

# How Does Kinship Affect Criminal Cases In Saudi Criminal Law And Islamic Law?

**Dr. Mohammed Sulaiman Alnasyan**

*Department of Islamic Studies, College of Science and Humanities, Majmaah University, Al- Majmaah 11952, Saudi Arabia* [m.alnasyan@mu.edu.sa](mailto:m.alnasyan@mu.edu.sa)

## Abstract

Kinship is a permanent relationship that is likely to impact the regulations adopted by the legislator to deal with crimes involving close relatives. Accordingly, the title “How Does Kinship affect Criminal Cases in the Saudi Criminal Law and Islamic Law?” highlights the legal provisions related to kinship, such as considering and proving a public criminal case. Furthermore, this paper will mention how the legislator aims to protect such relations.

**Keywords:** Kinship, Criminal Cases, Criminal Law, Saudi Law.

## 1. Introduction

Islamic Law has a distinctive approach with respect to criminal legislation aiming to protect people’s interests and society. Furthermore, kinship is a basic requirement for building society, as kinship is based on human values. Because of that, the Saudi legislator is influenced by such relations upon adopting the various criminal regulations, taking into account family relations and connections. Some crimes might be of a certain social dimension, which is highly sensitive, given the relationship between the parties thereof. That means crimes may involve perpetrators who have a kinship with the victim. Because of that, the Saudi legislator is compelled to adopt certain legal rules which take kinship into account. Also, the Saudi legislator has to provide full protection for public interests in the society, which is the subject of criminal protection. Given the significance of this matter, this study focuses on the impact of kinship in criminal cases under Saudi Criminal Law, and concerning the viewpoint of Islamic Law in this regard.

## 2. The Importance of the Study

1. Now, it is urgently needed to study real issues directly impacting the person’s relationship with his kins, and more particularly

concerning its impact on criminal regulations in Saudi Arabia.

2. It is important to study this matter in the light of law and Islamic Law.

3. There are only a few studies, especially with regard to the Saudi Criminal Regulations.

4. To facilitate reviewing the provisions related to kinship, within the field of criminal procedures, by specialized persons such as judges, lawyers, and researchers.

5. To invite the Saudi legislator to make certain amendments to the relevant criminal regulations, to keep up with the similar regulations which adopt advanced approaches in this regard.

6. Crimes occurring between kins are among the issues which are frequently asked about.

## 3. The Study Problem

The study problem emanates from the fact that there are now so many crimes involving kins, including murder, intimidation, kidnapping, and blackmailing; therefore, it is urgently needed to study the problems arising from the same. However, as long as the kinship, between the offender and the victim, is likely to impact the criminal procedure, it is necessary to study this matter. This study deals with the problems associated with the impact of kinship on the legislator’s approach; as well as problems

related to the grounds on which such relations are based in the light of the law and Islamic Law; together with problems related to the means of proof, in case that kinship is established between the offender and the victim; in addition to the statutory failure of the legislator to deal with the legal provisions related to this matter.

#### **4. About the Title of the Study**

Kinship is a permanent relationship that is likely to impact the regulations adopted by the legislator to deal with crimes involving close relatives.

Accordingly, this paper is intended to highlight the legal provisions related to kinship, regarding such considering and proving a public criminal case.

### **5. The Impact of Kinship on considering the Public Criminal Case**

#### **5.1 The Concept of considering the Public Criminal Case**

The concept of considering the public criminal case encompasses the investigation procedures and criminal trial. In Saudi Arabia, this concept refers to “a group of legal rules explains the legal procedures to be taken upon the occurrence of the crime, to determine the offender and to impose a penalty on him; moreover, these rules help the concerned authorities to initiate these procedures, and to determine the jurisdiction thereof”.(Al-Rashid, 2012) It is worth mentioning that the rules of criminal investigation and trial are carried out through a series of consecutive stages, and through a legal criminal mechanism, generally termed a criminal case. In a nutshell, a criminal case is a mechanism through which the government will be able to apply the procedures of criminal investigation and trial, and to impose a penalty on the offender, by way of sequential stages for considering the case, commencing by collecting evidence; then, conducting a preliminary investigation, and after that comes the stage of trial and the procedures related to the consideration of the criminal case before the competent criminal court, then the period of objection to the criminal judgment. The procedures of evidence collection, refer to a group of preliminary actions before the criminal case with the sole purpose of collecting information concerning a crime that has been committed; however, such

information is collected by the criminal police officer, who will send such information to the investigation authority to make a decision accordingly, to determine either it is appropriate to initiate a criminal case or not. (Al-Menshawi,2014)

