difficult for witnesses of serious crimes to testify, free from danger to themselves or their families. When the LCP in article 169 states “The court ... shall protect the witnesses against any attempted intimidation or confusion during the testimony,” there is a clear intention to be mindful of the state of mind of the witness and the need to protect them. However, in practice there are no special measures in place to achieve this in the way that there are in England.

The lack of priority given to the protection of VIWs in the Saudi CJS is a problem as it undermines the quality of Saudi justice. In the next section I discuss the status of women, children and those with mental health problems or learning difficulties as witnesses, or more correctly their lack of status.

2.4 Women and children under the KSA criminal law

Under Islamic shari'a law testimony is a fundamental means of proof. Here I will consider evidence from those considered unacceptable as witnesses under the KSA criminal law. Why does Saudi law treat women and children testifying in criminal cases differently to adult men? What guarantees are provided by the KSA criminal law that can stand as a barrier against any harm that might be inflicted on these witnesses due to their testimony?

Under the KSA criminal law these two groups of witnesses are regarded as unaccepted testimony in criminal courts. Their testimony might be used only to corroborate fully acceptable testimony or their testimony might be regarded as inadmissible. These two groups are important as they make up the majority of the Saudi population.⁷⁴ So, I will explain this issue in detail because the main beneficiaries of special measures for witnesses in English law are within these two groups – women and children. Islamic law's treatment of these two groups of witnesses is fundamental to assessing whether special measures of the type used in England and Wales can be transplanted to the KSA.

2.4.1 WOMEN

Some tribes in the Arabian Peninsula believe that women must be disposed of, even burying infant girls alive so they cannot bring shame to their families when they grow up. Arab societies consider manhood a privilege and honour, while womanhood is equated with humiliation and weakness. This theory of inferiority and inequality was prevalent in the Arab world before Islam.⁷⁵ It is certainly true that right from the Prophet's time up to the present day equal status for women has been widely debated and usually rejected by Muslim men.⁷⁶ Equally true is that other scholars see a constant theme of gender equality in the text. For example, one unequivocally states "It is

⁷⁴ Index Mundi, *Saudi Arabia Demographics Profile 2014* (last updated 30 June 2015)

⁷⁵ Gunawan Adnan, *Women and the Glorious Qur'ān: An Analytical Study of Women-related Verses of Sūra An-Nisa'* (Universitätsverlag Göttingen 2004)

⁷⁶ Hiba Khan, 'An open letter to Muslim men from an angry Muslim woman' *Independent* (<<http://www.independent.co.uk/voices/an-open-letter-to-muslim-men-from-an-angry-muslim-woman-a6961706.html>> accessed 10 April 2016)

certainly true that The Quran in all its normative statements gives equal status to men and women.”⁷⁷

Despite the above, Islam is very flexible in dealing with women. It is widely considered by modern Muslim scholars such Yusuf al qaradawi that islam have laid the foundation to ensure women's equality and rights.⁷⁸ As laws are enacted to protect the dignity of women and prevent their exploitation physically or mentally, they then have the freedom to delve into many areas of life. Yet, some customs, cultural traditions and social norms are attached to Muslim women in the KSA societies that come from neither religion nor creed. Islam decrees equality between men and women in humanity and in worship, does not distinguish between the two and is not contrary to women’s training and employment, which are specific to them. In essence, men and women are seen as having equal value but separate roles.

Women's testimony in court is one topic that should stand out in this research, especially since examining this issue could open the door to the demand that women testify before the courts, especially if such measures appropriate to the nature of Muslim women do not contradict Sharia law.

Before we proceed to the subject, one must wonder whether a testimony from women could be accepted in Islamic law. Is it permissible for them to testify in Hudud or retribution crimes? We need then to clarify the dispute among Muslim scholars on this matter.

Witness testimony is the highest form of evidence in Islamic jurisprudence, as it is decisive in all cases meaning that the balance of witness testimony will decide the outcome of the case. In some cases, women must testify about issues that are not seen by men, such as childbirth and virginity; in any such issue the judge must accept the woman’s testimony alone.

Scholars agree on the legality of permitting the testimony of only women regarding matters that men do not usually see, such as those relating to reproductive function and

⁷⁷ Adnan, *Women and the Glorious Qur’ān: An Analytical Study of Women-related Verses of Sūra An-Nisa’*,⁸

⁷⁸ Munir Adib, 'al-Qaradawi: Islam protects women's rights without deception' (*LahaOnline*, 2005) <<http://www.lahaonline.com/articles/view/13876.htm>> accessed 10 April 2016

breastfeeding, but they differ in the number of women needed to corroborate testimony on such matters. The different schools of thought⁷⁹ on this issue are as follows:

Abu Hanafi would accept the testimony of one woman.⁸⁰ Malik and ibn Hanbal, accept the testimony of two women, and require no more than that.⁸¹ Shafie does not accept testimony from less than four women.⁸²

Women's evidence under Islamic Shari'a is covered by two fundamental rules. Firstly, the testimony of one man has the same value as the testimony of two women, as according to the Quran: *"Thou should have two witnesses of your men. But if thou cannot find two men, then a man and two women whom you accept as witnesses, so that if one of the women forgets, the other can remind her."*⁸³

The second states that a woman's testimony cannot be admitted for crimes of *hudood* and *qisas*, for according to the Quran: *"For those of your women, who commit adultery; take the evidence of four witnesses from amongst you against them."*⁸⁴

Masculine gender is inferred by the words 'your' and 'amongst you' above. In this noble verse there is a clear reference to adultery, but most scholars agree that a woman's testimony is also unacceptable in any other *hudood* and *qisas* crimes. *Al-Zahra* said that from 'the Sunnh sayings, traditions and instructions of the Messenger of Allah to his two caliphs, it follows that women's testimonies in *hudood* and *qisas* crimes are not acceptable.'⁸⁵

The Sunnh scholars consider that crimes of *hudood* and *qisas* are not provable without the testimony of two adult males. They hold that a crime of *hudood* and *qisas* cannot be proven by one man's testimony even if accompanied by two female testimonies, nor by one man's testimony and the victim's oath. The latter is unacceptable as he is deemed biased, meaning that the victim cannot make a solemn oath for themselves in the way it

⁷⁹ Abu al Bassal Ali, 'The women's testimony in Islamic jurisprudence ' (2001) 2 Journal for Economic and Legal science 143-161

⁸⁰ Ibid, p 158

⁸¹ Ibid, p 158

⁸² Ibid, p 159

⁸³ Holy Quran, surat Al-Baqarah, verse 282.

⁸⁴ Holy Quran, surat Al-Nisa, verse 15.

⁸⁵ Khan Muhammad and Farooq Rizwana, *Islam and Women* (2005), 107

is accepted in civil cases in Saudi law; however, the judge can refer to such testimony as back-up evidence when strong evidence links the accused with the crime.⁸⁶

Most scholars contest that *qisas* crimes are not provable without at least two adult male testimonies, regardless of the victim's decision to waive his rights. This opinion is founded on the crime's initial status with reference to the *qisas* punishment instead of money. Blood money is paid where the *qisas* punishment is waived or where both are reconciled. The means of evidence is not necessarily a right. Moreover, the right of *qisas* punishment needs to be proved initially for the victim before the right of forgiveness or reconciliation can be decided upon.⁸⁷

2.4.1.1 Two approaches to women's testimony

Women's testimony in criminal cases among Muslim scholars divides into two opinions. In the first opinion of scholars, *Hanafis*, *Malikis*, *Shaa'fa'is* and *Hanbalis* are banned from accepting a woman's testimony in criminal cases. These scholars hold that hudud and *qisas* require that there is no doubt whatsoever about the reliability of the witness and their testimony, something which they argue disqualifies women as they are viewed as incapable of being free of suspicion (of unreliability) due to their propensity towards forgetfulness and negligence.⁸⁸

The second opinion is that of *Imam Ibn Hazm*⁸⁹ who accepts the testimony of women in criminal and civil cases. *Ibn Hazm* and scholars who follow his thinking respond by pointing to certain verses in the Quran which suggest the role of witness is not a gendered one. For example, "*O ye who believe! stand out firmly for justice, as witnesses to God, even as against yourselves, or your parents, or your kin, and whether it be*

⁸⁶ Abd al-Qadir Awdah, *Islamic criminal legislation comparative with positive law* (Dar al-kitab al-arabi 1986)

⁸⁷ Ibid, v 2, 140

⁸⁸ Al-Maqdisi Ibn Qudamah, *Al-Muqni' 'Explain the jurisprudence of Imam Ahmad ibn Hanbal'* (8 edn, Dar 'Alam al kutub 2013)

⁸⁹ Ali ibn Ahmad ibn Hazm, known as al Zahiri (994 – 1064) was a leading scholar of the Zahiri School of Islamic Thought, The Encyclopaedia of Islam refers to him as having been one of the leading thinkers of the Muslim world. It is worth noting that the views of Hazm and his followers tend to cite text from the Quran and Sunnah in a manifest, literal sense without explanation, whereas the four schools interpreted the text. Goldziher Ignaz, 'The Zahiris: Their Doctrine and Their History' (1971) A Contribution to the History of islamic Theology, tr Wolfgang Behn Leiden: EJ Brill

(against) rich or poor"⁹⁰; and also "*And let not the witnesses refuse when they are called upon*".⁹¹

In instances where no male witnesses are available scholars also take two different positions accepting the testimony of women. One group accepts women's testimony for or against another woman, in other words where the complainant and accused are both women, even in criminal or civil cases. The second group, as per Ali bin Abi Talib, prevents accepting the testimony of women when there are testimonies of men available.⁹²

These rules seem arbitrary in modern society. They actually offend against Islam and undermine the protection of individuals in society. They also make it difficult to prosecute successfully many crimes, including homicides, thefts, sexual and violent offences. Of course this is a rhetorical question because it is impossible to know the answer. What is noticeable is, of course, that in England the place of women as competent witnesses is not contested or the subject of academic debate, unlike in the KSA. We need to acknowledge this key point as a potential reason why special measures cannot be simply and quickly transplanted from England to the KSA?

Failure to accept the testimony of a woman disempowers half of society and will significantly reduce the likelihood of crimes being punished, resulting in many criminals going unpunished. It will decisively and negatively impact the safety and security of society and hence represents a clear public harm. It also sets the KSA at odds with international human rights standards such as those enshrined in the Convention on Elimination of all forms of Discrimination against Women (CEDAW).⁹³ Article 15 paragraph 2 of this Convention states that all signatories "shall treat [men and women] equally in all stages of procedure in courts and tribunals." As the KSA did not make any specific reservation to this Article and as in practice the country is in such clear breach of its obligations in this regard it can be concluded that this Article is covered by the

⁹⁰ Holy Quran, surat Al-Nisa, verse 135.

⁹¹ Holy Quran, surat Al-Baqarah, verse 282.

⁹² Ali, "The women's testimony in Islamic jurisprudence" 156

⁹³ This treaty came into form in 1981 and was ratified by Saudi Arabia in 2000. At that time the state made two reservations: "1. In case of contradiction between any term of the Convention and the norms of Islamic law, the Kingdom is not under obligation to observe the contradictory terms of the Convention. 2. The Kingdom does not consider itself bound by paragraph 2 of article 9 of the Convention and paragraph 1 of article 29 of the Convention." The first part of the second reservation related to equality of rights to pass nationality to children and the second part concerned binding arbitration.

general reservation that the state is not obligated in instances where there is a conflict with the “norms of Islamic law”.⁹⁴

From this discussion, it is clear that there is no strong argument for not accepting a woman's testimony in criminal cases. Thus, if someone were to say there is no need for special measures for witnesses because the KSA courts do not accept the testimony of women in criminal cases, the answer is that the courts must accept women's testimony in criminal matters. This provides the foundation for applying special measures for witnesses, particularly female witnesses, in the KSA courts. Women's testimony should be accepted equally with men's as a fundamental human right as specifically provided for in international treaties.

2.4.2 SEXUAL OFFENCE COMPLAINANTS

In the KSA, nowhere is the need for the protection of VIWs more acute than in the case of sexual offences, including rape. International human rights organisations reserve their most critical commentaries for the issue of women's vulnerability and lack of access to justice in cases involving sexual violence. According to Freedom House author Eleanor Doumato,

*“Women who report sexual abuse or rape are unlikely to find sympathetic judicial authorities, and instead of receiving protection they are often accused of having had illicit sex. In rape cases, the burden of proof lies with the victim, and the offense may only be proven through the perpetrator's confession or the testimony of four witnesses.”*⁹⁵

A complainant in a sexual offence in England and Wales has particular rights as a witness. As we will see in chapter 5 he or she is automatically eligible for the protection of special measures.⁹⁶ Indeed the protection of victim witnesses in rape cases was one of

⁹⁴ Ibid

⁹⁵ Kelly Sanja and Breslin Julia, *Women's rights in the Middle East and North Africa: progress amid resistance* (Rowman & Littlefield Publishers 2010)

⁹⁶ The Witness Charter p.2 as provided for in Section 17 (4) of the YJCE Act 1999

the main motivating factors behind the introduction of special measures in the YJCEA 1999⁹⁷, some of the measures having previously applied only to child witnesses.

The plight of rape victims was one of the main motivations behind the introduction of special measures in England and Wales. The special measures have been aimed at alleviating the secondary victimisation of rape complainants by the CJS. Rape victims in England and Wales now enjoy greater support and face more sensitive treatment by justice agencies but this was not always the case as leading scholar Jennifer Temkin reminded us in a book in 1987:

*“In the 1980s, the plight of the rape victim in this country remains as acute as ever. She continues to be viewed in court and out of it with suspicion and hostility and facilities to assist her are few and far between.”*⁹⁸

Sexual offence complainants in the KSA do not receive appropriate treatment or care. To understand the disincentive to report a rape in the KSA we can consider the case of a Shia women who was gang raped in 2006 by seven men after they abducted her, known as the Qatif rape case. The men were indeed arrested and punished but the treatment of the complainant gained worldwide attention. She was found guilty of an offence of being in a state of ‘*khalwa*’ – i.e. being with a male who is not a relative. She was sentenced to 90 lashes. When she appealed against this her sentence was increased to 200 lashes and six months in prison because she had gone to the press. Part of the notoriety of the case was the fact that she told her story to the world’s media thus laying bare women’s vulnerability in the KSA legal system.⁹⁹ As a response to international pressure, the king issued a pardon and her punishment was not carried out. Importantly, she also revealed to the media that she had been attacked by her own brother who had tried to kill her (for bringing shame on the family)¹⁰⁰ something which shows that the deterrents and disincentives to reporting a rape are found both within the formal system and informally in societal attitudes and norms. Saudi women also face other disincentives to report being a rape victim arising from the nature and level of proof

⁹⁷ Louise and Vanessa, 'A 'Special' Delivery? Exploring the Impact of Screens, Live-Links and Video-Recorded Evidence on Mock Juror Deliberation in Rape Trials'

⁹⁸ Temkin Jennifer, *Rape and the Legal Process* (Sweet & Maxwell 1987), 23

⁹⁹ Setrakian Lara, 'Exclusive: Saudi Rape Victim Tells Her Story' *ABC News* (<<http://abcnews.go.com/International/story?id=3899920&page=1>> accessed 25 November 2015

¹⁰⁰ Ibid

required to secure conviction. To secure a rape conviction requires the corroborated eye-witness testimony of four male witnesses or the confession of the accused,¹⁰¹ neither of which are likely to be obtained. Many incidents of sexual violence occur in private contexts with only the perpetrator and the complainant present.

Official statistics on the incidences of sexual offences in the KSA do not exist. Furthermore, they would in no way represent the scale of the issue in the kingdom because of the taboo on reporting rape and a judicial system that is heavily weighted towards men. Nevertheless under Sharia law rape is a crime punishable by severe punishment and it is true that significant punishments have been handed down – in the Qatif rape case the perpetrators were ultimately sentenced to between two and nine years each.¹⁰² In the Qatif rape case the prosecuting lawyer argued for the rape to be treated as a *hudood* crime punishable by death but the judge instead pronounced it a *ta'azir*, one which would be tried on the basis of the judge's interpretation of Sharia law.¹⁰³ As such the required number of witnesses was reduced to two.

In another aspect of the Qatif rape case with direct relevance to the issue of special measures for the protection of VIWs, the lawyer representing the complainant claimed in court that the KSA law provided that the said accuser was not required to be in the courtroom in the presence of the defendants. For doing so the lawyer had his licence to practice revoked on the grounds of “disobeying rules and regulations” which included criticizing the judiciary and conducting activist campaigns in the media.¹⁰⁴ However, his licence was subsequently returned as the prosecutor did not pursue the case¹⁰⁵.

In my opinion, this reduced status of women in the Saudi CJS inhibits access to justice for female victims of sexual offences and prevents improvement of the amount and quality of evidence heard by the judge.

Firstly, if women witnesses enjoyed more equal treatment and were offered protection as victims of sex offences then it would surely encourage more women to report crimes and then to give evidence. Secondly, without such a change in attitudes amongst the

¹⁰¹ Maha, 'Evidence in Islamic law: reforming the Islamic evidence law based on the federal rules of evidence'

¹⁰² Ebtihal Mubarak, 'Qatif Case Verdicts Get Ministry's Backing' *Arab News* (<<http://www.arabnews.com/node/305886>> accessed 27 November 2015)

¹⁰³ Ibid

¹⁰⁴ Ibid

¹⁰⁵ Ibid

wider society, the cause of achieving best evidence in the CJS would, in the case of sexual offences, have only a marginal effect on the quality of justice as women would still feel very reluctant to bring allegations and complaints in the first place.

2.4.3 CHILDREN

Due to a perceived lack of memory capacity, the testimony of an ordinary young person is not acceptable under Sharia law. Most scholars opine that according to God, '*Take two witnesses from amongst your men*'¹⁰⁶ means not to take the testimony of youths. Nonetheless, Hanbal accepted the testimony of ordinary youths should their evidence be recorded before they depart the scene of the crime because at this point their evidence is deemed truthful and reliable, before an adult could influence the evidence.¹⁰⁷

In the KSA law article 168 of LCP confirmed that child witnesses are not able to testify at court: "If a witness is a child or his testimony is otherwise inadmissible¹⁰⁸, his statement shall not constitute testimony."¹⁰⁹

Childhood in Islam begins with the human configuration of a foetus in the mother's womb and extends until reaching the age of adulthood. *Mukallaf* is the term used to describe someone who has reached moral and physical adulthood and effectively in physiological terms refers to the appearance of pubic hair or reaching the age of 15 (which ever is the earliest) in boys and the commencement of menstruation or reaching 15 years of age in girls.¹¹⁰ Saudi law does not specify the legal age of majority children but adopts what Islamic texts mention about the *Mukallaf*.

Scholars agree that puberty is not a requirement to testify, but in terms of performance it is seen as relevant.¹¹¹ If a pubescent child witness is allowed to testify, they are required to be of sound mind and distinctly aware of the incident, present when it occurred and with a view at the time of the incident that is the subject of the testimony.

¹⁰⁶ Holy Quran, surat Al-Baqarah, verse 282.

¹⁰⁷ Ibn Qudamah, *Al-Muqni' 'Explain the jurisprudence of Imam Ahmad ibn Hanbal'* v 14, 146

¹⁰⁸ While not defined in the Law of Criminal Procedure we can assume that "otherwise inadmissible" refers to witnesses deemed mentally incapable, dumb, not of good character, non-Muslim as so forth as discussed earlier in the chapter.

¹⁰⁹ LCP 2001

¹¹⁰ Ira M Lapidus, *A History of Islamic Societies* (Cambridge University Press 2014) 93-108

¹¹¹ Abu al Bassal Ali, 'Child testimony in Islamic jurisprudence' (2009) 1 Damascus University Journal for Economic and Legal science

Scholars¹¹² differ in accepting children's testimony; there are three views of the relevance and admissibility of a child's testimony.

1. A Child's Testimony is Not Admissible

In the first view, the court is prevented from accepting a child's testimony.¹¹³ The majority of scholars are in this camp, including scholars from the schools of Hanafi, Shafii, and Hanbali. Their arguments rely on the following assumptions:

1. Sunnh¹¹⁴: the Prophet said: "The Pen is lifted from three [i.e., their deeds are not recorded]:
 - A child until he reaches puberty;
 - An insane man until he comes to his senses;
 - One who is asleep until he wakes up"
2. Boys are not able to testify because they usually forget things, so they need someone to remind them and reminder is not acceptable in Islamic law.
3. Boys are not afraid of the sin of lying, so may say imaginary 'white lies' during testimony in the courts.

2. A Child's Testimony Is Admissible

In the second view of the admissibility of the child's testimony, including some scholars such as Ibn Shihab, some Malikis and Hanbalis, such testimony is admissible. Their evidence relies on the following assumptions:¹¹⁵

1. A child has the same understanding and awareness of what is happening around them and can see events the same way as an adult, thus they have the ability to testify.
2. Reason and logic require the need to accept children's testimony, in order to protect the lives, honour, and property of a community.

¹¹² Ibid, 752

¹¹³ Ibid, 752

¹¹⁴ Abdur Rahman Al Darimi Abdullah, *Sunan al-Darimi* (Dar al-Kutub Ilmiyah 1987) v 4, 76.

¹¹⁵ Ali, 'Child testimony in Islamic jurisprudence' 754

3. Conditional Admissibility

In the third view, children's testimony should be accepted but with some conditions. Some Malikis and some Hanbalis may accept the testimony of children against other children over injury but it is not permissible to others. They put some conditions for accepting a child testimony, which are:¹¹⁶

1. Knowledge: do not accept those who do not recognise truth, or are stupid.
2. Just boys testify, do not accept girls' testimonies.
3. Agreement is required on testimony; if they differ do not accept them.
4. Do not disperse before the child testifies; if the child leaves, then his testimony is not accepted because they may learn from others what to say. I could consider this in the light of the disallowing of witness coaching of all witnesses in England where the barristers' code of conduct states that it not permissible to "rehearse, practice or coach a witness in relation to his evidence."¹¹⁷
5. Witness testimony must not come from one related to the party or an enemy of the party, whether child or not.

In my opinion, there is no specific evidence to settle the dispute over the testimony of children, and Sunnh scholars disagree on the subject. The reason for this is the eligibility of the witness, it being considered that the testimonies of witnesses are not reliable if the witness lacks full capacity. In Islamic law a child is inherently incompetent, and his testimony is not valid even under oath. This is the origin of the dispute. If something is proven, the necessity to hear the testimony of children may be arguable in cases where inference and reasoning as evidence contribute to the revealing of the truth or the formation of a court conviction, when the weight of evidence already demonstrates guilt.

To facilitate this, special measures could be implemented in Saudi courts to accommodate the views of Sunnh scholars who find in favour of the admissibility of a child's testimony in general or those who accept children's testimony with some

¹¹⁶ Ibid, 755

¹¹⁷ BSB, *The Bar Standards Board Handbook* (April 2015)

conditions. However, the ambiguous place of children's testimony in Saudi law is another factor that may mean that special measures cannot be transplanted easily from England¹¹⁸ to the KSA.

While there are major groups of witnesses deemed unacceptable, or at least undervalued, in the KSA we will see in subsequent chapters that the effect of the law in England is to provide protections and safeguards for a broad range of witnesses. Women, children, people with learning disabilities, the dumb, the physically disabled are all eligible to give evidence with the benefit of special measures. There are no 'good character' requirements preventing testimony and with the exception of spousal privilege¹¹⁹, there are no restrictions on testimony from those likely to be prejudiced through a positive or negative relationship with the accused. In my opinion, permitting and then facilitating¹²⁰ the broadest possible participation in the CJS is not only in line with the principle of open justice but plays an important part in the achievement of best evidence. In contrast, the narrow of the eligibility of witnesses as seen in the KSA, has the opposite effect.

This section and the previous one highlighting the reasons for the low priority given to witness protection have established that a problem exists, or perhaps better put, an opportunity for public good has been identified. I now turn to establishing of the opinions of Sunnh scholars on witness protection.

¹¹⁸ A discussion of child witnesses under English law is included in Chapter Five of this thesis.

¹¹⁹ Spousal privilege in this sense is provided under section 80 of the Police and Criminal Evidence Act 1984 (as amended) and gives spouses or civil partners of defendants, protection against being compelled by the prosecution to testify.

¹²⁰ The facilitating of testimony for vulnerable and intimidated witnesses in England and Wales through the use of special measures is examined in detail in Chapter five.

2.5 The opinion of Sunnh scholars on witness protection

There are no recorded studies from Islamic history about the protection of witnesses. I have, however, studied the opinions of the Sunni scholars through their texts. I conclude that these opinions can be interpreted to support the view that witnesses should always be protected to provide the best possible evidence in the courtroom. The important question at this point is why Islamic scholars did not discuss this issue explicitly. Muslim scholars did not debate witness protection in their time. The judicial system at the beginning of the Islamic state seemed not to spend time on discussing witness protection (although it is worth noting that in England political interest in witnesses is relatively new: special measures were only introduced in 1999). Additionally, the Muslim scholars did not record detailed regulations or procedures for the judges, meaning there was no guidance which outlines the law and defines the jurisdiction of the judges in the era of the four schools of Islamic thought. The procedural details were not needed initially, due to a relative simplicity of life then compared to today's more complex world. As such, these issues were not so important to them at the time, but merely procedural matters that were followed according to the prevailing practice at trials. Another important difference between the KSA and England and Wales is that in the latter jurisdiction there have emerged more campaign groups and support groups for victims and witnesses, which have led the arguments for improved treatment of witnesses in the English CJS. In the KSA there are hardly any groups representing victims and witnesses seeking reform of the CJS.

Al Hanafi's opinion

The Hanafi School mentions that the judge must punish anyone who insults witnesses in the courtroom. This suggests support for the view that witnesses need to be protected. In particular, "If an adversary tries to abuse a witness (Physical harm or swearing for intimidate a witness from testifying), he must be subject to a painful punishment".¹²¹ Hanafi's books state that the importance of witnesses providing the best evidence provides the basis for treating witnesses well during trials:¹²² "The judge must not scold

¹²¹ Trabelsi Ala uddin Ali, *In particular rulers hesitate between the two provisions* (2 edn, Mustafa Halabi 1973) 23.

¹²² AL Sarksi Muhammad, *Mabsoot*, vol 16 (Dar Alelme, 1989) v 16, 87

or blame witnesses, nor abuse them as they give testimony, to discourage them from giving testimony in court".¹²³

It is clear from these extracts that, in covering how to prevent abuse to the witness, Hanafi implicitly confirms the importance of witness protection. The Hanafi school of thought has no objections to providing witness protection, because the ultimate goal of these provisions is to protect the witness to provide the best evidence at court. On a final point, as these scholars were writing so long ago at a time before the appearance of lawyers, they do not consider the issue of witnesses being abused or intimidated by lawyers.

Al Maliki opinion

Maliki does not differ from Hanafi, in that anyone who tries to abuse witnesses in either word or deed should be punished. Al Quraafi said, "If the defendant tells the witnesses his testimony is false or tries to intimidate the witness, the judge must punish the defendant".¹²⁴ Ibn Frhon said,

*"It is necessary for the judge to ensure order amongst the opposing parties if witnesses come to testify; the opposing side must remain silent and not subject the witness to abuse or reprimand. If the defendant tries to prevent the witness from testifying, the judge must punish the defendant according to his actions."*¹²⁵

Al Shafi'i opinion

Shafi'i also does not differ from the preceding doctrines in terms of protecting witnesses both morally and physically, illustrating that Muslim jurists have an interest in protecting witnesses to provide the best evidence in the courtroom. Al Nawawi said, "If the defendant tries to terrify witnesses, the judge must issue a warning to the defendant. If he does it again, the judge must send him to prison".¹²⁶

¹²³ Ibid, v 16, 87

¹²⁴ Al Quraafi Ahmad, Al Faroq (Alama al-kitab 1990) 234

¹²⁵ Al-Maliki Bin Farhon, Tabser al ahkam 'The rules of the judgments in islam', vol 1 (Dar al-kutub al ilmiyya 2003) 172

¹²⁶ Al-Nawawi Yahya, Minhaj 'A Classical Manual on Islamic Law According to Shafi'i fiqh, vol 1 (Dar alminhaj 2008) 255

Hanbal's opinion

Hanbali follows the preceding doctrines in terms of protecting witnesses, both morally and physically. Ibn Qudamah state "The judge must refuse any question that could influence the witnesses".¹²⁷ So, the KSA law has confirmed this opinion, that witnesses must be protected during the giving of testimony. Indeed, article 169 of LCP stipulates that: "... the court shall refuse to direct any question intended to influence the witness... the court shall protect the witnesses against any attempted intimidation or confusion during the testimony." This article has given the court the authority to take all necessary measures to protect witnesses. From the opinions of the Sunni scholars, I would argue that the following is clear:

- 1 - Jurists attempt to prevent the litigants from any offensive behaviour against each other by word or hand in the courtroom in an attempt to prevent any harm which might affect witnesses' testimony.
- 2 - Jurists agree that witnesses should be treated well to encourage them to tell the truth, with support even from the Prophet who said, "Honour the witnesses".¹²⁸ Honouring witnesses and treating them well will encourage them to provide the best evidence.
- 3 - Jurists agree that the judge too must not be irritable, or speak harshly, in case this is perceived as a means to intimidate the witness.

So, the general understanding from the scholar's statements is that Islamic law codifies witness protection. The benefits of this are both to preserve people's rights and well being and also to deter would be offenders from committing crimes in the first place, knowing as they would that witnesses would be protected and that their conviction more likely.

Hence, the diligence and practice of Islamic scholars is the most important means by which a researcher can discern the appropriateness of legal provisions and procedural matters. With such knowledge, we can now consider the question of special protection measures for witnesses, and show that the proper procedures can be applied within the

¹²⁷ Ibn Qudamah, *Al-Muqni' 'Explain the jurisprudence of Imam Ahmad ibn Hanbal'* v 7, 361

¹²⁸ Mansour, *The Explaining of the Hanbali Figh of Islamic sects* , 443

KSA when needed and that they will accord with Islamic principles as set out by the Sunni scholars.

2.6 Protecting witnesses in the evidentiary stage in the KSA

Clearly, protecting witnesses during the investigation stage is of great importance in helping investigators and judges determine the truth. The value of witnesses' testimony in this stage arises from the following reasons:

1. Listening to the witnesses is highly important in investigative procedures as the most prominent elements of crimes are material facts, and testimony is the most important evidence to identify the perpetrators of crimes and the relevant circumstances.¹²⁹
2. The testimony enables the investigator to decide what charges to bring against the defendant.¹³⁰
3. It enables the Judges at this stage to evaluate the strength of evidence and assess the likelihood of securing a conviction according to the standards of proof required. Specifically, if there is insufficient evidence against an accused for a hudd crime but there is still reason to believe the accused is guilty then the judge could try the accused for a ta'zir offence.¹³¹
4. The investigator's initiative to hear witnesses at this early stage could ensure that best evidence is obtained before details are forgotten through lapse of time.
5. Listening to the witness in this stage enables the officer to discuss with the witness their statement in the evidentiary stage and to assess the credibility of the witness.

¹²⁹ Hosni Muhammad, *Explanation of Criminal Procedure* (Dar Al Nahda 1995) 208

¹³⁰ Hijazi Abdul Fatah, *Origins of Criminal Examination* (Dar al Fikr 2005) 67

¹³¹ Al Kherashi Abdulla, *Control of the Investigation and Evidentiary Portion on Crime in Islamic and Common Law* (Dar al jamah al Jadida 2006) 97

The KSA law does not define or state how the investigating officer is to deal with witness testimony in the evidentiary stage but imposes a duty¹³² on criminal investigation officers to interview any relevant person before the prosecutors or to seek permission to obtain information from any person about the crime or the offender.¹³³

The absence of codified procedural regulations regarding the handling of witnesses, particularly VIWs is, in my opinion, a major flaw and this is the main argument of this thesis that special measures for the protection of VIWs could and should be transferred into the Saudi CJS. In England, as well as legal provisions in the YJCE 1999, there are detailed guidelines issued by both the police and the CPS.¹³⁴ The latter includes the statement, as one of its six basic principles that victims and witnesses “be protected in any way necessary.”¹³⁵ Individual police forces in England as well as national bodies such as the College of Policing issue detailed guidelines to officers. The College of Policing, in its Code of Practice, states that “Investigators... must recognise the individual needs and concerns of witnesses and treat them with dignity and respect. This can have a significant impact on how witnesses cooperate with the investigation and any subsequent prosecution.”

Turning back to the KSA, there are no such procedural guidelines in place for VIWs or witnesses at all for that matter.

Saudi legislation does not address the treatment of witnesses during the evidentiary stage. Provisions in procedural law regarding human dignity and honour must be drawn upon in order to provide for the protection of witnesses during the evidentiary stage. Article 35 of LCP stipulates that

“In cases other than flagrante delecto, 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

¹³² In the Law Criminal Procedure 2001

¹³³ Al Shamik Eiysa, *Estimating and directing the prosecution evidence in the investigation stage* (Dar ibn Rushd 2006) 167

¹³⁴ Among these documents are: Ministry of Justice, *Achieving Best Evidence in Criminal Proceedings: Guidance on interviewing victims and witnesses, and guidance on using special measures* (2011) and Ministry of Justice, *Code of Practice for Victims of Crime* (2015) Based on these and other documents police forces in England and Wales issue their own policy documents.

¹³⁵ Crown Prosecution Service, *Basic principles of Victim and Witness care* (2015)

bodily or moral harm. He shall also be advised of the reasons for his detention and shall be entitled to communicate with any person of his choice to inform him of his arrest.”

As to what is considered ‘decent’ treatment there are no formal guidelines on this and it is left to the investigator to interpret, something which could be seen as a procedural weak point. Nevertheless, in the context of my arguments for introducing special measures for the protection of VIWs it does demonstrate that the principle of ‘decent’ treatment is recognised. If it is recognised for those arrested and detained, it can and should be explicitly recognised for witnesses.

Article 21 of LCP states,

“... if acts are committed which may contravene court orders or constitute contempt of court or influence any member of such court or any of the parties or witnesses in connection with a case pending before it, the court shall review these acts and render its judgment in accordance with Sharia principles.”

This article proves that basic law prohibits activities that could prejudice witnesses and that the court has the discretion to act in these matters according to Islamic Sharia law. However, as mentioned, Saudi legislation has not specifically criminalised pressuring witnesses during the evidentiary stage.

2.7 The process of giving testimony in court

The witness in a Saudi court gives his testimony orally before the judge, the prosecutor, the court clerk, other witnesses, the defendant and public 'if the judge allows them' to be in the courtroom. The judge has the discretionary authority to evaluate whether the evidence obtained from the witness is, in his opinion, sufficient and relevant and whether it has the probative value and weight necessary to render a safe verdict. It is the judge alone who plays the role of fact finder, examining the evidence and deciding the verdict.¹³⁶

The witness in a Saudi court may not present testimony from a written statement but instead must rely on what the witness remembers about the factual circumstances of a particular case.¹³⁷ However, in exceptional cases, witnesses may give some information, such as numbers and dates, in written form as such details of particular situations can be difficult to remember.¹³⁸

When a witness gives his testimony, the defendant has the right to indicate to the judge possibly prejudicial testimony which casts doubt on either the witness or the testimony. Accordingly, Article 120 of the LPSC stipulates that "testimony shall be given orally. The use of written notes during testimony is permitted only with the judge's consent provided that the nature of the case justifies it."¹³⁹ Though entirely at the discretion of the judge, after testimony has been heard the defendant will be asked by the judge to state which parts of the testimony he wants to challenge in the form of cross-examination. It is the judge who puts the questions to the witness having heard from the defendant what the defendant would like to be asked and evaluated whether these questions are relevant. The second course of action open to the defendant in response to testimony against him is to bring forward evidence aimed at undermining the validity of the testimony by, for example, seeking to present them as having poor character. If this course is taken, the judge will seek to validate the witness's character by asking the prosecutor to bring before the court the two *Muzaki* who interviewed the witnesses,

¹³⁶ Maha, 'Evidence in Islamic law: reforming the Islamic evidence law based on the federal rules of evidence' 147

¹³⁷ Abdullah F Ansary, 'A brief overview of the Saudi Arabian legal system' (2008) See http://www.nyulawglobal.org/globalex/Saudi_Arabia.htm >

¹³⁸ LPSC 2000

¹³⁹ Ibid

neighbours and family to confirm whether the witness has good character or not. Thirdly, the defendant may not wish to follow either of these two courses of action, however, this option is likely to be seen as an admission of guilt.

There are two positions among legal scholars regarding the question of good character. The first based on the approach of Abu Hanifa and Ibn Hazm is that witnesses are to be assumed to be of good character unless this is challenged. Second, that good character needs to be verified in all cases before testimony can be considered valid; this is the position of the Hanbali and Maliki schools.¹⁴⁰

After the witness submits his testimony according to these proceedings, the judge may ask the witness about specific details of his testimony. The defence may ask that the judge make enquiries about the witness's submitted testimony, but the judge may reject immaterial questions, such as spurious attempts to undermine the character of the witness. As Article 121 of the LPSC states,

"The judge on his own or at the request of a litigant may ask the witness whatever questions he determines are conducive to determining the truth. The judge shall agree to the request of the litigant in this regard unless the question is immaterial".¹⁴¹

Saudi judges have the discretionary right to determine the question of immateriality. The previous article does not give other parties an absolute right to question the witness. The court has the right to consider the issue of immateriality of the crime and deny questioning the witness without challenge from the other parties. In this way, this article gives the judge the right to protect the witness in the discussion of matters relevant to his testimony during the trial. Thus, in theory, the judge serves as a bulwark protecting the witness.¹⁴²

The clerk of the court records testimony as it is uttered and submits the witness's own words and language. The clerk reports the questions asked in the record without omissions or changes. If the testimony contains ambiguities and has not been

¹⁴⁰ Abdulrahman M Almohideb, 'Criminal procedures relevant to crimes of killing in the Kingdom of Saudi Arabia' (PhD thesis, University of Glasgow 1996) 265

¹⁴¹ LPSC 2000

¹⁴² Ansary, 'A brief overview of the Saudi Arabian legal system'

understood, the trial judge should ask the witness to clarify the ambiguities.¹⁴³ After the testimony has been completed, the clerk should present the written transcript to the witness, who may enter new details about his testimony. The witness and judge must sign the amendments to ensure the accuracy of the transcript.

Article 123 of the LPSC addresses this procedure:

*“The testimony of a witness and the answers he gives to questions addressed to him shall be written in the record in the first person without change. It shall then be read to him, and he may enter any amendment thereto he wishes. The amendment shall be entered after the text of the testimony and signed by both him and the judge.”*¹⁴⁴

2.8 Standards of English witness care

The standards that witnesses to crimes in England and Wales can expect is set out in the Witness Charter (the ‘Charter’), a document published by the Ministry of Justice.¹⁴⁵ In it both defence and prosecution witnesses can read about the basic standards of treatment they are entitled to at each stage of the process not only from the police and all other law enforcement agencies but from other service providers including the CPS, Her Majesty’s Courts and Tribunal Service, defence lawyers and the Witness Service.

If the witness is also a victim of crime then the Code of Practice for Victims of Crime (the ‘Code’)¹⁴⁶ is applicable and explains, while not giving rise to any legally enforceable rights, a victim’s specific protections. The ‘Charter’ has not been enshrined in legislation so operates as ‘best practice’ guidelines. Some have argued that the Charter is akin to a series of entitlements that victims have as ‘consumers’ of criminal justice services.¹⁴⁷ However, it is important to note that at the time of writing legislation is being drafted to put victims’ rights on a legal footing, though the exact form and

¹⁴³ Ibid

¹⁴⁴ Ibid

¹⁴⁵ Ministry of Justice, *The Witness Charter ‘Standards of care for witnesses in the criminal justice system’*

¹⁴⁶ Victim Criminal Proceedings Policy Team Ministry of Justice, *Code of Practice for Victims of Crime* (Stationery Office 2013) introduced pursuant to section 33 of the Domestic Violence, Crime and Victims Act 2004

¹⁴⁷ A point made in Brian Williams, ‘The victim’s charter: Citizens as consumers of criminal justice services’ (1999) 38 *The Howard Journal of Criminal Justice* 384

potential impact of this cannot yet be assessed.¹⁴⁸ As such, while the above-named agencies will aim to adhere to the guidelines contained in the Charter there may be certain circumstances where this could be compromised.

Furthermore, where a witness is assessed as being vulnerable or intimidated the Charter sets out a further set of special measures. These special measures are automatically available to witnesses in cases of alleged sexual offences, cases involving gun or knife crime and human trafficking and child witnesses, but all witness are assessed individually at the police stage with the help of defence and prosecution lawyers.¹⁴⁹

The Witness Charter is comprised of 21 standards divided across each stage of the case from the outset of the police investigation stage to a post-process complaints procedure. In the first seven of these standards the police play the leading role. In the following section I set out the standards in this stage which, in my opinion, could be transplanted successfully to the same stage of the Saudi process.

2.9 Transplanting standards of care to the KSA Criminal Justice System

As part of my overall argument I present the guidelines below as being relevant and beneficial to the Saudi legal system, specifically during the police investigation stage.

In chapter six and seven I will address in detail whether special measures can in practice be transferred to the KSA law.

Equality of treatment

The first principle of the treatment of witnesses is that the same treatment is given to all witnesses whatever their gender, ethnicity, nationality, sexual orientation, age, social background or disability. This equality of treatment also extends to providing those who may need them special facilities such as the use of an interpreter. Only if treated equally

¹⁴⁸ At the 2015 General Election in the UK all three leading parties stated their intention to strengthen victims' rights. This includes the now governing Conservative Party who intended to bring in a 'Victim's Law' which would include a right to make a personal statement to the court before sentencing.

¹⁴⁹ Ministry of Justice, *The Witness Charter 'Standards of care for witnesses in the criminal justice system'*

can each citizen receive equality of access to justice, which is an underpinning principle of the legal system in England and Wales.¹⁵⁰

Reporting a crime or incident

This standard requires clear communication from the police when the witness first reports a crime, so they know what the next steps the police will take are. All reported crimes are allocated a crime number and the person reporting the crime is given the details of a police contact person.¹⁵¹

Making a statement

Making a statement is voluntary but the police may nevertheless request one depending on the circumstances (discussed earlier in the chapter). If no statement is taken, then the police may still request that the witness gives evidence at a later stage. Potential defence witnesses may be guided to the defence lawyer who will take a statement. In some cases, the police may take a statement from a defence witness. Whether it is the police or defence team there are a series of guidelines the person taking the statement must follow. These include: explaining the purpose of the statement; ensuring full understanding and accurate recording; offering the opportunity for the statement to be reviewed and amended; and finally, the witness is asked to sign the statement.¹⁵² In the case of minors or other VIWs there is an option to make a video recorded statement. Furthermore, if the witness is also the victim of crime they may give an additional Victim Personal Statement aimed at giving the victim to describe the impact the crime has had on them. After statements are signed they cannot be changed, although additional statement can be given and entered as evidence.

Witness needs assessment

Where a witness is giving a statement the police will also make an initial assessment of the witnesses needs. This covers: preferred methods of contact, language needs, potential needs arising from attending court and availability to do so. It is at this point that it will be assessed whether the witness is categorised as vulnerable and/or

¹⁵⁰ Ibid, 8

¹⁵¹ Ibid, 8

¹⁵² Ibid, 8

intimidated in which case a new set of arrangements are triggered. In the case of a defence witness, the defence lawyer will play a key role in meeting any special needs.¹⁵³

After the statement

Following the statement there are restrictions in place for the sharing of the witness's personal details with consent being required for certain sharing. If and when they are required to attend court to give evidence the witness may review again either the video-recorded or written statement not to change it but as a reminder.¹⁵⁴ In serious cases the police will proactively communicate progress to the witness while in less serious ones the police will give the contact details of the person the witness may contact for updates.¹⁵⁵

Intimidation

Firm action is taken by the police in the event that any witness reports being intimidated, something which is a serious offence in England and Wales. Indeed, it is a specific offence to intimidate a witness before and/or during a trial, and up to a year after a trial is finished.¹⁵⁶ Both defence and prosecution witnesses are advised that it is important they report any such incident immediately. If the police are aware of any intimidation or perceived possibility of intimidation they inform the prosecution who will bring the matter to the attention of the court where it will be considered in the context of the granting of bail.¹⁵⁷

Keeping witnesses informed

Satisfactory information flow is a key theme throughout the Witness Charter and this includes witnesses being kept informed of the progress of a case, particularly where it involves investigations into serious crimes and where the witness has been identified as likely to be required to give evidence in court.¹⁵⁸ The basic objective is a monthly

¹⁵³ Ibid, 9

¹⁵⁴ In English law, the Witness Service can show witnesses their statements as set out in the Casework Quality Standards (CQS), so that they can refresh their memories before giving evidence. Crown Prosecution Service, Director of Public Prosecutions (DPP), Case work Quality Standards, October 2014.

¹⁵⁵ Ministry of Justice, *The Witness Charter 'Standards of care for witnesses in the criminal justice system'* 9

¹⁵⁶ As provided in Criminal Justice and Public Order Act 1994 section 51

¹⁵⁷ Ministry of Justice, *The Witness Charter 'Standards of care for witnesses in the criminal justice system'* 10

¹⁵⁸ Ibid, 10

update until the investigation is closed, someone is charged or the matter is dealt with out of court. After six months the future frequency of updates is discussed between the police and the witness.¹⁵⁹ For witnesses in less serious cases or where the witness is not thought to be required to give evidence in court, the police will not automatically initiate regular updates though they will provide contact details of where the information can be obtained.¹⁶⁰ Victims, under the Victim's Code have a (non-statutory) right to be informed about the defendant's sentencing in any cases where the sentence is a custodial sentence of 12 months or more as well as any possible future release on license.¹⁶¹ Witness Care Units, which are located around England and Wales, were given a series of duties and responsibilities under the 'Code' and are staffed jointly by the CPS and the police. It is from these units that ongoing communication comes.¹⁶²

As mentioned before the guidelines under the Witness Charter do not give rise to legally enforceable rights but instead are non-statutory guidelines. When introduced civil liberties group Liberty welcomed the new Charter stating it was a "laudable effort to give minimum rights of treatment and information to people involved in court proceedings."¹⁶³ They also observed that the standards included were based on practical common sense. Beyond the main standards in the 'Charter' are the special measures for VIWs. Many of the rights in the Victim's Code were established under the YJCEA 1999 and so predate the Charter itself. The 'Code' actually first came into force on 3 April 2006, although there was a Victim's Charter before that. The most recent version of the 'Code' was issued by the Secretary of State for Justice in October 2015, a requirement under section 33 of the Domestic Violence, Crime and Victims Act 2004. It has also been updated to implement Directives of the European Union.¹⁶⁴

The British government keeps both the Witness Charter and the Victims Code under review in order to increasingly tailor the justice system to the individual needs of both witnesses and victims, to make the legal process efficient and to seek to ensure that the

¹⁵⁹ Ibid, 10

¹⁶⁰ Ibid, 11

¹⁶¹ Ministry of Justice, *Code of Practice for Victims of Crime*

¹⁶² Ministry of Justice, *The Witness Charter 'Standards of care for witnesses in the criminal justice system'* 11

¹⁶³ Liberty, *Liberty's Response to The Witness Charter Consultation'* (The National Council for Civil Liberties February 2006)

¹⁶⁴ It implements the relevant provisions of three EU Directives. Firstly, the Directive establishing minimum standards on the rights, support and protection of victims of crime (2012/29/EU); secondly, Directive 2011/92/EU combating the sexual abuse and sexual exploitation of children; and thirdly, Directive 2011/36/EU preventing and combating the trafficking of human beings.

quality of evidence is as high as possible.¹⁶⁵ There is some evidence that they are being successful in this regard. The Witness and Victim Experience Survey (WAVES) reported that for the periods 2007/8 and 2009/10, over 80% of the victims and witnesses surveyed indicated that they had been satisfied with their treatment in the CJS.¹⁶⁶ Other reports indicate that among the 20% who did not may be a disproportionate number of the most vulnerable and intimidated witness.¹⁶⁷ Unsurprisingly, no such survey evidence is available for the KSA because they are not undertaken, so it is not possible to make comparisons in this area.

2.10 Summary

In this chapter the position of witnesses in the Saudi CJS was discussed and analysed in detail. It is clear that witnesses are absolutely central to the effectiveness of this CJS, perhaps more so than in other jurisdictions. However, the problem – that insufficient priority is given to the protection of witnesses in the KSA – is equally clear. The contribution that witnesses can make to justice in the kingdom is also undermined by the status afforded to women, children and those with learning difficulties who are to varying degrees excluded or undervalued as witnesses by the CJS of the KSA. I summarised the opinions of Sunnh scholars of the four schools of Islamic thought. The chapter then turned to considering the witness experience in KSA at the evidentiary, and investigative stages.

The chapter conclude that the British government has taken important steps in putting victims and witnesses at the heart of the CJS in England and Wales and there are potentially important benefits to the KSA from examining the implementation of some or all of these in the Kingdom. The police are usually the first point of contact for both witnesses and victims and setting out standards such as those mentioned in this section will help ensure that all are treated equally, they receive a high quality of service and also there is the best possible chance that high quality evidence and a high standard of justice will be achieved. Whether there are any impediments to the implementation of special measures in the KSA will be explored in detail in chapter's six and seven.

¹⁶⁵ An example being the consultation paper Ministry of Justice, *Getting it right for victims and witnesses* (HMSO January 2015)

¹⁶⁶ Ibid

¹⁶⁷ As evidenced in Sara Payne, *Redefining Justice: Addressing the individual needs of victims and witnesses* (Ministry of Justice 2009)

CHAPTER 3

CONTEXTUALISING THE POSITION OF WITNESSES IN SAUDI CRIMINAL JUSTICE

3.1 Introduction

The quality of the justice provided by any justice system is dependent on the quality of testimony heard by the court. From this simple assumption it is clear that academics, legal scholars, lawmakers and the judiciary share a common interest in taking all possible steps to maximise the quality of witness testimony. In this thesis I am concerned with the facilitative approach, specifically, legal measures to encourage witnesses, to appear in court and then to give their testimony free from fear and intimidation.

The aim of this chapter is to contextualise the position of witnesses within the CJS of the KSA. The chapter starts by posing the question: Why are witnesses treated as a low priority?. In this chapter an overview of the Saudi legal system as it relates to criminal law is presented. It will include an explanation of the sources of law in that jurisdiction and the operation of its legal system. This chapter will give an overview of the four Sunni scholars – Hanafi, Maliki, Shafi'i, and Hanbali – on the subject of witness protection. Next I turn to a discussion of criminal law in the KSA starting with the five essentials of crime and punishment in Islam. I move on to present the three different categories of crimes in the KSA which each have their own approaches to punishment and to evidentiary standards.

In this chapter I consider the operation of the courts in the KSA and how this has been affected by recent procedural reforms.¹⁶⁸ Lastly, I put forward my analysis of the deficiencies in the legal system in terms of the treatment of witnesses and the barriers which may discourage the achievement of best evidence.

¹⁶⁸ Particularly those included in The Law of the Judiciary - Royal Decree No. M/78 (19 Ramadan 1428H) 1 October 2007.

3.2 Why witnesses are low priority in KSA

The teachings of the Islamic religion (the main source of the KSA law) teach that the testimony in Islam is a religious and moral duty, and Islam dictates that witnesses should testify without fear and that by doing so witness will gain reward from God, so, any harm to witnesses is forbidden. It is therefore reasonable to ask why Saudi law has paid so little attention to the protection of witnesses? To answer this I can offer four reasons as follows:

1. The Saudi Kingdom as a state began with its foundation in 1932¹⁶⁹, which in global terms makes it a very young state. It took until 1989 to establish the Bureau of Investigation and Public Prosecution and the Law on Criminal Procedure LCP was only enacted in 2001. Countries such as England have a longer history of reform for VIWs (the main reforms concerning special measures in England being contained in the YJCEA 1999.¹⁷⁰
2. The primary source of criminal law in the KSA is Islamic law as derived from the holy texts (Quran and Sunnah). Legislators in the KSA have therefore left the issue of protecting witnesses to the judges as stated in Article 21 of the LCP. This has led to a lack of collective action and failure to establish universally applied measures.
3. Due to the lack of the official information, where the information given through the media or direct to the public is very restricted, public awareness of the issue of witness intimidation has been virtually non-existent. However, when in 2007 a case of intimidation was reported widely across the country there was a strong reaction from a public who could not believe that such un-Islamic actions could take place.¹⁷¹
4. In my view most Saudi citizens lack awareness of or interest in their legal rights. This acts as a disincentive for the authorities to extend these rights, such as the right to protection for VIWs.

¹⁶⁹ Wynbrandt James, *A Brief History of Saudi Arabia* (Facts On File 2010)

¹⁷⁰ In the Youth Justice and Criminal Evidence Act 1999.

¹⁷¹ Fahd Al Ahmadi, 'The witness protection program'

3.3 Sources of Saudi legal system

Each nation's jurisprudence has multiple sources from which specific laws and provisions are derived. However, in the case of the KSA legal plurality has definite limits as Saudi jurisprudence is firmly and specifically rooted solely in Sharia¹⁷², or Islamic law¹⁷³, which is regarded as the original source of legislation. As a consequence, the Saudi system of law and Saudi legal scholarship does not provide for any change or challenge to the provisions laid down in Islamic law that are deemed to have come from the Quran and Sunnah. As we will see later, this is potentially a barrier to the effective transplanting of special measures from England to the KSA. However, I will critically consider the interpretations of Muslim scholars who have interpreted the textual sources. I will argue that the barriers to transplantation are not so great as to make special measures impossible to implement in the KSA.

3.4 The four Sunnh schools

Sharia is not merely a code of law, but also a code of conduct and ethics; a mixture of law and ethics that sees these concepts as one and the same.¹⁷⁴ The sources of the KSA's Sharia laws are the Quran¹⁷⁵ and Sunni (the practices and sayings of the Prophet Muhammed).¹⁷⁶ However, there are sources of disagreement between Muslim sects, about how to interpret these laws. The majority of Sunni Muslims follow one of the main schools of Islamic thought and jurisprudence: Hanafi, Maliki, Shafii or Hanbali, which are described later in this chapter.

¹⁷² Sharia in Arabic implies the way that leads one to the main source of water. The Islamic Scholars' definition is that refers to all the Provisions prescribed by God for His slaves by the messenger of his messengers. Tarek Badawy, 'Towards a contemporary view of Islamic criminal procedures: a focus on the testimony of witnesses' (2009) 23 Arab Law Quarterly 269

¹⁷³ Islamic or Sharia law consists of the rules and regulations, penalties, codes of conduct, how to handle legal and how to worship God, and generally everything that a Muslim needs to know in order to be a proper Muslim. Islamic law is the third major law system with civil and common law which is one of the three major legal systems governing the world. TS Twibell, 'Implementation of the United Nations Convention of Contracts for the International Sale of Goods (CISG) under Shari'a (Islamic Law): Will Article 78 of the CISG Be Enforced When the Forum Is in an Islamic State' (1997) 9 Int'l Legal Persp 25

¹⁷⁴ Richter H Moore Jr, 'Courts, law, justice, and criminal trials in Saudi Arabia' (1987) 11 International Journal of Comparative and Applied Criminal Justice 61

¹⁷⁵ Quran: The word of God revealed to the Prophet Muhammad by the angel Gabriel. Manisuli Ssenyonjo, 'Jihad re-examined: Islamic law and international law' (2012) 10 Santa Clara J Int'l L 1

¹⁷⁶ Sunni: An Arabic word that idiomatically refers to that which was ordered by the Prophet Muhammad or forbidden. It prompts Muslims about what to do in both word and deed. Yahia D Shatnawi, 'The Effect of Al-Sunah on the Building of the Islamic Personality "Rooted Study"' (2010) 37 Dirasat: Shari'a and Law Sciences

Few Arabic-speaking and Muslim countries depart from these four schools. However, Iran recognises Shiite doctrine in its legal system.¹⁷⁷ The KSA has relied on the Hanbali School¹⁷⁸ in all cases before its courts. This means that the legal system focuses nearly entirely on textual or traditional sources: the Quran, Sunnah, the Hadiths (sayings and customs of Muhammad) and the views of Sahabah (Muhammad's companions) and analogy.¹⁷⁹ Under the Hanbali School there is no scope for jurist discretion or community customs as a basis for law.¹⁸⁰

During the third Muslim Caliphate,¹⁸¹ a process of categorisation of Islamic jurisprudence into four schools of Madhhabs occurred. Each of the categories enshrined the norms common to their relevant location. Two separate approaches were developed in Sunnh schools. The first was to use analogy and reasoning, while the second focused nearly entirely on traditional sources. The four Madhhabs concur on the major Islamic issue but have different emphasis arising from their different interpretations of Quran and Hadith and different methodologies.

Understanding the basic approaches of each school and how they contrast is important because all rules applied today in the KSA courts can be found in books of the Sunni schools. Muslims acknowledge the status of each school as the sources of interpretation of the Quran and Sunnah and they would not accept the idea of witness protection if it is not based on scholars' interpretation of these texts. The books of the Sunnh schools were written between (702-855) and during the Middle Ages, the Mamluk Sultanate in Egypt outlined the acceptable Sunnh schools as only Hanafi, Maliki, Shafi'i and Hanbali and

¹⁷⁷ Another portion of the Muslim community includes the Shias, who have their own beliefs and sources. The main disagreement they have with Sunnis is their demand regarding the succession of Ali bin Abu Talib and his progeny. They also believe in the emergence of the Mahdi, which will cleanse the world of evil. For more detail see; Lapidus, *A History of Islamic Societies*

¹⁷⁸ Ahmad bin Muhammad bin Hanbal (780–855), the founder of the Hanbali School of Islamic jurisprudence. He is one of the most famous Sunni scholars. King Abdul Aziz realized that the diversity of schools of Islamic law means diversity in their judgments and legal proceedings, which can conflict with each other and hinder unification. As a result, he issued a decree on (1926) create a Hanbali school as the official school of Islamic law courts of the Saudi Arabia. Susan A Spector, 'Ahmad Ibn Hanbal's Fiqh' (1982) *Journal of the American Oriental Society* 461

¹⁷⁹ The Judicial Board of Saudi Arabia issued a resolution No. 3 in June 1928 (17/01/1347AH) which stated that in order to attempt to correct inconsistencies in the judgments, the King would support judgments made in accordance to the decisions found in the Hanbali School, because the Hanbali books are easier and clearer for judges. Frank E Vogel, 'Shari 'a in the Politics of Saudi Arabia' (2012) 10 *The Review of Faith & International Affairs* 18

¹⁸⁰ Hisham M Ramadan, *Understanding Islamic law: from classical to contemporary* (Rowman Altamira 2006)

¹⁸¹ The Third Caliph was Uthman (644-656 A.C.)

their status as the only four recognised schools has remained unchanged to this day.¹⁸² These four schools are now summarised.

3.4.1 *ABU HANIFA*

In Iraq, the most respected and powerful writer was the Iraq-born Abu Hanifa Numan bin Thabit, (702–767), who founded the first school of *fiqh*¹⁸³ which was named after him. Muslims travelled from far and wide to study Abu Hanifa's contribution to Islamic jurisprudence in legal thought. He was respected for his confidence and assertiveness in making independent decisions fearlessly.¹⁸⁴

To explain the main principles of his *ijtihad*¹⁸⁵ when deriving his rules Abu Hanifa is reported to have said that he followed 'Quran' when he finds a rule in it. When he did not find a rule in it, he followed the Sunnah of the Prophet Mohammed. When he did not find a rule in the main sources the Quran and Sunnah, he followed the opinion of the way of the Companions of the Prophet Mohammed he wished to follow and left aside the opinions of anyone he did not wish to follow.¹⁸⁶ Abu Hanifa also explained that he responded to the opinions of the Companions only in circumstances where he cannot find a text in the Quran and Sunnah indicating the rules of the situation at hand. If he does find such a text, he does not prefer the opinion of any one beyond the text. He opts for the opinions of Companions where he assesses them to be closer to the truth, and he does seek any further opinions. If there is no opinion of the Companions on the matter at hand and the issue went to the Successors, he did not necessarily adhere to their opinions, but exercised *ijtihad* in the same way as they had done. The texts of the Quran or of the Sunnah may indicate the rule by word and other times by reasoning and its ideas in which case it is considered that the rule has been arrived at by means of analogy. Abu Hanifa's strict following of traditions meant that he used a good deal of latitude in interpreting that which was proven authentic in his opinion and often adopted

¹⁸² Ibn Kathir Ismail, *The beginning and the end 'Islamic History'* (Dar Sadir 2005) v 3, 260

¹⁸³ The theory or philosophy of Islamic law, based on the teachings of the Koran and the traditions of the Prophet. Online Oxford Dictionaries <<http://www.oxforddictionaries.com/definition/english/fiqh>> accessed 12 November 2013

¹⁸⁴ Syamsuddin Sahiron, 'Abū Ḥanīfah's Use of the Solitary Ḥadīth as a Source of Islamic Law' (2001) 40 *Islamic studies* 257

¹⁸⁵ Islamic legal term meaning "independent reasoning," as opposed to *taqlid* (imitation). One of four sources of Sunni law. Oxford Islamic Studies Online, *Ijtihad*

¹⁸⁶ Hanif Amna, 'Muslima: The Realm of Muslims 'Imam Abu Hanafi, Life History and Works' 27 December 2011

) <<http://muslimarealm.blogspot.co.uk/2011/12/imam-abu-hanifa-life-history-and-works.html>> accessed 10 October 2015

analogy to respond to the increasingly novel situations arising in Iraq at the time, including its many issues and legal matters that were never earlier encountered by the jurists from among the Companions and Successors.

Abu Hanifa's doctrine was characterised by frequent use of Istihsan and analogy. Abu Hanifa would anticipate hypothetical legal issues and seek rules for them before they arose so that when they did arise citizens knew the rule. This process greatly impacted on the expansion of Islamic law and increased formal legal opinions and rules through which Islamic law is formulated. Abu Hanifa's followers were satisfied with his principles for deriving rules following his research methods; some however differed from their Imam concerning certain legal opinions and detailed points.

Today's scholars see Abu Hanifa as the first to formally apply analogical reasoning to Islamic law. At the aforementioned school, he is referred to as the great Imam; this school mainly appears in Turkey, Pakistan, Afghanistan, Iraq, India, China and Russia.¹⁸⁷

3.4.2 AL MALIKI

The second school of *fiqh* (Al Maliki) was founded by Abu 'Abd-Allah Malik bin Anas (713–795) in Medina in what is known today as the KSA, the first Islamic state. There, the law school is called the Maliki School.¹⁸⁸ According to him, the law was shown to Muhammad by God's will to help people. Therefore, in Islamic law, God is the main lawmaker. Therefore, breaking the law is not just an infraction of social norms; it is an act of rebellion against the great creator.¹⁸⁹

The views and particularly the practices of Medina were mirrored by Malik, aside from Quranic sources and were embodied into his *Kitab al-Muwatta* (The Smoothed Path)¹⁹⁰, which thoroughly researched law, justice and traditions in Islam. These lawyers relied heavily on customs associated with Prophet Muhammad. Where customs collided, Malik and his followers acted arbitrarily: "if for instance the conflict was between a tradition attributed to the Prophet and another to one of his companions, they chose the

¹⁸⁷ Abu Umar Faruq Ahmad, *Theory and practice of modern Islamic finance: the case analysis from Australia* (Universal-Publishers 2009) 77

¹⁸⁸ Neal Robinson, *Islam: A concise introduction* (Routledge 2013) 152

¹⁸⁹ Caesar E Farah, *Islam: Beliefs and Observances*, Woodbury, New York: Baron's Educational Series (7 edn, Inc 2003) 196

¹⁹⁰ E Michael Gerli, *Medieval Iberia: an encyclopedia* (Routledge 2013) 469

companion's.” This was based on the logic that these traditions could not have come to existence without knowledge of the Prophet's hadith and the Sunnah. Malik was celebrated for his bravery and impartiality and is best known for his doctrine of ‘ijma’ (consensus).¹⁹¹ He wove the traditions of Medina into Islamic jurisprudence.

This school is different from the other Sunnah schools of law, especially in the sources that are applied for rulings. The Qur'an is used as the primary source throughout, thereafter comes the prophetic tradition of Muhammad.

Moreover, Maliki's work focused on the principle of public interest, which Maliki said, shows the flexibility of Islamic law and this principle considered people's living requirements in the context of the regions and countries in which they lived. As people's lives were complex and sophisticated, there is no way for solving new issues only through applying this principle.¹⁹² This school received its support by overwhelming agreement among Malik himself and most Sunnah lawyers. This consensus became accepted as a source of law when taken from Muslims of the first, second and third generations from Medina, while analogy was only used as a matter of last instance.¹⁹³ The Maliki School of Islamic law is dominant in North Africa and northern Nigeria.

3.4.3 AL SHAFI'I

The Palestine-born Muhammad bin Idris al-Shafi'i (767–820) was the founder of the third school of Islam. Al-Shafi'i had an inherited talent of great memory, to such a degree that he was able to memorise the entire Qur'an by the age of seven. By the age of ten, he had also memorised Malik's book *al-Muwatta*.

The Shari'a systemisation offered a legacy of unity for every Muslim and postponed the initiation of independent, regionalised legal systems. Four Sunnah legal schools or *madhhabs* maintain the customs within the setup created by Al-Shafi'i.¹⁹⁴ Al Shafi'i school actually grew out of an attempt to reconcile the Hanifa and Malaki schools.¹⁹⁵

At that time, the Prophet's *hadith* was collated from various nations, and there was widespread debate until the famous book, *Al-Risalah*, was put together by Al-Shafi'i

¹⁹¹ Farah, *Islam: Beliefs and Observances*, Woodbury, New York: Baron's Educational Series 197

¹⁹² Robinson, *Islam: A concise introduction* 153

¹⁹³ Ahmad, *Theory and practice of modern Islamic finance: the case analysis from Australia* 78

¹⁹⁴ Ibid, 79

¹⁹⁵ Ibid

and was deemed the basis for Islamic jurisprudence. Al-Shafi'i took the literal meaning of the Qur'an and the Sunnah.¹⁹⁶ He debated passionately for these to be accepted as genuine. Indeed, he considered following the Sunnah to be as important as adhering to the Qur'an. He encouraged agreement and opposed personal opinion that lacked reference to the aforementioned books. Something that separated Al-Shafi'i from colleagues was that he had written elements of the books he supported, and other materials that comprised the body of jurisprudence. Moreover, he created a hierarchy of the four legal sources: the Qur'an, Sunnah, *Ijma* (consensus) and *Qiyas* (analogical reasoning).¹⁹⁷

Courtesy of Al-Shafi'i, people returned to the Sunnah following a long misunderstanding. He was known to be dedicated to using textual evidence, and to refusing potentially groundless and speculative interpretation. He stated: "If a hadith is proved authentic, then it becomes my belief. If you see that my words contradict the hadith, then apply the hadith and disregard my words."¹⁹⁸ When he witnessed the viewpoints of certain scholars that did not follow the Qur'an or Sunnah, and had no basis, he strove to combine the essentials of jurisprudence, and put into his famous book, *Al-Risalah*. He was the first to differentiate between discretion in legal concerns, and juridical rationale through analogy. His name is applied to one such legal school, which is replicated in many different places among Islamic nations such as Indonesia, Malaysia, Egypt, Somalia, Yemen as well as Sri Lanka and the southern parts of India.¹⁹⁹

3.4.4 HANBAL

Iraq-born Ahmad bin Hanbal (780-855) founded the fourth school of Islamic jurisprudence, known as the Hanbali school, having learned in-depth from the Al-Shafi'i school. He primarily referred to texts from the Qur'an and Sunnah, and scholarly consensus, with some analogical reasoning. Among the scholars of *hadith* specifically, he is likely to have been the most knowledgeable. Ibn Hanbal school rejected *kalam* or

¹⁹⁶ Noel James Coulson, *A history of Islamic law* (AldineTransaction 2011) 80

¹⁹⁷ Ahmad Hakim, 'Muhammad ibn Idris al-Shāfi'i and his role in the development of Islamic legal theory' (DPhil thesis, McGill University 1992) 12-30.

¹⁹⁸ Jordan Muhammed and Hajjar Muhammad *Explanation of Al Shafi jurisprudence*, vol 4 (Dar Al Salaam, Riyadh 1998) 44

¹⁹⁹ Etim E Okon, 'The sources and schools of Islamic jurisprudence' (2012) 3 Am J Soc Mgmt Sci 106

dialectic theology, as a method, even when applied to uphold the truth. He had a vast knowledge of both religion and civil law.²⁰⁰

The sources of the Hanbali School of jurisprudence and his method of jurisprudence included the following key elements:

Firstly, central to his methodology are the texts of Quran and Sunnh. If Ibn Hanbal found a fatwa issued in whatever text, he would take it and would not listen to anyone who gainsaid it.

Secondly, he studied carefully the fatwa²⁰¹ of the Companions of the prophet. Again, if there was a fatwa over which scholars had disagreements, he would apply the companions' fatwa in his framework.

Thirdly, if the prophet's companions differed over a particular fatwa, Ibn Hanbal would choose the fatwa closest to the Quran and Sunnh, and would not deviate from their words.

Finally, if an issue could not be solved through study of the text of the Quran or Sunnh, nor through the words of the companions, or any one of them, Ibn Hanbal would use analogical reasoning. That is to say knowledge which can be derived by a ruling from the Quran or prophetic tradition 'Hadith' Sunnh but not necessarily for that issue.

Numerous scholars have adhered to the Ibn Hanbal approach, and his works (*the Musnad*, put together by his son from lectures, with added supplements and consisting of more than 28,000 Hadith) are seen as a strong resource of the Saudi legal tradition. This school of law is supported strongly in the Arabian Peninsula, particularly among judges in the KSA and religious scholars.²⁰²

²⁰⁰ Ibid

²⁰¹ The legal opinion of a Companion.

²⁰² M.D. Dubber and T. Hörnle, *The Oxford Handbook of Criminal Law* (OUP Oxford 2014) 249

3.5 Criminal Law in the KSA

There is no written penal code in the KSA.²⁰³ Islamic Sharia is the basis of the Saudi system and also serves as the essential source of the substantive criminal law.²⁰⁴ The first article of Saudi criminal proceedings states:

*“Courts shall apply Sharia principles, as derived from the Qur’an and the Sunni to cases brought before them. They shall also apply state promulgated laws that do not contradict the provisions of the Qur’an and Sunni, and shall comply with the procedure set forth in this Law. The provisions of this Law shall apply to criminal cases that have not been decided and to proceedings that have not been completed prior to the implementation thereof.”*²⁰⁵

3.5.1 FIVE ESSENTIALS OF CRIME AND PUNISHMENT

Prominent jurist Al-Ghazzali²⁰⁶ states that punishments in Islam are aimed to protect and preserve five things:²⁰⁷

1. Religion: To make sure that religion is developed and preserved, including its rules and the spreading of its message.
2. Life: To protect the sanctity of human life and to outlaw killing.
3. Intellect: Islam elevates intellect and knowledge and thus bans things which reduce these qualities, such as alcohol and drugs. Punishments are put in place to ensure that these items are not consumed since sound intellect relies on moral responsibility.
4. Lineage: laws on marriage are brought for the preservation of lineage and the continuation of human life, and this disallows extra-marital sexual relations.

²⁰³ There is a great debate between two groups of scholars on Islamic law. The Hanafi and Maliki's say the codification of judgments is permissible in Islamic law. On the other hand, the Shafis and Hanbalis say that the legalization of Sharia is not permitted. This topic is still the subject of controversy and disagreement among legal scholars in Saudi. In 2012, the Council of Fatwa in Saudi Arabia (the highest authority of Islamic law in Saudi Arabia) referred the issue to the Council of Ministers and urged them to adopt the provisions of codification. Riyadh Arabiya net, 'Senior Saudi scholars send draft to legalisation for the adoption of codify Sharia' *Al Arabiya News* (<<http://www.alarabiya.net/articles/2012/05/05/212240.html>> accessed 20 April 2013)

²⁰⁴ Basic Law of Governance 1992-KSA, article 7

²⁰⁵ LCP 2001, article 1

²⁰⁶ Frank Griffel, *Al-Ghazalis Philosophical Theology* (Oxford University Press 2010)

²⁰⁷ Badr-El-Din Ali, 'Islamic law and crime: The case of Saudi Arabia' (1985) 9 *International Journal of Comparative and Applied Criminal Justice* 45

5. Wealth: Under Islamic law it is mandatory to take responsibility for supporting yourself and those others you have responsibility for, and there are subsequent laws to regulate the commerce and transactions between people in order to ensure fair dealing, and to stop oppression and contention. Wealth theft and fraud are criminal acts under Islamic law.

3.5.2 TYPE OF CRIMES IN THE KSA LAW

Before briefly reviewing the history of criminal procedures in the KSA, the division of crimes under Saudi criminal law should be stated. The importance of doing so lies in the evidential requirements that are attached to each type, which in turn impacts on the part that witnesses play in the process.

‘Crime’, in the Saudi system, is defined in terms of Islamic jurisprudence, which outlines the sins that God has confirmed as harmful and which Muslims must avoid; the committing of one of these sins is punishable by Saudi law.²⁰⁸ The classification of crimes under Saudi law involves the provisions of the Quran and Sunni and features three classifications *hudood*, *qisas*, and *ta'zir*. Moreover, each type has different sources of law and different evidentiary requirements, in relation to the substantive elements of the crime.²⁰⁹ The majority of Sunni scholars agree on this division though some scholars propose a five-fold classification which adds to the three types already mentioned ‘crimes against the state’, involving administrative punishment (*siyasa shar'iyah*)²¹⁰ and crimes that are corrected by acts of personal penance.

3.5.2.1 *Hudood*

Hudood offences form the first category of crime under Saudi law. The *hudood* crimes and punishments are maybe the most controversial Islamic legal provisions from the Western perspectives. *Hudood* (singular ‘*hudd*’ or ‘most serious’) are defined as crimes with fixed, mandatory punishment that are based on the Quran or Sunnah. *Hudood* concerns such crimes under Islamic law that merit punishment from God. They are immutable and their punishment cannot be suspended for any reason, because they are

²⁰⁸ Khadr Abdel Fattah, *Crime: general provisions in contemporary Islamic jurisprudence trends* (Institute of Public Administration 1985) 16

²⁰⁹ Awdah, *Islamic criminal legislation comparative with positive law* v 1 p 64

²¹⁰ Muslim law as expressed in regulatory decisions or policy of government.

crimes committed against God and the public interest.²¹¹ The objective of the ‘*hudd*’ punishment is to protect this interest.²¹²

The punishment of *hudood* offences is built on the difficulty of proof principle as a result of the severity of the punishment. Difficulty of proof means that any crime under the *hudood* requires that strict rules of evidence must be fulfilled with regard to witness testimony.

The crime of *zina*, unlawful sexual relations, is illustrative. This crime includes extra-marital sex (adultery), pre-marital sex, consensual non-marital sex, homosexual consensual sex. Rape itself is not defined as a specific offence. Although there have been instances of men being found guilty of rape and executed, international criticism of the treatment of this crime has centred on the barriers to reporting the offence, including the fact that a victim who reports a rape could themselves be charged with a *zina* offence (for example adultery) or false accusation, another *hudood* crime. Another element that draws criticism is that the evidential requirement for *zina* is four male Muslim witnesses²¹³ who testify to have simultaneously witnessed the act. The pregnancy of an unmarried woman can also be used as evidence against her for a *zina* crime. Unrestricted confessions can also be taken as evidence, for example where the witness requirement cannot be met. Hence, in the absence of a confession, which could be retracted, and without the seemingly unlikely requirement for four male eye witnesses being met, a woman reporting a rape in the KSA runs a serious risk of being found guilty of a crime for which stoning or beheading are among the punishments. The disincentives to report a rape in the KSA were discussed in chapter two.

Turning to the other *hudood* crimes, these five are Apostasy (*ridda*) punishable with death; false accusation / slander of illegal sexual intercourse (*qadhf*), punishable with whipping of 80 lashes; theft (*sariqah*), punishable with amputation of a hand; armed robbery (*hiraba*) punishable with death, crucifixion, cross-amputation of hand and foot or banishment, and intoxication (*shurb al khamr*), punishable with whipping of 80

²¹¹ In Islamic law, public interest (*maslahah*) means ‘welfare, interest, or benefit’. It consists of considerations that secure a benefit or prevent harm. Abdul Aziz Bin Sattam, *Sharia and the Concept of Benefit: The Use and Function of Maslaha in Islamic Jurisprudence* (IB Tauris 2015) 9

²¹² Rudolph Peters, ‘Crime and punishment in Islamic law’ (2005) *Theory and Practice from the Sixteenth to the Twenty-first Century*, Cambridge

²¹³ The verse of the Qur’an which mention the production of four witnesses:
"Those who commit unlawful sexual intercourse of your women – bring against them four [witnesses] from among you. And if they testify, confine the guilty women to houses until death takes them or Allah ordains for them [another] way" Holy Quran, suat Al-Nisa, verse 15

lashes.²¹⁴ The evidential requirements for these crimes is the witness testimony of two pious adult Muslim males or a confession.

3.5.2.2 '*Qisas*' crimes: restitution after crimes of retaliation

The second category encompasses crimes against the person whether psychological or physical. *Qisas* (retaliation) echoes the principle of Quran and the Biblical tradition of "... an eye for an eye, a nose for a nose, an ear for an ear, a tooth for a tooth".²¹⁵ The purpose of these laws is to maintain a sense of stability in people's lives and deter potential offenders.²¹⁶ There is no definitive list of such crimes but they certainly include crimes equivalent to murder, manslaughter, and offences related to causing bodily injury in English law²¹⁷.

While retaliation in law is perhaps the most controversial aspect of *qisas*, Sharia actually stipulates three possibilities regarding the route to be taken concerning punishment options for *qisas* offences: retaliation for bodily injuries or homicide (*qisas*); the paying of blood money (*diya*), and forgiveness (*afw*).²¹⁸ The evidential requirement for *qisas* crimes are is the witness testimony of two pious adult Muslim males or a confession.

3.5.2.3 *Ta'zir* (least serious): disciplinary sanctions

The final category of crimes relates to offences mentioned in the Quran or the Sunnah but where punishment is not described. Hence punishments are derived from a judge's own discretion (*ta'zir*) and results in disciplinary sanctions, often corporal punishments.²¹⁹ In other words, if there are no rules regarding a crime in the Quran or Sunna, then punishment is up to the discretion of judges as there are no written guidelines for them to follow.

²¹⁴ Obi NI Ebbe and Ionathan Odo, '16 The Islamic Criminal Justice System' (2013) Comparative and International Criminal Justice Systems: Policing, Judiciary, and Corrections 217

²¹⁵ Holy Quran, suat Al-Maidah, verse 45

²¹⁶ Ebbe and Odo, '16 The Islamic Criminal Justice System' 219

²¹⁷ e.g. Section 18 and section 20 of the Offences Against the Person Act 1861.

²¹⁸ Daniel Pascoe, 'Is Diya a Form of Clemency' (2016) Boston University International Law Journal

²¹⁹ Awdah, *Islamic criminal legislation comparative with positive law* 64

Through the years, '*ta'zir*' crimes have not been collated and registered, thus no body of case law has built up in the way it has in England. Each ruler was therefore afforded flexibility in terms of administering punishments. According to Islamic law, a judge²²⁰ does not have to accept precedent but is free to select from numerous punishments.

Human rights concerns are frequently voiced on *ta'zir*, arising mostly from the non-specificity of offences and punishments combined with what may appear as an unchecked discretion of the judge to determine a punishment, which may include capital punishment. Furthermore, judges are the sole evaluators of testimony and the only binding precepts to which they must adhere are the Quran and the Sunna.²²¹ The evidential requirements for '*ta'zir*' crimes are the same for *qisas*, two adult male Muslim witnesses or a confession.

This system of classification of crime is significant for this thesis because the way a crime is classified determines the level of evidential certainty required and the severity of the punishment. With so much at stake in terms of punishment the motivation to intimidate a witness is inevitably strong which is one of the key reasons that measure to protect witnesses are so important.

3.5.3 CRIMINAL LAW PROCEDURE CODES IN THE KSA

Sharia courts were first established in the KSA by Royal Order in 1927.²²² The function of this edict was to regulate the structure of the courts and their competence. A second system was put in place in 1938 that included new provisions regulating procedure before the court.²²³ In 1939 new laws were introduced, which included new provisions regarding Sharia courts and Sharia judges.²²⁴ In 1952, the governing rules for the administrative system were ratified in legislation, and a concentration of responsibilities under a Sharia-based judiciary came into operation. For nearly 50 years, until August

²²⁰ A judge can choose an appropriate punitive measure that will act as a deterrent for others and will assist in the offender's rehabilitation. Denis J Wiechman, Jerry D Kendall and Mohammad K Azarian, 'Islamic law: myths and realities' (1996) 12 Crime and Justice International

²²¹ Jeffrey K Walker, 'Rights of the Accused in Saudi Criminal Procedure, The' (1992) 15 Loy LA Int'l & Comp LJ 863

²²² Ansary, 'A brief overview of the Saudi Arabian legal system'

²²³ Ibid

²²⁴ Ayoub M Al-Jarbou, 'Judicial Independence: Case Study of Saudi Arabia' (2004) 19 Arab Law Quarterly 5

2000 this served as the law of procedures before the Sharia courts. Then the LPSC codified a full set of rules for how such courts should operate.²²⁵

In addition to this, a second set of procedures came into use on 16 October 2001 which focused on criminal procedures.²²⁶ It contains a set of rules and principles to govern all criminal cases tried in the KSA. This system sets out what procedures justice and law enforcement authorities are required to follow at each stage of the legal process. Under the new procedures torture is prohibited, the rights of suspects to legal counsel are assured, and periods of arbitrary detention are limited. Some would argue that these rights and prohibitions, while now codified, remain to be fully implemented in practice.

3.6 The operation of courts in the KSA

The purpose of this section is to set out the current court structure in the KSA and describe the reforms to the way the courts operate that have been introduced relatively recently in the kingdom. This is important because it is through this reformed structure that the transfer of special measures from England and Wales would be implemented. The discussion of the recent reforms also aims to demonstrate the willingness of the Saudi government to take steps to improve the operation of the courts. I start with the reforms and the pre-reform structure. The reason for including both pre- and post-reform structures is that implementing the reforms has proved a lengthy process, which at the time of writing is only partially complete.

3.6.1 JUDICIAL SYSTEM REFORMS

A Royal Order given in 2005 agreed to changes in the organisation of the judiciary, involving the inaugural forming of specialised courts in the KSA. Accordingly, specialised courts in labour, commercial, domestic and criminal cases (hearing the cases related to *hudud*, *qisas* and *ta'zir* crimes described earlier) were given total authority over their respective areas.²²⁷ The exact jurisdiction of judges is to be confirmed clearly in future to avoid any ambiguity. In 2007, the Saudi King permitted a further body of

²²⁵ Law of Procedure before Sharia Courts (LPSC) Royal Decree No. M/21, 20 Jumada I, 1421 [19 August 2000]

²²⁶ LCP 2001 Royal Decree No. M/39 of 28 Rajab 1422 (16 October 2001)

²²⁷ Ansary, 'A brief overview of the Saudi Arabian legal system'

laws covering the judicial system and the Board of Grievances.²²⁸ These fresh laws overrode existing regulations, some of which had been in place for 30 years.²²⁹ A Special Higher Commission of judicial experts was appointed by the Council of Ministers to draft these new laws. At the same time a budget of seven billion Riyals (about £981m) was granted, as reported by the BBC, “for the King’s project to revamp the judicial sector, which aims at upgrading the judiciary and developing it in a comprehensive and integrated manner.”²³⁰ The purpose of this expenditure was to train judges and build more courts, and the Saudi judiciary estimated a period of two to three years for the overhaul to be completed.²³¹ Opponents argued that paying £981 million will not succeed in improving the court system if the ideological foundation of the legal system, which reformers see as “opaque and arbitrary”, on which the nation rests continues to be Islamic law.²³²

Opponents’ legal questions are interpreted through a religious legal prism in the KSA, and the very idea of “reforms,” even if putative, will strike secularists as sheer fantasy. Naturally, throwing money at a problem will not necessarily solve any of its intrinsic shortcomings; the opponents argue that Saudi law must consider these matters deeply before any reforms are undertaken. Opponents believe that there are three points that must be addressed to complete the reform.

1) The lack of transparency in judicial decisions

Although there are some legal texts that refer to the trials as being public, the reality is quite different. Most trials are conducted in a non-public way, thereby lacking transparency and not guaranteeing a fair trial. Accordingly, the Saudi justice system appears incapable of modernising to fit contemporary standards of fairness.

²²⁸ Ibid

²²⁹ Bureau of Experts at the Council of Ministers, 'The Law of the Judiciary Royal Decree M/78, ' 1st Oct 2007)

<<https://www.boe.gov.sa/ViewSystemDetails.aspx?lang=ar&SystemID=131&VersionID=160&languageid=2>> accessed 6 Feb 2016

²³⁰ BBC News, 'Saudis to Overhaul Legal System'(5 October 2007) <http://news.bbc.co.uk/1/hi/world/middle_east/7029308.stm> accessed 25 April 2013

²³¹ Saudi Gazette, 'High Commission to lay bases for Shari’a verdicts', <<http://www.saudigazette.com.sa/index.cfm?method=home.regcon&contentid=2008072312485>> accessed 25 April 2013

²³² A Kechichian Joseph, 'Reforming the Judiciary in Saudi Arabia' (01Oct 2009, <<http://www.mei.edu/content/reforming-judiciary-saudi-arabia>> accessed 26 April 2013

2) The lack of judicial independence

Human rights organisations are also notable critics of Saudi judicial independence. Freedom House unequivocally reports that “The judiciary, which must coordinate its decisions with the executive branch, is not independent.”²³³ Similarly, an American human rights organisation²³⁴ has reported that judges are still defined as civil servants, and that the King exercises significant control through his appointment or removal of senior members of the judiciary, deciding the remit of the Supreme Judicial Council and personally deciding on retirement, transfer, promotion and demotion of judges, as well as determining their remuneration.

The Saudi justice system is tribal in character though ostensibly, it claims to be based on religious texts. As an example, the court in Al-Jouf City, in August 2005 break-up between the spouses forcibly because of "incompetence lineage with her husband". The case had been brought by her brothers after the death of their father, who agreed to a marriage. Muslim scholars who described the judgment as “not based on the provisions of the Islamic Sharia, but tribal customs.” As he criticised Human Rights Watch, King Abdullah called for the case to be referred to the Supreme Judicial Council “to correct the unjust decision”.²³⁵

3) The lack of women's rights

Saudi women feel that the judicial system is unjust and persecutes them, and the best example of this came in the case of "Qatif girl." Htun Fassi, from King Saud university in Riyadh and very active in the field of women's rights, considered that Saudi women "suffer from the absence of written laws, and sentences are left to the discretion of the judges."²³⁶ According to the activist, the Saudi justice system stipulated that: "Women are part of the property of her guardian." She went on, claiming that judges ignore the legislation and issue penalties unilaterally, often including the death penalty.²³⁷

²³³ Freedom House, 'Saudi Arabia: Freedom in the World' 2014)
<<https://freedomhouse.org/report/freedom-world/2014/saudi-arabia#.VRnm71Wqqko>> accessed 7 March 2015

²³⁴ USA, Department of state, 2011 Human rights report: Saudi Arabia, Bureau of democracy, available at
<<http://www.state.gov/documents/organization/220586.pdf>> accessed 8 March 2016

²³⁵ Voltairenet.org, 'Reforming Saudi judiciary between domestic defence and international pressure'
<<http://www.voltairenet.org/article153565.html>> accessed 10 March 2016

²³⁶ Ibid

²³⁷ Ibid

Despite the declaration of the Saudi authorities of its intention to reform the judicial system, real reform cannot be achieved in isolation from overall reform in the Kingdom, especially in a political, social and educational context. Therefore, the Saudi judiciary will not undergo qualitative changes according to many experts in judicial matters.

I believe that reforms to the justice system could perhaps be achieved through two conditions:

First, the independence of the judiciary is essential. Laws must be developed to take into account human rights and guarantee the rights of the complainants, defendants and witnesses. There must also be advanced institutes in place to teach these laws and learn from other countries laws and procedures, and appropriate forums for debate. In addition, there must be a special budget that should not be controlled by the king to ensure that the judiciary is completely independent, thereby allowing Saudi citizens to feel comfortable that it is free and fair.

Second, move away from old traditions. Judicial reform needs to be financed from independent sources to avoid undue influence. In addition judges should be technically assessed to ensure that they have the competence to carry out their duties. The performance and experience gained and the extent of the judiciary's ability to absorb and apply the law to cases before it as well as to evaluate the judge's behaviour are important. It is also crucial to learn about judges' relations with the outside world and any relevant information about their lives which might affect performance.

Those with a more positive interpretation of the reforms suggest it will bring the court structure more into line with other jurisdictions; make the jurisdictions of each type of court more transparent and less complex; and may facilitate the specialisation of members of the judiciary.²³⁸

The new law is designed to reform the judiciary and to establish higher standards including promoting the right to a fair trial, as detailed in the Law of Procedures before Shari'a Courts and the LCP from 2000 and 2001 respectively.²³⁹ The change was a

²³⁸ Al Hamidani Bandar, 'The Saudi Arabian court system is regulated by the Law of Judiciary promulgated by Royal Decree No. M/78 on 1 October 2007' <<http://www.tamimi.com/en/magazine/law-update/section-8/may-7/the-new-court-system-in-saudi-arabia.html#sthash.s881xdNq.dpuf>> accessed 26 February 2016

²³⁹ Muhammed AL-Subaie Salman, 'The right to a fair trial under Saudi Law of Criminal Procedure: a human rights critique' (DPhil thesis Brunel university, London 2013)

reaction to the KSA society's needs, both social and economic and is a significant move toward facilitating a modern and prosperous economy, as well as enhancing the business environment. For example, foreign companies operating in the KSA would benefit from the greater clarity and order created by the reforms.

It was hoped that the independence of the Saudi judiciary would be assured by the new law, which aims to deliver the fairest possible trials. The very first article of the law states: "Judges are independent and, in the administration of justice, they shall be subject to no authority other than the provisions of Sharia and laws in force. No one may interfere with the judiciary."²⁴⁰ Critics remain ambivalent regarding the reforms, on the one hand casting doubt on how fundamental the country's reforms will ultimately turn out to be and on the other conceding that they represent "one of its most sweeping legal changes in generations".²⁴¹

3.6.2 POST REFORM STRUCTURE

The Law of the Judiciary 1975 had established the Supreme Judicial Council (SJC) as the highest court in the KSA.²⁴² The Law of the Judiciary 2007²⁴³ introduced a Supreme Court the effect of which was to split the previous functions of the SJC into two: administrative functions remaining with the SJC and judicial functions which would be governed by the new Supreme Court. The primary aim of this was to alter the structure to facilitate one which, at face value, ensured the independence of the judiciary. The new Law of the Judiciary organises the Courts System into the hierarchical structure shown in figure 1.

²⁴⁰ The Law of the Judiciary - Royal Decree No. M/78 (19 Ramadan 1428H) 1 October 2007 Ch. 1 Art. 1

²⁴¹ Joseph, 'Reforming the Judiciary in Saudi Arabia'

²⁴² The Law of the Judiciary, Royal Decree No. M/64, arts. 5 & 26 (14/7/1395H, /Jul. 23, 1975), O.G. Umm al-Qura No. 2592 (29/8/1395H, Sep. 5, 1975)

²⁴³ The Law of the Judiciary 2007- KSA

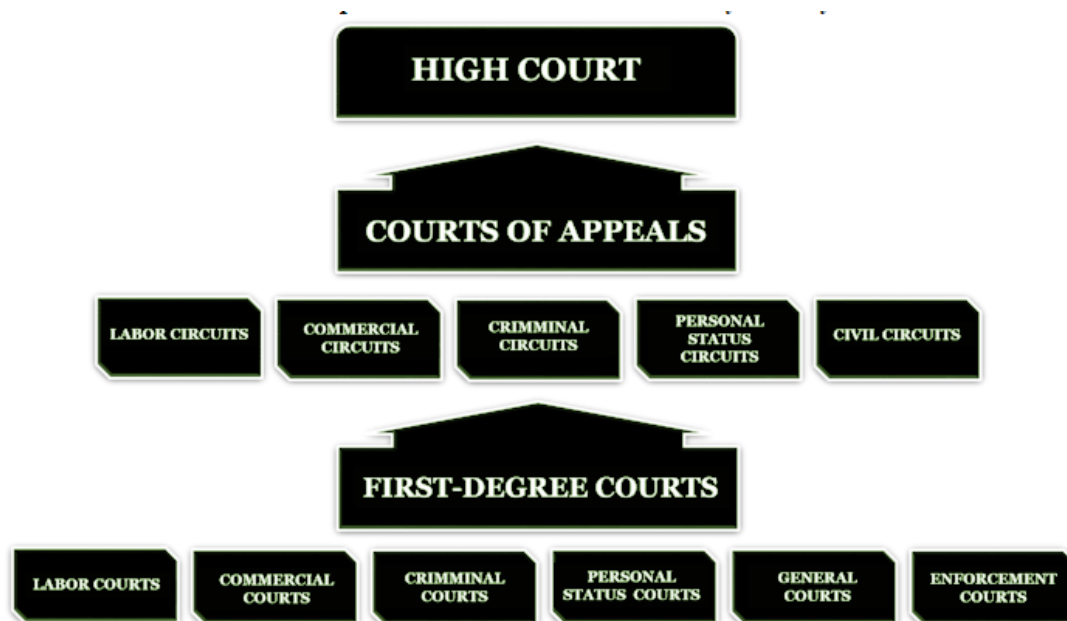


Figure 1. Structure of courts in the KSA Source: Based on Ansary, 2008.²⁴⁴

3.6.2.1 The Supreme Court

The primary function of the Supreme Judicial Council (SJC) is taken on by the Supreme Court, as the top power in the judicial framework. It oversees and helps with the enactment of Islamic law (Shari'a) and the regulations adopted by the King that are appropriate for the judiciary. The Supreme Court examines all kinds of rulings of the Courts of Appeals.²⁴⁵

The new Law of the Judiciary (2007) is different from the previous one (1975) because it includes elements of increased judicial independence. For example:²⁴⁶

- Administrative supervision of the court system has been transferred from the Ministry of Justice to the SJC. The previous law, for example, stipulated that rulings of the Court of Cassation required the approval of the Minister of Justice. If the Minister did not approve, the ruling was sent back to the court for reconsideration. If the body's deliberations failed to yield a decision that the minister approved, then the matter was referred to the SJC to render a final

²⁴⁴ Ansary, 'A brief overview of the Saudi Arabian legal system'

²⁴⁵ LJ 2007 article 10, 11,12,13,14.

²⁴⁶ Ansary, 'A brief overview of the Saudi Arabian legal system'

judgement. Under the new law, the Court of Cassation rules by majority decision and its decisions are final.

- The SJC alone possesses the prerogative to compose Courts of First Instance and to specify their specialisations; previously this fell under the authority of the Minister of Justice.
- The SJC also took over from the executive branch the job of specifying the experience required to occupy the various judicial ranks and examines all kinds of rulings of the Courts of Appeals.²⁴⁷

3.6.2.2 The Courts of Appeal

The Courts of Appeals act via specialised circuits of three-judge panels, except for criminal cases, where a five-judge panel examines decisions on severe crimes including those punishable by death.²⁴⁸ These courts comprise of the following circuits: Labour Circuits, Commercial Circuits, Criminal Circuits, Personal Status Circuits, and Civil Circuits. Each circuit is composed of a president appointed by the Chief of the Appellate Court and judges holding the rank of Appellate Judge.²⁴⁹ The Appeal Courts listen to decisions that can be appealed from lower courts, with the decisions delivered according to the Law of Procedure before the Sharia Courts and the LCP.²⁵⁰

3.6.2.3 Courts of first instance

Courts of first instance comprise of General Courts, Penal Courts, Commercial Courts, Labour Courts, and Personal Status Courts.²⁵¹ The jurisdictions of the courts of first instance are regulated by The Law of Procedures for Shari'a Courts.²⁵² These courts are well-formed in provinces and contain special circuits that include the enactment of Approval Circuits and Traffic Cases Circuits. The courts are made up of a panel of one or three judges as stipulated by the Supreme Judicial Council. The Criminal Court, which is the most relevant to this thesis, consists of the following specialised circuits: *Hudud* Cases Circuits, *Qisas* Cases Circuits, *Ta'zir* (Discretionary Punishment) Cases

²⁴⁷ Ibid

²⁴⁸ Ibid

²⁴⁹ Ibid

²⁵⁰ LJ 2007, articles 15, 16, 17.

²⁵¹ Ansary, 'A brief overview of the Saudi Arabian legal system'

²⁵² Issued by Royal Decree No. M/1 on 22/01/1435H corresponding to 25 November 2013

Circuits and Juvenile Cases Circuits.²⁵³ The Criminal Court will be composed of a three-judge panel. Other crimes outlined by the Council are heard by a single judge, while every current Summary Court is to be transferred to Criminal Courts.²⁵⁴ In September 2014, the Ministry of Justice established criminal courts in major cities throughout the KSA. The Ministry stated its intention to establish 18 criminal courts and 25 criminal circuits in general courts around the country. Concurrently, more than 100 criminal (first-degree and appeal) circuits currently under the Board of Grievances are being transferred to the jurisdiction of these criminal courts within the main judicial system.²⁵⁵

3.6.3 WITNESS TESTIMONY PROCEEDINGS AND LEGAL OBLIGATIONS UNDER THE LCP

So, to illustrate the idea of protecting witnesses in the investigation stage in Saudi criminal law, I will describe witness testimony proceedings and legal obligations concerning testimony in the investigation stage which are covered in section 4 of the LCP. I believe it is important to set these articles out in detail as they represent the only source from which the reader can measure the legal stance towards witnesses in Saudi criminal legal system.

Article 95 of (LCP) provides

“... the Investigator shall hear the statements of the witnesses called by the litigants unless he considers that their testimony would be useless. He may also hear statements from others whom he deems necessary with respect to the facts that may lead to the proof of the crime, its circumstances, and its attribution to the accused or his innocence.”

Article 96 of (LCP) states

“.... the Investigator shall enter into the record full information about each witness, including the name of the witness, his surname, age, profession, nationality, place of residence and his relationship to the

²⁵³ H.R. Dammer and J.S. Albanese, *Comparative Criminal Justice Systems* (Cengage Learning 2013) 178

²⁵⁴ LJ 2007, articles 18, 19, 20, 21, 22, 23, 24, 25, 26.

²⁵⁵ Al-Ansary Jubair, 'Inaugurating Labor and Commercial Courts in 2017' *Al-Sharq News* (<<http://www.alsharq.net.sa/2014/08/20/1206329>> accessed 26 February 2016

accused, the victim and the claimant of the private right of action. These particulars, the testimony of witnesses and the procedure for hearing the testimony shall be entered into the record without any amendment, cancellation, erasure, insertion or addition. These particulars shall be valid only after they have been approved by the Investigator, the clerk and the witness.”

Article 97 of (LCP) stipulates

“... the testimony shall be signed by the Investigator and the clerk, and it shall also be signed by the witness after it has been read to him. If the witness declines to sign or affix his thumbprint on such testimony or if he is unable to do so, a note to this effect shall be entered into the record together with any explanation on the part of that witness.”

Article 98 of (LCP) provides that “the Investigator shall hear each witness separately, and he may hear the witnesses in the presence of other witnesses and the litigants.”

Article 99 of (LCP) states that “following the hearing of the witness, the litigants may comment on his testimony and may ask the Investigator to hear the witness on any other point they raise. The Investigator may refuse to direct irrelevant or defamatory questions.”

Article 100 of (LCP) instructs that “if a witness is sick or unable to appear before the court, his testimony shall be heard at the place where he is available.”

These articles describe the role of witnesses in the investigation stage and guide investigators on how to deal with them but they do not address how to protect them during the investigation stage. Saudi legislators should add to procedural law an article that emphasises the importance of the testimony in this stage and which requires adherence to a comprehensive set of practices with regard to these witnesses, particularly VIWs just as has been done in England and Wales.

3.7 Analysis of the deficiencies in witness protection in KSA

As mentioned, Saudi law does not have explicit provisions concerning witness protection. The law actually contains contradictory ideas. For example, Article (96) forbids imposing any prejudicial pressure on witnesses. However, Article (99) permits the defendant to question the witness without any restrictions or conditions. This provision undermines the witness's right to be protected in many ways. Firstly, the witness may want to refrain from testifying if the defendant is allowed to investigate him in the examination phase. Second, the witness in the examination phase has the right not to appear before the investigator to testify. Third, the witness's right to refrain from testifying is likely to result in the dismissal of many cases due to the absence of the witness, though there are no official statistics available to demonstrate how many. The KSA's tribal social system may give the witness the right to refrain from testifying, if a rival tribe begs him not to testify against one of their tribe.

On this third point, it is important to remember that the KSA was tribal long before it was Islamic and these tribal influences still pervade society today. There is a kind of dichotomy between tribe and state in terms of authority. Sebastian Maisel, explains this dichotomy:

*“Tribe and state, just like nomads and settlers, live in symbiotic dependency. If the state is powerful it can extend central authority into tribal territory and enforce Shari‘a. However, if the state is weak, tribal customs become widely accepted even among settled communities and their mostly tribal members. Another, more subjective aspect depicts this dichotomy. While adherence to Islamic law is a question of faith and believing in the revelation of the Prophet Muhammad, the adherence to customary law is a matter of following age-old customs and values.”*²⁵⁶

The Saudi legal system should not be looked upon favourably for its failure to prevent criminals pressuring or intimidating witnesses in the pre-trial phase. The Saudi legal system should satisfy the ideals of Islamic Sharia law in this matter. These ideals, and

²⁵⁶ Maisel Sebastian, "Tribes and the Saudi Legal-System: An Assessment of Coexistence ' 1st Oct 2009) <<http://www.mei.edu/content/tribes-and-saudi-legal-system-assessment-coexistence>> accessed 11 May 2015

whether they are met, are discussed in detail in chapter 7. Without clear provisions for protection, witnesses might face or suffer intimidation which may affect the quality of his evidence while giving testimony.