The stage of evidence collection is of paramount significance because it leads to detecting many hidden things related to the committed crime, taking into account that investigations by the competent authorities often lead to detecting crimes and perpetrators. (Shareef,2013). The criminal police refer to the employees who are duly authorized to perform the procedures of evidence collection. (Al-Mojan,2013). The criminal police, with the exception to the public prosecution members, subject to their jobs are supervised by their chiefs, however, as for performing criminal police work, they are supervised by the public prosecution. (Al-Mojan,2013). A criminal investigation is defined as the series of criminal procedures performed by the investigation authority within the frame determined by law to search for the evidence which might enable the detection of a crime and to verify the validity of the facts thereof. (Al-Dawah et al.,2015). The police, in the Kingdom of Saudi Arabia, was the competent authority to conduct a criminal investigation, together with other bodies; but upon the issuance of the Regulations of the Bureau of Investigations and Public Prosecution, which was promulgated by the Royal Decree No. (M/56), dated 24/10/1409AH, said bureau became the sole authority which is authorized to conduct preliminary investigations, and its name has been recently changed to be “the Public Prosecution”. On the other hand, the criminal trial is the final stage of the public criminal case. It is also called the stage of the final investigation, which comprises a series of procedures, intended to examine all the evidence related to the case, as well as find the actual and legal facts in this respect, and then settle the matter either by conviction or acquittal. (Al-Menshawi,2014). However, the Criminal Court, in Saudi Arabia, is the competent authority to consider criminal cases and settle them by issuing final judgments, taking into account Article 128 of the Law of Criminal Procedure which provides as follows: “without prejudice to the jurisdictions of other courts, the Criminal Court shall have jurisdiction over all criminal cases”. The

Criminal Judiciary is an integrated multi-level system, comprising criminal chambers which have jurisdiction to consider criminal cases of all kinds and forms, as courts of the first instance. There are also appeal chambers that consider judgments under objection, during the objection period. Moreover, there are the criminal chambers at the Supreme Court; and they have jurisdiction to consider the contested judgments, rendered by the Court of Appeal. (Makhlouf,2014). The competent authority to consider a complaint, under Islamic Law, is the person who is in charge of the grievances, as he is also authorized to monitor local governors and to redress any injustice committed by them against their subjects, and he might also remove and replace them, in case that they do not observe equity.

## **5.2 The Impact of Kinship on the Investigator's Incompetence to consider the Public Criminal Case under the Law.**

Article 21 of the Law of Criminal Procedure provides as follows:

“A member of the Bureau of Investigation and Public Prosecution may not assume or decide on any case in the following events:

If a said member is the victim or the spouse, relative or in-law up to the fourth degree of any litigant.”

Furthermore, Article 8 of the Implementing Regulations of said Law provides as follows:

“In-law relationships, set forth in Article 21-1 of the Law, shall be deemed existing regardless of current marital status”.

The legislator is keen to abide by the principle of neutrality which shall be observed by the investigator (the Public Prosecutor) when dealing with the parties to the criminal case, to safeguard the investigator's decision from being influenced by factors associated with human nature, which are known to the investigator; therefore, the Saudi legislator has been keen to provide that an investigator may not investigate any case, or decide on it if the crime occurred to him personally, or if he is a spouse to any litigant, or if he has a kinship or in-law relationship with one of the litigant up to the fourth degree, even if the marital relationship is non-existent; in which case the investigator will be deemed incompetent to consider the case, and he shall not issue any decision on such case, even if he is not requested to be disqualified by one of the

parties to the case. “This is one of the events where the investigator is deemed incompetent to consider the case based on considerations related to kinship; in other words, this is termed as absolute incompetence”. (Al-Menshawi,2014). This situation is related to the investigation stage of the public criminal case; however, there is no provision in the Saudi Law of Criminal Procedure concerning the judge's incompetence to consider the criminal case; nonetheless, the researcher is of the opinion that the legal provisions related to the disqualification of the judge and his incompetence to consider the case, as contained in the Law of Civil Procedure, shall apply to criminal case, in this respect. This is further confirmed by the provision of Article 218 of the Saudi Law of Criminal Procedure which provides as follows: “The provisions of the Law of Civil Procedures shall apply to matters not provided for in this law, and no matters not contradicting with the nature of criminal cases.” The Saudi legislator set forth cases where the judge will be incompetent to consider the case, even if he is not required to be disqualified by one of the parties to the case; however, these cases are termed as cases of the judge's incompetence; and the legislator has specified some of these cases for reasons related to kinship as follows: The Law of Civil Procedures, promulgated by the Royal Decree No. M/1, dated 22/1/1435AH, provides in Article 94 thereof as follows:

“A judge shall be barred from considering and hearing a case in the following cases, even without a petition by any of the litigants:

- a. If he is the husband, relative or in-law up to the fourth degree of a litigant;
- b. If he is his wife has an existing dispute with a litigant in the case or with the wife of a litigant;
- c. If he is an agent, guardian, trustee, or a potential heir of a litigant or if he is the husband of the guardian or trustee of a litigant or if he is a relative or an in-law up to the fourth degree of such guardian or trustee;
- d. If he, his wife, a relative thereof, an in-law in the ancestral line or a person for whom he is an agent or guardian, has an interest in the case;”

Additionally, Article 95 of said Law provides as follows:

“An action or decision by a judge in any of the cases set forth in Article 94 of this Law shall be null and void even with the agreement of the

litigants. If such nullification occurs with respect to an affirmed judgment, a litigant may petition the Supreme Court to nullify the judgment and assign another court to reconsider the case.”