3.8 Summary

In this chapter I have contextualised the position of witnesses in the KSA starting by presenting my arguments on why witnesses have been treated as a low priority in the this jurisdiction. Following this I presented the sources on which the Saudi legal system is based and summarised the four Sunnh schools of Islamic thought. Further context is given through a discussion of criminal law in the KSA and how the courts operate under the recent process of reforms in the kingdom including witness testimony proceedings. Lastly I offer an anlysis of the deficiencies in the treatment of witnesses in the KSA. I conclude by asserting that Saudi procedural law must contain a provision giving protection to witnesses during the examination stage, similar to English law.

In the next chapter I present a comparative analysis and discussion of the key differences between the legal systems of Englnd and Wales and the KSA.

CHAPTER 4

KEY DIFFERENCES BETWEEN THE LEGAL SYSTEMS OF

ENGLAND, WALES AND THE KSA

4.1 Introduction

In this chapter I examine some of the main points of contrast between Saudi and English law and the respective CJSs. This is by no means intended to be a fully comprehensive analysis of all aspects of the CJSs, as this is beyond the scope of this thesis. I will consider the separation of religion and state, and independence of the judiciary, the contrasts of adversarial and inquisitorial systems, the role of judge and juries, and legal representation. I highlight distinctive aspects of the English legal system (evidence, testimony and witnesses in England's adversarial system) and identify differences between the English and Saudi legal systems. Then I highlight distinctive aspects of the KSA legal system on testimony before the judge and protecting the witness during the trial stage and finally witness compellability in both countries.

It will not be an exhaustive list of points of contrast but will outline key features that may inhibit or facilitate a transfer of special measures from England and Wales to KSA. The aim of this chapter is to describe and discuss the key differences between the two legal systems in order to consider structural, theoretical or cultural features of each system that may affect the transfer of special measures for VIWs as operated in England and Wales to the KSA. Do any of these contrasts and differences rule out, inhibit or facilitate such a transfer?

There are some similarities between the Saudi and English legal systems but for our purposes of evaluating whether special measures for witnesses could be transferred from England to the KSA it is more productive to consider the contrasts. I must bring that these differences do not prevent the Saudi courts from introducing and applying special measures for witnesses and whether KSA import some key features of English courts, which could effectively improve the treatment of witnesses in criminal courts. Below I set out a non-exhaustive series of these differences.

4.2 Separation of religion and state and independence of the judiciary

A key difference between English and Saudi law concerns the fundamental basis and source of law. Article 48 of the BLG states,

*“The courts shall apply the rules of the Islamic Sharah in the cases that are brought before them, in accordance with what is indicated in the Book (Qur’an) and the Sunnah, and statutes decreed by the Ruler which do not contradict the Book (Qur’an) and Sunnah.”*²⁵⁷

In England, under the principles of constitutionality and the separation of powers, the optimal sources of criminal law are the legislature and judicial precedent.²⁵⁸ Furthermore, unlike the Saudi judge the English judge does not interpret laws with regard to any religious texts, using secular reasoning. Although arguably some judges have been influenced by religious views in some criminal cases, particularly about sex (although less so in the last twenty years).²⁵⁹ By contrast, within every legal system in Arab or Islamic countries, the cornerstone of the system is Islamic jurisprudence. This means in each Islamic country efforts must be made to translate the principles provided in the Qur’an and the Sunnah of the Prophet into a bona fide legal framework.

Article 46 of the BLG of the KSA states that “The judicial authority is an independent power. In discharging their duties, the judges bow to no authority other than that of Islamic sharah.”²⁶⁰ This assertion is repeated in the Law of the Judiciary, wherein Article 1 states that “judges are independent and, in their administration of justice, shall be subject to no authority other than the provisions of the sharah and the laws in force” it goes on to state that “no one may interfere with the judiciary”.²⁶¹ In a Royal Decree enacted as long ago as 1961 an offence was created for judicial interference by government ministers which was punishable by a prison term of between three and five years’ imprisonment.²⁶²

There are, however, critics of the actual state of judicial independence in the Kingdom. Al Jarbou describes how judicial independence, a key principle of English law, is not

²⁵⁷ BLG 1992

²⁵⁸ Law Commission, *Criminal Law: A Criminal Code for England and Wales* (HM Stationery Office 1989)

²⁵⁹ [2004] EWHC2808 (fam), Para 116.

²⁶⁰ BLG 1992

²⁶¹ LJ 2007

²⁶² Ordinance Concerning the Prosecution of Ministers, Decree No. 88, art. 5 (22/9/1380H, Mar. 9, 1961)

recognised in Islamic Sharia.²⁶³ More specifically, he argues that Islamic political theory promotes centralised authority in the hands of the head of the state. The head of state either exercises this power himself or through the appointment and control of proxies (judges). Consequently, he, argues that “it is crucial to make some reforms to the judicial system with the aim to solve the confusion in its structure and jurisdiction and to guarantee the right of individuals to be heard by an independent and impartial court.”²⁶⁴ Human rights organisations are also notable critics of Saudi judicial independence. Freedom House unequivocally reports that “The judiciary, which must coordinate its decisions with the executive branch, is not independent.”²⁶⁵ Similarly, an American human rights organisation has reported that judges are defined still as civil servants, and that the King exercises significant control through his appointment or removal of senior members of the judiciary, deciding the remit of the Supreme Judicial Council and personally deciding on retirement, transfer, promotion and demotion of judges, as well as determining their remuneration.²⁶⁶

Aside from applying Islamic Sharia, Royal Decrees enact legislation as statutes or regulations in the KSA. When compared to a Western jurisdiction there are relatively few formal laws in the Kingdom. Two consequences of this are on the one hand flexibility in the interpretation of both law and tradition but, on the other, potential inconsistency in the interpretation of the scope and position of the law, something compounded by the lack of status of judicial precedents.²⁶⁷ When a judge seeks to formulate a ruling in the KSA they turn to their knowledge of the *fiqh*, Islamic Law which is comprised of the *ijtihad* (reasoning) of the Islamic religious-legal scholars, both contemporary and historical.²⁶⁸

In contrast England and Wales sees a prolific number of new laws introduced every year. For example, 2010 saw 3,506 new laws introduced in the UK, though it is

²⁶³ Al-Jarbou, 'Judicial Independence: Case Study of Saudi Arabia'

²⁶⁴ Ibid 52

²⁶⁵ Freedom House, 'Saudi Arabia: Freedom in the World'

²⁶⁶ Americans for Democracy and Human Rights in Bahrain, *The Pretence of Progress: A report on the implementation of Saudi Arabia's recommendations from the special rapporteur on the independence of judges and lawyers*, March 2015)

²⁶⁷ A Baderin Mashood, 'A comparative analysis of the right to a fair trial and due process under international human rights law and Saudi Arabian domestic law' (2006) 10 *The International Journal of Human Rights* 241

²⁶⁸ Frank E Vogel, *Islamic Law and the Legal System of Saudi: Studies of Saudi Arabia*, vol 8 (Brill 2000)

important to note that 98% of these were in the form of Statutory Instruments²⁶⁹ which are not required to pass through the full parliamentary legislative process.²⁷⁰ Nevertheless, there is more legislation on the statute books of England and Wales than is the case in the KSA. In addition, the rulings of judges in higher courts are recorded and become common law; judges in the lower courts have to use these decisions to help them make their own decisions in their court cases.²⁷¹

In England and Wales, judicial independence was effectively established as a key principle of the state by the Act of Settlement of 1701.²⁷² The modern day interpretation of judicial independence is one “impartial and independent of all external pressures” and these pressures are described as including “the executive or the legislature, by individual litigants, particular pressure groups, the media, self-interest or other judges, in particular more senior judges.”²⁷³ Independence is also supported by a legal immunity from prosecution for anything they do in their role as judges and anything they say being about parties to any case they hear.²⁷⁴ They also have security of tenure under the statutory retirement age of 70. Judges of the High Court and above cannot be removed from office without the passing of a parliamentary motion something which has never occurred. In 2009, the Supreme Court was established to take over from the Appellate Committee of the House of Lords and is now fully independent from Parliament.

I described in some detail earlier that the KSA has been undergoing a period of far reaching judicial reforms. The last decade or more has also seen such a process taking place in England and Wales. In particular, the Constitutional Reform Act 2005 included provision for a Supreme Court, established in 2009, to take over from the Appellate Committee of the House of Lords and is now fully independent from parliament.

²⁶⁹ According to the House of Commons Information Office, Statutory Instruments (SIs) are “a form of legislation which allow the provisions of an Act of Parliament to be subsequently brought into force or altered without Parliament having to pass a new Act. They are also referred to as secondary, delegated or subordinate legislation.” Parliamentary Archives, *‘Women in the House of Commons’*

²⁷⁰ BBC News, 'Record number of new laws made in 2010' 2011) <<http://www.bbc.co.uk/news/uk-politics-13569604>> accessed 28 February 2016

²⁷¹ HM Government, 'The role of judges'

<http://webarchive.nationalarchives.gov.uk/+www.direct.gov.uk/en/CrimeJusticeAndTheLaw/TheJudicialsystem/DG_181788> accessed 28 February 2016

²⁷² Perhaps most famously this is the Act which determined that no Roman Catholic could hold the crown of England and Wales, however, it also established that the sovereign could only declare war with the assent of parliament and, as relevant here, established security of tenure for judges.

²⁷³ Courts and Tribunals Judiciary, *Judicial accountability and independence*

²⁷⁴ Ibid

While the level of judicial independence in England and Wales can be viewed as very high as seen perhaps most clearly in the number of times the executive's actions are ruled as illegal²⁷⁵, the question of judicial independence is not entirely uncontroversial with one current issue being the combining of the roles of Lord Chancellor (a quasi-judicial function) and Secretary of State for Justice (an executive and political role).²⁷⁶

4.3 Adversarial v Inquisitorial

The dominance of the inquisitorial model of justice in Arab countries has been attributed to Napoleonic influences. The Napoleonic Code and other principles of civil society merging from France in the early nineteenth century had an important influence in the Middle East especially those countries that were colonized by France.²⁷⁷ It should be also remembered that the inquisitorial model is used more widely around the world than the adversarial counterpart.²⁷⁸ It has been argued that the rise to prominence of the inquisitorial system can be attributed to the desire to protect the accused from miscarriages of justice by only finding them guilty if they confessed or on the basis of the evidence of two eye-witnesses.²⁷⁹ However, this seemingly noble aim fostered the use of torture to secure convictions in cases where such eyewitnesses were not available.²⁸⁰ In response to this the modern inquisitorial model (which one could argue is what the KSA is seeking to evolve into) is chiefly characterised by a detailed pre-trial investigation including defendant and witness interrogation which is aimed at ensuring that no innocent person is taken to trial in the first place. Thereafter, "The trial in the inquisitorial system is less like a competition and more like a continuing investigation."²⁸¹

²⁷⁵ One notable case was *R (on the application of Q and others) v Secretary of State for the Home Department* [2003] 2 All ER 905, wherein high court judge Justice Collins, criticised the provisions of the Nationality, Immigration and Asylum Act 2002, stating that the removal of benefits from asylum seekers who did not apply on arrival in the country was unfair and breached their human rights.

²⁷⁶ Courts and Tribunals Judiciary, 'Judicial Independence: What is Judicial Independence?' *Politicscoulk*, (<<http://www.politics.co.uk/reference/judicial-independence>> accessed 28 February 2016)

²⁷⁷ Elisabeth Fehrenbach and Robert B Holtman, *The Napoleonic Revolution* (JSTOR 1981)

²⁷⁸ Louis Theodor Christian Harms, 'Demystification of the inquisitorial system' (2011) 14 PER: Potchefstroomse Elektroniese Regsblad 01

²⁷⁹ HR Dammer, E Fairchild and JS Albanese, 'Comparative criminal justice systems: Thompson Wadsworth' (2014) 144

²⁸⁰ Ibid

²⁸¹ Ibid

England and Wales follow the adversarial model in their procedures which English law Professor Jacqueline Hodgson described as

*“... characterized by the fact that responsibility for the investigation, as well as selection and presentation of the evidence, lies with the two parties to the case: the accuser and the accused. Trial is based on oral evidence presented before an impartial and relatively passive judge, with a lay jury delivering the verdict.”*²⁸²

The roles of accuser and accused are carried out by representatives. The accuser is firstly the police and then the CPS while the accused usually has legal representation. As with the Saudi system live oral testimony is the paramount means of case disposal.

It is worth adding that although England and Wales follows the adversarial model it does not mean that all cases brought before the court proceed along the classic adversarial line. The Ministry of Justice reported that between July 2012 and June 2013, 352,500 people were issued with an out of court disposal – a police caution or a penalty notice.²⁸³ Furthermore, around 65 percent of cases heard at magistrates’ courts or the crown courts are guilty pleas.²⁸⁴ There are also active discussions among leading members of the judiciary that the future could see family and civil justice in England and Wales taking on a more inquisitorial system. So although correctly labelled as an adversarial system, not all criminal justice is disposed in this way.

Overall while inquisitorial and adversarial labels appear distinct there are significant grey areas and many countries (arguably including England and Wales) have effectively evolved a mixed model.

4.4 The role of Judge and Juries

There are significant differences in the role of judges between the KSA and England. Understanding these differences could help improve Saudi criminal law’s protection of witnesses based on the structure of English criminal courts. There are a number of areas

²⁸² Hodgson Jacqueline, 'The future of adversarial criminal justice in 21st century Britain' (2010) 35 North Carolina Journal of International Law and Commercial Regulation 320

²⁸³ Ministry of Justice, *Criminal Justice Statistics Quarterly Update to June 2013*)

²⁸⁴ Jacqueline, 'The future of adversarial criminal justice in 21st century Britain'

where the respective roles of judges differ between the two countries and it would be helpful to summarise them here.

Judges together with legal scholars (*ulama*), are the lawful interpreters of the two holy sources, and apply Islamic Sharia in rendering a judgement or advice (*fatwa*) on the individual cases brought before them.²⁸⁵ However, their judgements do not constitute common law as the decisions of higher courts do in England and Wales.

As described above, Saudi judge's work within an inquisitorial system of justice in which they are the inquisitors. English judges operate within an adversarial system where their role is more one of arbiter between the prosecution and defence. Legal counsel decides upon which questions to ask and how or whether to conduct cross-examination. However, one point of similarity is that like their Saudi counterparts, English judges rule on admissibility of evidence.

The Hanbali School permits judges to act as 'witnesses'²⁸⁶ by presenting their own observations made through personal reasoning.²⁸⁷ The judge's role in an English court is to sum up the evidence for the jury and direct the jury as to the relevant law that they must apply, as well as sentencing if the verdict is guilty.

Saudi judges are the sole arbiters of whether a defendant is guilty, whereas, in England, as I describe later in chapter four, juries have the crucial role in deciding these matters. The Saudi judge is also responsible for sentencing and deciding upon punishments in those cases that are not Hudd crimes where the punishment is already described in the holy texts. In England, the judges must follow any relevant sentencing guidelines issued by the Sentencing Council for England and Wales.²⁸⁸ The lack of guidance for Saudi judges has led to some controversial judgements being made and fatwas issued.

In September 2006 a judge annulled a marriage as he considered that the husband and wife's lineages were not socially equivalent²⁸⁹, in 2009 the King himself had to

²⁸⁵ Esther van Eijk, '4 Sharia and national law in Saudi Arabia' (2010) SHARIA INCORPORATED 139

²⁸⁶ There is disagreement among the Islamic schools about the permissibility of the judge acting as a witness using his personal knowledge. In my own opinion it is not right to give the judge permission to becoming a witness in the cases he is hearing. For more detail on this topic <<http://fiqh.islammessage.com/NewsDetails.aspx?id=8892>>

²⁸⁷ Maha, 'Evidence in Islamic law: reforming the Islamic evidence law based on the federal rules of evidence' 148

²⁸⁸ S. 125 of the Coroners and Justice Act 2009

²⁸⁹ Huband Mark and Craze Joshua, *The kingdom: Saudi Arabia and the challenge of the 21st century* (Hurst Publishers 2009) 191

intervene to sack head judge *Sheikh Salih Ibn al-Luhaydan* after he had pronounced that it was permissible to murder owners of satellite TV channels which broadcast immoral programmes²⁹⁰, and in the globally reported recent case of *Raif Badawi* the appeal judge sentenced the liberal blogger to 1,000 lashes and ten years in prison for “offending faith” and transgressing “the boundaries of obedience” after he had been critical of leading Saudi scholars and Islam’s role in public life in the KSA.²⁹¹

In England and Wales, the role of the judge depends on the nature of the case. In the Crown Court, cases are heard before a judge and jury. Here the judge interprets the law and manages the trial. It is for the jury to consider the evidence and decide on guilt.²⁹² The judge acts as an arbiter between prosecution and defence. In civil cases there is no jury and the case is decided by the judge after a process of controlling the way the case is handled, and encouraging a settlement between the parties including those outside of court.²⁹³ Family cases have no juries and the judges presiding in such case have undertaken special training. The role of the judge is to listen to the opposing arguments, evaluate any evidence or opinions from experts and then arrive at a judgement which is in the child’s best interest.²⁹⁴

It is believed that juries have been a feature of the English legal system for more than one thousand years.²⁹⁵ In the 12th and 13th centuries it steadily replaced trial by ordeal and then trial by battle.²⁹⁶ In the 14th and 15th centuries, case law established juries as a collective institution.²⁹⁷ However, the right to be tried by a jury of one’s peers was established in law on July 5th 1641.²⁹⁸ In the same century the key principle of the independence of the jury was established in *Bushel's Case* of 1670.²⁹⁹ Closer to the

²⁹⁰ BBC News, 'Major reshuffle in Saudi Arabia' 14 February 2009)

<http://news.bbc.co.uk/1/hi/world/middle_east/7890211.stm> accessed 28 November 2015

²⁹¹ Knipp Kersten, *Saudi Arabia and its merciless judges* (Deutsche Welle 30 Oct 2014)

²⁹² HM Government, 'The role of judges'

²⁹³ Ibid

²⁹⁴ Ibid

²⁹⁵ The Rt Hon Dominic Grieve QC 'Discussing the history and importance of trial juries and how to deal with problems.' <<https://www.gov.uk/government/speeches/in-defence-of-the-jury-trial>> accessed 17 April 2016

²⁹⁶ JER Stephens, 'The Growth of Trial by Jury in England' (1896) *Harvard Law Review* 150

²⁹⁷ Ibid

²⁹⁸ Section 1 of the Act of Abolition of the Star Chamber

²⁹⁹ *Bushel's Case* (1670) 124 E.R. 1006. This case effectively established that jurors could not be punished for reaching any particular verdict.

present day, in 2005, the House of Lords confirmed in the case of *R v Wang*³⁰⁰ that under no circumstances is a judge entitled to direct a jury to return a verdict of guilty.

As mentioned case law developed and sustained juries in the earlier phase but in 1825, 1850, 1949, and most recently 1974 Juries Acts have codified the place of juries in the English legal system.

Critics of the jury system argue that jurors randomly selected from among the citizenry may be affected by subjective influences such as racial stereotyping, may not fully understand the directions of the court, and may become influenced by the media, particularly more recently social media.³⁰¹ Research conducted to evaluate the fairness of juries reported a 64% conviction rate. The findings of the study provided evidence that juries reached their decisions based on evidence and law rather than subjective factors. This was reflected in the lower conviction rates associated with offences in which the evidence often comprises of conflicting uncorroborated testimonies and higher conviction rates for types of offenses where evidence was more clear cut – as Cheryl Thomas states “conviction rates are associated with the nature of the legal questions a jury must answer to convict a defendant on specific offences and the nature of the evidence likely to be presented to a jury in those cases.”³⁰² I now look at the most obvious practical difference between the KSA and English criminal justice processes which is trial by jury.

4.4.1 JURIES IN ENGLAND AND WALES

One of the most salient points of difference between the English and Saudi legal systems is that the former has a centuries-long tradition of trial by jury while the latter has never used juries of any type.³⁰³ The English system of justice was indeed one of the pioneers of trial by jury and was responsible for exporting its use around the world, for example to the United States. Use of juries around the world continues to be widespread, in fact growing.³⁰⁴ For example, in 2009, Japan adopted a form of trial by

³⁰⁰ *R v Wang* ([2005] 1 WLR 661)

³⁰¹ Thomas Cheryl, *Are juries fair? Ministry of Justice Research Series 1/10* (Ministry of Justice February 2010)

³⁰² *Ibid* 30

³⁰³ Juries Act 1974. An Act to consolidate certain enactments relating to juries, jurors and jury service with corrections and improvements made under the Consolidation of Enactments (Procedure) Act 1949.

³⁰⁴ Nancy S Marder, 'Introduction to Comparative Jury Systems, An' (2011) 86 Chi-Kent L Rev 453

jury, based mainly on the English system.³⁰⁵ However, while the English system may have strong influences beyond its jurisdiction it is important to put into context the extent of the role of juries in 21st century England.

Nearly all criminal court cases³⁰⁶ in England and Wales begin in a magistrates' court where juries do not sit. These cases are either heard by two or three lay magistrates (volunteers drawn from the local community) or by a full time professional District Judge.³⁰⁷

Summary offences are handled in their entirety in these magistrates' courts. More serious offences are sent to the Crown Court, either for sentencing after the defendant has been found guilty in a magistrates' court, or for a full trial with a judge and jury. The Crown Court also receives appeals against decisions of the magistrates' courts. In 2012/13 in total, one million cases were handled in magistrates' courts.³⁰⁸

Juries are summoned in English law for criminal trials in the Crown Court where the offence is triable on indictment only or where an either-way-offence has been directed to the Crown Court by the magistrates or the defendant has elected to be tried in the Crown Court. In 2012/13 just over 15,000 cases prosecuted by the CPS proceeded to trial.³⁰⁹ Furthermore, in the Crown Court only 12% of all charges are ultimately decided by jury deliberation.³¹⁰ The biggest single reason for this is that juries are only sworn in for cases where the defendant has pleaded not guilty and in most cases the defendant pleads guilty.³¹¹

These figures seem to show that while at a level of principles the use of jury appears to be a sharp point of contrast between the English and Saudi systems of justice the reality is that it is only a contrast at the very margins because, based on the numbers quoted above, with only 1.5% of criminal cases going to trial in the crown court and only 12% of these being decided by jury deliberation, the role of juries in England though

³⁰⁵ Dimitri Vanoverbeke, *Juries in the Japanese Legal System: The Continuing Struggle for Citizen Participation and Democracy*, vol 13 (Routledge 2015)

³⁰⁶ For civil cases juries may sit in the courts of first instance, the High Court and County Court, however, this is relatively rare and is restricted to cases of defamation, civil fraud and false imprisonment. In these cases, the jury's role is to decide upon liability; the burden of proof which is 'the balance of probabilities'.

³⁰⁷ Ministry of Justice (MoJ), *A guide to criminal court statistics Last updated 25 June 2015*

³⁰⁸ Attorney General's Office and The Rt Hon Dominic Grieve QC, *In defence of the jury trial - speech at the Politeia forum* (12 December 2013)

³⁰⁹ Ministry of Justice (MoJ), *A guide to criminal court statistics Last updated 25 June 2015*

³¹⁰ Cheryl, *Are juries fair? Ministry of Justice Research Series 1/10*

³¹¹ *Ibid*

undoubtedly important is very limited. There have also been moves to restrict the use of juries in England and Wales still further.³¹² Nevertheless, while in practical terms the use of juries is highly restricted in numerical terms it remains a key point of difference in demonstrating how each legal system deals with cases where the defendant disputes the charge against him (ie. pleads not guilty) as this is when the nature of the CJS reveals itself and becomes important. In this respect, it is important to stress that the systems *are* different and that this difference is highly significant: after all, it is only in contested cases that a jury *and special measures* are used.

4.5 Legal Representation

For most of its history, in the KSA the accused was expected to present his own defence. This changed under the new LCP where Chapter 1 Article 4 states that “Any accused person shall have the right to seek the assistance of a lawyer or a representative to defend him during the investigation and trial stages.”³¹³ The right to representation during the investigation is then restated in article 64. In practice, however, according to a case analysis study from 2006³¹⁴, in the majority of cases, there have been no lawyers engaged. Scepticism about the difference between what is on paper and what happens in practice has been voiced by western academics, with American professors Dammer and Albanese suggesting that it is “The best example of what is theoretically possible and what really occurs in the Saudi CJS.”³¹⁵

This may be slowly changing due to changes introduced in recent years. In 2010 the Shura Council, the consultative assembly of the Kingdom approved the establishment of a public defenders programme for defendants who cannot afford a lawyer³¹⁶ and in 2012 a justice ministry directive permitted women lawyers to represent their clients in a

³¹² The Criminal Justice Act 2003, sections 43, 44 or 46(5) include provisions for trial to be conducted without juries and 46(3) provides for a trial to be continued without a jury. This applies to complex fraud trials (s.43) and trials at risk of jury tampering (s.44) or where such jury tampering is believed to have taken place (s.46(5)). However, s.43 was repealed by section 113 Protection of Freedoms Act 2012 and subsequent cases, most notably *R v Twomey* [2009] EWCA Crime 1035, have ruled that the circumstances where it is appropriate to hold a trial without jury must be very exceptional.

³¹³ LCP 2001

³¹⁴ Abdullah Al-Hargan Abdulhamid, 'The Saudi pre-trial criminal procedure and human rights' (PhD thesis, The University of Kent 2006) 255

³¹⁵ Dammer, Fairchild and Albanese, 'Comparative criminal justice systems: Thompson Wadsworth'

³¹⁶ Commings David, *Islam in Saudi Arabia* (IB Tauris 2015)

courtroom, up to that point women had lawyers had been able to provide advice to clients up to the point of trial.³¹⁷ These are both positive signs that legal representation will be more common if perhaps not universal.

In England and Wales, on arrest the accused has the right to consult with a solicitor (a right which the police are required to inform) and if this is taken up the police may not start questioning until the solicitor is present.³¹⁸ This right is provided for in the Police and Criminal Evidence Act 1984 (hereinafter PACE 1984).³¹⁹ The right to legal representation in court was established in the Prisoners' Counsel Act 1836 however, this was based on the ability to afford representation and it was not until the Legal Aid Act 1949 that the vast majority of the country was covered by publically-funded provision of legal aid.³²⁰ Legal Aid still functions today but in the last decade the level of public funding for legal aid has been dramatically reduced through a combination of tighter eligibility, narrower scope³²¹, and reduced fees for participating solicitors and lawyers.³²²

Considering the KSA and England and Wales together the current trends suggest that the actual level of legal representation (as opposed to the right in law) may be on a trajectory to equalise with English law but still there is still a long journey for Saudi law.

³¹⁷ Man, P. Saudi Arabia set to allow female lawyers to appear in court in overhaul of country's justice system. (2012 *Legal Week* 14 (37) 4

³¹⁸ HM Government, 'Being arrested: your rights' (2015) <<https://www.gov.uk/arrested-your-rights/legal-advice-at-the-police-station>> accessed 12 February 2016

³¹⁹ Police and Criminal Evidence Act 1984 s.58

³²⁰ I Morgan Richard, 'The Introduction of Civil Legal Aid in England and Wales, 1914–1949' (1994) 5 *Twentieth Century British History* 38

³²¹ Cairns Ralph, 'The Legal Aid, Sentencing and Punishment of Offenders Act 2012 The significant changes' (2013) 60 *Probation journal* 177

³²² *Ibid*

4.6 Evidence, testimony and witnesses in England's adversarial system

A key difference between the English and Saudi CJS's is the adversarial nature of the former and the inquisitorial nature of the latter.³²³ In the inquisitorial Saudi system, a judge investigates the case, examines witnesses directly and reaches a reasoned judgement. In common law adversarial legal systems, such as in England, two parties – prosecution and defence³²⁴ – oppose one another in an attempt to convince magistrates or the judge or jury that the defendant is or is not guilty beyond reasonable doubt. The judge remains impartial and acts as a facilitator, arbiter and gatekeeper.³²⁵ Under the adversarial system, rules of evidence are particularly important as they regulate and facilitate a flow of reliable evidence to the jury.³²⁶ The issue of what constitutes 'reliable evidence' has always been a contentious issue and the rules of evidence change over time and are a result of competing policy and political priorities.

Herbert Packer³²⁷ proposes two models of criminal justice which may be a useful way of explaining the differences between the Saudi and English systems. Neither jurisdictions fit perfectly into either models but if viewed as two ends of a continuum the two models help explain the differences and distance between the Saudi and English systems. His first model is based on 'Crime Control Values' and its main features are the paramountcy of the repression of criminal conduct, its efficiency (the ability to apprehend and convict high numbers of offenders), extrajudicial processes are preferred to judicial processes (e.g. police screening of suspects and establishing facts through interrogation rather than the examination and cross examination of witnesses in court). Once a defendant does enter a judicial process there is effectively a presumption of guilt. The second model is based on 'Due Process Values' and Packer characterises this model as a series of obstacles against the 'assembly line' of the Crime Control Values model.³²⁸ The Due Process Values model places a lower value on the extra-judicial search for 'facts', recognises that confessions and admissions can be coerced, witnesses can make errors and can tell investigating police what they want to hear. Hence, reliable

³²³ As I have been explained it in chapters 2, 3.

³²⁴ It must be noted that the duty of the defence is not to show the innocence of the defendant but to prevent the prosecution from proving guilt.

³²⁵ P. van Koppen and S.D. Penrod, *Adversarial versus Inquisitorial Justice: Psychological Perspectives on Criminal Justice Systems* (Springer US 2003)

³²⁶ Ibid

³²⁷ James R Acker David C Brody, *Criminal Procedure: A Contemporary Perspective* (Herbert L Packer, 'The Limits of Criminal Sanction' in James R Acker, David C Brody(eds), Jones & Bartlett Learning 2012)

³²⁸ Ibid 21

evidence arises only from “formal, adjudicative, adversary fact-finding processes.”³²⁹ The aim is to maximise reliability but perhaps at the expense of efficiency. Packer argues that ultimately the *raison d’être* for this model is a safeguard against power, specifically state power. Clearly the Saudi CJS has a closer fit with the Crime Control Values model while the English system bears a closer resemblance to the Due Process Values model, though it is also true to say that the English system has features of both models.

4.7 Witness compellability

In the KSA law, in cases not related to *flagrante delecto*, the witness is not obliged to submit his testimony, and no penalty will be imposed on him due to his absence.³³⁰ However, the LCP of the KSA governs cases of *flagrante delecto* and imposes penalties on the witness if he refuses to submit his testimony or appear before the court. The criminal officer then issues an indictment and proof in a report of wrongdoing so that the competent court may pronounce a verdict on the absent witness. According to article (32) of the LCP:

“ In case of flagrante delecto, the criminal investigation officer may, upon his arrival at the crime scene, stop whoever is found at the scene from leaving or moving away from that place until the required record is drafted. For that purpose, he may immediately summon any person from whom information relevant to the case can be obtained. If any person present at the scene fails to obey the order of the criminal investigation officer or if the person summoned refuses to appear, a note to that effect shall be entered into the record, and the violator shall be referred to a competent court to take whatever action deemed necessary”.

The KSA legal system leaves to the discretion of the court the question of how to punish an absent witness. However, it would be better for legislators to introduce a provision governing that conduct, except in the the case of a *hudood* crime. The view of

³²⁹ Ibid 22

³³⁰ Seraj Eldin Merglani Kamal, *Criminal procedures in flagrante delicto* (king Fahd National Library 2005) 192

Islamic scholars, concerning *hudood* crimes is that any witness has the right to choose whether or not to disclose his testimony at court. Furthermore, Islamic scholars³³¹ have produced evidence, especially from the *hudood*, supporting giving evidence outside the courtroom in certain circumstances.³³²

Prophet Mohammed says, “Protect the sinner of the Muslims. Whenever you can find excuse, let him to go because it is better for the Emam (the leader) to forgive and lift up the sanction than to impose a penalty in wrong manner.”³³³ Furthermore, according to twelfth-century jurist and philosopher Ibn Rushd (*Averroes*), ‘hard punishments are suspended in doubtful cases’.³³⁴

Hence there is a principle of avoiding wrongful convictions at all costs which in turn means that only witnesses completely sure of their testimony should stand as a witness against a Muslim. For example, the following hadith “Whoever conceals [the faults of] a Muslim, Allah will conceal [his faults] in this life and the Hereafter” is interpreted by scholars as meaning that no Muslim is obliged to come to court to give evidence against another Muslim. One may say based on this hadith witnesses of crime would not go to court to testify. There is further interpretation of this by Ibn Rajab who argued that the obligation or lack of obligation to testify is dependent on the type of person the accused is. He asserted that in this regard there are two kinds of people. The first type are people who are not already known as transgressors or committers of bad deeds. When such people make a mistake and transgress for the first time the matter should not be revealed. In other words, witnesses should not come forward. The second type are those known as wrongdoers who may even boast of their transgressions. Where such a person is accused then witnesses should come forward for the benefit of the community.³³⁵ This does not, however, apply in the case of *hudood* crimes (including as mentioned drinking and adultery), when there is no obligation to come forward when not asked to do so.

³³¹ al Shiraz Ebrahim, *Al Muhadhdhab fe Fiqh al Imam al Shafi'I* (Dar al Ma'rifah 2007) 146

³³² Whoever conceals [the faults of] a Muslim, Allah will conceal [his faults] in this life and the Hereafter. So, Islamic scholars interpret that, if the Muslim people ordered by their prophet to conceal the faults other Muslim, a priori that no one is forced to come to court.

³³³ Imam Al-Tirmidhi, *Sunan al-Tirmidhi*, vol section of Al Hudood (Hadith no 1424)

³³⁴ Averroès, *The distinguished jurist's primer: a translation of Bidāyat al-mujtahid* (Centre for Muslim Contribution to Civilization 1994)

³³⁵ I.I. Rajab and U. Jones, *The Heirs of the Prophets (AS)* (2014)

The word ‘*hudood*’ means restrictions made by Allah, the God, the almighty and the compassionate. God has the right to forgive sins committed by his people (his slaves); therefore, the witness may not reveal the complete truth in *hudood* crimes. (God defines the areas in which no action can be taken).³³⁶ Whether the religious nature of Saudi law in contrast to the mainly secular legal system in England is significant for the transfer of special measures is considered in chapter five.

In English law there are certain circumstances under which a witness can be compelled to attend court when either the defence or prosecution believe that voluntary attendance is unlikely. A ‘Witness Summons’ needs to be obtained from the court for each such witness.³³⁷ In the first instance the summons is sent to the court where it would normally be considered by the judge without having a hearing. In addition to a summons to attend to give evidence there is also the possibility of issuing a summons for the production of documents required as evidence.³³⁸ Once this process has been followed and approved by the court, should a witness fail to attend court or give evidence or make the required documents available, they can be punished for contempt of court for which they can receive a custodial sentence of up to 3 months and/ or be fined up to £2500.³³⁹ In addition to this, failure to attend court once a witness summons has been issued may lead to the witness being charged for the wasting the time of the court.³⁴⁰

The Witness Summons itself can be physically handed to the witness, it can be sent using first class mail to the address the witness is believed to be staying at or, when considered necessary, the court can instruct the police to serve it.³⁴¹

There are circumstances in criminal cases where a witness can make representations to the court to have the summons revoked. The three circumstances are: that the witness was not aware of the application for the summons and that he is not able to produce evidence that is likely to be material to the case; or that despite being able to his rights

³³⁶ Muhammad Kamal al-Din, *Explain the Islamic Fiqh*, vol 6 (2003) 368

³³⁷ Ministry of Justice Rules and Practice Directions: Part 34 - Witnesses, Depositions and Evidence for Foreign Courts last updated: Monday, 22 September 2014 <<http://www.justice.gov.uk/courts/procedure-rules/civil/rules/part34#34.2>> accessed 29 Feb 2015

³³⁸ In Brief, ‘I want to call someone as a witness in my case but I don’t think they will want to come to court. What should I do?’ <<http://www.inbrief.co.uk/court-proceedings/witness-summons.htm>> accessed 29th Feb 2015

³³⁹ Contempt of Court Act 1981, section 12.

³⁴⁰ A common law offence subject to statutory limitation in Contempt of Court Act 1981 section 14

³⁴¹ Contempt of Court Act 1981, section 12.

and duties such as the right to confidentiality or indeed the rights of other individuals connected to the evidence carry greater weight than the reasons for issuing the summons.³⁴² In other words, where the potential harm from giving evidence is greater than the likely importance of the evidence to the case. Similarly, in the case of a summons for the production of documents, the summonsed witness may object to the court which will assess the objection by considering the relevance of the material to the case and also the confidentiality consequences to the witness or other individuals.³⁴³

Saudi legal texts do not however address a situation where a witness refuses to provide testimony in court and it might be better if it were mentioned in Saudi legal texts that if witnesses refused to attend and to testify, there would be some punishment. This happens in English courts where witnesses, if they refuse to attend, are liable to penalties, for being in contempt of court.³⁴⁴ However, there needs to be a strong rationale before introducing such a rule, with witness safety needing to be assured. In the absence of a formal system, witnesses are called forward in front of the Qur'an: "The witnesses should not refuse when they are called on [for evidence]." ³⁴⁵ Sunna teaches that an "excellent witness is he who produces his evidence before he is asked for it."³⁴⁶ If a witness is slow in coming forward, there could immediately be a doubt raised in the mind of the judge as to his reliability, to such an extent that it would stay the imposition of *hudood*.

No specific procedure exists to bring witnesses to court in the KSA either in criminal or civil cases. In civil cases the law leaves the option to summon witnesses in the hand of litigants. Article 117 of the LPSC provides that

"A litigant who requests, during proceedings, proof by the testimony of witnesses shall set forth in writing or orally during the hearing the events he wishes to prove. If the court determines that such events are admissible under the provisions of Article 97, it shall decide to hear the

³⁴² Ministry of Justice The Criminal Procedure Rules: Part 28 Witness Summonses, Warrants And Orders in force from 6 October 2014 <<http://www.justice.gov.uk/courts/procedure-rules/criminal/docs/crim-proc-rules-2014-part-28.pdf>> accessed 1st March 2015 s. 28.7

³⁴³ Ibid. s. 28.6

³⁴⁴ Montgomery, R.V. (1995).16 Cr. App. R. (S) 274. Also, see the Contempt of Court Act 1981

³⁴⁵ Holy Quran, surat Al-Baqarah, verse 282

³⁴⁶ Ibn Hajjaj Muslim, *Sahih Muslim* (Dar almarrfah 2007) *Hadith* No 1719

witnesses and shall schedule a hearing for that purpose and ask the litigant to bring them then.”³⁴⁷

Restrictions are placed on how long a litigant has to produce a witness. Article 122 states

“If an adversary requests time to bring witnesses absent from the judicial hearing, he shall be granted the shortest time that is adequate in the opinion of the court. If he does not bring them to the scheduled hearing or brought persons whose testimony was incompetent, he shall be given another grace period along with a warning that he would be considered in default if he does not bring them. If he does not bring them to the third hearing, or brings persons whose testimony is incompetent, the court may decide the dispute. If he has an excuse for not bringing his witnesses, such as their absence or his ignorance of their place of residence, he shall have the right to bring a case when they are available.”³⁴⁸

4.8 The physical location of witnesses in the courtroom

There are significant differences in court processes and procedures between the KSA and England. Understanding these differences could help improve Saudi criminal law’s protection of witnesses based on the structure of English criminal courts. I again argue in this section that the structure of Saudi courts and the nature of the proceedings should be changed to apply such special measures to protect witnesses.

There are no specified places for witnesses to present their testimony in side or outside the courtroom itself, unlike in English law where witnesses can, in some instances , give evidence via CCTV link without having to be in the actual courtroom. Also, there are no waiting areas dedicated to the use of witnesses in Saudi courts and there is no separate seating for witnesses and no ‘dock’ for the accused as there is in England. This close proximity of the parties may cause witnesses to fear testifying. The judge has to be totally objective in spacing and wording, with regards to all parties. Practically, this

³⁴⁷ LPSC 2000

³⁴⁸ Ibid, art.122

results in all parties being seated in precisely identical positions in relation to the judge. However, Article 119 of the LPSC states:

*“The testimony of each witness shall be heard individually in the presence of the litigants but not in the presence of the other witnesses whose testimony has not been heard, though their failure to attend does not preclude hearing it. A witness shall state his full name, age, occupation, place of residence and whether he is related to the litigants by kinship, service, etc., if applicable, and his identity shall be verified.”*³⁴⁹

³⁴⁹ Ibid

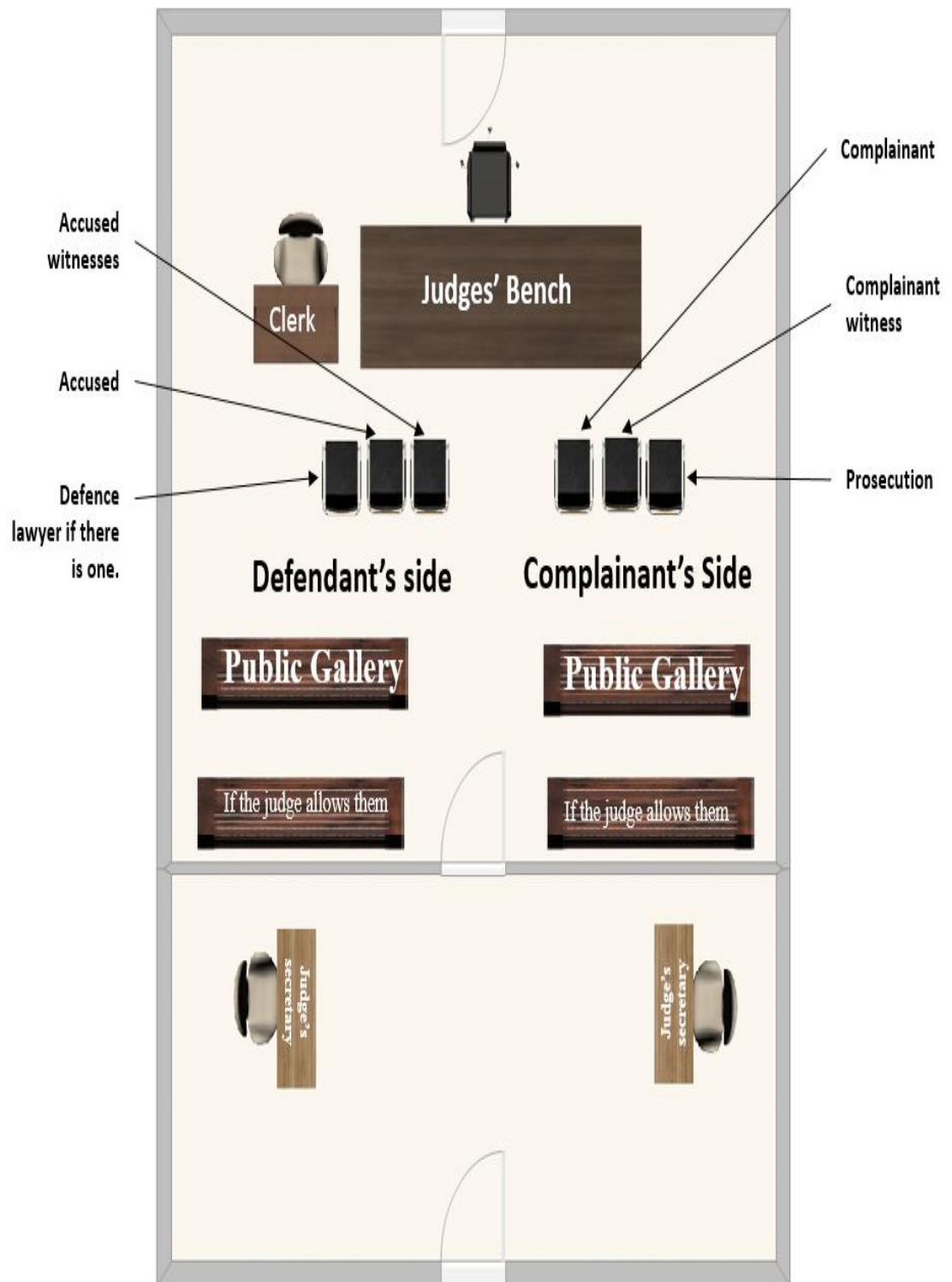


Figure 1: Diagram of a typical Saudi criminal courtroom

In England, as mentioned earlier, an opposite approach is taken when it comes to the physical location of witnesses and their families with regard to defendants and their families and defence witnesses. Witnesses wait in a witness room before being called to give their evidence (although not all courtroom have these facilities).³⁵⁰ There is a requirement for the Courts Service³⁵¹ to provide a separate waiting area for victims and witnesses and a seat in the courtroom away from the defendant's family, where possible.³⁵² However, despite this there is evidence that this provision is not always made available and one particularly tragic case arose where a woman who was encouraged to be a witness against her ex-partner was murdered by him despite her having made seven reports to police of harassment and domestic violence in the months leading up to her death.³⁵³

4.9 Analytical discussion

The KSA law imposes absolute responsibility on the trial judge, particularly in the procedures conducted by the clerks of the court. The sheer range of these procedures might impede and preoccupy the judge and may lead to confusion, hindering the judge from reaching a just decision. This is compounded by the lack of reference points that an English judge has such as common law of England and the special measures for VIWs.

The KSA law gives the judge the responsibility of questioning witnesses. This is also the case in other inquisitorial systems such as those in France or Germany but contrasts with the adversarial systems of countries including England and Wales and the United States.

There are no specified places for witnesses to present their testimony outside the courtroom itself, unlike in English law where witnesses can, in some instances, give evidence via CCTV link without having to be in the actual courtroom. The lack of such

³⁵⁰ Crown Prosecution Service, 'Giving Evidence' <https://www.cps.gov.uk/victims_witnesses/going_to_court/giving_evidence.html> accessed 6th October 2015

³⁵¹ HM Courts & Tribunals Service is the public agency responsible for the administration of criminal, civil and family courts and tribunals in England and Wales.

³⁵² Crown Prosecution Service, 'Giving Evidence'

³⁵³ IPCC, *IPCC publishes investigation report into Essex Police contact with Jeanette Goodwin prior to her murder*, 30 October 2012)

facilities in Saudi law can lead witnesses to refrain from testifying for fear of harm from the accused. Saudi law contains clear provisions punishing the accused who causes insult or injury to witnesses,³⁵⁴ but witnesses still might favour keeping silent and not testifying due to the risk of harm or the fear of the court process and environment. Designating a specific place in court for witnesses, or allowing evidence to be given via CCTV, would not contradict Sharia law but would protect witnesses from potential harm and encourage them to submit testimony. As discussed in chapter two, I argue that Islamic law permits such testimony and does not require the actual presence of witnesses in court.

The system of pleading in Saudi law gives neither prosecution nor defence an absolute right to question witnesses on their testimony. The parties may only indirectly question witnesses by posing questions to the judge, who decides whether to transfer those questions to the witness. However, this procedure undermines the right of the other party to evaluate the materiality of evidence pertinent to the case. Among many reasons, the language used by members of the general public is not similar to that used by judges and advocates in the field of law, witnesses may find it difficult to understand the legal language. There is no right to challenge or appeal on the basis of a judge's ruling on either questioning or inadmissibility, unlike in England where a judge's ruling on the admissibility of evidence or the permissibility of particular questions being put to a witness could be appealed.

The Saudi criminal procedure and penal code do not define the word 'witness', or differentiate types of witnesses, or distinguish the kinds of crimes that necessitate the protection of witness. In general, an intimidated witness is defined as "any person who receives a threat due to his connection with a criminal case"³⁵⁵, which encompasses all

³⁵⁴Article (74) of the Administration Rules of Acts in the Sharia Department stipulates that 'the administrating and controlling of the session is an entitlement of the court. The judge has the right to eject the person who makes noises or misbehaves in the court if this person is one of litigants or parties. If he insists on the misconduct, the judge has the right to issue a writ of imprisonment against him and detain him for a time not to exceed 24 hours. When he determines the conviction, then he sends it to the person, and the police administration must obey the order. If the judge determines to penalise him for more than 24 hours, he should appeal this order to the chief justice to determine the appropriate verdict'. See Article (74) Regulation of Controlling and Administered the Sharia's Courts, ratified number (109), and issued the date of 24/1/1373 H, Kingdom of Saudi Arabia.

³⁵⁵ Alhonidi Mansour, *Procedure of proofing of submitting testimony according to Saudi criminal procedure law* (King Fahd National Library 2004)

persons involved in a case, including judges, covering agent, prosecutors, translators and interpreters.³⁵⁶

The limited definition in the Saudi code which treats witnesses in a very general sense³⁵⁷ (people who submit testimony before the court) does not provide protection to witnesses' relatives and friends who may be endangered because of their testimony. Sharia law, however, encourages witnesses to submit testimony and aims to protect witnesses but despite this Saudi law remains silent on the issue.

The lack of witness protection provisions in Saudi law plays has major effects on the submission of testimony. Such a provision would might make witnesses feel like they are under the umbrella of justice and in safe hands. The law could both encourage them to testify and protect them from harm.

From the analysis and discussion in this chapter it is clear that the role of witness testimony is central to the CJS's of both the KSA and England and Wales. There is, however, a major contrast in the way this importance is reflected in a legal, procedural and regulatory way. England and Wales is now (for this was not always the case) a jurisdiction in which there is a strong and detailed framework of legal measures to reduce the incidence of reluctance to testify or testimony impaired and devalued through intimidation or the perception of intimidation whether from defendants, their friends and family, defence counsel or simply the court and the experience of giving evidence.

Having a framework, even one based in legislation, does not automatically resolve every issue. There is still intimidation of vulnerable witnesses in England and Wales yet evidence³⁵⁸ suggests that special measures are helping achieve best evidence in that jurisdiction. Where problems persist this is at least in part due to gaps in the coverage of special measures, particularly the fact that in the family justice system there is currently no legal definition of a 'vulnerable or intimidated witness'. This may change in the future, particularly as there is evidence³⁵⁹ that intimidation is widespread in cases heard by the family courts.

³⁵⁶ Ibid 35

³⁵⁷ Ibid 35

³⁵⁸ This evidence will discuss in the next chapter.

³⁵⁹ Maddy Coy Katherine Perks Emma Scott and Ruth Tweedale, *Picking up the pieces: domestic violence and child contact* (Rights of Women and CWASU 2012)

Despite this reservation there is clearly a major gap between the importance of witness testimony in Saudi law and the dispensing of justice and the prominence given to the facilitation of best evidence and specifically the protection of VIWs through the deployment of special measures.

4.10 Chapter Summary

Throughout this chapter it has been easy to see the differences between Saudi and English courts. One of my central arguments in this thesis is that these differences do not prevent the Saudi courts from introducing and applying special measures for witnesses, which leads me to further argue that the new Saudi judicial system, in which the work of the courts in the KSA can import some key features of English courts, will be able effectively to improve the treatment of witnesses in criminal courts.

In summary, there are many differences between the witness' experience in court in the KSA compared to England and Wales, unsurprising as an adversarial system prevails in the latter jurisdiction while the KSA has an inquisitorial system. The witness' experience is controlled by the judge who decides what questioning is appropriate, what weight should be given to the testimony based on the personal qualities of the witness³⁶⁰ and whether the witness requires protecting from the defendant or his/her family and associates. This protection is nowhere near as formulated or varied as is available in the English courts. It is true that the judge makes the special measures directions in England but they do so within a codified framework, something I would argue would benefit the Saudi CJS.

I have described in this chapter the experience of witnesses compellability in both legal systems and concluded that in English law there are certain circumstances under which a witness can be compelled to attend court. However, in Saudi law the legal texts do not address a situation where a witness refuses to provide testimony in court. In the next chapter I detail what the special measures for VIWs comprise of and evaluate their potential worth for the Saudi CJS.

³⁶⁰ In the same way that witnesses of bad character can be ruled ineligible, greater weight can be given to the testimony of certain witnesses if, perhaps though the testimony of character witnesses, they are shown to have certain personal qualities such as intelligence, integrity and a good memory. al-Jubayr Sheikh Hani, 'Assessing the quality of a witness's testimony' (*Islam Today*, <<http://en.islamtoday.net/node/1850>> accessed 9 February 2016)

CHAPTER 5

SPECIAL MEASURES IN ENGLAND AND WALES

5.1 Introduction

VIWs present a series of challenges to the CJS. In England and Wales, special measures for witnesses have emerged quite recently in order to protect them in the pursuit of best evidence and to treat them with appropriate sensitivity. In this chapter my aim is to outline and discuss the law relating to witness protection in England and Wales, highlighting key issues with their theoretical basis and practical operation. I will identify key issues relevant to transplanting special measures from England and Wales to the KSA.

Firstly, I will highlight the legal basis for special measures for VIWs; testimony and witnesses in English law; complainant witnesses; the emergence of witness protection in England and Wales; and protecting victims of sexual violence provides impetus for special measures. Secondly, I discuss the historical and legal development of special measures for witnesses in order to have a clearer picture of their use in England and Wales as well as describing the most relevant provisions of the YJCEA 1999. I analyse existing academic research and discuss how the law has been applied in England and Wales.

Towards the end of the chapter I consider the impact of special measures on juries and the rights of defendants. Finally, I summarise the main issues that the chapter has raised. In chapters 6 and 7 I turn to analyse whether special measures can and should be transferred to the Saudi CJS.

5.2 The legal basis for special measures for VIWs

There is general agreement among jurists in England and Wales that witnesses involved in the criminal justice process who find themselves at risk of harm as a result of that participation or who are fearful at the thought of going to court need to be protected in order to preserve the integrity of justice in that jurisdiction. It is perhaps surprising that it took until the very end of the 20th Century for special measures for the protection of witnesses to be codified in to law in England and Wales, particularly when, as previously mentioned, it had been known for perhaps two decades already that the perceptions of how witnesses were treated in the CJS was preventing them from coming forward.

In 1998, the UK Home Office published a report³⁶¹ into how vulnerable or intimidated witnesses were treated in the CJS in England and Wales. It made 78 recommendations aimed at improving this treatment and helping them give best evidence in criminal proceedings. Those measures that required legislation were included in Part II of the YJCEA 1999³⁶² making it the main source of legal provisions for the protection of witnesses within the CJS.³⁶³ Other elements of *Speaking Up for Justice* were implemented through best practice codes and guidelines such as those incorporated in the Police Service Guide³⁶⁴ and the aforementioned Victim's Code.³⁶⁵

Section 16 of the YJCEA defines eligibility for special measures based on age or incapacity while section 17 covers eligibility based on grounds of fear or distress about testifying.

Witnesses under the age of 17 at the time of the hearing are eligible for special measures (S.16 (1) (a) (i)). Witnesses suffering from a mental disorder as defined by the Mental Health Act 1983 or “a significant impairment of intelligence and social functioning” are

³⁶¹ Home Office, *Speaking Up for Justice: Report of the Interdepartmental Working Group on the Treatment of Vulnerable Or Intimidated Witnesses in the Criminal Justice System*

³⁶² Section 46 of the Modern Slavery Act 2015 made minor amendments to section 17(4), section 25(4)(a) section 33(6)(d) of the YJCE Act 1999, but these are not material to our discussions here.

³⁶³ The Serious Organised Crime and Police Act 2005 (SOCPA 2005) also contains provisions relevant to witness protection but these cover the protection of witnesses and those agencies and individuals concerned with providing such protection outside of the trial process. Also, section 143 of SOCPA 2005 provided for special measures to apply to proceedings under sections 1, 1C and 1D of the Crime and Disorder Act 1998 (“ASBO applications”).

³⁶⁴ Ministry of Justice, *Vulnerable and Intimidated Witnesses A Police Service Guide* (March 2011)

³⁶⁵ Ministry of Justice, *Code of Practice for Victims of Crime*

also eligible (S.16 (2) (a) (i-ii)). Finally, S.16 (2) (b) extends eligibility to those witnesses with a physical disorder or disability.

Section 17 covers the eligibility of VIWs. S. 17 (1) states that a witness is eligible “if the court is satisfied that the quality of evidence given by the witness is likely to be diminished by reason of fear or distress on the part of the witness in connection with testifying in the proceedings.” The court determines this by taking into account a range of circumstances, including the circumstances of the alleged offence, the age of the witness, their ethnicity, social and cultural background, employment and religious or political beliefs (S.17(2a-c)). It must also take account of how the defendant or their families have behaved towards the witness (S.17 (2)(d)). The views of the witness themselves must also be considered (S. 17 (3)).

The direction for special measures can either come following an application from one of the parties to the proceedings (normally the CPS or defence counsel), or the court can raise the issue itself (S.19 (1)). The process is as follows:

1. Is the witness eligible for assistance?
2. If so, will any of the special measures improve the quality of evidence?
[(s.19(2)(a))]
3. If so, which would be likely to maximise so far as practicable the quality of such evidence and give a direction providing for the measure(s) to apply to evidence given by the witness [s. 19(2)(b)].

At all times the key test is whether a measure or measures would be “likely to improve, or to maximise so far as practicable, the quality of evidence given by the witness.” (S.19 (3)).

The police and the CPS have particular responsibilities in relation to these provisions as set out in the Victim’s Code.³⁶⁶ Specifically, the police take control of three areas. Firstly, the police must identify whether a witness is vulnerable or intimidated and therefore potentially eligible for special measures.³⁶⁷ In doing so their main points of reference are sections 16 and 17 of the YJCEA 1999 which were described above. Early discussion should take place between the police and the CPS and be formalised using a

³⁶⁶ Ibid

³⁶⁷ There is an obligation on police in The Victims Code (p.40) to take all reasonable steps to identify vulnerable and intimidated witnesses.

standard information form (MG9).³⁶⁸ The investigating officer³⁶⁹ and CPS³⁷⁰ prosecutor formulate a view on the eligibility of the witness for special measures (again based on sections 16 and 17 of the YJCEA 1999) in order to decide whether to apply to the court for such a direction.³⁷¹ Case file research has highlighted the potential for inadequate communications at this point, particularly incomplete documentation.³⁷²

Applications for special measures are made by prosecutors under Part 29 of the Criminal Procedure Rules.³⁷³ Briefly, the key points of the relevant procedure are as follows:

- Applications must be made within a certain time period following the defendant entering a not guilty plea.³⁷⁴
- Applications are made in writing and must be served on the court officer and each other party.
- A standardised application form is provided by the Ministry of Justice for special measures applications.³⁷⁵
- The applying party (normally the CPS) is required to explain the decision of the court to the witness and, if so directed, explain the arrangements that will be made for them to give evidence.³⁷⁶

5.3 Testimony and witnesses in English law

Testimony is one form of evidence. In every society, the testimonies of witnesses provide important evidence used in courts of law. Testimony is defined by the Oxford English Dictionary of Law as “The evidence of a witness in court, usually on oath,

³⁶⁸ Home Office, *Early special measures meetings between the police and the Crown Prosecution Service and meetings between the Crown Prosecution Service and vulnerable or intimidated witnesses: practice guidance* (5 edn, 2009)

³⁶⁹ Under Code of Practice for Victims of Crime, the police must take responsible for the above points.

³⁷⁰ Under the Code for Crown Prosecutors, the prosecutors must consider is the accuracy, credibility or reliability of the evidence of any witnesses. Charles, *Special measures for vulnerable and intimidated witnesses: research exploring the decisions and actions taken by prosecutors in a sample of CPS case files*

³⁷¹ Home Office, *Early special measures meetings between the police and the Crown Prosecution Service and meetings between the Crown Prosecution Service and vulnerable or intimidated witnesses: practice guidance*

³⁷² Charles, *Special measures for vulnerable and intimidated witnesses: research exploring the decisions and actions taken by prosecutors in a sample of CPS case files*

³⁷³ Ministry of Justice, *The Criminal Procedure Rules* (London: HMSO: 2013)

³⁷⁴ The deadline is 28 days in a magistrates court and 14 days in the Crown Court

³⁷⁵ The Ministry of Justice form is known as a [CrimPR 18.3, 18.10](#)

³⁷⁶ The Criminal Procedure Rules Part 29.4

offered as evidence of the truth of what is stated”.³⁷⁷ It is normally voluntary but in some circumstances witnesses can be compelled to give evidence. Under s. 80 of the PACE 1984 a witness is deemed compellable if they can be lawfully required to give evidence.³⁷⁸ Most competent witnesses can be compelled to give evidence. The sole exception concerns civil partners and spouses who can only be compelled to give evidence against their partner under quite limited circumstances.

5.3.1 WITNESSES

Witnesses play a crucial role in the legal process. A witness can be defined as “a person who testifies under oath at a deposition or trial, providing first hand or expert evidence”.³⁷⁹ The English legal definition of a witness can be found in section 63 of the YJCEA 1999 and in section 52 of the Domestic Violence, Crime and Victims Act 2004. The definition in section 63 (1) is brief: “witness”, in relation to any criminal proceedings, means any person called, or proposed to be called, to give evidence in the proceedings. In the Domestic Violence, Crime and Victims Act 2004 s. 52(4) the definition is expanded as follows:

“Witness means a person (other than a defendant)-

(a) who has witnessed conduct in relation to which he may be or has been called to give evidence in relevant proceedings;

(b) who is able to provide or has provided anything which might be used or has been used as evidence in relevant proceedings; or

(c) who is able to provide or has provided anything mentioned in subsection (5)³⁸⁰ (whether or not admissible in evidence in relevant proceedings).”³⁸¹

³⁷⁷ Jonathan Law and Elizabeth A Martin, *Oxford dictionary of law* (Oxford University Press 2009)

³⁷⁸ I have been explained the issue of forcing witnesses to testify in the previous chapter.

³⁷⁹ Gerald N Hill and Kathleen Hill, *Nolo's Plain-English Law Dictionary* (Nolo 2009) 451

³⁸⁰ Subsection 5 includes three types of evidence which would identify someone as a witness:

(a) anything which might tend to confirm, has tended to confirm or might have tended to confirm evidence which may be, has been or could have been admitted in relevant proceedings;

(b) anything which might be, has been or might have been referred to in evidence given in relevant proceedings by another person;

(c) anything which might be, has been or might have been used as the basis for any cross-examination in the course of relevant proceedings.

³⁸¹ Home Office, 'Domestic Violence, Crime and Victims Act 2004'

<http://www.legislation.gov.uk/ukpga/2004/28/pdfs/ukpga_20040028_en.pdf> accessed 11 June 2013. S. 52 (4)

Essentially, a witness is described herein as a person other than the defendant who may be called to give evidence in criminal or anti-social behaviour proceedings.³⁸² The Council of Europe defines the term “witness” to mean “any person, irrespective of his/her status under national procedural law, who possesses information relevant to criminal proceedings, including experts and interpreters.”³⁸³

There are four types of witnesses that give testimony in court: eyewitnesses, expert witnesses, character witness and complainant witnesses. Eyewitnesses normally play an important role in revealing the details of a crime. Identifying, charging and convicting suspected criminals often depends on the evidence provided by such eyewitnesses. For this reason, it is important that eyewitness evidence be accurate and reliable.³⁸⁴ Expert witnesses give evidence based on both fact and opinion (the only type of witness to be allowed to give opinion), and are usually professionals in their fields. In order to get the best evidence, witnesses must present their testimony to the ears of the judges and jurors. A character witness³⁸⁵ is a person who testifies as to the moral character and reputation of a litigant in a court of law or other legal proceeding.³⁸⁶ The fourth category, complainant witnesses, is now dealt with under a separate sub-heading as it is of particular importance to the current study.

5.3.2 COMPLAINANT WITNESSES - VICTIMS

This category of witness is granted special status in English law. In criminal justice terms complainant witnesses are usually victims.

The treatment, including the availability of services, of adult witnesses in England and Wales breaks down into two parts. Witnesses who are not the victim of the crime are

³⁸² Clive Harfield, *Blackstone's Police Operational Handbook: Practice and Procedure* (OUP Oxford 2009)

³⁸³ Council of Europe Recommendation Rec (2005) 9 on the protection of witnesses and collaborators of justice, Appendix.

³⁸⁴ Janet Reno, *Eyewitness Evidence: A Guide for Law Enforcement* (DIANE Publishing 1999)

³⁸⁵ There are special rules that apply to non-defendant's bad character which is under section 100 of the Criminal Justice Act 2003.

³⁸⁶ J. Law and E.A. Martin, *A Dictionary of Law* (Oxford University Press 2009)

covered by the Witness Charter³⁸⁷ while those who are victims fall under ‘The Victims Code’.³⁸⁸ For the purposes of the Code you are classed as a victim if

*“... you have made an allegation to the police that you have suffered harm (including physical, mental or emotional harm or economic loss) which was directly caused by a criminal offence, or have had such an allegation made on your behalf, or if you are contacted as a victim in the course of investigations.”*³⁸⁹

The Code is issued by the Secretary of State for Justice and its legal basis is derived from section 32 of the Domestic Violence, Crime and Victims Act 2004.³⁹⁰ The connections between the Code and special measures for the protection of VIWs are found throughout the Code in the form of obligations placed on service providers in respect of victims. For example, in chapter 5 section 1.14 it is stated:

“Where, as a result of the individual assessment, a victim is identified as having specific protection needs and would benefit from Special Measures when giving evidence, the service provider responsible for prosecuting an offence must apply to the court for the appropriate Special Measure under Part 2 of the Youth Justice and Criminal Evidence Act 1999.”

The important point here as elsewhere in the Code is the clear obligation placed on the service provider (though without the force of law). The YJCE Act 1999 does not refer to any obligation but only to the fact of when “a party to the proceedings makes an application for the court to give a direction”³⁹¹ or when “the court of its own motion raises the issue whether such a direction should be given.”³⁹² Hence in terms of victims and special measures, the Code is a significant document.

³⁸⁷ Ministry of Justice, *The Witness Charter 'Standards of care for witnesses in the criminal justice system'*

³⁸⁸ Ministry of Justice, *Code of Practice for Victims of Crime*

³⁸⁹ *Ibid* 4

³⁹⁰ The Domestic Violence, Crime and Victims Act 2004 implements provisions of the EU Directive 2012/29/EU which establishes minimum standards on the rights, support and protection of victims of crime; Directive 2011/92/EU combating the sexual abuse and sexual exploitation of children; and Directive 2011/36/EU preventing and combating the trafficking of human beings.

³⁹¹ Youth Justice and Criminal Evidence Act 1999 S. 19 (1a)

³⁹² *Ibid* S. 19 (1b)

Regarding the complainants in sexual offence cases, the 1999 Act makes special provision for their status as eligible witnesses and in relation to the prohibition on the accused to face cross-examination in person. Criminal justice agencies have additional responsibilities towards this special category of witnesses, including the provision to them of special measures.

5.4 The emergence of witness protection in England and Wales

The phrase ‘witness protection’ is mostly associated with programmes to protect witnesses in cases of organised crime, terrorism and other serious crime. In this study a broader definition is intended to reflect the intentions of the YJCE Act 1999 which went far beyond the narrow definition. Witness protection in this current study signifies measures taken to remove or prevent harm from intimidation howsoever it should arise through the process of becoming and acting as a witness. In their comparative review of different protection regimes around the world, Dandurand and Farr found that in the majority of cases in the US protected witnesses were criminally-involved police informants or criminal associates of the defendants and that the protection of non-criminal witnesses or victims was very rare.³⁹³ Indeed in popular culture the notion of witness protection brings to mind physical protection, relocation, new identities and new lives for key witnesses in the trials of major criminals, a frequent theme in movies, such as the Hollywood production *Good fellas*.³⁹⁴

In 1998, the British Crime Survey revealed that the intimidation of witnesses went far beyond a small number of high profile organised crime cases. The study reported that 15% of victims and 8% of witnesses experienced intimidation.³⁹⁵ The most common form of intimidation was verbal abuse but a significant proportion also reported physical abuse. The findings referred to people who had been victim of a crime or had witnessed a crime whether or not this crime had been reported to the police or proceedings begun. It provided evidence that there was a widespread issue which was likely to threaten the interests of a fair and effective criminal justice not least by deterring the reporting of crime in the first place. One reaction to these has been the

³⁹³ Yvon Dandurand and Kristin Farr, *A Review of Selected Witness Protection Programs* (Research and National Coordination, Organized Crime Division, Public Safety Canada 2010)

³⁹⁴ *Goodfellas* Director [Martin Scorsese](#) Warner Brothers 1990

³⁹⁵ Tarling, Dowds and Budd, *Victim and witness intimidation: Findings from the British Crime Survey*. v –vi

proliferation of Crime stoppers schemes including one set up in the UK in 1988.³⁹⁶ Under such schemes, citizens can report criminal and anti-social behaviour without having to make their identities known. Such schemes have proved successful around the world. In the UK Crimestoppers has received 1.6 million actionable calls leading to 134,000 arrests and charges since 1988. Nevertheless, the obvious drawback is that information anonymously supplied by telephone or online does not constitute evidence. Hence, the issue of preventing harm to witnesses (including victims) requires a different solution.

The common law offence of perverting (or attempting to pervert) the course of justice includes among other things the intimidation of witnesses. This intimidation is defined as:

*“Making threats to harm someone, acts to harm them, physical and financial harm, acts and threats against a third party e.g. a relative of the case witness, with the purpose of deferring the witness from giving evidence in court or from reporting the crime in the first instance.”*³⁹⁷

Section 51 of the Criminal Justice and Public Order Act 1994 created specific offences covering acts causing harm to witnesses both during (s.51(1)) and after (s.51 (2)) trials. This harm may be financial or physical, may be aimed at a person other than the witness (i.e. family or friends) and also includes threats of harm. Sentencing guidelines for an offence under S. 51 of the Criminal Justice and Public Order Act 1994 allow for a sentence of up to 5 years. Beyond this it was still considered necessary to introduce a series of measures designed to support and protect vulnerable witnesses, particularly during the court process itself.

³⁹⁶ Crimestoppers, <<https://crimestoppers-uk.org/about-us/>> accessed 21st October 2015

³⁹⁷ In Brief, 'Perverting the course of justice. What is perverting the course of justice?' <<http://www.inbrief.co.uk/offences/perverting-the-course-of-justice.htm>> accessed 21st October 2015

5.4.1 PROTECTING VICTIMS OF SEXUAL VIOLENCE PROVIDES IMPETUS FOR SPECIAL MEASURES

Scholarly interest in the plight of women, children and men who were victims of sexual violence and the inability of the legal system to protect them led to a substantial body of literature on the subject developing since the 1970s. This work undoubtedly influenced policy makers and addressing the plight of victims in such cases can be viewed as perhaps the main motivating factor behind the introduction of special measures for the protection of VIWs.

One area of concern at the outset of this period was how many sexual offences were not being reported due to the lack of responsiveness, perceived or otherwise, of the criminal justice agencies. Temkin, one of the leading academics in this field, observed how starting in the early 1980s there was a rapid increase in the number of reports of sexual offences made to police which the author attributed to changing attitudes among the criminal justice agencies, particularly the police.³⁹⁸ While welcome, the greater reporting did not end the controversy as in parallel with the increase in reports there was a dramatic drop in the rate of conviction in rape cases from 32 per cent in 1979 to just 8 per cent in 1999/2000.³⁹⁹

Research has shown that one of the main factors behind the low conviction rate in cases of sexual violence is the attrition rate. The first point of attrition is failure to report. Research studies have estimated that just 5%-25% of rapes are reported to police meaning that at least three quarters never enter the CJS.⁴⁰⁰ Second is the police investigation stage; here between half and three quarters of cases are lost.⁴⁰¹ Of the dramatically reduced number of cases that make it through to a prosecution a further proportion are lost. Finally, there are even cases lost once court proceedings have begun and this is in addition to the high acquittal rate in rape cases.⁴⁰² Cases being 'lost' can refer to either a police officer or prosecutor making a decision to end the investigation/prosecution, or the withdrawal of the complaint.

³⁹⁸ Jennifer Temkin, *Rape and the Legal Process* (Oxford University Press 2002)

³⁹⁹ Ibid 12

⁴⁰⁰ Liz Kelly, Jo Lovett and Linda Regan, *A gap or a chasm?: attrition in reported rape cases* (Home Office Research Study 293, Development and Statistics Directorate February 2005) 30

⁴⁰¹ Ibid

⁴⁰² Ibid

The key point of relevance to this thesis is whether or not the use of special measures can address the issues of failure to report and the high rate of withdrawal among complainants. Firstly, it is important to state that the empirical evidence suggests that there are many practices which are believed to cause attrition which would not be addressed through special measures as provided for in the YJCE Act 1999. These include the fear of not being believed, the attitudes of the police, lack of communication, and lack of availability of female officers during the investigation. There are, however, attrition factors which should be ameliorated by special measures; these are the fear of intimidation and distrust of the legal process.⁴⁰³

In 2009, Sara Payne published the results of her review *Rape: The Victim Experience Review*.⁴⁰⁴ Again the importance of the attitude of the police to the initial reporting of a rape was highlighted by victims are crucial to whether they would proceed through the whole process. Specifically regarding special measures the review reported a finding that at the initial point of making a complaint to the police, victims regularly state from the outset that they will not face their attacker in court, but because of the process involved and the inconsistency of outcomes, the police are unable to offer any significant reassurance at this crucial initial stage.⁴⁰⁵ *The Stern Review* published the following year made one main observation on the question of special measures in rape cases. It reported that its investigations found that a substantial number of prosecutors and legal experts felt that the use of some measures reduced the impact of a victim's testimony, particularly where evidence is heard in court on a video recording rather than in-person testimony. The belief that juries may be less likely to convict because of the lack of impact of video recorded evidence does not appear to be borne out in the data on conviction rates which showed that conviction rates in such cases are relatively robust.⁴⁰⁶ Clearly attrition appears to be a greater challenge than low conviction rates.

As can be seen by the regular publishing of reviews and reports, the issue of special measures to protect victims of sexual offences did not disappear after the YJCE 1999

⁴⁰³ These two factors were reported as findings in research in international prevalence studies and cited in Kelly et al, 2005 p.31

⁴⁰⁴ Payne Sara, *Rape: The Victim Experience Review* (Home Office November 2009)

⁴⁰⁵ Crucial because this earliest stage also has the highest attrition rate.

⁴⁰⁶ The Stern Review reports: "With an overall jury conviction rate of 55 per cent, the research finds that juries actually convict more often than they acquit in rape cases, and that other serious offences such as attempted murder have lower jury conviction rates than rape." Baroness Vivien Stern CBE, 'A report by baroness Vivien Stern CBE of an independent review into how rape complaints are handled by public authorities in England and Wales' (2010) London, UK: Home Office 91.

was implemented did not disappear. A review of ways to reduce distress of victims in trials of sexual violence was undertaken by the Ministry of Justice and was published in March 2014.⁴⁰⁷ The main recommendations concerning special measures were expanding the role of intermediaries and encouraging and raising awareness of the use of special measures, particularly live links so that more evidence is given and more cross-examination⁴⁰⁸ conducted, while the witness is outside the courtroom. Such moves would be unlikely to require legislation.

The reasons why there appears to be a deficit in justice concerning rape is a complex issue and by no means one that can be solved by the use of special measures alone. Nevertheless, if special measures do indeed reduce the rate of attrition by making victims more likely not to withdraw then this would represent an important expansion of justice. Further research is required to establish whether such an effect can be established empirically.

⁴⁰⁷ Ministry of Justice, *Report on review of ways to reduce distress of victims in trials of sexual violence* (Ministry of Justice March 2014)

⁴⁰⁸ Ibid 4

5.5 The special measures in the YJCEA 1999

Sections 23 to 30 of the YJCEA 1999 set out the individual special measures that the court can apply, either individually or severally. With the prosecutor responsible for making the applications it is vital that there is close liaison between them and the police and both these parties with victims/ witnesses when it comes to any arrangements that may be necessary to help witnesses give their best evidence.

5.5.1 USE OF SCREENS (SECTION 23)

Under section 23 (1) a screen may be used in order for the eligible witness “to be prevented by means of a screen or other arrangement from seeing the accused.” However, the witness must stay in view of the judge, the jury, the legal representatives of each party and where appropriate the interpreter (S. 23 (2 a-c)). The purpose of a witness screen is to shield a vulnerable and/or intimidated witness from the view of the accused in the courtroom⁴⁰⁹ while maintaining the principle of orality.⁴¹⁰ There is a simple explanation for this stipulation: that the experience of going to court can be particularly difficult in terms of making a witness feel anxious, particularly VIW witnesses, including children.⁴¹¹ Furthermore, the thought of confronting the gaze of the accused, especially when the witness is a victim, may deter the witness from giving evidence or possibly even reporting a crime in the first place.⁴¹²

An adversarial system of justice normally places great weight on the notion that the defendant should come face to face with witnesses against them and bearing in mind that facing your accuser is a central tenet of the English legal tradition it is arguable that the s. 23 stipulation may prove to be contrary to the principles of England’s adversarial system of justice. Indeed, in some states in the United States the opportunity to confront the witness ‘eye to eye’ and in person is a constitutionally protected right⁴¹³, which is

⁴⁰⁹ Ministry of Justice, *Achieving Best Evidence in Criminal Proceedings: Guidance on interviewing victims and witnesses, and guidance on using special measures* 59,167.

⁴¹⁰ Malcolm Davies, Hazel Croall and Jane Tyrer, *Criminal justice* (Pearson Education 2009) 324.

⁴¹¹ English criminal law uses the term children to describe those under the age 14 and young persons’ to describe those under the age of 18. J. Fortin, *Children’s Rights and the Developing Law* (Cambridge University Press 2009) 678.

⁴¹² As referred to in the Stern Review.

⁴¹³ Dependent on interpretation of the Sixth Amendment to the American Constitution which includes the right “to be confronted with the witnesses against him”.

why special measures to which some English witnesses are entitled cannot be used in those jurisdictions.⁴¹⁴

However, the right to effective challenge which is enshrined in Art.6 of the European Convention on Human Rights must be interpreted in European jurisprudence for Member States from both the adversarial and inquisitorial traditions. The issue of the rights of the defendant and their legal protection under the European Convention on Human Rights are discussed later in this chapter.

Identification of the accused by the victim can be an integral part of any trial process and one which gives rise to difficulties in trying to protect VIWs from direct face-to-face confrontation with the person they are accusing. In England, the problem may not arise because the courts normally accept evidence of an identification parade or other police identification techniques prior to the trial as evidence that the accused was the person involved.⁴¹⁵ As summarised in the literature review in the introductory chapter, researchers in England and Wales have suggested that screening is an effective way of addressing the problem of direct confrontation in the courtroom. Hamlyn et al. reported that the majority of VIWs who had used screens had found them helpful and that many who had not used screens would have preferred to do so.⁴¹⁶

Despite this, some of the benefits from this measure could be lost by the on-going reluctance of the CPS to make applications for screens in advance of trial⁴¹⁷ (in many cases without explaining these matters to witnesses and asking for their views). Burton et al. conducted VIWs research with criminal justice agencies including the CPS and police. CPS respondents reported a sudden increase in the use of screens for adults once the YJCE Act 1999 had been implemented and both the police, who were also included in their research, and CPS respondents commented that judges, in their view, had a preference for screens instead of the live television link for adult witnesses.⁴¹⁸ The findings of the study by Ellison and Munro, already discussed in the literature review in chapter one, provided little support for the view that by using a screen the jury will have

⁴¹⁴ Hoyano, 'Striking a balance between the rights of defendants and vulnerable witnesses: Will special measures directions contravene guarantees of a fair trial?' 951

⁴¹⁵ Burton, Evans and Sanders, 'Vulnerable and intimidated witnesses and the adversarial process in England and Wales'

⁴¹⁶ Hamlyn and others, *Are special measures working?: Evidence from surveys of vulnerable and intimidated witnesses*

⁴¹⁷ As found in Burton, Evans and Sanders, 'Vulnerable and intimidated witnesses and the adversarial process in England and Wales'

⁴¹⁸ Ibid

less empathy or sympathy for the complainant (if the hypothesis is that the emotional impact of testimony will be lessened).⁴¹⁹ On the other hand, Payne expressed concern that the use of screens by adult sexual offence complainants may unreasonably prejudice the defence or impart an undeserved level of credibility on a complainant's testimony.⁴²⁰ The mere presence of the screen and the suggestion that the judge deemed it necessary could, the argument goes, give the jury a prejudiced view of the defendant simply through the use of special measures: "Why are the measures needed if the defendant is not guilty?" Measuring this kind of effect empirically is highly problematic because direct research of juries is largely ruled out by section 8 of the Contempt of Court Act 1981. However, in mock trials special measures such as a screen do not appear to weigh heavily in the minds of jurors.⁴²¹

In my own view, the use of the screen is clearly welcomed by vulnerable witnesses and this positive response from witnesses in turn gives advocates greater confidence to encourage complainants of sexual offences to make use of these or other available special measures. Moreover, I believe that in comparison to other measures the screen can bring a number of benefits, for example, it is less expensive and less technology reliant than the live link (discussed below) and will not have the potential to lead to delays while technical glitches are fixed. It is a flexible measure and can be put in place (or removed) very quickly in any courtroom. The placement of the screen is not time consuming and can be deployed at short notice, and it has the added benefit of shielding the witness from the possibility of physical attack. Testimony can be delivered in a reasonably stress-free environment thanks to the screen.

5.5.2 LIVE TV LINK (SECTION 24)

The YJCEA 1999 was not the legislation that introduced the use of live links. Section 32A of The Criminal Justice Act 1988 had provided for the use of such a link for some child witnesses under 14 years of age in the Crown Court and youth court with coverage extended to those under 17 for those involved in sex offence cases by s.54 Criminal

⁴¹⁹ Louise and Vanessa, 'A 'Special'Delivery? Exploring the Impact of Screens, Live-Links and Video-Recorded Evidence on Mock Juror Deliberation in Rape Trials'

⁴²⁰ Payne, *Redefining Justice: Addressing the individual needs of victims and witnesses*

⁴²¹ Louise and Vanessa, 'A 'Special'Delivery? Exploring the Impact of Screens, Live-Links and Video-Recorded Evidence on Mock Juror Deliberation in Rape Trials'

Justice Act 1991.⁴²² The effect of the YJCEA 1999 was to extend the use of live link to all VIWs who meet the eligibility criteria set out in sections 16 and 17. The provision of live links has been further developed since the YJCEA 1999. Section 51 of the Criminal Justice Act 2003 allows the court to enable witnesses (apart from the defendant) in the England and Wales to present evidence via live link provided that the court is satisfied that this means of giving evidence is “in the interest of the effective and efficient administration of justice” (section 51(4)(a)). Section 51 was first piloted in five Crown Court centres and was limited to serious sexual offences.⁴²³ The Criminal Justice Act 2003 (Commencement No. 24 and Transitional Provisions) Order 2010 widened the scope of live links to encompass all witnesses in all cases for all criminal offences in all courts and came into force on 26 April 2010. Furthermore, the witness does not have to be a special ‘category’ of witness (for example vulnerable or intimidated as defined by the YJCEA 1999).⁴²⁴ The witness could, for example, simply be unable to attend court for professional reasons. The stipulation is that it must be “in the interests of the efficient or effective administration of justice”.⁴²⁵

‘Live link’ is one of the most widely used special measures.⁴²⁶ Giving evidence through a live TV link means witnesses do not have to enter the formal and imposing surroundings of the courtroom and the direct gaze of the defendant, something which can cause stress and anxiety. In addition, there are less immediately obvious benefits. An adult must accompany a child witness in the room where the live link is installed. This is to ensure the link is working and to ensure the propriety of the process. This adult presence means that the child also has access to emotional support if it is required.

The “live link” is defined in section 56(2) of the Criminal Justice Act 2003 and Section 24(8) of the YJCE Act 1999⁴²⁷ and will normally involve a CCTV link, but may also

⁴²² It was the Pigot Report 1989 which led to better treatment of child witnesses. Advisory Group on Video-Recorded Evidence and Thomas Pigot, *Report of the Advisory Group on Video-Recorded Evidence* (Home Office 1989)

⁴²³ Crown Prosecution Service, ‘Special Measures’

<http://www.cps.gov.uk/legal/s_to_u/special_measures/#a13> accessed 8 Sep 2012

⁴²⁴ Ibid

⁴²⁵ Criminal Justice Act 2003 S.51 (4a)

⁴²⁶ Hamlyn and others, *Are special measures working?: Evidence from surveys of vulnerable and intimidated witnesses*

⁴²⁷ Section 24(8) YJCE 1999 uses the following definition: “a live television link or other arrangement whereby a witness, while absent from the courtroom or other place where the proceedings are being held, is able to see and hear a person there and to be seen and heard by the persons specified in section 23(2)(a) to (c).” The wording of section 56(2) of the Criminal Justice Act 2003 inserts a stipulation that the person giving evidence is inside the UK.

apply to other forms of secure technology with the same end result including video conferencing facilities or the use of a 'voice over internet protocol' (VOIP) of which Skype is an example.⁴²⁸ The wording "a live television link or other arrangement" in section 56(2) allows practice to change in line with new technology without requiring amendments to the legislation. When using the live link the witness must be able to see and hear a person at the place where the proceedings are being held and also be seen and heard themselves by the defendant(s), the judge, the jury, the legal representatives, any interpreter or other person appointed to assist the witness (section 56(3)).

It seems certain that live links are of particular help to witnesses who have limited availability, such as professional witnesses, or those having mobility issues who had not previously qualified for live links under the 'special measures' provisions of the YJCEA 1999. They should also help in cases involving police officers who have to travel longer distances to attend a Crown Court.⁴²⁹ My view is that the live link is a very valuable measure because in many cases it could be the only way for some witnesses to give testimony meaning that the overall evidence heard by the court is likely to be more complete and accurate. This view is supported by other scholars.⁴³⁰ Critics of live links may suggest that the accuracy of testimony would be affected by the witnesses' removal from the solemnity of the courtroom though there is no empirical evidence to support this view. This has to be balanced against the highly disputed perception that juries are more likely to believe evidence they hear directly in court because of the greater reality and empathy that may be generated. Payne has voiced a fear, based on discussions with legal professionals in the course of her work as the Government's Victims' Champion, that the absence of the complainant in the courtroom, and the mediating effect of the video link, could create a distance between her and the jury, which would quite possibly make it less likely that her account will generate sympathy and / or be believed.⁴³¹ This she reported was "because we are so desensitised from exposure to trauma on television."⁴³²

⁴²⁸ I will explain how courts in Saudi Arabia use TV link in chapter 7.

⁴²⁹ Mandy Burton, Roger Evans and Andrew Sanders, 'Are special measures for vulnerable and intimidated witnesses working? Evidence from the criminal justice agencies' (2006)

⁴³⁰ Laura CH Hoyano and Caroline Keenan, 'Child abuse law and policy across boundaries' (2007) Oxford Legal Studies Research Paper

⁴³¹ Payne, *Redefining Justice: Addressing the individual needs of victims and witnesses*

⁴³² Ibid, 25.

Cooper argues that if there is any foundation to the claim that televised testimony is somehow 'deadened', then surely a parallel effect will apply equally to the interaction between advocates and witnesses.⁴³³ In a separate point, some practitioners argue that the physical distance created by the technological barrier separating child from questioner creates allows the child to reflect on the questions asked of her and to take more time over her responses.⁴³⁴ This in turn means that children build confidence, feel more confident when giving evidence and find they are better able to answer complex or difficult questions and to resist suggestion.⁴³⁵

There is no recent definitive study on the aforementioned 'deadening effect' of live link testimony for the UK. However, earlier studies and those from other jurisdictions suggest that there is no significant change to conviction rates in cases where live link has been used compared to those where evidence is given in the courtroom, although it should be remembered that conviction rates are a weak and indirect measure of the effects of special measures on juries, as many other factors are involved.⁴³⁶ Hoyano and Keenan, who undertook an extensive review research into young witnesses, concluded that "It is probably impossible to resolve the issue of the impact of technology on English juries ... but what is beyond dispute is that live link is the only means to enable many vulnerable witnesses to testify, and it helps many to provide more complete and accurate evidence."⁴³⁷ This impossibility presumably stems from the difficulty of conducting research into jury members' perceptions, hence why studies have tended to focus on either quantitative analysis of conviction rates or qualitative studies of mock juries. One study used mock juries in mock rape trials to evaluate the effects of live links on juries. Ellison and Munro⁴³⁸ found that the majority of mock jury participants did not refer to the live-link or to the usage of video-recorded evidence during the course of their deliberations. Furthermore, when surveyed by questionnaire at the end of their deliberations and asked to reflect on direct questions concerning the complainants'

⁴³³ Cooper, 'Special measures for child witnesses: a socio-legal study of criminal procedure reform, 87.

⁴³⁴ Ibid

⁴³⁵ Ibid

⁴³⁶ Such studies include: American Bar Association (2002) *The Child Witness in Criminal Cases*. Task Force on Child Witnesses, American Bar Association Criminal Justice Section. Natalie Taylor and Jacqueline Joudo, *The impact of pre-recorded video and closed circuit television testimony by adult sexual assault complainants on jury decision-making: an experimental study* (Australian Institute of Criminology 2005), Graham Davies and Elizabeth Noon, 'Evaluation of the Live Link for child witnesses' (1991)

⁴³⁷ Hoyano and Keenan, 'Child abuse law and policy across boundaries' 644.

⁴³⁸ Louise and Vanessa, 'A 'Special'Delivery? Exploring the Impact of Screens, Live-Links and Video-Recorded Evidence on Mock Juror Deliberation in Rape Trials'

apparent emotional state, there was no conclusive evidence to point to the mode of delivery having had an impact.

Drawing my own conclusion on live links I would say that while the evidence is inconclusive about the impact that live links have on juries, there is good evidence of the benefits that witnesses derive from them. As we turn to think about their place in Saudi law, we need to be mindful of the possible impact on decision-makers. As the Saudi system does not use juries this would mean being mindful of the impact on judges as the ones who would exercise the discretion to use special measures and hear the testimony via the live link.

Apart from the very basic benefit of being able to hear testimony from witnesses who would otherwise not be able to testify, live link offers VIWs a means to give evidence in a less intimidating situation, one which creates a certain amount of emotional distance between the witness and their questioner, something often of great importance to child witnesses.⁴³⁹ The reduction of stress means that children build confidence, feel more confident when giving evidence and find they are better able to answer complex or difficult questions and to resist suggestion.⁴⁴⁰ Practitioners argue that the physical distance created by the technological barrier separating child from questioner creates allows the child to reflect on the questions asked of her and to take more time over her responses. This in turn means that children build confidence, feel more confident when giving evidence and find themselves better able to answer complex or difficult questions and to resist suggestion.⁴⁴¹

There is one important limitation to this ‘distance’ in regards to the use of live link and that is that the witness can still be seen by the defendants’ representatives and sometimes by the defendants⁴⁴², although this latter circumstance is not a legal right for the defendant. According to research conducted by Plotnikoff and Woolfson this causes concern among some young witnesses who had experienced using live links and were

⁴³⁹ Cooper, ‘Special measures for child witnesses: a socio-legal study of criminal procedure reform, 86

⁴⁴⁰ Ibid

⁴⁴¹ Ibid

⁴⁴² S. 23 of the YJCE Act 1999 states that the witness will be visible to the legal representatives, there’s no right of the defendant himself to see the witness but research suggests that in practice it is common for the defendant to be able to see the witness on live link.

not happy that they could be seen by the defendant.⁴⁴³ Other reasons elicited from witnesses for not wanting to use live links were wanting to confront the defendant in court and the fact that live link rooms, in which witnesses often had to spend extended period of time, were cramped and often lack natural light and were generally an unpleasant place to be.⁴⁴⁴

It appears that the deficiencies associated with live links are mostly ones of implementation and design rather than principle and worth in practice. Cameras being wrongly positioned so that the witness accidentally sees the defendant, the quality and reliability of the equipment, badly designed rooms, lack of pre-trial practice etc.⁴⁴⁵ are all things which can be put right while preserving the key benefits of live links. Studies also reveal an issue concerning the level of input the witness (particularly a child witness) has in the choice of how they give their evidence with some child witnesses reporting that they gave evidence by live link but would have preferred to give evidence in court and also vice versa.⁴⁴⁶ The 1999 Act creates a requirement on the court to consider the views of vulnerable witnesses, including child witnesses in decisions about special measures. As a result, under CPS guidelines⁴⁴⁷ it is the role of the prosecutor to provide the child witness with all the necessary information to be able to put forward an informed view on their desire or otherwise to use special measures. The younger the child the more the issue of competency to form an informed view arises.

Against these cautionary points there is a substantial body of empirical evidence showing the benefits of live links. Goodman et al,⁴⁴⁸ conducted an empirical study of 70 children and found that the advantages of using live links include reducing the chance that the children will refuse to testify, less pre-trial anxiety, meaning the live link “served a protective function for children even before they testified”⁴⁴⁹ while Doherty-Sneddon and McAuley argued that it reduces suggestibility in younger witnesses as they became more resistant to leading questions; there was no detriment to

⁴⁴³ Joyce Plotnikoff and Richard Woolfson, *Measuring Up?: Evaluating Implementation of Government Commitments to Young Witnesses in Criminal Proceedings: July 2009: Executive Summary* (NSPCC 2009) 91

⁴⁴⁴ Ibid, 90

⁴⁴⁵ Ibid, 90-93

⁴⁴⁶ Ibid, but also in Matthew Hall, 'The Use and Abuse of Special Measures: Giving Victims the Choice?' (2007) 8 *Journal of Scandinavian Studies in Criminology and Crime Prevention* 33

⁴⁴⁷ Crown Prosecution Service, 'Special Measures' '

⁴⁴⁸ Gail S Goodman and others, 'Face-to-face confrontation: Effects of closed-circuit technology on children's eyewitness testimony and jurors' decisions' (1998) 22 *Law and human behavior* 165

⁴⁴⁹ Ibid, 198

the correctness of the information when evidence was given by live link, in fact the researchers concluded that “Video-mediated interviews were ... more accurate in that they elicited less incorrect information.”⁴⁵⁰

The particular choice of technology might affect witnesses’ experiences. Cooper and Roberts⁴⁵¹ analysed CPS-generated monitoring data, in the form of in-house evaluation research instead of witnesses’ self-reports and found that, between April 2003 and March 2004, the CPS had made applications for video-recorded evidence on behalf of 41% of child witnesses and for live TV link for 84%. For child witnesses on whose behalf a special measures application of some kind had been made, 47% of applications included a request for video-recorded evidence and 96% contained a request for a live TV link. Where the Hamlyn et al. study collected primary data from witnesses, Cooper and Roberts analysed secondary data in the form of CPS research yet despite such differing methods both studies produced remarkably similar findings.

Applegate suggests that in England and Wales a live TV link at a remote location⁴⁵² was viewed as an effective way for children to give their evidence, eliminating most of the negative issues relating to the giving of evidence either in person in the court room, or from a live video link from a room usually located somewhere within the court complex.⁴⁵³ For Ellison and Munro the essential element behind the effectiveness of the live link measure was found to be the fact that the witness is not required to enter the courtroom and come into contact with other trial participants, something which increased their confidence and lowered their feelings of fear and intimidation.⁴⁵⁴

Cooper cites Applegate’s research stating it reported that 42% of child witnesses used video-recorded evidence after the implementation of the 1999 Act against 30% of child witnesses under the previous legislative regime. The equivalent results for live TV link were 83% after introduction of the 1999 Act and 43% before introduction. Of the

⁴⁵⁰ Gwyneth Doherty-Sneddon and Sandra McAuley, 'Influence of video-mediation on adult-child interviews: implications for the use of the live link with child witnesses' (2000) 14 *Applied cognitive psychology* 379

⁴⁵¹ Cooper and Roberts, *Special Measures for Vulnerable and Intimidated Witnesses: An Analysis of Crown Prosecution Service Monitoring Data*

⁴⁵² Not in the court itself or other court buildings

⁴⁵³ Richard Applegate, 'Taking child witnesses out of the Crown Court: A live link initiative' (2006) 13 *International Review of Victimology* 179

⁴⁵⁴ Louise and Vanessa, 'A ‘Special’ Delivery? Exploring the Impact of Screens, Live-Links and Video-Recorded Evidence on Mock Juror Deliberation in Rape Trials'

witnesses who used either of the two measures, 90% found live TV link praiseworthy and a near identical 91% said the same for video-recorded evidence.⁴⁵⁵

Turning to my own conclusions on live links I believe we should not view the live link as the answer to all the problems faced by prosecution witnesses. For example, the CCTV link often still leaves the witness in view of the defendant which is worrying for some VIWs who could opt for screens instead, despite the screens being of limited practical benefit to a witness who may have to face the defendant every day outside the court which is something special measures cannot cover of course.⁴⁵⁶ However, there is a significant two-fold benefit from this special measure. Firstly, the potential for harm in the form of stress, anxiety and intimidation is reduced. Secondly, and consequently, from the existing research evidence it seems that the use of this measure enables the court to hear testimony that may otherwise not be heard. Improving the experience of witnesses can benefit the system by ensuring best evidence is given, when no evidence might have been given without the special measure.

5.5.3 EVIDENCE IN PRIVATE

In this section I will discuss the special measure contained in Section 25 of YJCEA 1999, namely the giving of evidence in private. First, however, I will set out the legal basis for the principle of open justice and public court proceedings.

5.5.3.1 Open Justice

In *A-G v Leveller Magazine Ltd* [1979] Lord Diplock stated:

*“As a general rule the English system of administering justice does require that it be done in public... If the way that courts behave cannot be hidden from the public ear and eye this provides a safeguard against judicial arbitrariness or idiosyncrasy and maintains public confidence in the administration of justice.”*⁴⁵⁷

⁴⁵⁵ Cooper, 'Special measures for child witnesses: a socio-legal study of criminal procedure reform, 90

⁴⁵⁶ Burton, Evans and Sanders, 'Vulnerable and intimidated witnesses and the adversarial process in England and Wales'

⁴⁵⁷ *A-G v Leveller Magazine Ltd* [1979] AC 440 at 449 to 450.

He continued by explaining that this principle of open justice had two main manifestations. Firstly, it meant that court proceedings should be held in an open court in the presence of media and public. Secondly, that nothing should be done to inhibit the dissemination of fair and accurate court reports to the wider public.⁴⁵⁸

Jenks states: “one of the most conspicuous features of English Justice, that all judicial trials are held in open court, to which the public have free access ... appears to have been the rule in England from time immemorial.”⁴⁵⁹ Today, support for the principle of open justice is drawn from a number of statutes and cases. The International Covenant on Civil and Political Rights (ICCPR) declares: “Everyone shall be entitled to a fair and public hearing by a competent, independent tribunal established by law.”⁴⁶⁰ Court hearings held in public are seen to be “an important safeguard in the interest of the individual and of society at large.”⁴⁶¹ The equivalent arrangements in the KSA are discussed later in chapters 6 and 7.

Article 10 of the ECHR states there is a right: “to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.”⁴⁶² In addition, Article 6 includes the right “to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.” The same article, however, makes it clear that “public” is qualified:

Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

The ECHR has stated that public court proceedings were “a fundamental principle enshrined in paragraph (1) of article 6.”⁴⁶³ After the Human Rights Act 1998 was enacted the House of Lords gave a further affirmation of the importance of open justice:

⁴⁵⁸ Ibid

⁴⁵⁹ Edward Jenks, *The book of English law* (J. Murray 1928) 91.

⁴⁶⁰ (1966) UNTS 171, at art. 14(1).

⁴⁶¹ United Nations Human Rights Committee, General Comment 13 (21) (adopted in 1984), UN Doc. HRI/GEN/1/Rev.2 (1996), at p. 15, para. 6.

⁴⁶² Article 10 of the European Convention on Human Rights and Fundamental Freedoms (ECHR).

⁴⁶³ *Hakansson v Sweden* (1991) 13 EHRR 1 at [66]

“A criminal trial is a public event. The principle of open justice puts, as has often been said, the judge and all who participate in the trial under intense scrutiny. The glare of contemporaneous publicity ensures that trials are properly conducted.”⁴⁶⁴

So, it is clearly established that the open justice principle determines that by default, criminal court proceedings are held in public. However, the exceptions are also of considerable interest and are dealt with next.

5.5.3.2 Closed court proceedings

In line with Article 6 of the ECHR proceedings may be held in private “in the interest of morals, public order or national security in a democratic society” but also “to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice”. Additionally, the Court of Appeal recently reaffirmed that there was a common law basis for the power to hear a trial (or part of a trial) in private.⁴⁶⁵ At all times the principle of open justice places major constraints on making such a direction. In this case a judge had made an order in favour of an application from the CPS that the trial of two defendants – referred to as AB and CD - accused of terrorism offences should be held entirely *in camera* so that reporting should be prohibited and the defendants anonymised. This was on the grounds of national security. However, the Guardian newspaper appealed the ruling. When giving the decision of the Court of Appeal Lord Justice Gross stated:

*“We express grave concern as to the cumulative effects of holding a criminal trial in camera and anonymising the defendants. We find it difficult to conceive of a situation where both departures from open justice will be justified.”*⁴⁶⁶

However, as the CPS had indicated that, should the trial be public, they may cease the prosecution, the Court allowed the core of the trial to be *in camera* but not the entire proceedings: it rejected the anonymization of the defendants and it permitted a limited media presence. The decision reaffirmed that “No more than the minimum departure

⁴⁶⁴ Re S [2005] 1 AC 593 at [30]

⁴⁶⁵ Lord Justice Gross *Guardian News and Media Ltd - v - AB and CD* Case No: 2014/02393C1 para 3

⁴⁶⁶ Ibid. at para 21

from open justice will be countenanced.”⁴⁶⁷ However, it also illustrated and directly affirmed that there is a higher principle than open justice and that is doing justice:

*“Open justice must, however, give way to the yet more fundamental principle that the paramount object of the Court is to do justice accordingly, where there is a serious possibility that an insistence on open justice in the national security context would frustrate the administration of justice and turn into the ‘thin edge of the wedge’ for the principle of open justice; for example, by deterring the Crown from prosecuting a case where it otherwise should do so, a departure from open justice may be justified.”*⁴⁶⁸

5.5.4 EVIDENCE GIVEN IN PRIVATE (SECTION 25)

Section 25 of the YJCEA 1999 provides for the court to direct the exclusion of persons from the courtroom while a witness is giving evidence. Who exactly is being excluded is detailed in the direction.⁴⁶⁹ The defendant(s), the legal representatives, the interpreter or other assisting person may not be excluded.⁴⁷⁰ One nominated representative of a news-gathering or reporting organisation will also not be excluded.⁴⁷¹ This special measure direction can only be made when the proceedings relate to a sexual offence or where there are grounds to believe that someone other than the defendant might intimidate the witness.⁴⁷²

Clearly the intention of this measure is to reduce the embarrassment and/or sense of intimidation that could be felt by witnesses while they are giving evidence.⁴⁷³ This provision is available to the court for cases involving sexual offences as individually defined in the Sexual Offences Act 2003.⁴⁷⁴ These inevitably involve very personal and sensitive evidence being given. It is also available in cases where there is believed to be actual or likely witness intimidation.⁴⁷⁵ The intention is to reduce the embarrassment

⁴⁶⁷ Ibid. at para 2

⁴⁶⁸ Ibid. at para 5 ii

⁴⁶⁹ YJCEA 1999 s. 25 (1)

⁴⁷⁰ Ibid. s. 25 (2)

⁴⁷¹ Ibid. s. 25 (3)

⁴⁷² Ibid. s. 25 (4)

⁴⁷³ Ministry of Justice, *Vulnerable and Intimidated Witnesses A Police Service Guide*, 16.

⁴⁷⁴ As defined in Sections 1 to 71 of Sexual Offences Act 2003

⁴⁷⁵ The precise wording of s. 25(4)(b) is: it appears to the court that there are reasonable grounds for believing that any person other than the accused has sought, or will seek, to intimidate the witness in connection with testifying in the proceedings.

and/or sense of intimidation that could be felt by witnesses while they are giving evidence.⁴⁷⁶

The evidence in private measure is referred to as ‘clearing the public gallery’. There is some research suggesting that among legal practitioners there is a sense of ambivalence toward this measure arising from the way it is seen to conflict with the principle of open justice.⁴⁷⁷ However, its use is limited⁴⁷⁸ and it appears particularly well-suited to sexual offences where the witness might find it difficult to be questioned about very intimate matters in the presence of members of the public. As the public galleries of English courts are often occupied by the families and supporters of both the accused and the complainant they can undoubtedly be a source of intimidation.⁴⁷⁹

The Section 25 special measure is not the first time a court has had the power to clear the gallery. Under Section 37 of the Children and Young Persons Act 1933 “in any proceedings in relation to an offence against, or any conduct contrary to, decency or morality” to clear the public gallery if a child or young person is giving evidence.⁴⁸⁰ The media, however, may not be excluded under this Act.⁴⁸¹

There are two strong justifications for the exclusion of the public from court proceedings when a witness is testifying under YJCEA 1999. Firstly, the public’s exclusion can be justified on the grounds of safety. In certain cases, including those where gangs and organised crime are involved there could be legitimate fears for the safety of witnesses, the judge, and court staff. Closure of the court may be ordered when, for example, the witness has been in protective custody or other witnesses in the case have already been subject to intimidation. As a result of the closure witnesses are less likely to be influenced in any conscious or unconscious way and better able to focus on their testimony.

Second, there is a privacy justification. In some cases, the law may be used to protect the identities of victims, witnesses and even defendants and this can also lead to court

⁴⁷⁶ Ministry of Justice, *Vulnerable and Intimidated Witnesses A Police Service Guide*

⁴⁷⁷ Burton, Evans and Sanders, ‘Are special measures for vulnerable and intimidated witnesses working? Evidence from the criminal justice agencies’ 59.

⁴⁷⁸ Ibid

⁴⁷⁹ Ibid

⁴⁸⁰ Children and Young Persons Act 1933. S. 37 (1). For an understanding of decency and morality as concepts in English law we could consider the common law offence of ‘outraging the public decency’. Cases where the defendant is charged with this offence have involved public sexual activity, indecent exposure, publication of obscene materials. Among others.

⁴⁸¹ Ibid. S. 37 (2)

closure. The pre-trial anonymity of witnesses is covered by sections 74 to 85 of the Coroners and Justice Act 2009 and at trial anonymity by sections 86 to 90 of the same Act. For example, in rape cases, the law protects the identity of the complainant, hence the judge might redact the complainant's name from documents and clear the courtroom when she is giving testimony. The right to anonymity was established in The Sexual Offences (Amendment) Act 1976 and extends throughout the complainant's lifetime.⁴⁸²

Rape complainants qualify for special measures as of right.⁴⁸³ Furthermore, courts are regularly cleared to protect the identity of confidential informants or undercover police officers. Youth courts are closed to the public to protect the child from any future implications of the case (unless the child is being tried as an adult). In court pleadings the child's name is normally redacted. Along similar lines, when they are children, the identities of victims and witnesses can also be kept secret, although such orders under the CJA 2009 are very controversial.⁴⁸⁴ Witness anonymity is beyond the scope of this thesis which is concerned with those special measures included in the YJCE 1999.

5.5.5 REMOVAL OF WIGS AND GOWNS

Section 26 of the YJCE Act 1999 simply states: "A special measures direction may provide for the wearing of wigs or gowns to be dispensed with during the giving of the witness's evidence."

5.5.5.1 Context and history of wigs and gowns in England

The wearing of gowns has been a feature of English courts for centuries though the precise fashion of the day went through many changes. In fact the basic elements of the costume of a today's High Court judge, including a long robe, full hood with a cowl covering the shoulders and a mantle (or cloak) – were already in place at the time of Edward III (1327-77).⁴⁸⁵ Why robes and gowns came to be worn in the first place seems likely to be a result of a desire to follow the scholarly tradition of wearing togas, and then robes.⁴⁸⁶ An alternative explanation is that judicial wear was effectively following

⁴⁸² Section 4 The Sexual Offences (Amendment) Act 1976

⁴⁸³ YJCEA 1999 s 17(4)

⁴⁸⁴ Coroners and Justice Act 2009, sections 86 to 90.

⁴⁸⁵ Courts and Tribunals Judiciary, *History of Court Dress*

⁴⁸⁶ John Hamilton Baker, 'History of the gowns worn at the English bar' (1975) 9 *Costume* 15

the rules for what should be worn at royal court.⁴⁸⁷ The origin of the current black robe is thought to be associated with the death of King Charles II in 1685 and perhaps accelerated following the death of his successor Queen Mary in 1694. Indeed, the type of gown worn today is actually a mourning gown.⁴⁸⁸

Regarding wigs, until the 17th century the judiciary appeared in the court with short neatly groomed hair but when in the reign of Charles II (1660-1685) wig wearing became *de rigueur* throughout the whole of 'polite society' it is unsurprising that they began to appear in the courtrooms.⁴⁸⁹ What is perhaps surprising is that they are still there, hundreds of years later long after the fashion that ushered them in has been consigned to history.

By the 1920s the wearing of costumes and uniforms had spread throughout society and throughout the British Empire as a means of displaying rank. The precise details of what every rank of academic, clergy, diplomat, police officer, judge, barrister and in fact anyone involved in ceremony was set out in an official publication.⁴⁹⁰ In the 1920s it was the Lord Chamberlain's task to issue regulations for court dress (i.e. ceremonial dress). Today the Lord Chief Justice issues guidelines.⁴⁹¹ The latest set of guidelines were issued in 2008.⁴⁹² Under these guidelines the main concession to modernity is that judges would no longer be donning wigs when hearing civil cases. In criminal proceedings wigs would remain. The colour and style of robes varies from one court to another. Legal counsel also issued new guidelines the following year but these remained almost unchanged meaning that business suits would be worn in certain divisions and at certain stages of proceedings while court dress (robe and wigs) will be worn at others. The intention is to reflect the gravity of the proceedings in the costumes being used. A clear example of this is that in the Family Division most hearings are undertaken in

⁴⁸⁷ Courts and Tribunals Judiciary, *History of Court Dress*

⁴⁸⁸ Baker, 'History of the gowns worn at the English bar'

⁴⁸⁹ Ibid

⁴⁹⁰ Herbert Arthur Previte Trendell, *Dress and Insignia Worn at His Majesty's Court* (London : Harrison & sons, Limited 1921)

⁴⁹¹ Court dress refers to the ceremonial dress and insignia to be worn at royal court whereas judicial dress refers to what judges and advocates wear during court proceedings. Mention of court dress is made both to emphasise the role of uniforms in the exhibiting of rank and because judicial dress has tended to follow court dress when the latter has been officially defined.

⁴⁹² Practice Direction (Court Dress) (No. 5) and Amendment No. 20 to The Consolidated Criminal Practice Direction (Court Dress) issued by the Lord Chief Justice dated 31 July 2008

business suits but when a contested divorce petition is heard the wigs and gowns reappear.⁴⁹³

Today, it is fair to say that the obsession with rank and ceremony in the wider public has dissipated almost as much as the Empire but that is not to say that gowns or for that matter wigs have disappeared. In fact, a series of neck tabs on the latest court dress indicate the rank of the judge.⁴⁹⁴ It would also be wrong to suggest there was widespread public clamour for the removal of all vestiges of tradition from the costume of the judiciary and counsel. Research undertaken on behalf of the Lord Chancellor's Department and published in 2002 showed that while 60% of members of the public and court users surveyed felt there should be some changes to court dress, two-thirds wanted to retain the wig for criminal judges.⁴⁹⁵ The respondents differentiated between civil and criminal cases, which appears to suggest that the guidelines that were ultimately published in 2008 broadly reflected public opinion.⁴⁹⁶

Opponents of judicial costume can point to evidence that court users find courts “scary, formal and frightening”⁴⁹⁷ and that the use of wigs and gowns certainly does nothing to alleviate these perceptions. However, the fact that governments seem reluctant to enact major changes and spend long period deliberating over any changes at all suggests that among the judiciary there is a point on which Saudi and English law is similar: both have traditions to which they cling.⁴⁹⁸ Based on their study of users' experiences of the Crown Court, Jacobson, Hunter and Kirby label the use of wigs and gowns as: “a deliberate strategy to sustain the Crown Court's aura of authority for those who work in court but, especially, for those who enter the space as outsiders – victims, witnesses.”⁴⁹⁹

⁴⁹³ Desmond Brown QC ‘Court Dress: Revised Guidelines from the Chairman of the Bar Counsel’ 2nd June 2009

⁴⁹⁴ Op cit 31 s. 3 requires neck tabs as follows: Court of Appeal – gold tabs; High Court – red tabs; Members of the High Court Masters Group – pink tabs; and District Judges – blue tabs.

⁴⁹⁵ Lindsay Hermans ‘Public Perceptions of Working Court Dress in England and Wales’ Available at: <http://www.dca.gov.uk/consult/courtdress/orcreport.pdf> Accessed 25th October 2015

⁴⁹⁶ Ibid

⁴⁹⁷ OP cit 34

⁴⁹⁸ Indeed, the 2008 guidelines were supposed to have come into effect 10 months earlier than they did (1st January 2008 and not 1st October that year), reportedly due to strong opposition from within the judiciary to the original proposals.

⁴⁹⁹ Jessica Jacobson, Gillian Hunter and Amy Kirby, ‘Structured mayhem: Personal experiences of the Crown Court’ (2015)

5.5.5.2 Removal of wigs and gowns (section 26)

While the details of court dress are governed in England by Practice Directions⁵⁰⁰ from the Lord Chancellor (for judges) and the Bar Council (for counsel) the trial judge's power to order the removal of wigs and gowns is set out in section 26 of the YJCEA 1999. The aim of this measure was to assist witnesses with learning disabilities and child witnesses who may perceive the courtroom costumes inhibiting and unfamiliar, a recommendation made in the Pigot Committee's report.⁵⁰¹ As we have seen above, the YJCEA 1999 provides that special measures apply only to witnesses as defined in sections 16 and 17: defendants do not qualify for special measures. However, where the defendant is a young person, the current Crown Court practice direction on the trial of children and young person's states, "Robes and wigs should not be worn unless the court for good reason orders that they should."⁵⁰² In reality, the main function of Section 26 is to clarify that the dispensation regarding wigs and gowns already in place for child witnesses can also be made in the case of vulnerable or intimidated adult witnesses.

Section 26 states simply "A special measures direction may provide for the wearing of wigs or gowns to be dispensed with during the giving of the witness's evidence."⁵⁰³ It should be pointed out however that it had already been widely assumed that the judge had the power to require removal of wigs and gowns.⁵⁰⁴

McEwan argues that this kind of judicial request has normally been complied with, for the benefit of both adults with learning disabilities and for child witnesses, yet there are some reports, published in McEwan, of counsel refusing such a judicial request. McEwan also points out the importance of early communication as witnesses may be

⁵⁰⁰ The current practice directions for judges are as follows: "(I.1.1) In magistrates' courts, advocates appear without robes or wigs. In all other courts, Queen's Counsel wear a short wig and a silk (or stuff) gown over a court coat with bands, junior counsel wear a short wig and stuff gown with bands. Solicitors and other advocates authorised under the Courts and Legal Services Act 1990 wear a black solicitor's gown with bands; they may wear short wigs in circumstances where they would be worn by Queen's Counsel or junior counsel.

(I.1.2) High Court Judges hearing criminal cases shall wear the winter criminal robe year-round. Scarlet summer robes are no longer issued or worn."

⁵⁰¹ Burton, Evans and Sanders, 'Are special measures for vulnerable and intimidated witnesses working? Evidence from the criminal justice agencies' p 58, referring to Home Office (1989) Report of the advisory group on video-recorded evidence. Chairman His Honour Judge Thomas Pigot, QC.

⁵⁰² The Consolidated Criminal Practice Direction (2005) Part III.30.14.

⁵⁰³ YJCEA 1999 s. 26

⁵⁰⁴ McEwan Jenny, 'In Defence of Vulnerable Witnesses: The Youth Justice and Criminal Evidence Act 1999' (2000) 4 Int'l J Evidence & Proof 1

confused if having prepared for the trial expecting to face wigs and gowns, they arrive in court to find there are none on view.⁵⁰⁵

It seems clear to me that this measure for VIWs could be a valuable means of reducing stress particularly for children. The measure could be of value to a minority of VIWs and needs to be carefully assessed based on the individual witnesses' needs and preferences.⁵⁰⁶ Hamlyn et al. conducted research among Crown Court witnesses and found that in one quarter of cases wigs and gowns had been removed for child witnesses and the majority had found this helpful.⁵⁰⁷ As regards to how often child witnesses are given the option, in their study Plotnikoff and Woolfson found that of the 36 young Crown Court witnesses surveyed 24 had been asked their preference.⁵⁰⁸ However, both these last two studies were relatively small scale and it appears it may require additional research before some prosecutors are swayed from the view that children actually have a preference for seeing judges and counsel wearing formal court dress.⁵⁰⁹ This might point to a deeper issue: lawyers might be wedded to tradition to such an extent that they resist change, such as special measures.

Burton et al. present criticism of the criminal justice agencies, including the police and CPS, for not expanding the use of this special measure.⁵¹⁰ They point out that despite wig and gown removal being the third most popular measure for children in the Crown Court, it was still lagging behind a live TV link and use of video-recorded evidence by some significant distance.⁵¹¹

To summarise, wigs and gowns appear likely to be a feature of criminal trials in England and Wales for the foreseeable future. The judge's power to direct the removal of court dress was already established but the YJCEA 1999 established that this measure was available to adult VIWs not only children. I see such a measure as useful

⁵⁰⁵ Ibid

⁵⁰⁶ Burton, Evans and Sanders, 'Are special measures for vulnerable and intimidated witnesses working? Evidence from the criminal justice agencies'

⁵⁰⁷ Hamlyn and others, *Are special measures working?: Evidence from surveys of vulnerable and intimidated witnesses*

⁵⁰⁸ Joyce Plotnikoff and Richard Woolfson, *In their own words: The experiences of 50 young witnesses in criminal proceedings* (National Society for the Prevention of Cruelty to Children 2004) 18.

⁵⁰⁹ Mandy Burton, Roger Evans and Andrew Sanders, 'Protecting children in criminal proceedings: Parity for child witnesses and child defendants' (2006) 18 *Child & Fam LQ* 397

⁵¹⁰ Ibid

⁵¹¹ Paul Roberts, Debbie Cooper and Sheelagh Judge, 'Monitoring Success, Accounting for Failure: The Outcome of Prosecutors' Applications for Special Measures Directions under the Youth Justice and Criminal Evidence Act 1999' (2005) 9 *The International Journal of Evidence & Proof* 269

in making the court itself a less intimidating place, which may be of particular importance to child witnesses. However, it should not be automatically assumed that the child will see the removal of wigs and gowns as important or even desirable.

5.5.6 VIDEO RECORDED INTERVIEWS AS EVIDENCE-IN-CHIEF (SECTION 27)

Section 32 of the Criminal Justice Act 1988 had provided for the use of live links for child witnesses in cases involving sexual offences or crimes of violence, this was amended by the Criminal Justice Act 1991 which inserted section 32a into the 1988 act containing provisions for the use of video recordings in the abovementioned cases and established that this evidence “shall be treated as if given by that witness in direct oral testimony.”⁵¹² To accompany the introduction of video evidence the Memorandum of Good Practice on Video-Recorded Interviews with Child Witnesses for Criminal Proceedings was published in 1992.⁵¹³ Hence, once again the YJCEA 1999 was not breaking new legal ground but instead extending the provision for video-recording from child witnesses in certain types of cases to all VIWs in all criminal cases. The automatic admissibility of section 27 video recorded statements as evidence in chief was provided for adult complainants in sexual offence trials in the Crown Court by means of a new section inserted into the YJCE Act 1999 by the Coroners and Justice Act 2009.⁵¹⁴

As with other special measures it is the investigating officer who makes the initial evaluation, including eliciting the views of the witness themselves, as to the likelihood that a) the witness is likely to be deemed by the court to be eligible for special measures and b) that section 27 is the most appropriate measure. This opinion is discussed with the prosecuting barrister or solicitor (the CPS) and it is for the latter to make the application. The trial judge decides whether to make a section 27 direction.⁵¹⁵

The legislation refers to the ‘interests of justice’ test in the context of whether the video-recording should not be admitted, and s. 27(3) says that “the court must consider whether any prejudice to the accused which might result from that part being so

⁵¹² Criminal Justice Act 1991 s. 54 (6)

⁵¹³ Home Office in conjunction with Department of Health, *Memorandum of good practice on video recorded interviews with child witnesses for criminal proceedings* (London: HMSO 1992)

⁵¹⁴ Section 101 of the Coroners and Justice Act 2009 inserted section 22a into the Youth Justice and Criminal Evidence Act 1999.

⁵¹⁵ ACPO (Association of Chief Police Officers), *Advice on the Structure of Visually Recorded Witness Interviews* (2013)

admitted is outweighed by the desirability of showing the whole, or substantially the whole, of the recorded interview.”

Having given a direction for this special measure the court may still disallow all or part of the recording to be admitted as evidence if it finds that it is not in the interest of justice to do so.⁵¹⁶ Furthermore, s. 27 refers to video recorded evidence in chief is also inadmissible from a witness who will not be available for cross-examination.⁵¹⁷

The objective for recording the interviews is to make sure that the most reliable and accurate representation of the interview possible was secured as early on in the process as possible as a way to ensure that the witness testimony was not misrepresented subsequently when a Section 9 Criminal Justice Act 1967 (written reproduction of the interview) statement was prepared.⁵¹⁸

There are three clear benefits of video evidence. Firstly, it offers the court access to evidence that may not otherwise be available. Secondly, it has the potential to ameliorate the process of giving evidence for VIWs as it might be less stressful than giving evidence in open court and there is research to suggest that this is indeed the case.⁵¹⁹ Thirdly, as supported by empirical studies, the video evidence is likely to be more complete and less prone to omissions or inaccuracies.⁵²⁰ Taken together video evidence appears to be in the interests of justice for cases involving vulnerable or intimidated witnesses.

However, it should also be remembered that the Stern Review⁵²¹ highlighted “substantial problems” with the implementation of video recorded interviews which were “an issue of considerable concern” because they were harming the smooth running of trials, were expensive and were causing distress to victims. The problems, however, are not ones of principle but of practice. Police interviewers, in their pursuit of

⁵¹⁶ YJCEA 1999 s. 27 (2)

⁵¹⁷ YJCEA 1999 s. 27 (4a)

⁵¹⁸ Section 9 of the Criminal Justice Act 1967 sets out the conditions which must be met for a written statement to be treated equally with direct testimony given in court in evidential terms.

⁵¹⁹ Burton, Evans and Sanders, 'Are special measures for vulnerable and intimidated witnesses working? Evidence from the criminal justice agencies'

⁵²⁰ J Don Read and Deborah A Connolly, 'The effects of delay on long-term memory for witnessed events' (2007)

⁵²¹ Baroness Vivien Stern CBE, 'A report by baroness Vivien Stern CBE of an independent review into how rape complaints are handled by public authorities in England and Wales'

‘Achieving Best Evidence’ (hereinafter ABE) guidelines⁵²² are producing excessively long interviews, which turn into ineffective evidence.⁵²³ The ‘free narrative account’⁵²⁴ phase of the ABE interview, which can go on to be presented as evidence in court and which can last hours⁵²⁵, thus becomes very different in character to evidence-in-chief given in person in court where the prosecuting barrister is more likely to guide the witness with their questions and focus on the key points. The police interviewers’ desire to follow the guidelines is understandable as they are warned in those guidelines that failure to do so may mean the evidence is ruled inadmissible in court.⁵²⁶ The interviews are carried out at an investigatory stage when police are pursuing various lines of enquiry and many of the circumstances of the crime may be unknown. This may make for more meandering interviews certainly when compared to the logical and sequential narratives that would be heard in the courtroom as an advocate takes the witness through their testimony.⁵²⁷

Delays, however, come at a price in terms of quality of evidence. As everyone's memories, including those of children, are prone to fade with time, a video recording is made close to the time of the event when the details are still vivid. Such a recording acts to preserve the witness' original account of events in their own words. It can be months or years after the recorded interview that a preliminary investigation or trial begins so the video recording acts as an important aid to memory for cross-examination. Memory researcher Elizabeth Loftus undertook studies of what happens to memories over time and found that the passage of time increases susceptibility to false memories. Essentially, as time passes memory of actual events is supplanted by imagination in the young.⁵²⁸ In an empirical study of a sample of undergraduate students with direct implications for eyewitness testimony it was found that memories of an incident could be interfered with by the perpetrator either directly through threats and intimidation or more subtly in the manner of their denial.⁵²⁹ To avoid the influence of such

⁵²²As published in Ministry of Justice, *Achieving Best Evidence in Criminal Proceedings: Guidance on interviewing victims and witnesses, and guidance on using special measures*

⁵²³ Ibid

⁵²⁴ Ibid, 74

⁵²⁵ Baroness Vivien Stern CBE, 'A report by baroness Vivien Stern CBE of an independent review into how rape complaints are handled by public authorities in England and Wales'

⁵²⁶ Ibid

⁵²⁷ Louise and Vanessa, 'A ‘Special’ Delivery? Exploring the Impact of Screens, Live-Links and Video-Recorded Evidence on Mock Juror Deliberation in Rape Trials'

⁵²⁸ Elizabeth F Loftus, 'Imagining the past' (2001) 14 *The Psychologist* 584

⁵²⁹ Daniel B Wright, Elizabeth F Loftus and Melanie Hall, 'Now you see it; now you don't: Inhibiting recall and recognition of scenes' (2001) 15 *Applied Cognitive Psychology* 471

misinformation it is clearly advantageous to ask the witness to give their testimony as soon as possible while the memories are still vivid.

5.5.7 VIDEO RECORDED CROSS-EXAMINATION (SECTION 28)

Cross-examination has been viewed as the essential feature of the English adversarial system of justice for centuries.⁵³⁰ It has been every bit as central as the principle of the accused hearing face-to-face the testimony of the accuser.⁵³¹ Yet the latter principle is now seriously qualified as the special measures discussed above illustrate. So what of cross-examination?

Video recorded cross-examination has not yet been fully implemented and is currently being piloted in three Crown Courts.⁵³² Section 28 (1) states that where a direction has been made under section 27 (video-recorded interviews as evidence-in-chief) there may be a matching direction for video-recorded cross-examination and re-examination. As with other Achieving Best Evidence interviews, with the leave of the trial judge the video recording of cross-examination will be able to be edited in order to remove prejudicial matters or irrelevant material together with any breaks in the questioning, the resulting recording will then be played to the jury at trial.⁵³³

The intention of section 28 is clearly to afford cross-examination the same opportunity as evidence-in-chief in terms of the use of video recordings, in that they offer witnesses that opportunity to give evidence in less intimidating circumstances. However, there is an issue concerning how to deal with instances where new evidence comes to light after the original cross-examination which prompts a need to re-examine a particular point or points of a witness' evidence. This is where it becomes apparent that the video-recording process can be somewhat cumbersome as the witness will need to be recalled to be questioned on the specific new point.

A further question is whether video-recorded cross-examination should be used. If a VIW is faced with cross-examination in court does that not undermine one of the key

⁵³⁰ Henderson Emily, 'Theoretically Speaking: English Judges and Advocates Discuss the Changing Theory of Cross-Examination ' (2015) *The criminal law review* (London : Thomson / Sweet & Maxwell) No 12

⁵³¹ Frank R Herrmann and Brownlow M Speer, 'Facing the Accuser: Ancient and Medieval Precursors of the Confrontation Clause' (1993) 34 *Va J Int'l L* 481

⁵³² M Stevenson and H Valley, 'Pre-recorded cross examination '
<<http://www.criminallawandjustice.co.uk/features/Pre-recorded-Cross-Examination>> accessed 29th October 2014

⁵³³ Ibid

objectives of video recorded evidence-in-chief which is to encourage witnesses to come forward in the first place. If they give video recorded evidence-in-chief and then balk at the idea of being cross examined in person in court then their evidence-in-chief would be inadmissible.⁵³⁴

This particular special measure raises fundamental questions about the adversarial nature of the English system and other key principles such as open justice and the role of juries. A series of high profile cases in which witnesses were exposed to traumatic and lengthy cross-examination having already suffered the trauma of the offence itself has provided the political impetus to introduce this measure as the issue was causing the adversarial nature of the whole system to be questioned.⁵³⁵ When the pilot scheme was announced the Secretary of State for Justice stated that the purpose was to “spare these victims from the aggressive and intimidating court atmosphere.”⁵³⁶

Under the adversarial system there is no limit to how many different advocates can cross examine and how long the cross-examination can go on for. While the judge has the discretionary power to intervene to prevent overly aggressive interrogation this has failed to prevent lengthy cross-examination during which the witness is asked to recall the graphic details of events they would surely prefer not to have to discuss such as sexual abuse. Ultimately, misgivings about the implementation of section 28 (which had delayed implementation by 14 years) were set aside in pursuit of a solution to the hardships of witnesses that were receiving widespread press coverage.⁵³⁷

The KSA operates an inquisitorial model of criminal justice in which cross-examination is conducted by the judge who is therefore in a position to personally mediate and moderate both the length and content of such questioning. Therefore, there may be limited use for such a provision in that jurisdiction.

⁵³⁴ YJCEA 1999 s.28 4(a)

⁵³⁵ Stevenson and Valley, 'Pre-recorded cross examination '

⁵³⁶ As reported in The Guardian, 'Pre-recorded evidence to spare vulnerable victims court ordeal ' *The Guardian newspaper* (<<http://www.theguardian.com/law/2013/jun/11/pre-recorded-evidence-victims-court>> accessed 10th March 2016

⁵³⁷ George Mark, 'Concerns over cross-examination of witnesses 'Let sleeping dogs lie: Cross-examination in advance of trial in cases of sexual assault" (*The justicegap*, 2013) <<http://thejusticegap.com/2013/06/let-sleeping-dogs-lie/>> accessed 10th March 2016

5.5.8 COMMUNICATING THROUGH INTERMEDIARIES (SECTION 29)

An intermediary is a person approved by the court to communicate questions from the court, the defence and the prosecution to the witness, and also to communicate the responses the witness gives in answering. The Registered Intermediary Annual Survey 2010 includes the following definition of an intermediary as "a person who facilitates two way communication between the vulnerable witness and the other participants in the legal process, to ensure that their communication is as complete, accurate and coherent as possible".⁵³⁸ Section 29 provides for "any examination of the witness (however and wherever conducted) to be conducted through an interpreter or other person approved by the court for the purposes of this section ("an intermediary")."⁵³⁹ The intermediary must make a declaration to the court that they will faithfully carry out their role.⁵⁴⁰ Furthermore, intermediaries are also subject to the Perjury Act 1912.⁵⁴¹

Intermediaries are not restricted to court proceedings, they are also called upon provide communication assistance at the investigation stage - when this happens the admissibility of the evidence taken in this way is sought and decided retrospectively. The intermediary is permitted to provide explanations of the questions and answers to the extent that this is necessary to render them understandable for the witness or questioner but may not change the substance of the evidence. Additionally, the intermediary may also be involved in tasks at the pre-trial stage, one example is attendance at and facilitation of communication at police interviews.⁵⁴² Should the witness undertake a court familiarisation visit then the intermediary may accompany them.⁵⁴³ The PACE 1984⁵⁴⁴ introduced the role of the 'appropriate adult' who is normally the parent, guardian or social worker of a child or vulnerable adult involved in

⁵³⁸ As cited in *OP v SofS for Justice* [2014] EWHC 1944 (Admin) <https://www.crimeline.info/uploads/cases/2014/2014ewhc1944admin.pdf>

⁵³⁹ Under YJCEA 1999 s. 29 (1).

⁵⁴⁰ Under YJCEA 1999 s. 29 (5).

⁵⁴¹ Under YJCEA 1999 s. 29 (7).

⁵⁴² Gisli H Gudjonsson, 'Psychological vulnerabilities during police interviews. Why are they important?' (2010) 15 *Legal and criminological Psychology* 161

⁵⁴³ Penny Cooper, 'Highs and lows: the 4th intermediary survey' (2014)

⁵⁴⁴ Police and Criminal Evidence Act 1984 (PACE) Codes of Practice, primarily Code C

a police investigation. They accompany the person concerned during a range of police processes including interviews, intimate searches, and identification procedures.⁵⁴⁵

Penny Cooper evaluated the role of intermediaries in a recent study which elicited this group's views on special measures. She found that intermediaries for VIWs were in high demand. Indeed, according to Ministry of Justice data published in Cooper's study, in June 2014 there were 263 requests for an intermediary from police and the CPS.⁵⁴⁶ She argues that this high demand is evidence of the importance of intermediaries in achieving best evidence.⁵⁴⁷ The main issue concerning intermediaries is one of capacity, particularly as it appears demand is likely to remain high.

5.5.9 SPECIAL COMMUNICATION AIDS (SECTION 30)

For some witnesses the use of the court's official languages is problematic, finding it too complicated to properly comprehend because it is both adult and legalistic.⁵⁴⁸ Innovative communication aids, such as diagrams or toys with which to identify different body parts, can help some witnesses, particularly children, to give oral evidence. Such communication aids were suggested in the *Speaking up for Justice* report.⁵⁴⁹

In research undertaken in 2001⁵⁵⁰, 2004⁵⁵¹, 2007⁵⁵² and 2009⁵⁵³, Plotnikoff and Woolfson conducted a total of 394 interviews with child witnesses England. In each study, at least fifty percent of the participants stated that they failed to comprehend at least some of the questions asked of them in the courtroom: not to mention those who did not even realise they had not understood. Among the population at large

⁵⁴⁵ Harriet Pierpoint, 'Quickening the PACE? The use of volunteers as appropriate adults in England and Wales' (2008) 18 *Policing & Society* 397

⁵⁴⁶ Cooper, 'Highs and lows: the 4th intermediary survey'

⁵⁴⁷ Ibid

⁵⁴⁸ Jenny, 'In Defence of Vulnerable Witnesses: The Youth Justice and Criminal Evidence Act 1999' 8.

⁵⁴⁹ Home Office, *Speaking Up for Justice: Report of the Interdepartmental Working Group on the Treatment of Vulnerable Or Intimidated Witnesses in the Criminal Justice System*. Recommendation 47 at para. 8.77

⁵⁵⁰ Joyce Plotnikoff and Richard Woolfson, 'An evaluation of young witness support' (2001) Scottish Executive Central Research Unit Edinburgh: Scottish Executive

⁵⁵¹ Plotnikoff and Woolfson, *In their own words: The experiences of 50 young witnesses in criminal proceedings*

⁵⁵² Joyce Plotnikoff and Richard Woolfson, *Evaluation of young witness support: examining the impact on witnesses and the criminal justice system* (Home Office 2007)

⁵⁵³ Plotnikoff and Woolfson, *Measuring Up?: Evaluating Implementation of Government Commitments to Young Witnesses in Criminal Proceedings: July 2009: Executive Summary*

approximately half of children from socio-economically disadvantaged backgrounds have speaking and overall language skills that are markedly less developed than those of other same-aged children.⁵⁵⁴

Conscious of this issue, English law provides for measures under s.30 of the YJCEA 1999 to support children and vulnerable adult witnesses while they are giving evidence; these include the use of an interpreter where appropriate, the adoption of additional communication techniques or aids.⁵⁵⁵ This may include using alphabet boards, signs or symbols, Braille oath cards, text to speech technology and loop systems for the hard of hearing.

Provision of communication aids under s.30 should be differentiated from the provision of an intermediary under s.29, although the two measures can and are sometimes used in conjunction. Broadly speaking, such communication aids and interpreters enable direct conversion from one language or communication system into another. By contrast, an intermediary's role is the facilitation of improved communication by reinterpreting questions and answers in a way that is more understandable or highlighting comprehension issues with the way a question has been phrased.⁵⁵⁶

According to Cooper's study, relatively few children would need the support of communication aids under s.30 of the YJCEA 1999. Furthermore, not one prosecutor participating in the study could recall any instances where they had seen the application of s.30. Prosecutors rely on any requirement for such communication aids being notified to them by the police.⁵⁵⁷ Studies suggest that this may be a rare occurrence. For example, Burton et al. found no such applications during their research and Hamlyn et al. found only eleven (either child or vulnerable adults) in a much larger study.⁵⁵⁸

This begs the question as to why with such low demand for the provisions did lawmakers legislate for it at all. The answer may lie in the work of the revision team who issued the ABE in Criminal Proceedings wherein they sought to evaluate the

⁵⁵⁴ The Child Protection System in England,
<http://www.publications.parliament.uk/pa/cm201213/cmselect/cmeduc/writev/1514/cps87.htm>.
Accessed 19 Sep 2014.

⁵⁵⁵ Ministry of Justice, *Achieving Best Evidence in Criminal Proceedings: Guidance on interviewing victims and witnesses, and guidance on using special measures* 168.

⁵⁵⁶ Cooper, 'Special measures for child witnesses: a socio-legal study of criminal procedure reform

⁵⁵⁷ Ibid

⁵⁵⁸ Hamlyn and others, *Are special measures working?: Evidence from surveys of vulnerable and intimidated witnesses*

strengths and weaknesses of section 30 communication aids.⁵⁵⁹ Among the advantages cited were that of by using props, drawings, pictures, symbols, photographs, figures and dolls child witnesses could be better at demonstrating what happened through these means instead of in words; they facilitate two methods of communication, so that child witnesses can both show and tell; there is the possibility that fuller information, with more detail can be gathered applying fewer questions; they can act as retrieval cues or memory triggers; they may help children to overcome fear or reluctance, such as those who treat peers' and parents' 'don't tell' advice as a literal rule; they might be less stressful for child witnesses would could show rather than tell; they might resolve problems or concerns regarding false allegations; they could offer a means for children to organise a more detailed account. In other words, these aids may provide an organisational framework for children to give a fuller account.

Against this a number of pitfalls and drawbacks were highlighted concerning the use of drawings, pictures, photographs, symbols, dolls, figures and props, including: the possibility of the use of what are effectively toys (toy animals, teddies, dolls houses etc.) engendering play and/or fantasy; the further possibility of the use of anatomical dolls leading to inaccuracies or distortions; the potential for children or carers to be upset by the use of explicit dolls or drawings; and the risk that legal challenge could be brought against their use to test whether they had implications for the defendants right to a fair trial.

While it is true to say that the use of such provisions for child and vulnerable adult witnesses is somewhat rare this does not equate to a lack of importance. From my point of view, it is fairly clear that the benefits both to witnesses and the legal process as a whole significantly exceed the possible risk to the value of the evidence given. Furthermore, given the use of children's language with regard to the body's organs and human sexual acts, I assess that this is a particular area where such practices can work greatly to the benefit of the trial process. At the same time, I see little prospect of the use of such devices and techniques leading to Article 6 problems in the sense that they undermine the right to a fair trial.⁵⁶⁰

⁵⁵⁹ Ministry of Justice, *Achieving Best Evidence in Criminal Proceedings: Guidance on interviewing victims and witnesses, and guidance on using special measures* 89.

⁵⁶⁰ Ian H Dennis, *The law of evidence*, vol 604 (3 edn, Sweet & Maxwell 2010) 655

5.6 Analysis and discussion

I have discussed each of the special measures contained in the YJCEA 1999 and while I have also set out some of their potential drawbacks, in each case I have argued that they are in the interests of justice, specifically in terms of achieving best evidence. From this discussion I now want to draw out the most interesting and relevant questions that will need to be addressed when I turn to consider the possible use of such measures in the KSA. I start with a consideration of the impact of special measures on juries and the rights of defendants and then go on to set out the main points for consideration when evaluating whether it would be appropriate to transfer these measures to the Saudi CJS.

Hamlyn et al's, study of witness satisfaction was based on witness self-reports from before and after the implementation of YJCEA 1999.⁵⁶¹ One-third of respondents reported that they would not have been able to provide evidence without the use of the special measures. Seventy-six percent of respondents who used special measures expressed satisfaction with their criminal justice experience, in comparison to the 65 percent of respondents who had not used special measures. There was also a statistically significant improvement in satisfaction with the experience of being a witness after the implementation of YJCEA 1999: the percentage reporting satisfaction rose from 64% prior to implementation to 69% post-implementation.⁵⁶²

5.6.1 THE IMPACT OF SPECIAL MEASURES ON JURIES

According to research⁵⁶³, VIWs value special measures suggesting a lot of best evidence has been obtained that otherwise would have not been heard by the court. This is clearly in the interests of justice. Furthermore, there is also evidence that criminal justice agencies also value the use of special measures albeit with some of the caveats that have been discussed in this chapter.⁵⁶⁴ However, we also need to consider what the impact of special measures is on juries. Does it influence their perception of witnesses and/or their verdicts? This is a highly problematic question as it is not possible to research how actual juries make their decision, because of section 8 of the Contempt of Court Act

⁵⁶¹ Hamlyn and others, *Are special measures working?: Evidence from surveys of vulnerable and intimidated witnesses*

⁵⁶² Ibid, 89

⁵⁶³ Ibid

⁵⁶⁴ Burton, Evans and Sanders, 'Are special measures for vulnerable and intimidated witnesses working? Evidence from the criminal justice agencies'

1981.⁵⁶⁵ It is a question that needs careful consideration because if it were to be found that the introduction of these special measures had tilted the balance of justice so as to endanger the safety of juries' verdicts, their justification would be drastically undermined. If true, it would suggest that special measures were arguably in breach of Article 6 (1) of the ECHR because it would undermine the defendant's right to a fair trial.

There is a theory that juries may be swayed by the mere fact of the use of special measures. The argument goes that if the witness needs to have the benefit of special measures, surely the defendant must have done something wrong or be the kind of person who is likely to do something wrong. But is there empirical evidence to back this up, or disprove this?

The first point to be made is that the risk that a jury may draw an inference from a special measures direction has been recognised in law. Section 32 of the YJCE Act 1999 states that the judge in a case where a special measures direction has been given should warn the jury not to draw any such inference.⁵⁶⁶ In *Brown and Grant*⁵⁶⁷ the Court of Appeal held that the statutory obligation was to give the warning which could be given either at the point the witness concerned gives evidence or during summing up. A review of the available empirical literature suggests that this warning is a precautionary measure rather than one based on evidence that juries were in fact drawing adverse inferences concerning the defendant.

The inability of researchers to conduct research on actual juries means inevitably there is no substantial body of empirical evidence on the effect that special measures have on verdicts.⁵⁶⁸ The absence of research is one reason why the answers to these questions are often presented using anecdotal evidence, particularly from criminal justice

⁵⁶⁵ The Contempt of Court Act 1981 s. 8 states that it is an offence to "obtain, disclose or solicit any particulars of statements made, opinions expressed, arguments advanced, or votes cast by members of a jury in the course of their deliberations" this has been taken as precluding research but more recently this has been disputed. In a speech in December 2013 the Attorney General, the Rt Hon Dominic Grieve QC alluded to this saying that section 8 "does not in fact, as was commonly believed, prevent meaningful research being carried out."

⁵⁶⁶ Section 32 Youth Justice and Criminal Evidence Act 1999 (as amended by Criminal Justice Act 2003, section 331 and schedule 36, paragraphs 74 and 75) provides: "Where on a trial on indictment with a jury evidence has been given in accordance with a special measures direction, the judge must give the jury such warning (if any) as the judge considers necessary to ensure that the fact that the direction was given in relation to the witness does not prejudice the accused."

⁵⁶⁷ [2004] EWCA Crim 1620; [2004] Crim LR 1034

⁵⁶⁸ Louise and Vanessa, 'A 'Special'Delivery? Exploring the Impact of Screens, Live-Links and Video-Recorded Evidence on Mock Juror Deliberation in Rape Trials'

agencies. The anecdotes frequently express concern about the effects of special measures but these concerns are often contradictory. On the one hand some critics of special measures have suggested that a direction of special measures imbues a witness's testimony with undue credibility and as such is prejudicial to the accused.⁵⁶⁹ Conversely, when specifically considering the effect of a video link, others have suggested that a greater distance may be created between the witness and the victim which may make testimony less believable and juries less sympathetic⁵⁷⁰ "Juries prefer theatre to film," was one opinion reported in the Stern Review referring to a perceived preference for seeing the 'actors' in a trial 'in the flesh' not on screen.⁵⁷¹

One way to get around the Contempt of Court Act 1981 prohibition⁵⁷² is to conduct a study of a jury in a mock trial, which is what Ellison and Munro did.⁵⁷³ This study concluded that the evaluation of rape testimony was not affected by the use of special measures; that there was equally no evidence that the emotional impact of testimony reduced when video recorded evidence replaced testimony in court; and that neither the perceived credibility of testimony or the perceived fairness of the trial process were impacted.⁵⁷⁴ There are, however, limitations to this study, the trials were restricted to rape cases and the trial reconstructions which only lasted for 75 minutes. So while those in favour of special measures can view this research as encouraging more research still needs to be conducted before any definitive conclusions can be drawn.

Some jurists and researchers have cast doubt on whether jury research is in fact precluded.⁵⁷⁵ Perhaps as a result of this Professor Cheryl Thomas is currently

⁵⁶⁹ Jennifer Temkin, 'Prosecuting and defending rape: Perspectives from the bar' (2000) 27 *Journal of Law and Society* 219

⁵⁷⁰ Payne, *Redefining Justice: Addressing the individual needs of victims and witnesses*

⁵⁷¹ Baroness Vivien Stern CBE, 'A report by baroness Vivien Stern CBE of an independent review into how rape complaints are handled by public authorities in England and Wales' 16

⁵⁷² Section 8 of the Contempt of Court Act 1981 makes it a criminal offence to "obtain, disclose or solicit any particulars of statements made, opinions expressed, arguments advanced or votes cast by members of a jury in the course of their deliberations."

⁵⁷³ Louise and Vanessa, 'A 'Special' Delivery? Exploring the Impact of Screens, Live-Links and Video-Recorded Evidence on Mock Juror Deliberation in Rape Trials'

⁵⁷⁴ *Ibid*

⁵⁷⁵ Former Lord Chief Justice, Lord Woolf expressed this opinion as cited in Thomas, C. 'Exposing the Myth of Jury Research' *Criminal Law and Justice Weekly* Available at: <<http://www.criminallawandjustice.co.uk/features/Exposing-Myth-Jury-Research>> accessed 21st January 2016

conducting a major study into the impact of special measures on jury decision-making using real juries.⁵⁷⁶

Of course, we should also remember that in the Saudi CJS there are no juries so the question would be whether special measures transferred would have a particular impact on the judge. This something we can only speculate on as special measures are not in place. However, bearing in mind it would be the judge who directed that special measures be used in the first place it would be difficult to imagine that he would be swayed by its use.

5.6.2 RIGHTS OF THE DEFENDANT

Taken together special measures for the protection of VIWs have inevitably changed the nature of criminal trials in England and Wales. Hoyano goes as far as to say that this has “radically altered the orthodox adversarial trial model.”⁵⁷⁷

The main concern has been the potential to tilt the scales of justice away from the defendant and towards the prosecution. Some have seen the introduction of special measures as part of a wider trend for disadvantaging defendants. This narrative is summed up by John Wadham, director of human rights organisation Liberty, who argued “The past 20 years have seen 100 or so substantial measures that have reduced the rights of suspects and defendants but have had little or no effect on levels of crime.”⁵⁷⁸

In this section, I examine the case for this assertion for special measures in general and the individual measures in the YJCE Act 1999. If special measures were to change the balance of fairness away from the accused, this right to a fair trial would be fundamentally undermined. I have carefully considered this question in my consideration of the special measures of the YJCEA 1999 firstly in the overall right to a fair trial and secondly on the issue of vulnerable defendants. There are two questions to

⁵⁷⁶ For more information see ‘Impact of Special Measures on jury Decision -making’ at <<http://www.nuffieldfoundation.org/impact-special-measures-jury-decision-making>>

⁵⁷⁷ Hoyano, ‘Striking a balance between the rights of defendants and vulnerable witnesses: Will special measures directions contravene guarantees of a fair trial?’ 948

⁵⁷⁸ Wadham, J. Reduction of a defendant's rights. (2002, Dec 16). *The Times* Retrieved from <<http://search.proquest.com/docview/318789618?accountid=14680>> accessed 17 January 2016

answer. Firstly, do special measures for VIWs threaten or undermine the right to a fair trial? Second, should vulnerable defendants be eligible for special measures?

Special measures and the right to a fair trial

The right to a fair trial has been fully established in the CJS of England and Wales; in addition to the right being protected in common law it is enshrined in Article 6 of the European Convention on Human Rights, which was incorporated into British law by the Human Rights Act, 1998. It states that all accused charged with a criminal offence should be presumed innocent until proven guilty by law, and establishes five basic rights for defendants as follows:

- to be informed properly, in a language which he or she understands and in detail, of the nature and cause of the accusation against him
- to have adequate time and facilities for the preparation of his defence
- to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require
- to examine or to have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him
- to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

The question of special measures and Article 6 has been tested in the courts both in England and in Europe. *Doorson v Netherlands* (1996)⁵⁷⁹ established that there was no guarantee of confrontation and the importance of Art 8 (Art 6(3) (d) does not stipulate *when* or *how* a witness is to be available for examination by the defence. Furthermore, evidence need not always be given at a public hearing in court. In England and Wales one of the key cases is *R (D) v Camberwell Green Court* (2005)⁵⁸⁰. In this case the defendant challenged the assumption of the use of live link for witnesses under 17 in sex or violent offence cases.⁵⁸¹ It was held that the purpose of YJCE Act 1999 s. 21 was to achieve best evidence and that no right existed under Article 6 or elsewhere that an accused had the right to be allowed to face his accusers. The issue of anonymity

⁵⁷⁹ *Doorson v Netherlands*; ECHR 26 Mar 1996/20524/92, (1996) 22 EHRR 330, [1996] ECHR 14

⁵⁸⁰ [2005] 1 WLR 393, [2005] 1 All ER 999

⁵⁸¹ As provided for in YJCE Act 1999 s. 21

and screens and Article 6 rights have also been tested in the English courts. In *R v Davis and others* (2006)⁵⁸² it was held that there was no conflict with the ECHR provided the court ensured that the defence had the opportunity to test the evidence given through examination. Although the potential for disadvantage to the defendant meant that applications for such anonymity had to be handled with considerable care and consideration.

A consideration of the basic rights in Article 6 the light of the special measures included in the YJCE Act 1999 leads me to conclude that the special measures for VIWs are not incompatible with the article 6 right to a fair trial either individually or as a combined effect. Nevertheless, there remains the issue of vulnerable defendants.

Special Measures for vulnerable defendants

In the interests of justice should a vulnerable defendant not be afforded the same protections as a vulnerable witness? Clearly, some defendants have the same vulnerabilities as those witnesses eligible for special measures under the YJCE Act 1999. Indeed, there is a substantial body of research in the form of prevalence studies, which show that a high number of offenders, both adult and children, have support requirements and could be classed as vulnerable. Among the findings are that six out of ten child offenders have communication difficulties⁵⁸³, a quarter of child offenders have an IQ⁵⁸⁴ of less than 70⁵⁸⁵, 32% of adult offenders have an IQ of less than 80⁵⁸⁶ three quarters of adult prisoners had a dual diagnosis (mental health problems and alcohol/drug misuse⁵⁸⁷, Clearly, the issue of vulnerable defendants is a significant one.

It is true that the special measures in the YJCEA 1999 do not extend to defendants and this may appear unbalanced. However, it is not true to say that vulnerable defendants

⁵⁸² [2006] EWCA Crim 1155, [2006] 2 Cr App R 32

⁵⁸³ Karen Bryan, Jackie Freer and Cheryl Furlong, 'Language and communication difficulties in juvenile offenders' (2007) 42 International Journal of Language & Communication Disorders 505

⁵⁸⁴ Intelligence Quotient

⁵⁸⁵ Richard Harrington and others, 'Mental health needs and effectiveness of provision for young offenders in custody and in the community' (2005) Youth Justice Board for England and Wales

⁵⁸⁶ PG Mottram, 'HMP Liverpool, Styal and Hindley study report. Available from the author from the University of Liverpool' (2007) The School of Population, Community & Behavioural Sciences, Liverpool, UK Available electronically from www.prisonreformtrust.org.uk/temp/StudyspReport2.pdf

⁵⁸⁷ J Shaw and others, 'A national evaluation of prison mental health in-reach services' (2009) Manchester: Offender Health Research Network, University of Manchester

are left without any form of accommodation or protection. In *R v Camberwell Green Youth Court* [2005] UKHL 4⁵⁸⁸ the House of Lords ruled that

“The defendant is excluded from the statutory scheme because it is clearly inappropriate to apply the whole scheme to him ... but the court has wide and flexible powers to ensure that the accused receives a fair trial and this includes a fair opportunity of giving the best evidence he can.”

Similarly, it was ruled that while the Youth and Criminal Justice Act 1999 has no matching set of measures for the vulnerable accused, “it does not affect any power of the court, in the exercise of its inherent jurisdiction, to make an order, or to give leave, of any description in relation to such defendants who are witnesses.”⁵⁸⁹

Effectively, this means that while special measures are clearly detailed in the YJCEA 1999 for VIWs the judge has the power to consider similar accommodations for the accused.

Notwithstanding the fact that there is no specific legislation on this matter, special arrangements can be made for vulnerable defendants in accordance with the Consolidated Criminal Practice Direction (CCPD).⁵⁹⁰ The CCPD establishes the term ‘vulnerable defendants’ as well as the general principle that “All possible steps should be taken to assist a vulnerable defendant to understand and participate in [criminal] proceedings”⁵⁹¹ and that “The ordinary trial process should, so far as necessary, be adapted to meet those ends.”⁵⁹² In addition to the Practice Direction there are further practices that have developed on an ad hoc basis.⁵⁹³

⁵⁸⁸ The certified question in this ruling was “Are the provisions of s 21 (5) of the Youth Justice & Criminal Evidence Act 1999 compliant with Art 6 of the ECHR in so far as they prevent individualised consideration of the necessity for a special measures direction at the stage at which the direction is made?”

⁵⁸⁹ *R v Camberwell Green Youth Court* [2005] UKHL 4

⁵⁹⁰ Ministry of Justice, ‘The Consolidated Criminal Practice Direction - Criminal Procedure Rules (Part III.30.14.)’ Friday, 19 April 2013) <<http://www.justice.gov.uk/courts/procedure-rules/criminal/practice-direction/part3#id6328221>> accessed 10 April 2015

⁵⁹¹ *Ibid* Part III 30.3

⁵⁹² *Ibid*

⁵⁹³ Peter Verbeke and others, ‘Protecting the fair trial rights of mentally disordered defendants in criminal proceedings: exploring the need for further EU action’ (2015) 41 *International journal of law and psychiatry* 67

The Police and Justice Act 2006 (section 47) inserted sections 33A into the YJCE Act 1999. This provide for the certain defendants to give evidence through live link.⁵⁹⁴ The Coroners and Justice Act 2009 (section 104) inserted sections 33BA and 33BB into the YJCE Act 1999 and made provision for the accused's evidence, in some cases, to be given through an intermediary.⁵⁹⁵ Common law powers also exist to permit a vulnerable defendant to be absent from the trial.⁵⁹⁶

In addition to the above-described changes to protect vulnerable defendants, the issue was recognised by the Council of Europe in 2009 when it endorsed a roadmap for enhancing the procedural rights of both suspects and defendants in criminal proceedings.⁵⁹⁷ Among the measures in the roadmap is measure D which states: "In order to safeguard the fairness of the proceedings, it is important that special attention is shown to suspected or accused persons who cannot understand or follow the content or the meaning of the proceedings, owing, for example, to their age, mental or physical condition."⁵⁹⁸ The resolution is not itself law and is more an expression of political intent. In England and Wales, a case in the Court of Appeal in 2012⁵⁹⁹ was relevant to this issue for two reasons – first it stated an assumption that a special measure contained within the YJCE Act 1999 (in this case the use of an intermediary) *should* be made available to a defendant where deemed necessary. Secondly, it made clear that many special measures⁶⁰⁰ whether for witnesses or defendants were at the discretion of the trial judge suggesting that in practical terms the status of the witness and defendant are similar in terms of provision of special measures.

The fact that special measures for witnesses are on a statutory footing while those for vulnerable defendants are extremely restricted under existing legislation⁶⁰¹ has prompted the Law Commission to recommend greater equality of treatment between

⁵⁹⁴ Eligibility applies to defendants aged under 18 and defendants who suffer from a mental disorder (within the meaning of the Mental Health Act 1983) or otherwise has a significant impairment of intelligence and social function.

⁵⁹⁵ Eligibility for this measure is the same as for s. 33A

⁵⁹⁶ See *R v Ukabio* [2008] 1 WLR 728

⁵⁹⁷ Council Of The European Union 15434/09 resolution Of The Council on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings

⁵⁹⁸ *Ibid*, 3

⁵⁹⁹ [R v Anthony Cox \[2012\] EWCA Crim 549](#)

⁶⁰⁰ An exception being the use of a Live Link for child witnesses where there is a presumption that the measure will be applied.

⁶⁰¹ Only the use of live link from a room separate from the court room but linked to it by CCTV equipment (YJCEA, s 33A) is statutorily provided for vulnerable defendants.

witnesses and defendants in particular they highlight the need for a statutory right for vulnerable defendants to have access to intermediaries.⁶⁰²

Based on the English experience and the moves that have been undertaken to address fair trial concerns I believe that the English CJS has been able to introduce special measures for the protection of VIWs which has enabled best evidence to be achieved and has done so without undermining defendants, or where such potential for undermining has been recognised appropriate steps have been taken, or are being taken, to address this.

5.7 Chapter Summary

In England nearly one in ten witnesses are identified by criminal justice agencies as being vulnerable and/or intimidated as defined by YJCEA 1999.⁶⁰³ The majority of these are women or children. Having discussed each of the special measures in the aforementioned legislation I have argued that each has merits in terms of achieving best evidence and are overall in the interests of justice.

Although research is very limited on the issue, the perceptions of juries do not appear to be altered significantly by these measures and there is a strong argument that the rights of defendants are not undermined, provided that the necessary steps are taken to ensure that vulnerable defendants can fully participate in court proceedings.

Nevertheless, there remain a number of important questions to answer before we can reach a solid conclusion that special measures can be transferred into the Saudi CJS. The next step in addressing these is to establish whether there is a mechanism for such a transfer, a framework through which the evaluation and possible implementation can take place and this is addressed in the next chapter.

⁶⁰² Law Commission (2016) 'Unfitness to Plead: Summary' <http://www.lawcom.gov.uk/wp-content/uploads/2016/01/lc364_unfitness_summary_English.pdf> accessed 21st January 2016

⁶⁰³ Burton, Evans and Sanders, 'Vulnerable and intimidated witnesses and the adversarial process in England and Wales'

CHAPTER 6

TRANSPLANTING SPECIAL MEASURES TO KSA: THE PRINCIPLE OF MASLAHA

6.1 Introduction

The aim of this chapter is to consider whether transferring special measures to the KSA is possible. In this chapter I discuss the concept of *al maslaha* ‘public interest’ in Islamic law because this is the key principle in evaluating the transfer of special measures for VIWs. I explain the definition of *maslaha* and the reason for selecting *al maslaha* for my principal argument regarding the acceptability of the transfer of special measures.

In this chapter, three categories of *maslaha* that have been identified in Islamic law will be outlined. Firstly, the recognised type is that which is clearly stated in the Quran and the Sunna or has acquired consensual recognition *ijma* among experts in Islamic jurisprudence (*fuqaha*). The second category is ‘nullified’, which contradicts the Quran and the Sunna and lacks any *ijma* among the *fuqaha* (Islamic scholars). Thirdly, the unrestricted category lies between the first two types and neither agrees nor disagrees with the Quran, Sunna or *ijma* of the *fuqaha* and explain the status of *maslaha* as a source of law in the KSA.

In this chapter, I will highlight the conditions for valid *maslaha* to analyse whether these conditions aimed at preventing *maslaha* from becoming a tool for inserting individual preferences or not and providing a counter argument to opponents who see the *maslaha* doctrine as a means for self-interested parties to arbitrarily create Islamic law.

This chapter draws on Islamic legal literature, including Arabic sources, to argue that transferring such measures has a basis in Sharia and legal scholarship, so that implementing special measures similar to those in England and Wales will be in accordance with Sharia and the KSA law.

6.2 Al maslaha in Islamic law and its application to witness protection

In chapter 2, I showed that the Quran and Sunnah are the sources of Sharia universally accepted by the majority of jurists. Other secondary sources of Sharia debated by scholars of the four schools are used in this research as guidance if the primary sources present no views about specific issues. The researcher's first task is to consider the text of the Quran and Sunnah. If no explicit evidence for a specific question is available, the researcher moves to consider disputed sources of evidence of Islamic jurisprudence, such as general consensus (*ijma*), reasoning (*qiyas*), public interest (*al maslaha*), fatwa of the companions (*Prophet companion's saying*),⁶⁰⁴ juristic preference (*istihsan*), presumption of continuity (*istishab*) and local custom (*urf*).⁶⁰⁵

The social aspects of Saudi law must be taken into account as it is likely to be problematic for lawmakers, Muslim scholars and Saudi society to accept special measures for witnesses derived from English law without thoroughly investigating the ramifications of such a transfer. Laws and legal procedures have been put in place to deliver an efficient, effective, accountable and fair justice process for the public. Muslim scholars have recognised this reality by stating that *maslaha*⁶⁰⁶ exists wherever Sharia exists.⁶⁰⁷

At this point I should explain why I have selected *al maslaha* for my principle argument regarding the acceptability of the transfer of special measures. The hierarchy of issue resolution in Saudi law follows the order of Islamic sources. For example, with regard to the application of witness protection in Saudi law procedures, the researcher must follow the order of Sunnah sources. If there is no text from the Quran and the Sunni providing procedures for protecting witness, he moves to the third source *ijma* (consensus of Sunni scholars) to see whether scholars discussed this issue. If not, he or she moves to the fourth source *qiyas* (reason by analogy), and so on until he finds a solution to the issue. If scholars find a solution for the issues in any source then he or she cannot move on to the subsequent sources. The search for correct interpretation stops there.

⁶⁰⁴ A ruling on a point of Islamic law given by a recognized authority. Oxford Dictionary, *The Oxford Dictionary of the Middle Ages* (Oxford University Press 2010)

⁶⁰⁵ E Ann Black, Hossein Esmaili and Nadirsyah Hosen, *Modern perspectives on Islamic law* (Edward Elgar Publishing 2013)

⁶⁰⁶ I will explain this term in detail later in this chapter. (public interest)

⁶⁰⁷ Felicitas Opwis, 'Maslaha in contemporary Islamic legal theory' (2005) 12 *Islamic law and society* 182

As mentioned in Chapter 2, there are no explicit provisions that outline a procedure regarding the protection of witnesses in the Quran and Sunnah. However, both sources have been interpreted by Sunni scholars as indicating that witnesses are not to be harmed. So I moved to search for a consensus of Sunni scholars on the issue of witness protection, which I could not find. Sunni scholars have actually said very little about the issue. Thereafter, I moved on to examine the fourth source, *qiyas*. However, I discovered that should I wish to apply an analogy about transferring special measures for witness protection to Saudi law using this source, then I would have to find a text from the Quran and Sunnah in order to establish my argument and that the text would have to have the same operative causes *illah* to link the text with the new issue I want to solve; for example, the use of *qiyas* of its use. By analogy, this prohibition of the use of hashish similar to the prohibition of alcohol and the justification of Islamic law is that both induce the wastage of money and cause users to lose control of their minds. Through my review of the texts of the Quran and Sunnah, I found no text that could measure the application of the special measures for witnesses. Therefore, I moved on to sources of public interest in order to build my arguments in the transfer of special measures from English law to Saudi law using this source.

In the KSA, Sharia scholars have accepted *al maslaha* as a source, based on the Hanbali School's embrace of it.⁶⁰⁸ If there is no text regarding an issue in the Quran or Sunnah or from *ijma* or *qiyas*, the Sharia scholars seek a solution⁶⁰⁹ and accept or reject an issue based on the public interest.⁶¹⁰ Saudi Sharia scholars consider *al maslaha* a reliable source as the current situation of society is different than in the past. For example, at the founding of the first Saudi state in 1932, the nation's population was only in the few thousands, no state institutions were established, and there was no need for courts as people settled disputes through the imam of their mosque. When the kingdom was first established, *King Abdul-Aziz* attempted to organize the judicial system along the lines of the Egyptian one.⁶¹¹ However, as the KSA flourished economically in the 1990s, *King Fahad bin Abdul Aziz Al Saud* enacted laws and regulations to develop and modernise

⁶⁰⁸ Ansary, 'A brief overview of the Saudi Arabian legal system'

⁶⁰⁹ An example of this occurred concerning the punishment of alcohol use. In the Prophet's time 40 lashes was the punishment for drinking alcohol. After the Prophet's death the number of those who drank alcohol increased. So, the companions of Prophet agreed to increase the number of lashes to the eighty to deter people from drinking alcohol. The referee gave as the reason public interest – *maslaha*. Al Shatibi Ibrahim, *Al-I'tisām (The Maintenance)* (Umm Al Qura University, 1992)

⁶¹⁰ Ansary, 'A brief overview of the Saudi Arabian legal system'

⁶¹¹ Al Dreib Saud, 'Judicial Organization in Saudi Arabia in the Light of Islamic Law and the Judiciary System' (PhD thesis, Imam Muhammad ibn Saud Islamic University, Riyadh, Saudi Arabia 1999)

the way the judiciary was organized to make it more comparable to other jurisdictions.⁶¹² The KSA has sought to take advantage of other countries' experiences by signing international conventions and treaties to improve its judiciary and learn from the laws of advanced countries. However, in an annual survey of political and civil rights by human rights organization Freedom House the KSA is described as having a very strict ruling regime ranking among the "worst of the worst" for human rights abuses.⁶¹³

One might ask what the *maslaha* of transferring English experience in witness protection is. What is the *maslaha* for witnesses in Saudi courts, especially given the considerable difference between the two judicial systems? To answer this question, I have to explain what is meant by *maslaha*, describe what the categories of *maslaha* are and consider to what degree *maslaha* is regarded as an authoritative source in Islamic law. I will also consider how jurists have viewed *maslaha* and ask whether *maslaha* is accepted in general or whether there are limits on its acceptance. Furthermore, it is important to understand to what extent *maslaha* has been achieved in witness protection and what the possible applications of *maslaha* for the issues raised in this thesis. I will argue later in the chapter that special measures for the protection of VIWs are indeed in the public interest and will go through them one by one.

6.2.1 PRINCIPLE OF MASLAHA IN ISLAMIC LEGAL THEORY (CONSIDERATIONS OF PUBLIC INTEREST)

The aim of this section is to define, categorise and discuss the legal status of the concept of *maslaha*. In its literal definition, *maslaha* is "a cause or source of something good and beneficial".⁶¹⁴ It is most commonly rendered as "public interest" in English, but "welfare" and "well-being" are arguably closer, while others prefer the translation "benefit".⁶¹⁵ Its antonym concept is *mafsadah*, or 'harm'. For an action to be wise, it

⁶¹² Lapidus, *A History of Islamic Societies*, 615

⁶¹³ Freedom House, *Worst of the Worst 2010 'The World's Most Repressive Societies'*

⁶¹⁴ Opwis, 'Maslaha in contemporary Islamic legal theory'

⁶¹⁵ Bin Sattam, *Sharia and the Concept of Benefit: The Use and Function of Maslaha in Islamic Jurisprudence*

must either cause *maslaha*, avoid *mafsadah* or do both, while not violating divine laws.⁶¹⁶

The most important verse in the Quran on this topic states: “Indeed, God demands justice, doing good and generosity towards relatives, and he forbids what is shameful, blameworthy and oppressive. He teaches you so you may take heed”.⁶¹⁷ Thus, there is a command to strive toward *maslaha* and to avoid *mafsadah*; the former is an obligation, and the latter is prohibited. A number of other verses reinforce this core, comprehensive command. As well, an overriding principle in Islam holds that everything initiated by Sharia is by definition *maslaha*, in the public interest and that Sharia gives full consideration to the realisation of people’s interests.

Discussion of *maslaha* can be found throughout scholarly works on the principles of Islamic jurisprudence. *Maslaha* and *mafsadah* are recognised as relative concepts; in other words, their interpretation and application are context-dependent. They adapt to the changing times, unlike the holy texts. However, the criterion that *maslaha* must be Sharia compliant is a constant.⁶¹⁸ Indeed, medieval theologian *al-Ghazali* argued for what he believed was a more relevant definition of *maslaha*: ‘preserving the Sharia objectives’.⁶¹⁹ This theologian identified five objectives which Sharia seeks to preserve: religion, life, brain, parentage and wealth. Following this definition, anything that promotes the preservation of these five aspects is *maslaha*, while anything that fails to do so is *mafsadah*.⁶²⁰ This definition remains highly influential today.

At the end of the 19th century, al-Afghani, an ideologist seen as a founding father of Islamic modernism,⁶²¹ revisited the concept of *maslaha* in his writings. Al-Afghani was more open to Western ideas but was also anti-imperialist.⁶²² He favoured a broader practice of the principle of *maslaha* than *al-Ghazali* and, in particular, saw a greater role for reason in interpreting *maslaha*.

⁶¹⁶ Ibid

⁶¹⁷ Holy Quran, Surta Al-Nahl, verse 90

⁶¹⁸ Opwis, ‘Maslaha in contemporary Islamic legal theory’

⁶¹⁹ Bin Sattam, *Sharia and the Concept of Benefit: The Use and Function of Maslaha in Islamic Jurisprudence* 4

⁶²⁰ Ibid

⁶²¹ Muhammad Khalid Masud, Armando Salvatore and Martin Van Bruinessen, *Islam and modernity: key issues and debates* (Edinburgh University Press 2009)

⁶²² William Shepard, ‘Salafi Islam: The Study of Contemporary Religious-Political Movements’ in Clinton Bennett, *The Bloomsbury Companion to Islamic Studies*, vol 57 (A&C Black 2013) 168.

With the establishment of newly independent states in the Middle East such as the KSA, Egypt and Jordan) during the post-World War II era, many writers advocated the importance of *maslaha*. The concept of *maslaha* is at the heart of the discourse of modernisation and helps resolve the challenges of modernity with Muslims' desire to adhere to Islamic principles despite the passage of time. According to *Abdelkader*, the principle of *maslaha* is "very pertinent to the synthesis between modernity and Islam."⁶²³ This principle derives authority from two main sources: firstly, leading scholars have evaluated and discussed it since the emergence of Islamic law into the present day, and second, contemporary scholars widely endorse it.⁶²⁴ Modern experts see *maslaha* as a primary and vital component of Islamic jurisprudence in the absence of textual reference.⁶²⁵

However, *maslaha* has been criticised for serving as a means to restrict freedom and develop laws without taking into consideration their implications for the future.⁶²⁶ One might also ask, if the purpose of Sharia is to bring about benefit and stop harm, why does Sharia call for cutting off the hands of thieves and the application of other punishments to which *maslaha* is seemingly contrary? *Al Taher bin Ashur*⁶²⁷ answered this question when arguing that Muslims have embraced Islam, including following its commands and prohibitions. Among the ordinances of Sharia is the enforcement of *hudood* punishments on whoever is found guilty of a crime. In addition, the general purpose of Sharia is to keep order in Muslim nations, which, according to Islamic beliefs, can be achieved only by the enforcement of *hudood* as imposed by God.⁶²⁸ As *Al Izz bin Abdul Salam* states, "The reasons for *maslaha* might be evils, which are required not for being evils but as being conducive to *maslaha*."⁶²⁹

⁶²³ Deina AbdelKader, 'Modernity, the Principles of Public Welfare (*maslaha*) and the End Goals of Shari'ah (a *maqasid*) in Muslim Legal Thought' (2003) 14 *Islam and Christian-Muslim Relations* 163

⁶²⁴ *Ibid*

⁶²⁵ *Ibid*

⁶²⁶ Wilcke Christoph, 'Saudi Arabia needs a more transparent justice system' *The Guardian* (<<http://www.theguardian.com/commentisfree/libertycentral/2011/oct/26/saudi-arabia-justice-system-reform#comments>> accessed 25 May 2015)

⁶²⁷ Muhammad al-Tahir ibn Ashur (1879–1973) was a famous figure in the Islamic reform movement. He became a judge in 1932 and was a creative writer in the area of restructuring Islamic law. Basheer M Nafi, 'Tāhir ibn 'Āshūr: The Career and Thought of a Modern Reformist 'ālim, with Special Reference to His Work of *tafsir*' (2005) *Journal of Quranic Studies* 1

⁶²⁸ Muhammad Al-Tahir Ibn Ashur, *Ibn Ashur: Treatise on Maqasid al-Shariah* (IIIT 2006)

⁶²⁹ Ibn Abdul-Salam Al-Izz, *Rules of Sharia are made to gain interests*, (1 edn, Dar al Qlam 2000)

In contrast to *bin Ashur*, *Ali bin Hussein*⁶³⁰ argues that the West often mistakenly believes that enforcement of *hudood* is the only solution for preventing crime in Islam, missing the fact that enforcing *hudood* is only the final punishment for criminals, which is preceded by several means for preventing crime, including:

1. Sharia continuously reminds Muslims of God and punishment in this world and the hereafter.
2. Sharia includes the discipline of souls and morality at schools and mosques. For instance, prayer restrains worshippers from committing shameful and unjust deeds, so Muslims performing prayers should not commit matters prohibited in Islam.
3. Islamic law regularly reminds Muslims citizens of the strict penalties for those found guilty of crimes. For example, in every prayer, Muslims recite verses that warn of these punishments, and these warnings should always be present in one's mind whenever one intends to commit any wrong deed. Thus, the criminal must think before venturing to commit such deeds and already knows the punishments and their severity.
4. For those not deterred by punishment from committing wrong deeds, the remedy switches from preaching and counselling to direct punishment, to deter them from repeat violations.

Furthermore, it would be a mistake to believe that these high profile controversial punishments for *hudood* crimes are the only means of punishment in the KSA. Indeed, the KSA has a higher prison population per capita than England and Wales.⁶³¹ A noteworthy 72% of Saudi prisoners are foreigners (which might be a result of transgressing laws of which they were not aware).⁶³²

Therefore, if Muslims cannot, in principle, violate Sharia provisions as such provisions are assumed to be inviolable, I think Muslim scholars should for the first time consider the *maslaha* principle in order to develop and enforce the best laws for protecting witnesses in the KSA for the following reasons:

⁶³⁰ AlHudhaify Ali, 'Misconceptions about Islam' 2011)

<http://aboamaralialhodefe.blogspot.co.uk/2011/08/blog-post_08.html> accessed 11 Sep 2015

⁶³¹ Institute for Criminal Policy Research, 'World Prison Brief 'Saudi Arabia' <<http://www.prisonstudies.org/country/saudi-arabia>> accessed 10th December 2015. Saudi Arabia has 161 inmates per 100,000 of population while the figure for England and Wales is 148. However, 72% of the Saudi prison population are foreigners.

⁶³² Ibid

1. The nature of criminal lawsuits requires the highest degree of evidence and the absence of any doubt at the time of trial. While in England the legal test for a conviction is 'beyond reasonable doubt', in Islamic law there is a principle that translates as 'seek doubts to avoid punishment'. Hence the duty of the judge is to seek doubt (*shubha*) before passing any verdict in a criminal case.⁶³³ Superficially, the western concept of 'reasonable doubt' and the Islamic canon of *shubha* may seem similar. However, reasonable doubt is a solely fact based concept of what constitutes proof, whereas *shubha* covers factual doubts, legal doubts, and even moral doubts about the appropriateness of punishment.⁶³⁴ The importance of legal doubt is underlined by the fact that the different schools of Islamic thought (that were presented in chapter two) do not always agree on interpretation, including the definition of certain crimes. Hence pragmatic jurists saw this interpretative doubt as a means to introduce flexibility into the legal system and encourage the notion that the textual sources should be interpreted within a particular context to give it an appropriate effect.⁶³⁵
2. Testimony has probative value as evidence in Islamic criminal courts whereby the judge always considers that the testimony of witnesses is reliable evidence in proving, or disproving, a particular fact in the case. As the Saudi judge has a right to decide which testimony of witnesses are valid or invalid, this could impose a duty on Saudi lawmakers to search for the best means to ensure witness protection, as the testimony of witnesses is crucial evidence in Islamic law.
3. The severity of punishments inflicted on the accused requires lawmakers to look for the strongest possible procedures to ensure the best possible evidence. Undoubtedly, witness protection is one important means through which courts seek to obtain best evidence.
4. If applied, punishments in Islamic law cannot be repealed or changed. For example, a hand which has been cut off cannot be returned if the real thief becomes known later, forcing judges to consider deeply the judgements they issue. In providing special measures for witnesses the court would be encouraging more witnesses to come forward and those witnesses would be able

⁶³³ Prophet Mohammad commanded judges to avoid implementing a serious punishment in case of uncertainty, his famous saying in this regard is: ادروا الحدود بالشبهات "Seek doubts to avoid punishment." al Gindy Hosni, *The legitimate purposes of punishment in Islam* (Dar Al Nahda 2005)

⁶³⁴ Intisar A Rabb, 'Reasonable Doubt in Islamic Law' (2015) 40 Yale J Int'l L 41

⁶³⁵ Ibid

to testify in less intimidating circumstances. This would greatly assist the judge in reaching the correct verdict which is clearly in the public interest and satisfies the *maslaha* principle.

5. Developing and incorporating such provisions into law could also increase the deterrent role of the CJS because potential offenders will know that witnesses are likely to go to court to testify if special measures are in place and they would be less likely to be in a position to intimidate them.

6.2.2 CATEGORIES OF *MASLAHA* IN ISLAMIC LAW

Three categories of *maslaha* have been identified. Here I explain each one in turn.

6.2.2.1 Recognised *maslaha*

First, the recognised type is that which is clearly stated in the Quran or the Sunna or has acquired consensual recognition *ijma* among experts in Islamic jurisprudence (*fuqaha*). The recognised category is seen as obligatory in all circumstances. The recognised type of *maslaha* is acknowledged as a source for legal rulings by those who accept analogy as a form of reasoning and evidence (as mentioned earlier there is a dispute among Muslim legal scholars as to the validity of certain sources). In presenting analogy as legal reasoning the jurist interprets the purpose that the Divine Legislator ordained in an original Sharia ruling and then applies it to the case at hand.⁶³⁶ Examples of recognized *maslaha* are the prohibition of alcohol consumption, which is regarded as a source of harm (*mafsadah*). The objective of Islamic law as I mentioned in chapter 2 is to deter any harmful and adverse effects to the mind and the financial well-being of Muslims. So, consumption of alcohol affects the mind, causes disease and wastes Muslim money and so its prohibition is an example of recognized *maslaha*.

6.2.2.2 Nullified *maslaha*

The second category is 'nullified', which contradicts the Quran and the Sunnah and lacks any *ijma* among the *fuqaha* (Islamic scholars). In other words, anything that contradicts the holy texts or Sunna cannot become part of the law of the land. Nullified

⁶³⁶ Bin Sattam, *Sharia and the Concept of Benefit: The Use and Function of Maslaha in Islamic Jurisprudence*

maslaha is viewed as having being explicitly considered and rejected by the Divine Legislator and so is not acceptable as either causative evidence or the basis of a ruling. An example of this type of *maslaha* is the equal division of inheritance between a brother and a sister. Although this act of equality in inheritance could be seen as *maslaha* based on siblings' equality in creation and their equal affiliation to their parents, it has been expressly nullified by the Divine Legislator, who ordained that the male should receive a two-thirds share and the female a one-third share.⁶³⁷ Similarly, *maslaha* permitting the consumption of alcohol, the practice of which might be widespread, would directly contradict Islam's command to preserve the intellect as stated in the Quran and Sunnah.⁶³⁸

6.2.2.3 Unrestricted *maslaha*

Third, the unrestricted category lies between the first two types and neither agrees nor disagrees with the Quran or Sunnah or *ijma* of the *fuqaha*.⁶³⁹ In other words, unrestricted (or conveyed) *maslaha*, gains neither support nor rejection through textual evidence, analogy or consensus. In these cases, the Divine Legislator is effectively silent on the validity of *maslaha*. In this case, the definition of this category supported by the collective work of leading authorities on Islamic legal theory⁶⁴⁰ is *maslaha* supported by a Sharia objective in an incident that has no particular Sharia indication as to whether it is acknowledged or rejected'.⁶⁴¹ Contemporary Muslim legal philosophers have generally held to this or similar definitions which essentially see *maslaha* as having a 'gap-filling' function.

⁶³⁷ Holy Quran, surat Al-Nisaa, verse 11

⁶³⁸ In Surah Al-Maidah, Allah says: "O ye who believe! Strong drinks and games of chance and idols and divining of arrows are only an infamy of Satan's handiwork. Leave it aside in order that ye may succeed. Satan seeketh only to cast among you enmity and hatred by means of strong drink and games of chance, and turn you from remembrance of Allah and from (His) worship. So will ye not then abstain?" Holy Quran, surat Al-Maidah, verse 90. From Sunnah, Ibn 'Umar reported the Messenger of Allah as saying, "Every intoxicant is Khamr and every intoxicant is haram (forbidden)." Muslim, *Sahih Muslim*

⁶³⁹ AbdelKader, 'Modernity, the Principles of Public Welfare (*maslaha*) and the End Goals of Shari'ah (a *maqasid*) in Muslim Legal Thought'

⁶⁴⁰ Among these are Al-Ghazali, Al-Shatibi and Abu Zahra.

⁶⁴¹ Bin Sattam, *Sharia and the Concept of Benefit: The Use and Function of Maslaha in Islamic Jurisprudence* 32.

6.2.3 DETERMINING THE STATUS OF *MASLAHA* AS A SOURCE OF LAW

So how do we know if a matter falls under *maslaha* or not in Saudi law? They are two official committees who decide whether a matter is *maslaha* or not.

First: The Permanent Committee for Islamic Research and Fatwa is a scholarly committee which consists of 21 member of Council of Senior Scholars, which is the country's highest religious body, and five member of Permanent Committee whose members are drawn from the Council of Senior Scholars. It has conducted a great deal of work in explaining rulings of Sharia to the people and issuing fatwas covering all aspects of life.

Second: The Consultative Assembly of the KSA also known as *Majlis as-Shura* or *Shura Council*⁶⁴² is the formal advisory body of the KSA which is an absolute monarchy. The Assembly does, however, have the power to interpret laws, as well as examine annual reports referred to it by state ministries and agencies. It can also advise the King on policies he submits to it, along with international treaties and economic plans. The Assembly is also authorized to review the country's annual budget, and call in ministers for questioning the Consultative Assembly has limited powers in government, including the power to propose laws to the King and cabinet, but it cannot pass or enforce laws which is a power reserved for the King.

Unrestricted *maslaha* typically are transactions whose permissibility tends to be assumed unless a specific prohibition is in place. To illustrate this category of *maslaha* through a topical example, we can consider the issue of smoking. There is no textual reference to smoking, so there is room to discuss the issue and its potential ban in the context of *maslaha* by reflecting on the public good of a smoking ban. Recently, a series

⁶⁴² It has 150 members, all of whom are appointed by the King. The assembly consists of thirteen committees: Islamic, Judicial Affairs Social, Family, and Youth Affairs Committee Economic Affairs and Energy Committee Security Affairs Committee Educational and Scientific Research Affairs Committee Cultural and Informational Affairs Committee Foreign Affairs Committee Health and Environmental Affairs Committee Financial Affairs Committee Transportation, Communications, Information Technology Committee Water and Public Facilities and Services Committee Administration, Human Resources and Petitions Committee. As of September 2012, the council has 12 women advisors, mainly dealing with the issues in regard to women, families and children.

of regulations and orders have been introduced to restrict smoking in a variety of ways.⁶⁴³

Another area of discussion concerning *maslaha* is whether and to what extent this concept is aimed primarily at the individual or the wider (Muslim) community. The popular English translations of 'public welfare' or 'wellbeing' tend to suggest that the collective good is the main concern; however, some argue that the concept of *maslaha* is also highly relevant to discussions of human rights in the context of Islamic law.⁶⁴⁴ Human rights are essentially formulated for the prevention of harm and the prevention of harm is one of the twin aims of *maslaha*, the other being the securing of a benefit.⁶⁴⁵ The issue of human rights will discuss later in chapter 8 in the context of the right to a fair trial.

Social change poses a challenge to any system of law that is based on fixed and finite texts whether they be religious scriptures or written constitutions. To explain this, we can draw a comparison between the Quran and Sunnah on the one hand and the constitution of the United States on the other. Specifically, I would like to consider the case of the Second Amendment.

American society has changed a great deal since the constitution was ratified in 1788 and many would argue that the Second Amendment, which provides that "A well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed", is no longer in the public interest. Indeed, there has been controversy over the interpretation of the amendment since it was framed (in 1791). Was it establishing a collective right (i.e. that states had the right to self-defence) or was it referring to an individual right to bear arms?⁶⁴⁶ The world of December 1791 (when the Amendment was adopted) is greatly different to today's world; yet the Second Amendment remains in place vociferously supported by some

⁶⁴³ Until 2010 there were no restrictions on smoking at all in the KSA. Since then a series of regulations or 'official orders' have extended a ban on smoking in a variety of circumstances – tourist facilities, public buildings, restaurants, supermarkets, and shopping malls. The moves have been motivated by public health concerns rather than on religious grounds. For example, Sambidge Andy, 'Saudi Arabia starts to enforce smoking ban' 2 Aug 2012) <<http://www.hoteliermiddleeast.com/14855-saudi-arabia-starts-to-enforce-smoking-ban/>> accessed 10th December 2015

⁶⁴⁴ A point made by, for example, Farrukh B Hakeem, Maria R Haberfeld and Arvind Verma, *Policing Muslim Communities: Comparative International Context* (Springer Science & Business Media 2012) 50.

⁶⁴⁵ According to *Al Ghazali* cited in Siraj Sait and Hilary Lim, *Land, law and Islam: property and human rights in the Muslim world*, vol 1 (Zed Books 2006) 40

⁶⁴⁶ Randy E Barnett, *Was the Right to Keep and Bear Arms Conditioned on Service in an Organized Militia* (HeinOnline 2004)

sections of the American population due to the sanctity of its origin. Arguably, with 33,636 deaths a year resulting from firearms⁶⁴⁷, the Second Amendment is not in the 'public interest' and could be viewed as failing the *maslaha* test on the basis of the public harm arising from the use of firearms, though it is recognized that there are also counterarguments.

The reason I have brought this comparison into my argument is to show that the debates about Islamic law and legal change through *maslaha* are not unique, on the contrary, they have close parallels in other forms of legal systems where finite texts are the most fundamental sources of law. The legal system of England and Wales has no such finite text as its primary source, instead supreme authority to make law rests with Parliament. These laws can and are regularly amended by simple majorities in Parliament, a far lower barrier than that required for amendments to the US constitution.⁶⁴⁸ In addition to legislation passed by parliament there are three other sources: common law, European Union law and the European Convention on Human Rights.

Finite text legal systems, are faced with the challenge of social change and when reacting to it are hampered to a greater extent than jurisdictions such as England and Wales. Commentators in countries such as the UK with extremely limited gun ownership find the American gun situation as inconceivable, in a similar way that they react to some aspects of Sharia law.⁶⁴⁹

However, as I argue in this chapter, *maslaha* is the Islamic route to meeting this challenge. In this I am supported by Felicitas Opwis, Georgetown scholar and author of several books on *maslaha*, who writes "*Maslaha* can be used as a vehicle for legal

⁶⁴⁷National Center for Health Statistics, 'All firearm deaths 'Faststats'' <<http://www.cdc.gov/nchs/fastats/injury.htm>> accessed 1st March 2016

⁶⁴⁸ Article V of the Constitution of the United States sets out how the Constitution can be amended stating: "The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the [first](#) and [fourth](#) Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be [deprived](#) of its equal Suffrage in the Senate."

⁶⁴⁹ Perhaps the most well-known example of this is the case of former British newspaper editor turned US-based CNN TV host, Piers Morgan. Mr Morgan made known his disbelief at the US gun laws in a very public way triggering an outcry from supporters of the Second Amendment and a campaign to have him deported. See more at T.J. Raphael, 'Piers Morgan on gun control: "To me, doing nothing is unconscionable"' (*Public Radio International (PRI)*, <<http://www.pri.org/stories/2015-10-08/piers-morgan-gun-control-me-doing-nothing-unconscionable>> accessed 15th December 2015

change”.⁶⁵⁰ Opwis argues that, in common with other forms of legal system, Islamic jurists are required to use interpretation of the finite texts, in this case the revealed scriptures, to extend the law to new situations.⁶⁵¹ This has a clear parallel with the example used above, the Second Amendment of the US Constitution. Courts in the US including the Supreme Court have given interpretative rulings in many cases pertaining to the Second Amendment.⁶⁵² Ultimately, here I conclude that legal change is possible in countries with finite texts as their primary source of law. Having established *maslaha* as a legitimate source of legal change I now go on to discuss the conditions required for validating specific cases of *maslaha*.

6.2.4 CONDITIONS FOR VALID MASLAHA

The four Islamic schools of thought, which were discussed in chapter two, have developed a series of conditions that must be met if *maslaha* is to be validated. These conditions are aimed at preventing *maslaha* from becoming a tool for inserting individual preferences and biases into legislation and providing a counter argument to opponents who see the *maslaha* doctrine as a means for self-interested parties to arbitrarily create Islamic law.⁶⁵³ The three principal conditions are as follows.

1) Maslaha Must Be Genuine Not Specious

Maslaha must be genuine not speciously based on speculative conjecture. In other words, it must be based on reliable evidence that supports the claim to public benefit and shows that this benefit outweighs the potential for harm. *Maslaha* is also deemed specious if it contradicts an existing, recognized *maslaha*, as in the matter of alcohol consumption. When I refer to reliable evidence in Islamic law I mean a text from the Quran and Sunnah. Below, I provide an example of a legal change that took place in the KSA that has been based on clear evidence according to council of Scholars in the KSA.

⁶⁵⁰ Felicitas Opwis, 'Islamic law and legal change: the concept of Maslaha in classical and contemporary Islamic legal theory' (2007) *Shari'a: Islamic law in the contemporary context*

⁶⁵¹ Ibid

⁶⁵² Among others these include: *Presser v. Illinois*, [116 U.S. 252](#), 265; *United States v. Cruikshank*, [92 U.S. 542](#); *United States v. Miller* [307 U.S. 174](#) *George Calvin LEWIS, Jr., Petitioner, v. United States* 445 U.S. 55; *Pearl Barrett, Petitioner, v. United States* 423 U.S. 212

⁶⁵³ Mohamad Akram Laldin, *Islamic law: An introduction* (Research Centre, International Islamic University Malaysia 2006)

The punishment for drug trafficking in the KSA is prison. But when the drug trade increased from 1986, King Fahd sent an official letter to the Council of Senior Scholars (religion scholars):

“Drugs has bad effects on society, and the Ministry of Interior and health care service have noticed a large spread of drugs in recent times, and because the public interest requires a deterrent punishment for those dealers, either through smuggling or promotion, I wish you to discuss this issue to the Council of Senior Scholars on an urgent basis and provide us with what is decided”.⁶⁵⁴

The decision of the Council on drug trafficking was issued, and reads as follows:

The Council of Senior Scholars in the 29 session held in Riyadh on 9/ 6 /1407 H 18/2/1986 briefed this letter and the Council has studied the issue and discussed in all its aspects in more than one session at the Council. According, to the Quran, God said Indeed, the penalty for those who wage war against Allah and His Messenger and strive upon earth [to cause] corruption they must be killed. The scholars found that after discussion and deliberation of the results of the spread of drugs, adverse effects on public health could lead to an imbalance in the mind and ultimately madness, which would result in higher crime rates and more corruption throughout society. So, the Council decided unanimously that: First, the punishment for drug trafficking is execution the reason being is to protect society from this evil and protect the state and humankind. Second, the Council considers that the legal procedures must be conducted in front of Sharia courts, where the guilt of the accused will be decided.⁶⁵⁵

This shows how Saudi scholars apply a text from Quran and interpret it through the principle of *maslaha* to arrive at the appropriate punishment for drug dealers who seek to corrupt society and the state, in circumstances where there is no explicit text about the issue under consideration.

⁶⁵⁴ Portal of the General Presidency of Scholarly Research and Ifta, Decision of scholar no 138, 1986 v 21.

⁶⁵⁵ Ibid

2) *General benefit to all*

The objective of any *maslaha*, if it is to be validated, must be to seek benefit for all (*aumh*) and not merely to benefit sectional interests, whatever the social or political status of the beneficiaries. The concept of *maslaha* derives its validity from the notion that it secures the welfare of the people at large.

The principle of public interest should apply for all Muslims in general and not specific to the Saudis. For example, al-Ghazali says that, "Public interest must be for all Muslims not for a specific group".⁶⁵⁶ It is clear that personal interests belonging to an individual or specific group are not treated differently because what is important in Islamic law is the public interest for all Muslims. Al-Ghazali gives an example of this: "Throw someone from the ship, because the captain announced that the ship will sink, so we have to throw one of the passengers, to save other passengers, according to the principle of public interest".⁶⁵⁷ He said, this is not considered a public interest because the survival of the ship's passengers is not a general threat for all Muslims, but is rather limited to only those on the ship.

The reason for not taking into account the interests of just a few relates to the notion of personal interests, or the idea of benefiting only certain people. Thus, legislation could not proceed based on individual opinions or assumptions because if this were the case, we would encourage more people to vie to pass laws in order to obtain certain benefits, as well creating legislation for the benefit of influential individuals.

I will give recent example in the KSA, where the age of marriage has changed for girls in the KSA law from the age of 12 to the age of 18 years and over.⁶⁵⁸ This is an issue of great controversy in the KSA, arising from a number of cases of marriages where young girls (between twelve and eighteen years) were being married to men over the age of 50, with the family of the girls motivated by financial gains to allow this.

When the claim was raised to change the age of marriage for girls, a recommendation from the Consultative Council and a decision of the Ministry of Justice was made to determine the age of marriage for females to be 18 and those who violated this law

⁶⁵⁶ Al-Ghazali Abu Hamid Muhammad, *Al-Mustasfa*, vol 1 (Dar Ehia Al Tourath Al Arabi 1994)

⁶⁵⁷ Ibid, v 1, 294

⁶⁵⁸ Arabiya net, 'The Saudi Ministry of Justice established controls to allow the marriage of underage girls' *Arabiya net* (<<http://www.alarabiya.net/articles/2013/03/05/269776.html> > accessed 7 March 2016

would be punished according to the judge's discretion. This however raises a religious issue for some Muslims in the KSA in that they rejected this law as it conflicted with Sharia.⁶⁵⁹ But other religious Muslims say that if we look to benefit all Muslim girls and there is no text in Sharia that defines the age of marriage, then the change is permissible to protect such girls from abuse.

3) No conflict with clear nass (text)

For *maslaha* to be validated, it must not be in clear conflict with the Holy Quran, the Sunnah or the consensus view of Islamic scholar's *ijma*. For example, we can consider the prohibition of *riba* (paying financial interest). The principle of *riba* prohibition follows the concept of no risk – no gain in Islamic finance which for reasons of social equality and justice seeks to avoid unjustifiable increases in capital. Some might argue that, in modern times and the globalised world, *maslaha* would be served by allowing *riba* (usury). However, this *maslaha* would conflict with the clear text of the Quran, so it may not be validated.⁶⁶⁰

In summary, *maslaha* does not rank as equal with the four main sources of Islamic law (the Quran itself, the Sunna, *ijma* (scholarly consensus), and *qiyas* (analogy). Hence *maslaha* is not *Sharia*. However, not least because of its perpetuation throughout time, it is a widely supported method of extending laws into areas and contexts for which there is no textual evidence. *Maslaha* also serves as a tool for enacting legal change and prioritising promotion of the public good when doing so does not conflict with the fundamental Islamic principles as set out in textual sources the Quran and Sunna. *Maslaha*, therefore, can be counted as a secondary source of law principally used by the different Islamic schools of thought to decide on permissions and prohibitions.

⁶⁵⁹ Riyadh (a. B), 'One of the authority senior member of Saudi Arabia opposed the scholars to determine the age of eighteen years of marriage' *The seventh day Newspaper* (<<http://s.youm7.com/1416464> > accessed 7 March 2016

⁶⁶⁰ There are four places in the Qur'an where Allah mentions *riba* (usury). For example, at Surat al-Nisaa' 4:161 it is written "And for their taking usury though indeed they were forbidden it and for their devouring the property of people falsely, and we have prepared for the unbelievers from among them a painful chastisement."

5.2.5 APPLICATIONS OF MASLAHA

Maslaha provides an approach to address cases arising from scientific, social and political developments in Islamic states.⁶⁶¹ Islamic jurists' approaches to these issues have fallen into two types, one focused on the ethical content of Islam, its flexibility and adaptability and the other on preserving and retaining the traditional framework of Islamic law. Hence, the principle of *maslaha* needs to be comprehensively and accurately applied to avoid conflict with the second type of scholars and to persuade the first group with reason. Doing so allows movement among the schools of jurisprudence and consideration of the individual views of Islamic jurists in support of alternative arguments regarding to applying special measures for witnesses into Saudi law.

6.3 Summary

With no guidance available from the Quran and Sunnah or other sources of Islamic law it falls to scholars to apply the principle of *maslaha* when they consider the question of witness protection and specifically the transfer of special measures for vulnerable and intimidated witnesses from England to the KSA. For this reason, this chapter has focussed on discussion of the *maslaha* principle, types of *maslaha* and to establish the status of *maslaha* as the legitimate means to evaluate the aforementioned transfer. I posited that in a legal environment based on finite texts a degree of flexibility through scholarly interpretation is required. For example, there is often discussion in the United States as to what the intention of the framers of the US Constitution was in addition to the precise words used.

I conclude by arguing that *maslaha* is indeed a legitimate and appropriate means through which to consider the transfer of special measures for the protection of vulnerable and intimidated witnesses to Saudi law. In the following chapter I build upon this argument by looking in more detail at whether and how the special measures in use in England can be implemented. I will discuss the way of transplanting special measures to KSA by using set of criteria, based on the all-important *maslaha* principle and applying specific application of the YJCE Act 1999 in KSA courts.

⁶⁶¹ Mariya Ali, 'Child sexual abuse: can the doctrines of al-maqasid al-shariah and maslahah assist in challenging the honour ideology?' (2014) 18 The International Journal of Human Rights 508

CHAPTER 7

TRANSPLANTING SPECIAL MEASURES TO KSA: SPECIFIC APPLICATION

7.1 Introduction

The aim of this chapter is to develop the arguments emerging from the previous chapters concerning special measures for witnesses as codified in England and Wales and their potential transfer to Saudi law. Specifically, to consider the principles and practicalities that would dictate whether such a transfer was necessary and reasonable.

There are two sections to this chapter, In the first section I develop my arguments further by devising and discussing a set of scholarly criteria, including the all-important *maslaha* principle which could be used for the systematic evaluation of the appropriateness of the transfer of the special measures for witnesses currently provided for in English law as described in chapter five. In this section I acknowledge the challenges to importing special measures that are likely to come from Sharia scholars and I argue that those challenges can be rebutted and overcome.

In the second section I proceed one-by-one through the special measures provided for in the YJCE Act 1999 and aim to demonstrate their fit with the KSA criminal justice system, particularly with regard to the ‘public interest’ test.

Throughout this chapter my argument is that special measures for VIWs, as provided for in England by the YJCE 1999, would be hugely beneficial to the Saudi CJS. This chapter draws on Islamic legal literature, including Arabic sources, to argue that transferring such measures has a basis in Sharia and the KSA law. They will provide specific benefits for the KSA criminal justice system.

7.2 Maslaha in reforming legal proceedings in Saudi courts

The Saudi judicial system has been criticised for lacking transparency and guarantees of fair trials in criminal cases⁶⁶² for lagging behind modern legislation and for being unable to deal with modern life.⁶⁶³ The Islamic interpretation of some issues, imposed by the Muslim scholars at one point in time may change due to the fact that life has changed greatly from the time at which these provisions are imposed. For example, when mobile phones were first introduced women were banned under the fatwah of certain scholars but later this was changed and women now use them commonly. Staying with mobile phones, in January of 2016 a religious scholar issued a fatwah against the use of mobile phones while driving, he was quoted as saying, “Using mobile phones while driving amounts to disobeying God the Almighty who prohibits acts that will cause harm.”⁶⁶⁴

In its first report on human rights in the KSA in 2006, the independent, non-governmental National Society for Human Rights⁶⁶⁵ cited violations of the rules for fair trials, including gender inequality, non-compliance with the right to equality in litigation without discrimination between litigants or Saudis and non-Saudis, unequal punishments for the same offence and a lack of public access at court sessions conducted in secret. The report also highlighted other negative judicial trends, including long delays in hearing cases and the inability of the accused to exercise their right to seek the help of lawyers.

In chapter 3, I explored practices in the Saudi judicial system, especially the way defendants and witnesses appear at trials in criminal cases, which might lead to their rights being neglected. *Maslaha* encompasses addressing practices to ensure procedures for a fair trial. Thus, applying special measures for witnesses could have a positive impact on Saudi law. As mentioned in chapter 2, recent attempts at judicial reform are

⁶⁶² Washington Times, 'Gang-rape case roils Saudi legal system' *Washington Times* (<<http://www.washingtontimes.com/news/2006/nov/21/20061121-101328-4991r/?page=all>> accessed 29 May 2015)

⁶⁶³ Human Rights Watch, *World Report 2015: Saudi Arabia*)

⁶⁶⁴ Emirates, 'Saudi fatwa bans use of phone while driving' *Emirates* 24/7 (<<http://www.emirates247.com/news/region/saudi-fatwa-bans-use-of-phone-while-driving-2016-01-03-1.615774>> accessed 11th March 2016)

⁶⁶⁵ The National Society for Human Rights states on its website that it was founded “for protecting and defending the human rights in accordance with the ordainments of Islamic Muslim Law, the governing statute, and the international conventions and covenants that don’t contradict with the Islamic Muslim Laws.” See <http://nshr.org.sa/en/?page_id=52> accessed 11 March 2016

among the most potentially important reform initiatives undertaken in the KSA.⁶⁶⁶ This reform effort requires improvement to ensure fair trials and to transfer special measures for witnesses to Saudi criminal courts.

In this chapter, I apply the concept of *maslaha* discussed in chapter 6 to the specific issue of reform in Saudi criminal justice.

Variations in judgments have significant impacts on victims and witnesses, and preventing both from appearing at court to give testimony. Perhaps more importantly, it undermines confidence in the system among the general public. Judges are given full rein in judicial *ijtihad* (independent reasoning),⁶⁶⁷ court judgements are not codified, and *ta'zir* (disciplinary) sanctions are not specified and range from one lash to a hit by a sword. In the absence of legal references, judges have absolute power to issue judgments according to their own *ijtihad* based on Islamic literature, which is wide, and can have different opinions in every case. Clear-cut legal rules are needed so that judgments issued for the same charge do not differ from one court to another which they can and do at the moment in the absence of sentencing guidelines for non-*hudood* crimes. Such issues of disparity are largely avoided in England and Wales where the Sentencing Council issue mandatory guidelines that judges in that jurisdiction should follow, designed to ensure consistency in sentencing an approach that I would argue would benefit the KSA.

Saudi law does not give defendants the absolute right to directly cross-examine witnesses. Defendants have only the right to put questions to witnesses through the judge, who assesses whether the question contributes to the case. It could be argued that this practice neglects the rights of the accused to a fair trial but there is also the issue that a complainant may find it intimidating to be asked questions by a judge, which suggests there needs to be a better way of engaging them in the criminal process, to produce their best evidence. For example, the public uses different terms and expressions than judges and lawyers. With a jury present there is an incentive for counsel to use everyday language in court but this incentive disappears when there is no jury.

⁶⁶⁶ Joseph, 'Reforming the Judiciary in Saudi Arabia'

⁶⁶⁷ This is an Islamic legal term meaning 'independent reasoning', one of the sources of Sunni law. It requires a full knowledge of religion, a capacity for legal reasoning and a thorough knowledge of Arabic. Oxford Islamic Studies Online, *Ijtihad*

Notwithstanding the question of language, the right to cross-examine witnesses, which is partially absent in the KSA, seems fundamental to the right to a fair trial and it needs to be present in Saudi law. This is not an unequivocal recommendation because cross-examination brings with it potential problems. In England, the adversarial system means that defence lawyers may seek to undermine witnesses' credibility through their questioning; some would say that the very fact of having an adversarial system is what creates the problems (of the intimidating nature of the trial process) in the first place.

Nevertheless, as overall I would argue that the KSA should move towards a more adversarial system to which cross-examination is so fundamental and I would maintain that such cross examination should be introduced. Making this recommendation makes it even more important that VIWs are protected using special measures, as they are in England. Witness cross-examination in the English adversarial legal system is an important component in ensuring that witness evidence can be tested. According to Heffernan and Raifeartaigh, "To confront one point of view with another in cross-examination is the heart of the adversarial process."⁶⁶⁸ Special measures for witness protection are aimed at ensuring the best possible quality of evidence in the courts of England and Wales. I would argue that cross examination of witnesses also works towards the same ends. In no legal system can it be assumed that testimony is always 'the truth, the whole truth and nothing but the truth'. Cross-examination of witnesses facilitates the challenging of a witness's direct testimony, and gives the opportunity to explore the testimony, expand upon it and potentially reveal new important information.

There is no text in the original sources, the Quran or Sunnah, binding judges to cross-examine witnesses. Therefore, we can apply the *maslaha* test, of either preventing harm or promoting public good, on this issue. I believe it is in the interests of justice that defence lawyers and public prosecutors conduct questioning and that the judge's power be limited to rejecting irrelevant questions. In England, judges have to be careful when ruling out a line of questioning, because if they rule that a particular line of questioning is not acceptable they might find the defendant appeals successfully against the judge's ruling. In the KSA the judge's discretion in this area cannot be challenged.

⁶⁶⁸ Liz Heffernan and Una NíRaifeartaigh *Cross-Examination in Criminal Trials* 3rd Edition (Bloomsbury Professional, 2009) [online edition, Ch. 6]

Testing witnesses' testimony and their overall credibility through cross-examination would assist the judge in evaluating the reliability of the evidence, be in the interest of justice and therefore passes the *maslaha* test. In my opinion, the *maslaha* in witness cross-examination by lawyers and public prosecutors is that punishments in Islam, as indicated, are severe and include the death penalty. Therefore, it is *maslaha* (in the public interest) and therefore obligatory to do our best to test and assess the credibility of witnesses through questioning by experienced lawyers and public prosecutors as this helps ensure that the evidence on which a person is convicted has been carefully and thoroughly scrutinized.

Maslaha leads to restructuring the physical layout Saudi courts, especially the criminal ones, so that the physical places for lawyers, defendants and the public are pre-assigned as in English courts. The benefit of this layout, in my opinion, is that it permits participants easy access to their places and some comfort and familiarity in the courtroom before proceeding into the trial.

There needs to be a dedicated place for witnesses as the absence of a witness box might lead witnesses to refrain from giving testimony knowing that they would have to sit next to the defendant during the trial, something which may be intimidating to them. I maintain that the lack of an assigned place likely makes witnesses afraid to attend court and give evidence. It is possible that giving testimony against the accused while standing beside them exposes witnesses to harm. Although the law punishes the accused if he intrudes upon the witness while giving testimony (as discussed in chapter 2), most witnesses prefer to not give testimony if it would expose them to physical or verbal abuse.⁶⁶⁹ Witness boxes have many benefits, such as making witness protection easier by allowing the putting up of a screen to protect the witness from facing the defendant directly as provided for in the YJCE Act 1999⁶⁷⁰. This measure also maintains due regard for witnesses and protects them from assault. These procedures could encourage

⁶⁶⁹ Hamdan Buthaina, '49 Thousand Stuck in the Courts Issue! Because of Non-attendance of Witnesses?' Arabic Life '(Palestine <<http://www.alhaya.ps/tahqeqat/mahakem.pdf>> accessed 20 June 2015

⁶⁷⁰ YJCE 1999 s. 23

witnesses to appear and offer testimony before courts.⁶⁷¹ As mentioned, Islamic law urges adopting all procedures that encourage witnesses to give testimony.⁶⁷²

Those who oppose the principle of *maslaha* as a source of Sharia believe that it will be conducive to allowing rational scholars to develop new provisions similar to the texts of the Qur'an and Sunnah, which could disable Sharia in general across the Muslim world. This position was expounded by Professor *Abdul Wahab Makhlaf*. He argued that, “establishing and developing rules of Sharia by rational thought and opinions...will risk the divine religion and all laws”.⁶⁷³ These opponents of *maslaha* argue against the application of the principle of public interest in Saudi law in cases that were not previously known.

First, they argue that Islamic law was created during the time of the Prophet, which covered all areas of laws and regulations to serve and facilitate the lives of those in Islamic nations, and that claims by Sharia scholars that the notion of public interests can be found is not true. For example, God said, “This day, I have perfected your religion for you, completed my favour upon you, and have chosen for you Islam as your religion”.⁶⁷⁴ So, Muslims do not need any other religion or laws except the law from God and Prophet Muhammad. Allowing the application of special measures for witnesses in Saudi law would be a violation of Sharia, according to opponents of *maslaha*.

My response to this is to point out that all four schools of Sunni agree on the validity of the *maslaha* principle. All that we have seen in Arabic countries of the organization of life that was unknown at the time of the Prophet comes under this principle (for example, organization of countries laws, organization of the work of the courts and the traffic laws of which there is nothing in the Quran). To say that all this undermines the meaning of Sharia is invalid as these things actually seek to improve the life of Muslim society. In addition, the books of *Hanbali* have many examples of this principle as a source of Islamic law. I emphasize that the special measures for witnesses are not novel, or a change to the provisions of the Quran and Sunnah texts but is rather a way to apply

⁶⁷¹ Buthaina, '49 Thousand Stuck in the Courts Issue! Because of Non-attendance of Witnesses?' Arabic Life '

⁶⁷² God commanded people to offer their testimonies. God stated (And the witnesses should not refuse when they are called on for evidence.) Holy Quran, suat Al-Baqra verse 282.

⁶⁷³ Makhlaf Abdul Wahab, *Ilm usul al fiqh 'the principles of jurisprudence'* (Al azhar library 1974)

⁶⁷⁴ Holy Quran, surat Al-Maidah, verse 3

what God ordered; namely, not to harm witnesses. God said, ‘And neither scribe nor witness should be harmed’.⁶⁷⁵

The second argument of the scholars opposed to using *maslaha* to find a solution for issues that are unknown in Islamic law, is that it may be used as a means to escape the provisions of Islamic law and to open the door for the ruler of the KSA and the government to codify any provisions under this principle to inflict punishment on the Saudi people. It was also mentioned that special measures for witnesses may be suitable for English law, but not for Saudi law. For example, those who work in government could take advantage of these measures to bring false witnesses to testify at courts.⁶⁷⁶

My response to this is that applying the public interest approach requires a deeply thought out analysis according to diligence, evidence and the conditions put by Islamic law scholars that show the issue is viable for consideration under the public interest principle. In addition, in the KSA there are legal procedures that would ensure that special measures are applied under the principle of public interest or not by the Council of Senior Scholars (Fatwa Council), who take a legitimate document, and then send it to *Shura* Council for approval or rejection.

I have studied the special measures for VIWs currently available in England and Wales and their advantages and disadvantages in Saudi law and have found that five of these special measures are appropriate for Saudi law and two of these measures are not, which I will explain at end of this chapter.

7.2.1 Maslaha of protecting witnesses in criminal cases

In Sharia law jurisdictions, the principles governing testimony require that witnesses give oral testimony during trials.⁶⁷⁷ Defendants have the right to challenge witnesses⁶⁷⁸ and to refute the testimony by revealing such issues as kinship or enmity between the witness and the accused which may motivate the witness to testify for or against the

⁶⁷⁵ Holy Quran, surat Al-Baqarah, verse 282.

⁶⁷⁶ Similar to the case of Saddam Hussein, the former President of Iraq, Miranda Sissons and Ari S Bassin, 'Was the Dujail Trial Fair?' (2007) 5 Journal of International Criminal Justice 272

⁶⁷⁷ MS Mohd Ab Malek and others, 'In the Purview of an Oath from the Jurisprudential Method of Islamic Law of Evidence', *Islamic perspectives relating to business, arts, culture and communication* (Islamic perspectives relating to business, arts, culture and communication, Springer 2015)

⁶⁷⁸ Ibid

accused and which the judge may otherwise remain unaware of.⁶⁷⁹ In some cases, charges might be brought against powerful figures in government, society or terrorist groups. I therefore stress the importance of protecting VIWs as required by *maslaha* and providing specific measures that can be used to facilitate the gathering and giving of evidence by vulnerable and intimidated witnesses in Saudi criminal courts. I support this assertion of *maslaha* through the example of England and Wales where the application of special measures has been a valuable step forward in achieving best evidence, including providing suitable conditions for reluctant witnesses (for reasons of intimidation or vulnerability) to testify.

Despite the fact that the Arab Anti-Corruption Convention⁶⁸⁰ only deals with one category of crime - corruption - it does offer further evidence that special measures for VIWs and indeed the protection of all witnesses is compatible with Saudi law and recognized as such. Article 14 of the Convention recognises the need to protect witnesses, experts and victims who give testimony about criminal acts. This duty extends to protecting their relatives and loved ones from any possible revenge or intimidation. The means to do so include:

1. Providing protection for informants, witnesses, experts or victims in their places of residence
2. Not disclosing information about the identity or location of informants, witnesses, experts or victims
3. Allowing informants, witnesses, experts and victims to give evidence in a fashion that ensures their safety, such as through communications technology

⁶⁷⁹ Hanbali scholars have written long dissertations on conditions that are requirements for refusing testimony. These have been summed up as the following conditions:

1. Testimony of those kin from birth one to another, even from the mother's side, is not accepted, but if they testify against each other, the testimony will be accepted.
2. If the witnesses is involved in any kind of dispute with the accused.
3. The testimony of one spouse to the other is not accepted because of the suspicion that the testimony might benefit either side. The testimony will be accepted if given after separation because of the lack of benefit for either side.
4. Witnesses must be Muslim. The reason for this condition is that non-Muslims, who do not believe in Islam as a religion, might not view adultery or drinking alcohol as a sin.
5. A witness's testimony is not accepted if he has any relationship with the litigants.
6. Testimony is not accepted if the witness testifies to benefit himself.
7. Anonymous testimony is not accepted.

See, Alvnej Walid, *Quadh (Contraindications) of Testimony* (Naif Arab Academy for Security Sciences University 2007)

⁶⁸⁰ League of Arab States General Secretariat, *Arab Anti-Corruption Convention* (Egypt 21 December 2010)

4. Taking punitive measures against anyone who discloses information relating to the identity or location of informants, witnesses, experts or victims.

This convention implies that the KSA has made a commitment to providing witness protection in serious crimes.⁶⁸¹ However, in my view, the Arab Anti-Corruption Convention lacks clarity as it stipulates these conditions without detailing the procedures to be followed in such cases, and it is not binding on the signatory states to undertake such protective procedures within a specific period of time. Hence the Convention offers evidence of support for witness protection more on paper than in practice. Thus, most signatory states⁶⁸² have not yet applied the terms and conditions of the Convention, leading to the neglect of witness protection in most Arab countries.

That witness protection is the exception to the rule motivates the researcher to look at the appropriate manner in which protective procedures for witnesses can be applied. Considering the research on how England began to protect witnesses and the benefits it gained from applying such procedures⁶⁸³, it is in the interests of Saudi lawmakers to follow the steps taken by English lawmakers to create laws to protect VIWs. Based on my comprehensive and coherent study of this issue conducted since 2011, I assert that special measures for VIWs are one of the most important elements in ensuring best evidence and a fair trial. However, we need to consider carefully whether transferring special measures is appropriate and in order to do so, I turn now to consider criteria by which we might evaluate the possibility of transferring special measures to KSA.

7.3 Possible criteria to evaluate transfer special measures for witnesses to Saudi law

In the previous section I presented my arguments concerning the application of the principle of *maslaha* to the specific legal issue of special measures for witness protection. It is an argument mainly aimed at Hanbali Sharia scholars because it is this school on which Saudi law is based. This is because establishing that these new

⁶⁸¹ Ibid

⁶⁸² Concerning those who have made moves toward implementation, in 2006 Algeria, Jordan and Yemen published anti-corruption laws which contain articles protecting anyone who gives any information about corruption (whistleblowers). In 2008 Iraq issuance a law for protect witnesses and informants. In 2010 Lebanon issued a draft anti-corruption law was mentioned in texts materials for the protection of witnesses and informants. However, it is still in the preparation and review stage.

⁶⁸³ See chapter 5

measures would be in the public interest would be a prerequisite before further discussion of the transfer of the special measures from English law to Saudi law can progress.

This section aims to take these arguments further by seeking to establish a set of criteria which could be used to evaluate the appropriateness of the transfer of special measures for witnesses from English law as described in chapter 5. The criteria are aimed at the generality of legal scholars in the KSA and Arabic country.

The section comprises a discussion of five criteria for evaluating such a transfer that I have developed using the principles of Famous Arab legal scholar Al-Sanhuri (1895-1971). Al-Sanhuri⁶⁸⁴ pioneered transferring and incorporating western laws into Islamic jurisprudence. I have applied the standards for transferring laws that he established in his book (*Alosaet fe sharh alganon almdani*) *Mediator to Explain Civil Law*.⁶⁸⁵ Although Al-Sanhuri was familiar with Islamic jurisprudence and legislation, he relied on his personal views, independent of Islamic law, to create a guidance framework to be applied when considering the codification of western laws into the legal codes of Islamic countries in a way that was harmonious with Islamic jurisprudence. Al-Sanhuri describes his philosophy: “Islamic law is that of the Orient and [the] inspiration of its provisions. Whenever it is combined with western laws, [the] spirit of the Orient and its heritage will light our way and contribute to the revival of jurisprudence worldwide.”⁶⁸⁶

Al-Sanhuri argued that good lawmakers do not overlook the provisions, rules and principles of comparable foreign laws when making use of modern experiences to support a distinct, modern legal product, compatible with the historical circumstances and development of laws. This law must also reflect the prevailing conditions of the society to which it is applicable. The use of comparable laws should always take into account the requirements of legal sociology and the controls for deriving domestic laws from foreign ones: law is a social phenomenon, and what fits one society might not fit another or even the same society if the relevant circumstances change. As well, the

⁶⁸⁴ Abdel-Razzak Al-Sanhuri is a prominent Arab legal figure who devoted his efforts and life to adapting and combining western laws into those of Arab countries. He traveled among countries, including Egypt, Sudan, Iraq and Kuwait, teaching in law schools and helping Arab governments and legislatures establish constitutions and laws. Wafiq Zein Al Abedeen Mohamed, 'Al Sanhuri's Attitude towards Applying and Legalizing Islamic Law' 4 Sep 2013) <<http://www.albayan.co.uk/MGZarticle2.aspx?ID=3122>> accessed 10 May 2015

⁶⁸⁵ el-Sanhuri Abd el-Razzak, *Mediator to Explain Civil Law*, (Dar Ehia Al Tourath Al Arabi 1980)

⁶⁸⁶ Mohamed, 'Al Sanhuri's Attitude towards Applying and Legalizing Islamic Law'

controls for adapting foreign legislation to domestic legal systems should be considered.⁶⁸⁷ In this section, I have specifically applied Al-Sanhuri's legal guidance to the transfer of special measures for witnesses from England to the KSA law and used it to devise the five criteria discussed below which are each posed as questions. These questions are: Are witness protection measures consistent with Islamic law and not in conflict with Sharia law? Are special measures in accordance with the social norms of the KSA? Can the new witness procedures be properly incorporated into Saudi criminal law? Does this transfer maintain the heritage of Islamic law? Is the concept of legal pluralism consistent with Saudi law?

7.3.1 ARE WITNESS PROTECTION MEASURES CONSISTENT WITH ISLAMIC LAW AND NOT IN CONFLICT WITH SHARIA LAW?

The KSA applies the provisions of Islamic law in all cases filed in courts, as stipulated by Article 7 of the BLG: "The Government in the KSA derives its authority from the Book of God and the Sunna of the Prophet (PBUH), which are the ultimate sources of reference for this Law and the other laws of the State."⁶⁸⁸ Islam's status as the official state religion commits the government and other authorities to carry out the principles and rituals of Islam, to respect the rights of Muslims to perform their religious obligations and to organise Muslims' relations and personal statuses in accordance with the provisions and principles of Islam. This, of course, contrasts with the law of England which is secular and while one hundred years ago some may have contended that Christianity was part of English common law, since the decision of the House of Lords in *Bowman v Secular Society Limited*⁶⁸⁹ this contention has been impossible to make on any legal basis. Secular law is even more prevalent in England today where there is less adherence to one particular religion.

Article 48 of the BLG states that "the Courts shall apply rules of the Islamic Sharia in cases that are brought before them, according to the Holy Quran and the Sunna, and according to laws which are decreed by the ruler in agreement with Holy Quran and the

⁶⁸⁷ Mohammed Fayez, 'The Impact of el-Sanhuri project in the Arab civil law' <http://www.mara.gov.om/nadwa_new/wp-content/uploads/2014/04/16_3.docx>

⁶⁸⁸ BLG 1992

⁶⁸⁹ *Bowman v Secular Society Limited* [1917] AC 406. In his ruling in this case Lord Sumner used the Latin phrase *deorum injuriae diis curae*, "offences to the gods are dealt with by the gods" to describe how matters of religion – specifically in this case blasphemy – were outside the remit of the law. Elsewhere in the ruling it was stated "the phrase 'Christianity is part of the law of England' is really not law; it is rhetoric".

Sunna.”⁶⁹⁰ This article raises two pertinent points: first, there are other sources of legislation - the laws and decrees issued by the king - which take the interests of the state and society into consideration. Second, the KSA abides by the rules of international law and the conventions and decisions of certain international organisations to which it is a signatory. This article offers the latitude for researchers to investigate and propose laws that are useful to society and do not conflict with Islamic law, as is the case with this thesis

Certainly, there is a strong case to make that Saudi society would benefit greatly from making use of the English experience in witness protection in criminal procedures. In chapter 5, we saw the benefits that the English CJS has gained from the special measures for witnesses. We also cannot overlook that the KSA has signed the United Nations Convention against Corruption (UNCAC), which it ratified as recently as the 29th April 2013. UNCAC stresses the need for witness protection in Article 32 and requires signatories: “to provide effective protection from potential retaliation or intimidation for witnesses and experts who give testimony concerning offences established in accordance with this Convention and, as appropriate, for their relatives and other persons close to them.”⁶⁹¹ While Article 32 is referring specifically to offences related to corruption it is nevertheless significant that the benefit of such protection measures has been recognised by the KSA.

If UNCAC is an example of acceptance of ‘external’ law, then there are also clear examples of where international law is rejected as it conflicts with Sharia law. For one such example we can stay within the domain of witnesses and consider women’s equality before the law. Article 15 of the United Nations Convention on the Elimination of All Forms of Discrimination against Women (hereinafter CEDAW)⁶⁹² provides for gender equality in all issues related to law and the justice system. Although the KSA ratified the convention in 2001 it made the general reservation: “In case of contradiction between any term of the Convention and the norms of Islamic law, the Kingdom is not under obligation to observe the contradictory terms of the Convention.”⁶⁹³ One of these norms is the legal treatment of women as witnesses and specifically the status of their

⁶⁹⁰ BLG 1992

⁶⁹¹ United Nations, *Convention against Corruption* 58/4 (United Nations, 2004) A/58/422 Art. 32 para. 1

⁶⁹² CEDAW, *The United Nations Committee on the Elimination of Discrimination against Women*

⁶⁹³ United Nations, 'Declarations, Reservations and Objections to CEDAW '

<<http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm>> accessed 12 November 2015

testimony which is viewed as having half the value of that of a man's, something which I considered in detail in chapter two⁶⁹⁴ The contrast between this example and the near unreserved acceptance⁶⁹⁵ of UNCAC demonstrates that this first criteria of the five is both valid and clear. In Article 32 of UNCAC⁶⁹⁶ it is stated that parties must put in place "evidentiary rules to permit witnesses and experts to give testimony in a manner that ensures the safety of such persons, such as permitting testimony to be given through the use of communications technology such as video or other adequate means." In signing up to this the Kingdom is acknowledging that such evidentiary rules are not in conflict with Sharia, otherwise a CEDAW-type blanket reservation would have been deployed.

Muslim scholars have established that Sharia is concerned with producing public benefits (*maṣlaḥa*) and avoiding the causes of public harm *mafsadah*⁶⁹⁷; this latter principle was discussed in chapter 6. Furthermore, an investigation of the literature of Islamic jurisprudence in chapter 2 has demonstrated that Islamic law encourages witness protection. So we can conclude that protecting witnesses giving their testimony, especially VIWs, is among the public benefits that is consistent with Sharia. In chapter 3, a review of literature on criminal procedure law found calls for witness protection throughout the criminal justice proceedings and requiring application and enforcement on the ground. However, these indications were not taken seriously and Saudi lawmakers leave the protection of witnesses in the hands of officials at each stage of the criminal justice process without providing any form of guidelines or explanation about how this should be done.

7.3.2 ARE SPECIAL MEASURES IN ACCORDANCE WITH THE SOCIAL NORMS OF THE KSA?

To accept the idea of transferring witness procedures into Saudi courts, Saudi lawmakers should consider the particularity of social reality. Lawmakers should adopt

⁶⁹⁴ The Quran states, "And get two witnesses of your own men, and if there are not two men then a man and two women such as you choose for witnesses - so that if one of them errs, the other can remind her " Holy Quran, suat Al-Baqra 182.

⁶⁹⁵ In fact there were two reservations made at the time of signing as follows: - "1. The Kingdom does not consider this Convention to be the legal basis for the matter of extradition with other State Parties to this [C]onvention, provided for in paragraph (5) of Article (44). 2. The Kingdom does not consider itself bound by paragraph (2) of Article (66) of the Convention, in accordance with paragraph (3) of the same Article."

⁶⁹⁶ United Nations, *Convention against Corruption* 58/4 , Article 32 para 2. (b)

⁶⁹⁷ Mohammad Hashim Kamali, *Maqasid al-Shariah made simple*, vol 13 (Iiit 2008)

only procedures that are consistent with and do not conflict with the circumstances of society which involve its social norms which represent the public attitudes prevailing at the time. We can return to the example of CEDAW, and consider attempts to apply certain provisions of this Convention⁶⁹⁸, such as developing domestic laws to create alternative families and to accommodate relations between men and women outside legal marriage, which could lead to either execution or imprisonment as these attempts are contrary to Islamic law.⁶⁹⁹ Therefore, taking guidance from social norms is of paramount importance when using the texts of foreign laws. These norms should be one of the benchmarks for foreign texts, and only the ones compatible with the social norms of the country to which the proposed transfer is being made should be selected.⁷⁰⁰ However, social norms are less easily defined than codified law as they can be more subjectively interpreted. Furthermore, social norms can change across time. What may be unacceptable according to social norms at one point in time may become acceptable at a later date as public perceptions of the issue change. For example, in Europe for centuries adultery was considered a serious crime but gradually, one by one each European country repealed adultery laws to reflect changing social norms.⁷⁰¹ This shows that social norms change but at different paces in different societies.

The first criterion was concerned with establishing the absence of conflict with the divinely ordained system of normative Islamic law, which is mostly viewed by Islamic legal scholars in the abstract in so far as it is separated from the progress and passage of time in society. This second criteria recognises the need to meet the demands of practical realities. Specifically, the criterion is established because special measures can only be transplanted if they are in accordance with the social norms of the KSA. There are certain very clear issues concerning the position of women and children in Saudi society that were discussed in chapters two and the Saudi CJS that would indicate that the implementation of special measures for VIWs would in the KSA, at least for the foreseeable future, take on a different complexion than it has in England, where three-

⁶⁹⁸ CEDAW, *The United Nations Committee on the Elimination of Discrimination against Women*

⁶⁹⁹ Spencer Richard, 'Saudi Arabia court gives death penalty to man who renounced his Muslim faith' *The Telegraph* (<<http://www.telegraph.co.uk/news/worldnews/middleeast/saudi-arabia/11431509/Saudi-Arabia-court-gives-death-penalty-to-man-who-renounced-his-Muslim-faith.html>> accessed 1st August 2015) Also see Raif Badawi's case, <<https://www.amnesty.org.uk/actions/saudi-arabia-free-raif-badawi-flogged-blogger>> accessed 15th March 2015.

⁷⁰⁰ Fayeze, 'The Impact of el-Sanhuri project in the Arab civil law'

⁷⁰¹ Bonnie G Smith, *The Oxford Encyclopedia of Women in World History: 4 Volume Set*, vol 1 (Oxford University Press 2008)

quarters of all uses of special measures are for children and three-quarters of uses with adults were for women.⁷⁰²

In conclusion, while this second criterion is valid, it is less straightforwardly applied and requires more critical reasoning on behalf of legal scholars. It also suggests a law which may be deemed unsuitable for transfer at one point in time may not always remain so. Part of the problem with implementing special measures in KSA is that social views of women and children are very different from those in England and Wales. These views, particularly as they see women as of less legal significance and weight than men, will hamper the transfer and use of special measures. Furthermore, lawmakers must be familiar with all the circumstances of society so that they can develop laws consistent with prevailing social conditions.

7.3.3 CAN THE NEW WITNESS PROCEDURES BE PROPERLY INCORPORATED INTO SAUDI CRIMINAL LAW?

This criterion differs from the previous one in that it refers to practical implementation. The imperative to unify and incorporate the texts of foreign laws with the entirety of national laws is among the most important controls for receiving and incorporating foreign laws so that these texts stand apart and separate from their foreign origins but are properly integrated into the laws of the transferee country.⁷⁰³ For example, The Regulation on Criminal Procedure (2001) has borrowed provisions from Egyptian and French criminal procedures.⁷⁰⁴ Saudi lawmakers have been keen to make these texts fully independent and separate from their source, so neither judges nor the texts adhere to their foreign origins. Thus, these texts become completely independent of their source and merge into the whole text of national laws, in line with its rules and principles.⁷⁰⁵ In other words, combining the principles of foreign laws with those of domestic laws is required for the interpretation and enforcement of foreign laws.⁷⁰⁶

Here, the main issue that appears relevant to taking advantage of the experience of English law on witness protection is that lawmakers should not overlook the legal

⁷⁰² Cooper and Roberts, *Special Measures for Vulnerable and Intimidated Witnesses: An Analysis of Crown Prosecution Service Monitoring Data*

⁷⁰³ el-Sanhuri Abdal-Razzaq, 'The Task of Reviewing the Civil Code of Egypt and on What Basis It Should Be Done' (1936)

⁷⁰⁴ van Eijk, '4 Sharia and national law in Saudi Arabia'

⁷⁰⁵ Abdal-Razzaq, 'The Task of Reviewing the Civil Code of Egypt and on What Basis It Should Be Done'

⁷⁰⁶ Ibid

legacy of society, including juristic provisions, Islamic jurisprudence and well-established, valid laws. If lawmakers do so, the new legislation should not cause any confusion in society or affect the administration of justice, order and legal stability—the main objectives of the law. England has benefited from empirical research into the use of special measures as detailed in chapter five. This would also be required in the KSA so the effects of special measures could themselves be measured.

We also need to consider the question of appropriate drafting of the new provisions and whether the new legislation can be correctly framed for the KSA. Al Sanhuri, advised scholars who want to transfer legal texts from Western law to Arabic law and offers advice as a guidance to scholars who are keen to translate Western law to Arabic law, which he thinks would be a difficult task because any error could lead to the loss of the benefit of the text that has been translated. In addition, he also felt that these texts require a lawyer who applies deep analysis and thought and not simply to be translated verbatim. In other words, it is not a task for copying and pasting.

Al Sanhuri has always advocated the need to refer to the heritage of Islamic jurisprudence as a common ground between all Arab countries. We must maintain the respect Arab countries and respect their laws. For example, the KSA applies Islamic law in all aspects while Egypt applies Islamic and civil law. Therefore, we cannot criticize Saudi law that does not include civil law but rather must respect it as there is common ground between these countries; namely, Islamic jurisprudence.

It is necessary to Arabicize legal terminology in order to make it closer to Arab thinking without jeopardizing its legal content. Legal texts are extremely difficult to translate effectively especially when translating Western legal terms to Arabic and vice versa. Legal translation requires accuracy in translating the meaning of content, where the translator must pay close attention to both the character and meaning of the text at the same time. Legal texts have precise legal terminology, which requires similarly accurate legal terms to replace them with the meaning remaining intact. The style in legal translation should be noted where the legal style is precise and free from poetic images and rhetoric, and that the legal interpreter does not add any individual insight into the work. It is imperative that the legal translator in all circumstances respects his work because any mistake can lead to a misunderstanding of the translated law.

7.3.4 WOULD THE TRANSFER MAINTAIN THE HERITAGE OF ISLAMIC LAW?

This Fourth criterion differs from the first two in so far as it addresses special measures in the terms that Islamic jurists would. Maintaining the legacy and heritage of Islamic law is necessary if it is to benefit from English experience in witness protection in accordance with the principles of Islamic law and the views of Muslim scholars. The English experience should be adopted as they do not contradict the views of jurists. Thus, it should be easy for judges, lawyers and investigators to accept the idea of special measures for witnesses as it is difficult to advance a contrary opinion when jurists have reached a consensus. However, different views on issues such as retribution and female testimony in *hudood*⁷⁰⁷, give researchers room to debate their opinions, as explained in Chapter 3.

In my opinion, in making use of the benefits of English experience in witness protection, the Islamic historical background should be considered as it is impossible to take advantage of an experience that completely contrasts with the views of Muslim jurists. This is particularly important as the legal heritage that England follows is one that has developed along a different path to those in an Islamic country such as the KSA. Following a long history of religious warfare and then the Age of Enlightenment, most European countries firmly divided church and state and the accepted wisdom and practice was that religious morality and secular law should be strictly separated. It has become an underlying assumption that the path to a modern effective legal system is firmly built on secularization, something which also underpins the critiques of many western scholars and policymakers' attitudes to Islam. This path contrasts greatly with the understanding of a divinely ordained system of law that prevails in Islamic countries including the KSA.

In transferring a legal text from the West to an Islamic country I would contend that it is not necessary to transfer the entire epistemological environment from which it comes, in other words the prevailing understanding of the nature and source of knowledge, the prevailing legal philosophy and the society underpinning it. Instead purely the mechanisms to achieve public good as worded in the legal text should be examined in

⁷⁰⁷ The Arabic term *Hudood* refers to a category of crimes that are classed as crimes against God; these crimes include adultery, homosexuality, apostasy, consuming alcohol among others. Punishments for these crimes are deemed to be Quranically fixed and may include public stoning to death, lashing, and amputation of hands or public execution.

isolation from its epistemology. Through the correct application of criteria such as the ones presented for discussion here it is entirely plausible to maintain the legacy and heritage of Islamic law fully intact while aiming to extract the public good from the transferred legal text.

7.3.5 IS THE CONCEPT OF LEGAL PLURALISM CONSISTENT WITH SAUDI LAW?

In its broad sense legal pluralism can be defined as a situation where a society observes more than one body of law.⁷⁰⁸ While the legal systems of Muslim countries such as the KSA are often characterised as autonomous, closed and self-sufficient legal systems the reality is that they are already pluralistic. For example, Sunni Islam is itself divided into four schools of law creating a form of pluralism within Sharia. Beyond this, Shahar argues that Sharia never governed every aspect of life in Muslim societies and gradually ceded many areas of law to other sources, highlighting taxation, penal law, the law of war, constitutional law, and to some degree, the law of contracts and obligations.⁷⁰⁹ Hence having multiple sources of law is already an established reality in the KSA (although many would argue that international law is not a particularly strong part of this mix).

Countries seek the help or experience of foreign laws when contemplating legal change which can lead to laying down a modern, developed law, based on several sources, rather than one law, in a way which does not neglect the national legal legacy and traditions. As stated by Al-Sanhouri, “no nation can be apart in its laws from others’ laws; otherwise, it will deprive itself from other countries’ experiences. The wise nation is required to not imitate others blindly, but only convey what is compatible with its circumstances.”⁷¹⁰ These words may be very true but it is also true to say that the KSA keeps its legal system quite insulated from others’ laws and incorporates little of other systems. This fact should not prevent further moves in this direction in the future, such as the one that is the topic of this thesis.

Today Islamic scholars increasingly use legal pluralism as a socio-legal theoretical perspective, applying it to the analysis of Islamic law and Sharia courts. It is also used to discuss the interrelations of Islamic law, state law and local customs in Muslim

⁷⁰⁸ Ido Shahar, 'Legal Pluralism and the Study of Shari'a Courts' (2008) 15 *Islamic Law and Society* 112

⁷⁰⁹ *Ibid*, 116

⁷¹⁰ Abd el-Razzak, *Mediator to Explain Civil Law*, v 1, 170

states.⁷¹¹ Shahar explains that, particularly since the turn of the millennium, Muslim scholars have used this perspective to understand the relationship between Islamic Sharia, state laws and local customs while others have applied it to what he calls “forum shopping between the madhhabs” (the four schools).⁷¹²

Unsurprisingly, legal pluralism is also one of the most prominent perspectives used by Muslim legal scholars when examining the interrelations of Islamic law and the legal systems of contemporary Western nations. However, not all legal scholars validate legal pluralism as a concept. Brian Z. Tamanaha, for example, argued that it is “constructed upon an unstable analytical foundation.”⁷¹³ Tamanaha argues that the problem with legal pluralism is its inability to distinguish between the legal and the non-legal, leading it to embrace virtually anything that exerts some form of social control even down to the level of family. He argues for a more tightly framed definition that recognizes the state as the source of all law. It is interesting to apply this debate to the KSA where the constitution situates Holy Quran and the Prophet's traditions (Sunna) as the source of the state's power⁷¹⁴ even stating that these holy texts are in fact the constitution of the Kingdom.⁷¹⁵ The point is that the divine sources only achieve their status through the consent of the state, of men.

However, despite Tamanaha's dim view of the future of legal pluralism it has continued to thrive. Despite this suggestion of instability, I would argue that legal pluralism is already a reality in Islamic states and that the transfer of witness protection laws from England to the KSA can be evaluated within the context of this pluralism.

To summarise my analysis of the criteria for evaluating the transfer of special measures for the protection of VIWs to the KSA, I have argued that special measures are consistent with Islamic law; that, with the important reservation of the status of women and children in the CJS, special measures are in accordance with the social norms of Saudi culture; that it would be possible to incorporate special measures into Saudi criminal law; that the transfer would maintain the heritage of Islamic law; and finally that the concept of legal pluralism is consistent with the law of the KSA.

⁷¹¹ An example of this being, Leon Buskens, 'An Islamic Triangle Changing Relationships between Sharia, State Law, and Local Customs' (2000) 5 ISIM Newsletter 1

⁷¹² Shahar, 'Legal Pluralism and the Study of Shari'a Courts' 112

⁷¹³ Brian Z Tamanaha, 'The folly of the 'social scientific' concept of legal pluralism' (1993) 20 Journal of Law and Society 192

⁷¹⁴ BLG 1992, Article 7

⁷¹⁵ Ibid, Article 1

7.4 Maslaha of developing Saudi criminal law to incorporate special measures for witnesses similar to English law

Before I go through each of the special measures applying the concept of *maslaha*, it is worth stating that counter-arguments for the transfer of specific special measures or indeed the generality of such measures are not yet developed as the issue has not yet been discussed by legal scholars. I can, however, make reasoned assumptions that opposition would be mainly informed by a general conservatism to change among some jurists, particularly that which appears to have 'Western' origins. Additionally, there would be concerns similar to those raised in England regarding the rights of the accused. Against these counter arguments I will argue that the principle of *maslaha* should prove persuasive in gaining support for the transfer of special measures whatever their origin.

7.4.1 SCREENS

In chapter 5, I described the use of screens and the advantages and disadvantages of their usage in English law. If *maslaha* entails protecting witnesses from the accused, Saudi law may adopt this procedure, especially if witnesses are assigned a place where they may be screened from the accused. Unfortunately, Saudi criminal courts do not currently have such a place for witnesses.

In the trial of late Iraqi President Saddam Hussein in the Dujail case⁷¹⁶ in which he was accused of killing 148 Iraqi people in 1982, the court used curtains to protect witnesses. These procedures, not previously known in Iraqi law,⁷¹⁷ raised problematic issues, such as the legal basis for putting up a screen preventing the accused from seeing the witness and the use of such a procedure only for the Iraqi president. Consequently, Iraqi citizens not familiar with legal proceedings believed the claims of Saddam's lawyer that he was denied a fair trial, creating the impression that the court lacked credibility.⁷¹⁸ In addition to this, witnesses' voices were automatically distorted, which made it difficult to

⁷¹⁶ Sissons and Bassin, 'Was the Dujail Trial Fair?'

⁷¹⁷ Ahmed, 'Inadequate Protection of Witnesses in the Criminal Legislation of Palestinian and Arab Countries'

⁷¹⁸ Ibid

determine their gender, and Saddam's lawyers had no opportunity to cross examine witnesses, provoking criticism from human rights advocates.⁷¹⁹ Sissons and Bassin recognized that the judges in the case were faced with a difficult task of seeking to meet international standards while coping with 'domestic pressures'. Ultimately they concluded that, "The proceedings were marred by political interventions that damaged the Tribunal's independence and undermined the final result."⁷²⁰

Inevitably, Saudi criminal law will be affected by this case because both jurisdictions are based on Islamic legal principles, especially if no field or applied research and studies are conducted to lay a valid, legal foundation for witness protection. Each piece of new legislation or changes to procedural rules within the CJS need to be evidence-based making them more likely to gain the support of the wider community. As discussed in chapter 2, Islamic jurisprudence and Saudi law leave the determination of the necessity of witness protection to judges' discretion.⁷²¹

There is no obstacle in Sharia or Saudi law preventing the use of screens for witness protection during trials; rather, *maslaha* is gained by preserving the lives and wellbeing of witnesses by protecting them from the accused who might intimidate, harass or harm them. As indicated in chapter 3, one purpose of Islamic law is to preserve and promote five basic human interests: religion, life, Intellect, Lineage, and Wealth. In chapter 5, I also explored the benefits which English law acquired from implementing this procedure.

Adding this procedure to Saudi criminal law will increase society's confidence in the courts, allowing witnesses to offer testimony with peace of mind and providing best evidence at criminal courts. However, it is recognized that some modifications to the layout of Saudi courtrooms will be necessary as there is currently no witness box that can be screened in the way it is in England. Allocating witnesses a specific place in the courtroom to the right of the judge and giving them a special entrance so they do not directly encounter the accused and their families would also be a benefit from courtroom modifications. This modification (witness box and separate entrance) would

⁷¹⁹ Michael A Newton and Michael P Scharf, *Enemy of the State: The Trial and Execution of Saddam Hussein* (Macmillan 2008) 120.

⁷²⁰ Sissons and Bassin, 'Was the Dujail Trial Fair?' 285

⁷²¹ LPSC 2000, article 169

then be available in all cases as there is no Sharia prohibition of it, while the use of screens would only be required for VIWs.

7.4.2 USE OF LIVE TELEVISION LINKS

Like other domains, the judiciary is undergoing rapid development to keep abreast with the latest changes in the world and to positively address current issues to protect society from harm.⁷²² One procedure used in Saudi law is accepting the testimony of witnesses given at their residence, which is called judicial deputation. In a sense, the judge deputises work to another judge. For example, if a witness cannot appear before the court due to a reason deemed acceptable to the court, the judge moves to the witness's residence to hear the testimony. The LPSC provides for deputation in hearing the complainant whenever the witness lives outside the court's jurisdiction. Article 98 states: 'If a litigant's evidence is in a place outside the area of court's jurisdiction, said court shall deputize the judge with jurisdiction over that place to hear such evidence'.⁷²³ Article 118 also states:

*"If a witness has an excuse that prevents his appearance to testify, the judge shall proceed to where he is to hear it or the court shall assign one of its judges to do so. If the witness resides outside the area of the court's jurisdiction, the court shall deputize the court of his place of residence to hear his testimony."*⁷²⁴

The types of deputation (*Estklafe*) in Saudi law adapted from Islamic scholars include:⁷²⁵

1. A judge deputises another judge in all of his work, assigning him everything coming from his jurisdiction.
2. The judge deputises another judge in a certain assignment, delegating a special matter to this judge, such as hearing evidence, selling a private estate or deciding a certain judgment between two litigants.

⁷²² Al Elfi Mohammed, 'The Test of Electronic Court: Between Reality and Expectations' (The 6 Conference of Electronic Government)

⁷²³ LPSC 2000, article 98

⁷²⁴ Ibid, article 118.

⁷²⁵ Mustafa Al-Zuhali Mohammed, *Judicial Organization in Islamic Jurisprudence: A Comparative Study between the Schools of Islamic jurisprudence, Regulations and Laws in Syria, Saudi Arabia, and the United Arab Emirates* (Dar al-fikr al muasir 2012)

3. The judge deputises another judge for a certain day, such as authorising the second judge to sentence litigants only on Saturday. The deputised judge then pronounces judgments in all legal actions on that Saturday, and his jurisdiction ends by Saturday sunset.

The Saudi minister of justice, Dr Mohammed Al-Essa, recently approved the use of live television broadcasting to hear the testimony of witnesses if they cannot appear before the court.⁷²⁶ This technique is classified as judicial deputation. In browsing websites and Saudi law literature, I have not found a single study to identify the advantages and disadvantages of this service that the Ministry of Justice or a Saudi researcher conducted before launching it. However, I found a newspaper report showing that this service follows the principle of *maslaha*, for instance,⁷²⁷ relieving witnesses from the pains of travel to give testimony and speeding the processing of cases. There is, of course, a limit to what kind of research can be conducted before the measure is introduced. In England, in advance of rolling out the digitization of courtrooms a so-called concept court operated as a pilot.⁷²⁸ The court took the latest available technology and applied it to court processes, including wireless internet technology in the courtroom, digital evidence screens and new software for researching case law.⁷²⁹ Having introduced it a range of possibilities are available including the kind of studies conducted following the introduction of special measures in England which were discussed in chapter 5.⁷³⁰

Section 24 of the YJCE Act 1999 does not provide for the giving of evidence via live link at the visitor's home, however, I believe there is a strong case that if one of the aims of the measure is to remove the stress of a courtroom appearance then being able to give evidence from the place most familiar to you must surely be the ultimate way to remove this stress. The counter argument that this undermines the accused's right to cross-examine prosecution witnesses was discussed in chapter five.

⁷²⁶ Osama, 'Start working to hear the testimony at courts through the display screens'

⁷²⁷ Ibid

⁷²⁸ The concept court was Birmingham Magistrates Court and the pilot scheme ran in 2013.

⁷²⁹ Coleman Clive, 'Courtrooms to be fully digital by 2016' *BBC News* (UK <<http://www.bbc.co.uk/news/uk-23092868>> accessed 25 December 2015

⁷³⁰ In particular I am thinking of Burton, Evans and Sanders, 'Are special measures for vulnerable and intimidated witnesses working? Evidence from the criminal justice agencies'; Cooper and Roberts, *Special Measures for Vulnerable and Intimidated Witnesses: An Analysis of Crown Prosecution Service Monitoring Data*; Hamlyn and others, *Are special measures working?: Evidence from surveys of vulnerable and intimidated witnesses*

Saudi legal permission to hear evidence at witnesses' homes might harm the accused by violating an important element of the judicial process, namely, the face-to-face principle. Saudi law has not set any conditions for implementing this method but leaves it to the judge's discretion. I am interested by the fact that the Saudi government has permitted use of this service although there are no codified provisions allowing for the use of modern technologies. However, I believe that the use of this technique in terrorism, rape and other serious cases should not be left to the judge's discretion in the interests of open justice.

There are advantages and disadvantages. Among the advantages are that the length of court cases could be cut as there would be no need to wait for witnesses to be available to travel to court. The expense of travelling would be removed. For female witnesses it would be particularly useful as in the KSA a woman may not go out of the home without the permission of her husband or other male guardian. There could be similar benefits for child witnesses who would be intimidated by attending court.

Protecting VIWs in criminal cases is one of the most important legal interests,⁷³¹ and there is no Sharia or legal objection to applying this technique and some modern Muslim judges support using such technologies.⁷³² As an example, Judge Taher Abu Eid explains that technology in general, and Internet technology in particular, could improve practice and transactions in all government institutions, and that progress or development in any environment is not possible without the use of technology in what has become known as technological management of institutions. Among the modern technological management techniques that will change the judiciary are those being referred to as E-Courts.⁷³³

Although the criminal law system in the KSA has no provisions for the possible use of modern technologies in testimony, this does not prevent the use of such technologies as long as they do not conflict with the accused's right to have a face-to-face confrontation with witnesses who are providing testimony against him during cross-examination at

⁷³¹ Robin Elliott, 'Vulnerable and intimidated witnesses: a review of the literature' (1998) *Speaking Up For Justice*

⁷³² Mustafa Al-Zuhali Mohammed, 'The legality of modern evidence in proof' (Discussion of the new legal provisions in Islamic law)

⁷³³ Hefny Rania, 'The face of the slow pace of litigation and achieve rapid deterrence E-courts, ' *Al ahram news* (Cairo <<http://www.ahram.org.eg/NewsPrint/375996.aspx>> accessed 24 December 2015

trial.⁷³⁴ The use of technology is considered a measure left to the judge's discretion in special cases, such as those involving terrorism and rape.⁷³⁵ In addition, Islamic jurisprudence lays down certain conditions for accepting such technology. It must not conflict with text of the Quran or Sunnah; it must be proven that it is not fraudulent and is supported by reliable official bodies and does not violate logic, common sense and impact.⁷³⁶

Therefore, Saudi law could benefit from a special protection system for witnesses based on English law to gain the best evidence from VIWs without violating the rules of law. *Maslaha* serves as an important source of support for applying special measures for witnesses in Saudi law. The protection measures I seek to develop follow principles similar to the special measures for witnesses in England and Wales but are based in Saudi law.

Therefore, I call for decision makers to apply this technique in Saudi criminal courts and to learn from the experience of English law how to do so. In England, the introduction of technologies saw some glitches. For example, with live links there were reports that the feed from the live links was not being switched on and off appropriately meaning that the court could still hear the witness and the witness the court at times they should not have been able to. Other times malfunctions caused a break in court proceedings. Some problems diminished through training and familiarity. Others were reduced by more thorough pre-use testing.⁷³⁷ Concerns regarding technologies now tend to focus more on security issues and the possible consequences of a court's technological systems being compromised.⁷³⁸

In the KSA these technology-based measures can be applied through the potentialities of the Ministry of Justice, which has provided courts with state-of-the-art live broadcasting equipment.⁷³⁹

734 LPSC 2000. Chapter 5 Testimony, articles 121 to 127.

735 Ibid, article 169.

736 Mohammed, 'The legality of modern evidence in proof'

737 Frances Molyneaux & Teresa Geraghty Helen McNamee, Key stakeholder evaluation of NSPCC Young Witness Service Remote Live Link (Foyle) (January 2012)

738 As reported by Clive, 'Courtrooms to be fully digital by 2016'

739 Osama, 'Start working to hear the testimony at courts through the display screens'

7.4.3 EVIDENCE IN PRIVATE

Public court hearings are an important factor in ensuring the fairness and justness of the judiciary⁷⁴⁰ by allowing the public to oversee the work of courts, monitor the judiciary and know the charges, facts in question, evidence and judgments in cases. The judge, consequently, must discharge his duty to the best of his abilities in all stages of cases.⁷⁴¹ In the KSA, the judicial regulation providing for conducting proceedings in open court is article 61 of the LPSC, which states: “Proceedings shall be in open court unless the judge on his own or at the request of an litigant closes the hearing in order to maintain order, observe public morality, or for the privacy of the family”.⁷⁴² This article stipulates three exceptions for holding hearings in secret: the interests in maintaining order, observing public morality and protecting the privacy of the family. Article 155 of the Criminal Procedure Law expresses this principle:

*“Court hearings shall be public. The court may exceptionally consider the action or any part thereof in closed hearings, or may prohibit certain classes of people from attending those hearings for security reasons, or maintenance of public morality, if it is deemed necessary for determining the truth.”*⁷⁴³

Human rights organisations have criticised the KSA for holding secret trials, involving suspected terrorists and militants, and of breaching a number of fair trial guarantees such as the right of detainees to be promptly informed of any charges, to be tried without undue delay and the right to public hearings and to legal assistance.⁷⁴⁴ In England there is a general rule to hold court proceedings in public but this rule can be

⁷⁴⁰ Mohammed, *Judicial Organization in Islamic Jurisprudence: A Comparative Study between the Schools of Islamic jurisprudence, Regulations and Laws in Syria, Saudi Arabia, and the United Arab Emirates*

⁷⁴¹ Ibid

⁷⁴² LPSC 2000, article 61.

⁷⁴³ LCP 2001, article 155.

⁷⁴⁴ C. Wilcke and Human Rights Watch, *Human Rights and Saudi Arabia's Counterterrorism Response: Religious Counseling, Indefinite Detention, and Flawed Trials* (Human Rights Watch 2009) 19.

overridden on certain grounds as established in the EHCR (Article 6)⁷⁴⁵ and stated in Ministry of Justice guidelines.⁷⁴⁶

Here, I am interested in the provisions in Saudi legal texts allowing holding trials in closed hearings to serve the public interest or protect the privacy of the family. Based on these texts, the hearing of witnesses in rape and terrorism cases in closed sessions can be applied to protect witnesses, provided that such exceptions are incorporated into Saudi criminal law.

7.4.4 VIDEO RECORDING OF EVIDENCE IN CHIEF

Saudi law prohibits using video equipment to present witness testimony as chief evidence as they accept only testimony given in court before the judge and litigants. Article 120 of CLP provided: “Testimony shall be given orally....” In discussing the live television link technique earlier, I pointed out that Saudi procedures have recently encompassed the hearing testimony of witnesses through live television links, classifying this technique as judicial deputation.

There is a public interest to video record witnesses’ testimony via video for the following reasons:

1. The judge going to the residence of the witness who cannot appear before the court and taking his testimony in writing has the following shortcomings:
 - The judge’s time for resolving cases is wasted, even when other persons act on behalf of the judge in this work.
 - The evidence collected may be incomplete is only written notes are made.
 - A judge visiting a witness at their home may raise questions as to the right of the defendant to a fair trial as the evidence is not heard in open court where it can be challenged.

⁷⁴⁵ Article 6 of ECHR states “...Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.”

⁷⁴⁶ Ministry of Justice, *Rules and Practice Directions: Part 39 - Miscellaneous Provisions Relating To Hearings’ Rule 39.2* (11 September 2013)

2. Recording the witness's testimony by video serves the interests of the judicial process and the defendant's lawyer.
 - The work of the court is expedited, especially if the judge's assistants record the video, leaving the judge to spend time on evaluating the evidence.
 - Testimony taken by video recording is accurate as it is transmitted as if the witness were present in the courtroom.
 - This work provides assurance for the accused that the evidence is genuine especially when the defence lawyer verifies this. It gives the accused confidence in the justice system.
3. Video-recorded testimony protects witnesses who are in fear or at risk of intimidation.
 - It protects witnesses and their families from being threatened or intimidated because of their testimony.
 - Given Saudi customs and traditions, which prevent women from leaving home without a guardian, video recording provides a safe way for them to have their testimony heard.
 - These procedures adopted in English law have been developed to promote and strengthen justice, support intimidated witnesses, give the accused a fair trial and bring criminals to justice.

In my view, there is no objection in Saudi law to adopting England's experience in presenting witnesses' testimony by video in the courtroom for the judge and lawyers to discuss and provide their feedback. Certainly, in England there have been issues raised with this technique, as discussed in chapter five. On the one hand, the Stern Review highlighted significant issues with video recorded evidence in rape cases, including finding that they were still giving rise to distress among victims, were expensive and were negatively affecting the smooth running of trials.⁷⁴⁷ On the other, prosecution lawyers have been reported to be harbouring opinions that video evidence has less impact on juries than testimony given in open court, though this may be based on instinct rather than empirical evidence.⁷⁴⁸

⁷⁴⁷ Baroness Vivien Stern CBE, 'A report by baroness Vivien Stern CBE of an independent review into how rape complaints are handled by public authorities in England and Wales' 121

⁷⁴⁸ These opinions came to light in Burton, Evans and Sanders, 'Are special measures for vulnerable and intimidated witnesses working? Evidence from the criminal justice agencies' but are contradicted in

There will undoubtedly be capacity and training issues involved with the use of video-recorded evidence in the KSA as there have been in England and Wales. However, I believe these can be overcome provided robust research and review processes are put in place such as the ones that have been conducted in England and Wales following the implementation of the YJCE Act 1999.

7.4.5 REMOVING THE BISHT

Saudi courts have a tradition similar to the English one in which the judge wears the *bisht* or *mashallah*, a robe worn by judges and senior public figures on official occasions. Some writers report that *bisht* is a Persian word, which was widely used in the Gulf and Iraq and replaced the classical word *aba*.⁷⁴⁹ The *bisht* is spun from camel and goat wool, takes a long time to make and is worn only by men. A *bisht* is placed on both shoulders and flows down to the feet, covering the back, right and left sides while open from the front.⁷⁵⁰

The *bisht* is often described as being worn to give solemnity to decision makers. However, in a blog, the lawyer Al Lahem criticises this dress⁷⁵¹ suggesting that these almost mystical male robes endow the wearers with an unquestionable status allowing judges to almost do everything in the KSA, even if it is conflict with principle of justice. Judges, he argues, can even deny their own selves when seeing their image in this marvelous dress.⁷⁵²

Although no studies have explored how the *bisht* affects their experiences of appearing in court, I believe that the *bisht* should not be worn in trials involving children as this is likely to raise their fear and apprehension of the overall court experience which may inhibit them giving best evidence. If the judge did not wear the *bisht* in trials in which children and intimidated witnesses are involved, these parties might feel more affinity with and confidence in the court staff and witnesses. It could also lead children and intimidated witnesses to offer the best evidence. However, this procedure would require

Louise and Vanessa, 'A 'Special' Delivery? Exploring the Impact of Screens, Live-Links and Video-Recorded Evidence on Mock Juror Deliberation in Rape Trials'

⁷⁴⁹ Bisht, Almaany Arabic dictionary, <http://www.almaany.com>. Accessed 12 July 2015.

⁷⁵⁰ Ibid

⁷⁵¹ Al Lahim Abdulrahman, 'Law of Bisit' 2011) <<http://allahim.tumblr.com/post/5360180753/قائدون-لك-هو-ال-بشت-أو-المش-ال-بشت>> accessed 17 July 2015

⁷⁵² Ibid

the court to identify vulnerable or intimidated witnesses beforehand to avoid the measure being used indiscriminately.

This argument points to the need for judges to kindly, amicably and informally handle the cases involving children or women, such as rape, murder and other violent crimes. Judges and lawyers should consider these persons' feelings while being cautious that such sympathy can lead to automatically believing them, which is a key issue.⁷⁵³ The Law of the Judiciary, issued by the Royal Decree No M/78 (1/10/2007), ensures fair trials for all juveniles.⁷⁵⁴ In decision number 145/74 (12/8/2011), the Shura Council also approved a draft child-protection law, marking a considerable gain for children's rights and a definite leap forward in how Saudi society views child protection although it falls short of the rights afforded to children in English law.⁷⁵⁵

The system established by the KSA has been subjected to some criticism that the new law has shortcomings. Writer Abdullah al-Mutairi⁷⁵⁶ from the newspaper *Al-Watan* commented that there are other reasons for children to be vulnerable to abuse that the legislature forgets about, such as discrimination on the grounds of religion or due to sectarian or national discrimination. The KSA also has different doctrines regarding discrimination against children. Does a distinction between male and female children fall within acceptable grounds of discrimination, according to the system? What if a father decided to prevent his daughter from receiving secondary education, claiming that women do not need such a level of education? Issues surrounding young marriage and other problems are well known and problematic, but I also know that these issues can be traced back to the rights of children, so those dealing with child protection needs to be clear and explicit in such cases. Perhaps implementing regulations describes the system's position on the above issues. At present, several departments are considering relevant mechanisms and procedures for enforcing this law. It is worth mentioning that approval of the Protection from Abuse Law, issued by the Royal Decree No (M/52) (15/9/2014), which includes child and women, will also contribute to establishing a

⁷⁵³ Matthew Hall, 'Children giving evidence through special measures in the criminal courts: progress and problems' (2009) 21 *Child and Family Law Quarterly* 65

⁷⁵⁴ Al Jamaan Osama, 'Minister of Justice sponsored the launch of the criminal courts' *Al Riyadh Newspaper* (Saudi Arabia <<http://www.alriyadh.com/976886>> accessed 23 July 2015

⁷⁵⁵ Saudi Shura Council, First decisions, Project of Child Protection from domestic violence, <http://www.shura.gov.sa/wps/wcm/connect/shuraarabic/internet/Councils+Resolutions/Fifth+Term/First+Year/?presentationtemplate=PT_Inner_PrintFriendly2New> accesses 25 July 2015.

⁷⁵⁶ al-Mutairi Abdullah, 'Child rights protection system' *Al-Watan newspaper* (Saudi Arabia <<http://alwatan.com.sa/Articles/Detail.aspx?ArticleId=24018>> accessed 10 March 2016

comprehensive legislative system for protecting children and women from all forms of abuse.⁷⁵⁷

These texts imply that there are shortcomings in child protection. This deficiency is also revealed by the Saudi official newspaper,⁷⁵⁸ which publicised the suffering of this segment of society, who account for a large number of court cases. For example, the lack of clear-cut personal status laws (they are not codified in the way they are in some other Muslim countries such as Kuwait) creates shortcomings in these cases, such as the slow processing of cases and delays in conducting procedures.

7.4.6 EXAMINATION OF WITNESSES THROUGH INTERMEDIARIES AND USE AIDS

Procedures for examining witnesses through intermediaries⁷⁵⁹ and use aids⁷⁶⁰ have been adopted in English law for communicating only with vulnerable witnesses.⁷⁶¹ The function of these measures is ‘actively to intervene when miscommunication may or is likely to have occurred or to be occurring’.⁷⁶² The availability of these procedures depends on whether the witness falls into one of the categories in the YJCEA.

In the Saudi legal system, testimony given as evidence in criminal prosecution must be direct testimony⁷⁶³ according to the basic principle that the witness testifies to what he knows directly by hearing or sight. In other words, the testimony results from the direct contact of the witness’ senses with the incident in question. As explained in chapter 2, Saudi law also sets conditions that witnesses have to fulfil, including excluding the testimony of children and insane people. Saudi law treats such testimony as supporting evidence to other evidence. The testimony of female witnesses is also evaluated as being worth only half that of a man. Indirect testimony, given through an intermediary

⁷⁵⁷ Bureau of Experts at the Council of Ministers, Law of Protection from Abuse, <<https://www.boe.gov.sa/ViewSystemDetails.aspx?lang=en&SystemID=309&VersionID=287>> accessed 25th July 2015.

⁷⁵⁸ Al-Omran Salwa, ‘Retreat and peaceful coexistence in Saudi society index raises concern’ Al Riyadh Newspaper (Saudi Arabia <<http://www.alriyadh.com/995597>> accessed 25 July 2015

⁷⁵⁹ YJCEA 1999, s 29.

⁷⁶⁰ Ibid, s 30.

⁷⁶¹ Ibid, s 16.

⁷⁶² R v Cox [2012] EWCA Crim 549.

⁷⁶³ LPSC 2000, article 117.

or hearing, does not serve as evidence for the prosecution in Saudi criminal law. Instead, it may be heard for seeking evidence that may be used at trial.⁷⁶⁴

Testimony, like other evidence, is subject to the discretion of the judge, who may not be questioned about his reasoning for accepting, rejecting or relying on testimony. In other words, the judge's decisions regarding the admissibility or otherwise of evidence are not grounds for appeal as they could be in England and Wales. Saudi lawmakers should address and review this issue and not leave it to the discretion of the judge as testimony is the most important evidence proving or disproving charges. If testimony is left to the judge's discretion, the judge might fail to or fall short of issuing the right judgment.

As implementation of these procedures depends entirely on the categories of witnesses identified in English law, the examination of witnesses through an intermediary and aids cannot be implemented in the Saudi courts for the following reasons:

1. To transplant this measure, there must be witnesses recognised as vulnerable, so children's testimony is excluded under Saudi law. For example, child witnesses fall into two categories in Saudi law: children who cannot distinguish at all and are regarded by jurists as completely insane and children who are under 15⁷⁶⁵ but can differentiate. Scholars take two views of these children. One, they do not accept the testimony of children because of statements in the Quran ('and get two witnesses, out of your own men, and if there are no two men, then a man and two women').⁷⁶⁶ The reasoning here is that children are not men and find it easy to lie, so no certainty can be obtained from their statements. The second view is that children's testimony can be accepted under certain conditions: their testimony relates to each other or to injuries, they should be alone, they should appear together, and they should give their testimony immediately after the incident. As Ibn al-Qayyim argued the requirement for accepting their testimony is that: they should be sane, free, male Muslims, two or more in agreement, before going in different directions, related to each other, and in killings and

⁷⁶⁴ Faraj Hussein Ahmed, *Proof evidence in Islamic Jurisprudence* (Dar al Jamah alJadeed 2004) 269.

⁷⁶⁵ Definition of the child in Saudi law is "every human having not reached eighteen years of age" Article 1 of the draft of child protection in Saudi law.

⁷⁶⁶ Holy Quran, suat al-Baqarah, verse 282.

injuries in particular. Their testimony that an adult killed a child or a child killed an adult cannot be accepted.⁷⁶⁷

2. Islamic law rejects the testimony of people with any type of mental illness, (whereas in England every effort is made to facilitate their testimony) and Saudi law aligns with this provision of Sharia. In explaining the requirements for accepting testimony, Ibn Qudama states that witnesses “should be sane. The testimony of insane people is unanimously rejected by Muslim scholars, whether their mind has gone due to madness or drinking, where no certainty is obtained from their sayings, as well as they don’t guard against lying.”⁷⁶⁸ Ibn Mofleh maintained that there are six conditions for witnesses whose testimony is acceptable: sanity, a good memory, justice, Islam, the ability to speak and having come of age.⁷⁶⁹ Therefore, no testimony may be given by (people with mental disorders) people known for committing frequent errors, omissions and forgetfulness. The reason for this prohibition is that litigant’s rights are proven based on certainty that Islamic law does not regard as achieved by statements from such persons.

Therefore, I believe that Saudi law can adopt procedures for implementing mediators and supporting tools in the future, especially as some scholars accept the testimony of children against each other. If used correctly, this procedure could achieve positive outcomes for justice.

⁷⁶⁷ Ibn Qayyim Muhammad, *Governance Roads in Islamic Politics 'siyasa shar'iyya'* (Dar Al-Alam alfouid 2007) 144.

⁷⁶⁸ Ibn Qudamah, *Al-Muqni' 'Explain the jurisprudence of Imam Ahmad ibn Hanbal'*

⁷⁶⁹ Ibn Muflih Muhammad, *Al-frou 'Explain Hanbali jurisprudence'* (Dar al Risalah 2003)

7.5 Summary

Throughout this analysis I have argued that special measures for VIWs should be transplanted from England to the KSA and I have highlighted the case for each individual measure provided for under the YJCE Act 1999. At this point I want to make it clear that for such measures to have the same level of positive impact as studies have suggested they have had in England and Wales several barriers must be dealt with.

The first key point concerns different categories of witnesses. Perhaps the most important of these is the question of the status of women and children as witnesses (and more broadly as citizens) in KSA. First, I should restate that in England and Wales three quarters of those instances where special measures for VIWs are applied are for child witnesses, and yet in the KSA children are not permitted to give testimony. Second, for the remaining quarter of cases in England where special measures are applied, three quarters of these are women, often in cases involving sexual offences, and yet in the KSA the testimony of a woman is treated as half the value of a man and in cases of rape the evidential requirement is for four eyewitnesses or a confession. We remember the defence lawyer in the Qatif rape case discussed in Chapter two who dared to suggest that the victim was not required to attend court to be confronted by those she had accused, only to have his license to practice removed. Third, the question of evidence from those suffering from a mental disorder. In England, s.16 of the YJCE Act 1999 identifies this category of witness as eligible for special measures, yet in the KSA it is highly likely that such a potential witness would be disqualified from giving evidence by virtue simply of having a mental disorder.

Hence the three most important categories of witnesses to whom special measures are being applied in England are either ineligible to be witnesses at all or have major limitations placed on the value of their testimony. Just one in sixteen of the instances of special measures applied in England would appear to be partially or fully valued witnesses in the KSA.

Would it therefore be worth the cost, time and effort involved to transfer them into the Saudi CJS? I would respond by saying that medical researchers do not try to solve all the body's problems all together and at once. They are not all engaged in a search for immortality, indeed none are, but more often than not in a modest enhancement of

outcomes and a small step on the way to tackling just one of the many diseases or afflictions that we face there. The introduction of special measures for vulnerable and intimidated witness in the KSA would only have partial application and bring partial benefits while the other anomalies are in place, however, having them available within the Saudi CJS would be an important step in the right direction.

My second reaction to the obvious deficit between the witnesses that special measures were essentially introduced for in England and Wales and the status of these groups as witnesses in the KSA is that both social change changes in law evolve in many cases very slowly over time. By way of illustration, in the comparison jurisdiction, England and Wales, after a long period of intense struggle in 1918 British women over 30 were given the right to vote.⁷⁷⁰ The following year the first women took her seat in the House of Commons.⁷⁷¹ The Representation of the People (Equal Franchise) Act 1928 equalised voting age for men and women at 21 and the following year 16 women were returned to Parliament.⁷⁷² Fifty years later, a general election was held and 19 women were returned despite being a majority of the electorate; 50 years for 3 additional seats.⁷⁷³ Women's representation in Parliament only accelerated when one British political party introduced all-women candidate shortlists in 1997.⁷⁷⁴

Turning to the KSA, there have been changes affecting women and their position in Saudi society in recent years. For some time more women than men have been attending university⁷⁷⁵ and in 2011, King Abdullah decreed that women would be enfranchised from 2015 having been previously disqualified from voting or holding elected office.⁷⁷⁶

⁷⁷⁰ Representation of the People (Equal Franchise) Act 1928 HLRO HL/PO/PU/1/1918/7&8G5c64 (6 February 1918).

⁷⁷¹ The first women to be elected was Constance Markievicz in, however, being an Irish republican she refused to take her seat in the Commons. The first woman to take her seat was Nancy Astor, in 1919.

⁷⁷² Parliamentary Archives 'The First Women MPs'

<<http://www.parliament.uk/business/publications/parliamentary-archives/archives-highlights/archives-the-suffragettes/archives-the-first-women-in-parliament-1919-1945/>> accessed 23 March 2016

⁷⁷³ Parliamentary Archives 'Women in the House of Commons'

<<http://www.parliament.uk/about/how/guides/factsheets/members-elections/m04/>> accessed 23 March 2016.

⁷⁷⁴ The British Labour Party introduced all women shortlists for candidates for the 1997 General Election. By 2015 there were 191 women MPs.

⁷⁷⁵ Pasquosoone Valentine, 'Higher Education: the Path to Progress for Saudi Women' (*World Policy* 18 October 2011) <<http://www.worldpolicy.org/blog/2011/10/18/higher-education-path-progress-saudi-women>> accessed 3 March 2016

⁷⁷⁶ Ibid

The lessons of this are two-fold: firstly, social and legal change can be slow and occur in unanticipated ways;⁷⁷⁷ and secondly social and legal change can occur in both a Western and Islamic context despite the widely held perception that the KSA is a static unchanging society rooted in the distant past. Therefore, I conclude it would be wrong to dismiss research into areas of Saudi law that could bring real benefits. I also argue that the transfer of special measures from England and Wales to the KSA is precisely one of these areas.

⁷⁷⁷ I am referring to the fact that one might have expected that the new UK statutes to enfranchise women making them a majority of the electorate would have led to women being well represented in parliament when, in fact, it was non-legal action that achieved this.

CHAPTER 8

THE KSA, SPECIAL MEASURES AND HUMAN RIGHTS

8.1 Introduction

In this chapter, I address the human rights critique of the KSA, its laws and its CJS. I explore to what extent there have been steps undertaken to improve these rights, in particular the right to a fair trial. I also examine whether the reforms discussed in chapter 3 are a significant sign of progress in this regard. I provide an overview of human rights developments in the KSA. To commence, I examine the KSA's performance in terms of the main Declarations and Covenants that underpin human rights internationally. This is followed by discussion of what guarantees there are for the accused in Saudi law

8.2 Human Rights and the CJS of KSA

While there are some positive signs that KSA is improving fair trial rights for defendants, these are not matched in improvements in the way Saudi law treats victims and witnesses in the way that other countries such as England and Wales have moved forward in recent decades. Indeed, most Saudi focus has been on seeking to improve and demonstrate that the right to a fair trial for defendants is established in the Kingdom. The KSA has not adopted the standards in the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985)⁷⁷⁸ and does not adhere to the non-binding Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime (2005)⁷⁷⁹ or the internationally recognised norms set out in Justice in Matters involving Child Victims and Witnesses of Crime.⁷⁸⁰ In essence what I am arguing here is that to the extent that the KSA is improving its criminal law procedures, partially perhaps in response to international pressures then the protection of witnesses has received low priority so far. This thesis can therefore be seen as a timely and important reminder of the centrality of witnesses in the CJS.

The KSA was one of the fifty countries participating in the formulation of the Charter of the UN in 1945 and since then has become a recognised and active member of the international community.⁷⁸¹ However, in 1948 the kingdom abstained from the vote on

⁷⁷⁸ The UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (29 November, 1985 - A/RES/40/34)

⁷⁷⁹ Guidelines for Action on Children in the Criminal Justice System ECOSOC Resolution 2005/20

⁷⁸⁰ United Nations Office On Drugs and Crime (UNODC) 'Justice in Matters involving Child Victims and Witnesses of Crime: Model Law and Related Commentary' <https://www.unodc.org/documents/justice-and-prison-reform/Justice_in_matters...pdf> accessed 14th February 2016

⁷⁸¹ Salman, 'The right to a fair trial under Saudi Law of Criminal Procedure: a human rights critique

the Universal Declaration on Human Rights over two articles: the first, article 16 which guarantees equal marriage rights; and the second, article 18, which states that everyone has the right "to change his religion or belief".⁷⁸² Notwithstanding these two issues, the question here is whether presently the KSA upholds the right to a fair trial as set out in the Declaration and the Covenant (which the KSA has also not signed).⁷⁸³

While the KSA has not signed 'the Declaration' or 'the Covenant' it has ratified a number of regional and international agreements in the domain of human rights. In chronological order these are:

- i) The Convention on the Prevention and Punishment of the Crime of Genocide 1948, which KSA ratified in 1950⁷⁸⁴
- ii) The International Convention on the Elimination of All Forms of Racial Discrimination 1997⁷⁸⁵
- iii) The Convention against Torture and Other Cruel, Degrading or Inhuman Treatment or Punishment, ratified in 1997⁷⁸⁶
- iv) The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) ratified by the KSA in 2000.

These demonstrate an arguably substantial change with regards to human rights, particularly in the arena of women's rights within the country.⁷⁸⁷ Hence of the seven major UN human rights conventions the KSA has acceded to four.⁷⁸⁸ In addition to these UN conventions the KSA has also signed the Arab Charter on Human Rights (ACHR), which was sanctioned in 2004.⁷⁸⁹ It established the National Society for Human Rights (NSHR) in 2004.⁷⁹⁰ (G) The Saudi Human Rights Commission (HRC) was established

⁷⁸² Ibid

⁷⁸³ Ibid

⁷⁸⁴ 78 UNTS 277, entered into force 12 January 1951

⁷⁸⁵ UN Doc A/6014 (1966)

⁷⁸⁶ UN Doc A/44/49 (1989)

⁷⁸⁷ UN Doc A/34/46.

⁷⁸⁸ Saudi Arabia made reservations on certain provisions of the four conventions it ratified including general reservations on provisions that contradict Islamic Law "Sharia".

⁷⁸⁹ Rishmawi Mervat, 'The revised Arab Charter on Human Rights: a step forward?' (2005) 5 Human Rights Law Review 361

⁷⁹⁰ The Constitution of the National Society for Human Rights (NSHR). See the English version <http://nshr.org.sa/en/?page_id=130> accessed 3 March 2015.

in September 2005.⁷⁹¹ A case could be made that the KSA has become increasingly involved in the global human rights movement and raised the status of human rights issues in the KSA.

Nevertheless, for international human rights organisations such as Amnesty International and Human Rights Watch there are still regular expressions of concern across a range of human rights issues. The former summarised its concerns of the Saudi CJS as follows:

*“the KSA’s Sharia law-based justice system lacks a criminal code, leaving definitions of crimes and punishments vague and widely open to interpretation. The system also gives judges power to use their discretion in sentencing, leading to vast discrepancies and in some cases arbitrary rulings. For certain crimes punishable under tai’zir (discretionary punishments) suspicion alone is enough for a judge to invoke the death penalty based on the severity of the crime or character of the offender. The justice system also lacks the most basic precautions to ensure the right to a fair trial.”*⁷⁹²

Whatever may be said of progress the KSA lies far behind those countries who have implemented human rights legislation, including England and Wales where the Human Rights Act 1998 requires English courts to take into account the jurisprudence of the ECHR when determining a question which has arisen in connection with a right under the European Convention on Human Rights.⁷⁹³

In recent years the KSA has passed a series of legislative instruments aimed at underpinning a fair and balanced justice system. These include: The LPSC 2001,⁷⁹⁴ which provides for the legal right of defendants to have legal representation as well as putting in place the processes involving pleas, presenting of evidence and the role of

⁷⁹¹Council of Ministers Resolution No 207, 2005. See the full text of the English version in the Bureau of Experts at the Council of Ministers <<http://www.boe.gov.sa/Default.aspx?lang=en>> accessed 3 March 2015

⁷⁹²Amnesty International (2015) Report: Rampant Executions in Saudi Arabia Fuelled by Justice System 'Riddled with Holes' <<http://www.amnestyusa.org/research/reports/amnesty-international-report-rampant-executions-in-saudi-arabia-fuelled-by-justice-system-riddled-wi?page=show>> accessed 14th February 2016

⁷⁹³ Human Rights Act 1998

⁷⁹⁴ Law of Procedure before Sharia Courts. Royal Decree No. M/21, 20 Jumada I, 1421 [19 August 2000]

experts in the court. Second, The Code of Law Practice of January 2002⁷⁹⁵, which states the requirements necessary to act as a lawyer, defining the rights and duties of these lawyers, which includes the right of attorney–client privilege. Third, The LCP 2001⁷⁹⁶ protects a defendant’s rights in the areas of investigation, interrogation, and incarceration. It outlines a set of regulations that law enforcement and justice authorities must adhere to at each stage of the legal process, from arrest and interrogation to trial and sentencing; the Act outlaws the use of torture and protects the right of suspects to obtain legal counsel; it also limits the period of detention before charge.

Notwithstanding these positive developments in the area of legal and judicial reforms, the human rights community continues to maintain that this progress “remains seriously undermined by a lack of unequivocal legal safeguards, weak adherence to international human rights obligations and a criminal justice process which fails to meet basic standards of fairness and defendants’ rights”.⁷⁹⁷ There are also observations from the same community that “The judiciary, which must coordinate its decisions with the executive branch, is not independent.”⁷⁹⁸ This criticism brings into question whether special measures to protect VIWs can be transferred into Saudi law when such fundamental, and in my opinion, justified questions are being asked about Saudi justice system such as the independence of the judiciary, respect for human rights and the treatment of women, children and non-Muslims under the law. With regards to special measures, the fact that only one in six special measures directions in England and Wales have been made for adult males is a telling statistic.⁷⁹⁹ Women and children, the main groups of witnesses that are eligible for special measures in England and Wales, have no or limited participation as witnesses in the KSA. But does this telling point mean that discussion of the transfer of special measures is fruitless, inevitably leading us to the conclusion that special measures just cannot be transplanted in any way to KSA?

To this I would respond that such special measures need to form part of a range of reforms. A full analysis of all reforms that are needed is, of course, not practicable within this thesis. However, as discussed in this chapter, there are some indications of

⁷⁹⁵ The Code of Law Practice [2001] Royal Decree No.(M/38), 28 Rajab 1422 [15 October 2001]

⁷⁹⁶ Law of Criminal Procedure. Royal Decree No. (M/39). 28 Rajab 1422 – [16 October 2001]

⁷⁹⁷ Saudi Arabia: Amnesty International Submission to the UN Universal Periodic Review: Fourth session of the UPR Working Group of the Human Rights Council, February 2009.

⁷⁹⁸ Freedom House. Saudi Arabia: Freedom in the World 2014 <<https://freedomhouse.org/report/freedom-world/2014/saudi-arabia#.VRnm71Wqqko>> accessed 7th March 2015

⁷⁹⁹ Cooper and Roberts, *Special Measures for Vulnerable and Intimidated Witnesses: An Analysis of Crown Prosecution Service Monitoring Data*

changing attitudes towards, for example, women witnesses and child witnesses, to show that there is some doctrinal room for manoeuvre on these issues. The utility of special measures would only be marginal if seen in isolation from an overall reform of Saudi justice. My focus on special measures should not be taken as any denial or deprioritising of the other issues raised but in a doctoral thesis such as this it is important to delimit consideration to the research problem at hand.

8.3 The guarantees for the accused in Saudi law

The accused is entitled to many guarantees established in Saudi law during the three stages of hearing testimony. The accused is entitled to the right of attendance at the trial, including all procedures of examination. The investigator may not hear witnesses in the absence of the defendant unless circumstances require it. These circumstances include where it is believed that the defendant may seek to influence the witness such as through intimidation and may also arise where it is feared that the presence of the defendant may result in the witness not attending court to give evidence.⁸⁰⁰ The accused's right to be heard in the examination phase includes the right to respond to testimony by asking questions transmitted to the witness by the judge to explain points and parts of the evidence.⁸⁰¹ One important question at this point is whether the introduction of special measures would in any way restrict what questions the defendant can put to witnesses through the judge, particularly about questions concerning the complainant's sexual behaviour in sexual offence cases.

The procedural CJS as governed by the LCP gives the accused the inquisitorial right to demand that the investigator disclose and explain other matters of testimony. Defendant may transmit questions to the witness if the investigator agrees. The investigator may refuse to transmit irrelevant or insulting questions.⁸⁰² Article 99 of LCP lays out this principle: 'Following the hearing of the witness, the litigants may comment on his testimony and may ask the Investigator to hear the witness on any other point they raise. The Investigator may refuse to direct irrelevant or defamatory questions'⁸⁰³

This article stipulates that litigants may make comments only after the witness has completed his testimony without interruption. Then, the litigants and advocates

⁸⁰⁰ Mohammed Awad, *General principles of criminal law procedure* (Dar Elgamaa Elgadida 1999) 431

⁸⁰¹ Almrswawi Hsan, *Origins of criminal procedures* (Monshaat Al Maaref 2000) 429

⁸⁰² Saroor Fathi, *Mediator in the Criminal Procedure Law* (Dar Al Nahda 1981) 382

⁸⁰³ LCP 2001

commence their discussion, which the investigator considers. The litigants have the right to ask the investigator to record his refusal of statements in writing for the judge's review.⁸⁰⁴

The two most important pieces of legislation in the KSA regarding Human Rights and specifically the right to a fair trial are the BLG⁸⁰⁵ and the LCP.⁸⁰⁶ The BLG states in article 28 the key principle of human rights in the KSA "The State shall protect human rights in accordance with the Sharia".⁸⁰⁷ In article 38 further principles of judicial fairness are stated: "No-one shall be punished for another's crimes. No conviction or penalty shall be inflicted without reference to the Sharia or the provisions of the Law. Punishment shall not be imposed ex post facto".

A further movement regarding the right to a fair trial came in 2001 when the LCP was introduced. The LCP has put in place rules for the arrest and investigation of suspects in addition to a fair trial process, and provisions safeguarding the accused's right at the pre-trial stage. Thus, Article 2 declares 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".⁸⁰⁸ Article 3 states "No penal punishment shall be imposed on any person except in connection with a forbidden and punishable act, whether under Sharia principles or under the statutory laws, and after he has been convicted pursuant to a final judgment rendered after a trial conducted in accordance with Sharia principles".⁸⁰⁹ Article 4 includes the provision that "Any accused person shall have the right to seek the assistance of a lawyer or a representative to defend him during the investigation and trial stages. 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."⁸¹⁰ Article 64 states: "During the investigation, the accused shall have the right to seek the assistance of a representative or an attorney..."⁸¹¹

⁸⁰⁴ Al hejailan Salah, *General View of the System of Saudi Criminal Procedural Law and Its Role in Protecting Human Rights* (2007) 254

⁸⁰⁵ BLG 1992

⁸⁰⁶ LCP 2001

⁸⁰⁷ BLG 1992, Articles 26, 38.

⁸⁰⁸ LCP 2001

⁸⁰⁹ Ibid

⁸¹⁰ Ibid

⁸¹¹ Ibid

We can observe that subsequent to its participation within the UN, the KSA has made significant efforts to improve the status of its human rights with regard to the right to a fair trial. These moves have been highly visible over the last two decades and include establishment of two national human rights bodies the NSHR and the HRC and the enactment of the LCP which was intended to establish implementation of the fair trial rights after its provision in the BLG.

There are, however, counter arguments to the argument that KSA has made significant improvements to protecting human rights. Much of this questioning of the KSA's progress point to specific cases of human rights abuses. For example, the Al-Adala Center for Human Rights published a report which refers to human rights violations taking place systematically in the KSA. The report highlights specific incidents where human rights campaigners have been mistreated concluding, "Engaging in human rights activities in the KSA is a dangerous endeavour and human rights defenders are always subjected to arbitrary arrest, harassment and travel bans."⁸¹²

International human rights watchdog Freedom House produces annual evaluations of the level of freedom in each country. The KSA is ascribed the lowest possible overall rating.⁸¹³ They reported suppression of reform activism, sectarianism, the criminalisation of political dissent, the persecution of women, and widespread corruption. Specifically, instances of unfair judicial process including imprisonment are described.⁸¹⁴

The highest profile human rights case of the last few years is that of Raif Badawi, a blogger who was sentenced to 1000 lashes and ten years in prison for charges related to his setting up of a website called 'Saudi Arabian Liberals'. Human rights organisation Amnesty International described flogging as "a barbaric medieval 'punishment' that constitutes torture" and referred to Badawi as "a prisoner of conscience" and someone who "championed free speech".⁸¹⁵

There has undoubtedly been a significant rise in the profile of human rights in the KSA and the right to a free trial specifically. While the steps towards this on the global stage

⁸¹² Al-Adala Center for Human Rights, 'Freedom in Shackles' May 2012) <<http://www.adalacenter.net/index.php?act=artc&id=666>> accessed 12 March 2015

⁸¹³ Freedom House, 'Saudi Arabia: Freedom in the World'

⁸¹⁴ Ibid

⁸¹⁵ Amnesty International 'Saudi Arabia, Free Raif Badawi' <<https://www.amnesty.org.uk/actions/saudi-arabia-free-raif-badawi-flogged-blogger>> accessed 15th March 2015.

have been highly visible, so to, in the eyes of many, have been cases which suggest there is still some distance to travel before it can be generally recognised that the KSA has established *and* implemented the right to a free trial to international standards as intended under the Declaration and the Covenant.

8.4 Summary

In this chapter I have examined the issue of human rights in the KSA and the country's performance in regard to the main global Covenants and Declarations. The voices criticising the KSA's record are many and are getting louder so it is important to consider this in the context of the current thesis because the value of special measures for the protection of VIWs could be lost among these concerns. The chapter has also considered what protections are available in the KSA for defendants in criminal cases.

The human rights environment in the KSA is undoubtedly challenging particularly with regard to the rights of women and children but I would repeat my argument that this should not preclude steps toward a strengthening of the criminal justice system in that jurisdiction. As has been demonstrated in England, by raising the priority given to the way witnesses and particularly VIWs experience the CJS and by introducing special measures for these VIWs substantial benefits in terms of evidence and justice as a whole can be derived. This is an opportunity that should not be missed.

The final chapter in this thesis summarises this study, and its main findings and makes recommendations for further research.

CHAPTER 9
SUMMARY AND CONCLUSION

This thesis has applied a comparative doctrinal analysis to the transfer of special measures for VIWs from England and Wales to the KSA. I set out on the journey that was this thesis, in order to offer an original comparative study between English law and the KSA law in the field of measures to protect VIWs. I also wanted to offer an original critical study of the use of the principle of *maslaha* in the KSA law. Furthermore, I have devised a framework of criteria to evaluate the appropriateness of the transfer of special measures which could be used elsewhere where the transfer of laws is considered. The comparative doctrinal analysis I have performed on the role of witnesses in the two contrasting legal systems of England and Wales and the KSA is aimed at helping all those involved in the criminal justice agencies of the Kingdom, particularly those who inform policy and practice, of the experience of England and Wales in regard to special measures for VIWs. The thesis was divided into six chapters.

The **first chapter** provided an introduction to the issue in the form of a literature review. It also set out the problem being studied, as well as the purpose, aim and objectives of the thesis. The comparative doctrinal analysis methodology was also briefly introduced. Here I also explained to readers what could be expected in terms of the structure of the thesis.

Chapter two demonstrated the importance of witnesses' testimony in Islam which underlined the need for protecting VIWs in the Saudi CJS. It comprised a doctrinal analysis that drew on primary legislation, case law and commentary from academics and practitioners. The chapter stated the problem of why it is important to protect VIWs, this problem being that the quality of Saudi justice is being undermined by the absence of protection for VIWs. I also considered a major issue amplifies this problem: the lack of status in law of women and child witnesses.

In **chapter three** I examined the position of witnesses in the CJS of the KSA. I presented an overview of the KSA legal system as it relates to criminal law. It included an overview of the sources of Saudi law, the basic principles of Sharia and the four Sunnah schools which are acknowledged by Muslims to be the legitimate interpretations of the Divine texts. After this I turned to the essential elements of crime and punishment including the three types of crimes and the punishments they attract. Following this I outlined the structure of Saudi courts and discussed the recent reforms.

In **chapter four** I analysed some of the main points of contrast between CJSs of England and KSA. The aim was to describe and discuss the points at which the two

legal systems differ in order to carry this forward to the further evaluation of the viability of the transfer of special measures for VIWs as operated in England and Wales to the KSA, with the key question being, Do any of these contrasts rule out, inhibit or facilitate such a transfer?

Chapter five again utilised a doctrinal analysis approach, this time to examine special measures for witnesses to provide a clear picture of their current use in England and Wales as well as describing the most relevant provisions of the key piece of legislation, the YJCEA 1999. The advantages and disadvantages of the measures in the YJCEA 1999 were discussed. I completed the chapter with consideration of the rights of the defendant and whether these rights could be infringed through the use of special measures.

In **chapter six** I introduce the key concept of *maslaha*. This concept was the primary means I used to evaluate and justify the transfer of special measures for the protection of VIWs from England to the KSA. The three categories of *maslaha* were explained and then there was a discussion considering the status of the principle of *maslaha* (public interest) as a means to justify and facilitate the aforementioned legal transfer.

Chapter seven continued the arguments based on *maslaha* to consider individual special measures including screens, live television links, evidence in private, video recording of evidence in chief and removing the *Bisht*. I then reflected again on the question of whether because women and children have significantly reduced roles as witnesses compared to men special measures are inappropriate in the KSA. I rejected this argument although I recognised that the use of special measures would not be optimal unless the KSA sought to amend its stance on women's and children's testimony. Overall I conclude that special measures for VIWs would be beneficial to the Saudi criminal justice system.

In **chapter eight** I turned to the much discussed question of human rights in the KSA and particularly the right to a fair trial. I examined the country's performance in regard to the main global Covenants and Declarations. While I accepted that the human rights environment in the KSA was challenging, particularly regarding the rights of women and children, I do not believe that this should preclude steps toward strengthening the criminal justice system in that jurisdiction and that the introduction of special measures is one way to do this.

9.1 Main Findings

My examination of the experience in England and Wales regarding the relatively recent implementation of special measures for VIWs revealed that this introduction has proven to be in the interests of justice, that the objections raised in some quarters that the rights of defendants may be undermined have not been adequately demonstrated or sustained in law. Where weaknesses in the implementation were found, these have tended to be practice/ training related such as communication between criminal justice agencies and consistency in the way special measures are applied for. Witnesses themselves seemed to have mainly responded positively to special measures in England and Wales. I believe that special measures encourage VIWs to testify when they would otherwise not do so. Furthermore, I believe they increase the effectiveness of these witnesses and enhance the quality of their evidence by reducing the level of trauma and stress involved in giving evidence. This would also be the case if they were transferred to the KSA.

The main finding of this thesis is that there is a sound scholarly basis for the transfer of special measures for the protection of VIWs from England and Wales to the KSA. Firstly, the ‘public interest’ test was applied and then a set of five further criteria were used to evaluate the robustness of the case for transfer. In each case I found that those tests could be passed. I found that special measures would be in the public interest, that such measures would be consistent with Islamic law and not in conflict with Sharia law, that such a transfer could take place with appropriate consideration of the KSA’s social reality and social norms, that the new witness procedures be properly incorporated into the KSA criminal law, that this transfer would not challenge the maintenance of the heritage of Islamic law, and that finally the concept of legal pluralism is consistent with the KSA law.

The rights of the accused are a much discussed matter in the context of the KSA. Human rights commentators have pointed to many concerns related to the right to a fair trial. There has been some movement toward reforms in recent years though much still needs to be done. However, I would argue that the conclusion reached in law in England that special measures for the protection of VIWs does not undermine the rights of the defendant would hold true in the KSA too.

Finally, I turn to a significant reservation that I would have been remiss to have overlooked in this thesis – the question of women and children as witnesses in the KSA legal system and the fact that in England and Wales the vast majority of special measures directions are made for these two groups of witnesses. Throughout the thesis I have highlighted this major difference between the two legal systems in this regard and have relevant it is to the use of special measures. However, notwithstanding the restricted role of women and children as witnesses in the KSA I still feel that witnesses as a whole including these two groups would benefit from the transfer of special measures.

9.2 Recommendations for further research

Legal researchers in the UK have understood the importance of research with real juries in terms of how special measures and such research is currently underway. They have also explored and evaluated the post-implementation period in England and Wales in terms of how special measures have been received by both witnesses and criminal justice agencies. The situation in the KSA regarding empirical research and the availability of official data on the CJS contrasts greatly with the UK. Basically, there is very little, something which makes recommendations for further research somewhat problematic. Having said that, empirical research on the existing issues that special measures would seek to address such as the number of witnesses experiencing intimidation, or the number who feel they were prevented from giving best evidence for one or another reason would be highly desirable as part of any official review of the transfer of special measures. England and Wales have provided a useful model of the role of research in policy making and policy monitoring and I would recommend that such research be undertaken more frequently in the KSA.

Turning to jurists and policy makers I would urge that this thesis be used as the basis for further consideration of how the CJS in the KSA can be improved by prioritising the goal of achieving best evidence in every case and how by giving greater attention to the experiences of witnesses more witnesses are likely to come forward and be more likely to be able to give best evidence. Beyond this, and inevitably more controversially, I would call on policy makers to reflect on whether, in the public interest, more could be done to secure the evidence of women, children, and those members of society with

mental disorders or other impairments of intelligence or social functioning, particularly as these are the very groups which have been seen to benefit from special measures in England and Wales.

TABLE OF LEGISLATION

Basic Law of Governance 1992 (KSA)

Children and Young Persons Act 1933

Child Protection from Abuse and Neglect 2014 (KSA)

Code of Law Practice 2001 (KSA)

Contempt of Court Act 1981

Coroners and Justice Act 2009

Courts and Legal Services Act 1990

Criminal Justice Act 1967

Criminal Justice Act 1991

Criminal Justice Act 2003

Criminal Justice and Public Order Act 1994

Criminal Justice and Public Order Act 1994

Juries Act 1974

Law of Criminal Procedure 2001 (KSA)

Law of Procedure before Sharia Courts 2000 (KSA)

Law of Protection from Abuse 2013 (KSA)

Law of the Judiciary 1975 (KSA)

Law of the Judiciary 2007 (KSA)

Mental Health Act 1983

Police and Criminal Evidence Act 1984

Sexual Offences Act 2003

Youth Justice and Criminal Evidence Act 1999

GLOSSARY

- Adl (good character) means a trusted and respectable individual examination in which the judge evaluates if the witness is well-known enough to be abide to the Islamic religion, denying even minor sins; and known to never have partaken in serious sins such as committing drinking alcohol or undertaking any act that punishable by God in the hereafter.
- Afw (forgiveness) means to waiver of punishment and amnesty either from the victim or his family.
- Baghy: Means specifically a robbery on the highway or the circulation of terror, while the term itself is normally applied by Muslim legal scholars to refer to an act of rebellion or political resistance.
- Bisht, mashallah, abaya (robe) is a customary Arabic man's cloak common among men in the KSA and certain other Arab states. Basically, the robe is an outer garment composed of wool, worn on top of normal Arabic dress. The bisht is normally exclusively adorned on particular events including weddings or important festivals. The bisht is commonly put on by kings and judges in the KSA too.
- Caliphate means "government under a caliph". The latter is the frontman of a whole Muslim community who attests to have assumed power from Prophet Muhammad. The term comes from the Arabic word khalifa (successor).
- Companion's opinion the view of the Prophet Muhammad (Sahaba) is actually an Arabic term for companions. The latter are persons who existed within this relevant era, and saw or listened to the Prophet talk, for however long. Their views were clearly the most dependable in terms of the religious requirements, the Sunnah and the Prophet and the method of ascertaining the Islamic lessons.
- Council of fatwa (The Council of Senior Scholars) means the highest religious group which gives advice to the king or individuals on religious issues. The council is chosen by the king which contain up of 21 members.

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- Council of Shura (parliaments) refer to the chief executive (the King or leader of Muslims) should gather the opinions of the scholars, experts and wise people of the state when operating the duties of a Muslim nation.
 - Diya (blood money) is found in a situation in which the victim of a criminal act has passed away, and the offender is given the chance to pay the victim's family a sum of money deemed sufficient to compensate them.
 - Emam means the legal ruler of a particular Islamic nation.
 - Faqih or its plural 'Fuqaha' means legal students of Islamic law.
 - Fatwa is an Islamic religious ruling, a scholarly opinion on a matter of Islamic law.
 - Fiqh (deep understanding or full comprehension) of Islamic jurisprudence. *Fiqh* refers to a growth of the Sharia Islamic law founded clearly upon the Quran and Sunnah which blends with Sharia by evolving rulings of Islamic legal experts. Effectively, it means the composition of Islamic law taken from deep understanding of Islamic sources. The steps taken toward obtaining understanding of Islam via jurisprudence, and the basis of legal assistance established from an in-depth knowledge.
 - Hadith: In the Islamic faith, hadith refers to particular recordings of the Prophet Muhammad's words and actions and other important figures in the religion's initial stages. The hadith writings are an excellent example of Arabic writings from the very first stage of Islam.
 - Hirabah (brigandage) is efforts made to attack people by using weapons to seizing the property or land, often takes many victims soul.
 - Hudood (most serious or limitation) means a criminal act with an obligatory penalty according to the Quran or Sunnah.
 - Ijtihad (independent reasoning) is the implementation of a person's intellectual skills in the search for a legal opinion/solution according to the person's mental capacity. It deals with the steps taken to the process of deriving rules matters not directly mentioned in the Quran and Sunnah.

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- Illah (motive or cause) is a legal reason. The Illah of a particular matter is compared to a new issue, and they have the same legal cause, then Qiyas can be implemented. For instance, the Prophet stated: “The judge should not pass judgment in a state of anger” [Abu Dawud, Sunan, III, 1018, Hadith no 3582]. In this case the implied Illah for failing to judge is anger as this will impact upon the ruling, therefore, the connection between the characteristics of anger and the ruling is disruption to objective thinking. Because of the presence of a real connection it is possible to draw an analogy between anger and other new attributes which have similar link and bring out a new Illah via Qiyas. For instance, hunger is connected to anger as it shares the same outcome in that both will impinge rationality. Therefore, hunger is a new Illah derived via analogy. The companions have increased the scope of the ruling of this hadith to all that appears to be resembles anger in its effect such as extreme hunger and depression.
 - Istihsan is an Arabic Islamic word which means juristic choice. It steers decisions in instances where there exists a number of possible eventualities. Jurists are therefore enabled to dismiss a firm precedent for a lesser one in the pursuit of justice. The altered version applied by today’s reformers as a basis for altering Islamic law.
 - Istishab is an Arabic Islamic term referring to the presumption of continuity, were a situation existing previously is presumed to be continuing at present until the contrary is proven. A common example here is where someone is where a person is presumed to be free from liability until the contrary is proven.
 - Kabair (major sins) mean things that are not permitted by God and the Prophet Muhammad in the Quran and the Sunnah.
 - Khalwa is where a man is with an unrelated woman in a tight space in such a situation where no others could see them or be in the same place.
 - Madhhab is refer to a mujtahid (Islamic scholars) who choice in regard to a number of interpretive possibilities in deriving the rule of God from the primary texts of the Qur'an and Sunnah on a particular question.

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- Mukallaf is a word which refers to a person who has become a moral and physical adult and is essentially in reference to the emergence of puberty or reaching the age of 15.
 - Muzaki means someone who visit people who can give an information about the trustworthiness of a witness.
 - Qadhf (Slander, defamation, or accusation): Means to allege that a person has done something without proof. Specifically, accusing a woman or man of committing adultery.
 - Qatif is a city in eastern province the KSA which the most resident in this city from the Shia sect.
 - Qisas (retaliation or revenge) means an instance of murder, or physical harm which allows the victim's and closest family member to, if granted court permission, take the life of offender or recoup the Diah (blood money).
 - Qiyas: Applying to a new case, where the laws are quiet and the ruling of the first case due to the effective cause, found in each case. The Qiyas represents the expansion of a regulation to cover fresh issues via analogy founded upon a common 'Illah. Therefore, the hukm of the initial issues is passed on to a new issue when the new matter is of similar type. Therefore, Qiyas is always built on the following four pillars: i. Asl (old matter), ii. fari' (new matter), iii. Hukm (rule), iv. 'Illah (effective reason).
 - Quran: The Arabic speech of Allah that was revealed to the Prophet Muhammad both in word and in meaning by the angel Gabriel. It is contained inside the mushaaf, and was told in mutawaatir chains, and presents a mission for people. It comprises 114 parts of different substance, referred to as suras. The suras refer to every element of human life, including matters of doctrine, social organization, and legislation.
 - Riba is literally to increase or grow but is normally considered to mean usury. Though this is normally perceived in English as the insistence upon excessive fees, the term 'riba' in Arabic refers to a broader scope of commercial activity.
 - Ridda (Apostasy) is refer to the act of a Muslim who refusal the Islamic religion and becoming a non-believer.

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- Sariqah (theft) is refer to steal something valuable to a person or nation out of.
 - Sharia: The literal meaning of Sharia is “the way to water”. It is an expansive word for Islamic legal rules, and reflects the path to God and goodness. According to the lessons from the Quran and Sunna Sharia can refer to following religious and everyday tasks and occasionally enforcing punishment for lawbreaking.
 - Shia: A word in Arabic meaning a person part of the second biggest religious body in Islam, according to the understanding that Ali, from the family of Muhammad, and the teachers who came after Ali were the true religious leaders. And they rejected the Sunni sources.
 - Shrub al-khamr Consumption of any intoxicating substance which can be subject to a penalty of 80 lashes under Islamic law.
 - Shubha (doubt) is an Islamic word meaning the responsibility of the leaders judges to seek the doubt (shubha) before implementing any verdict in case of a crime of any degree, accordingly the Prophet Muhammad commanded to avoid implementing a serious punishment in case of uncertainty, his famous saying in this regard is : 'seek doubts to avoid punishment.'
 - Siyasa shar'iyya: Islamic legal rules as stated in legal rulings or national strategy. In addition, siyasa is the main resource for the king on which he relies to prevent violence, defend chastity, prevent evil, subjugate evildoers and forestall crimes which lead to sedition and disturbance"
 - Sunnah: A word in the Arabic language which essentially means what has been instructed by the Prophet Muhammad. The Sunnah directs Muslims on what they should do in both word and deed.
 - Sunni: A person belonging to the biggest Islamic religious faction that adheres to the lessons exclusively of Mohammed (Sunnah), but not any teachings of the religious leaders who came after him.
 - Ta'zir (disciplinary sanctions): Means a penalty for a criminal act not equating to the stringent needs of *hudood* punishments, but they are of similar type, or those where particular penalties have not been outlined in the Quran. Penalties include

death for spying to flagellation, jail, banishment, and a selection of financial punishments. Determination of punishment is left to the judge.

- Ulama means scholars who have learned Islamic religious teachings.
- Urf (custom) is an Arabic Islamic word meaning the tradition or knowledge, of a given society. If one is to attain recognition in an Islamic community, urf should be compatible with Sharia law. Urf is from where laws emerge in the absence of foundational writings of the Quran and Sunnah.
- Usul al-Fiqh is an Arabic Islamic word meaning the body of basic elements and examining methodologies that enable laws to emerge from the original basic sources. (Primary and secondary sources in Islamic law).
- Zina (adultery or fornication): Means having sex wilfully between a man and woman who are unmarried.

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