Furthermore, Article 96 of this Law provides as follows:

“1. A judge may be disqualified for any of the following reasons:

- a) If he, or his wife, has a case similar to the case before him;
- b) If he, or his wife, has a dispute with a litigant or the wife of the litigant after the case under consideration was filed before the judge, unless such case was filed with the intention of disqualifying the judge from considering the case pending before him;
- c) If his divorcee with whom he has a child or one of his relatives or in-laws up to the fourth degree has a dispute before the court with a litigant in the case or with the wife of the litigant, unless the case was brought with the intention of disqualifying him;”

As explained above, it is clear that the Saudi legislator specified certain cases where the judge will be incompetent to consider the criminal case because of kinship relations; the reason for this incompetence is evident, because any marital relationship or in-law relationship between the judge and a litigant, will violate the judge’s neutrality, as such relationship is likely to make the judge incline in favor of one of the litigants. The reason leading to incompetence is as when the judge is a spouse of one of the litigants, a relative or in-law of one of them, or of both of them; and the judge might have affection or hatred relationship with any of the litigants, or indifference despite the in-law or kinship relation. (Shawshari,2010). The incompetence, in this case, requires that the dispute should be in existence of the time of filing the claim. If such dispute has come to an end upon filing the claim, or if it has been abandoned by the other party, or his spouse, or against his/her spouse, following the filing of the claim to the judge; this shall not be considered as a reason for incompetence so that the litigants shall not attempt to bar the judge from considering such claim, by invoking a dispute with him or his spouse. Furthermore, the dispute requiring incompetence should continue pending the dismissal of the claim. If such dispute has come to an end and decided before filing the claim, in this event there will be no incompetence.

However, a request to disqualify the judge, might not be deemed a dispute, which makes the judge incompetent to consider the claim because the law does not bar the judge to continue considering the claim, in respect of which he is required to be barred from considering; if he refuses such request. Accordingly, the judge will be deemed competent to consider any other claim that may be filed even though one of the litigants requested disqualifying him from a previous suit. It seems that the purpose for non-competence in any such case is only based on the remark that disputes normally invoke grudges and give rise to a desire to revenge (Shawshari,2010). The main reason of incompetence in the foregoing case is that kinship gives rise to a sentiment towards one of the litigants, in contradiction to the neutrality which is expected to be observed by the judges towards the litigants. As an example, Riyadh General Court decides in one case as follows: “The kinship, or in-law relationship between the judge and one of the litigants, which constitutes a reason for the judge’s incompetence to consider the case, is a relationship of the fourth degree, the matter which does not apply to the claim which has been brought before the judge”. (The decision of Riyadh General Court on case no. 19852, dated 18/3/1436AH, judgment deed no. 23895.)

### **5.3 The Impact of Kinship on the Investigator’s Incompetence to consider the Public Criminal Case under Islamic Law**

The regulation of disqualifying judges is one of the most important issues which have been covered by Islamic Law, which has set forth an integrated regulations in accordance with the approach of Quran and Sunna (Sharaf,2004), in application of the principle of the judge’s neutrality; in order to protect the public interest of the community, by compliance with the principle of justice by the judicial authority (Jabrah,1990). Moreover, the regulation of disqualifying judges is considered a guarantee that ensures the integrity of the judiciary, and protects it from being under the influence of special or private considerations which might make him deviate from the requirements of justice (Sa’eed,2000). The Law and Islamic Law agree on this matter as to purpose, because their common aim is to achieve good performance of the function of the judiciary.

Because the judiciary is considered by Islamic Law to be the most significant job on earth. It is stated in the Holy Quran as follows: “David! Surely, we have made you a vicegerent in the earth. So, rule between mankind with justice and do not follow the low desires (the soul) lest it should lead you astray from the Way of Allah” (Surrat Sad – 26). This is because of the sublime purpose to judge between litigants righteously and justly (Sa’eed,2000). Furthermore, Islamic Law is keen to protect rights and give them back to their owners; the matter which requires keeping judges away from anything that is likely to lead to suspicion and prejudice (Badawi,1998) However, jurists knew the regulations for disqualifying judges, but they did not provide any definition thereto; however, a request for disqualifying a judge used to be considered by a person known as “the disqualifying official”. Some jurists define the disqualification of judges in Islamic Law as follows:

“Barring the judge from considering a claim, because of any of the reasons which have been mentioned by jurists in this respect, so that if a judge declares a judgment on the case, in spite of that, his judgment will be null and void and will have to be revoked.”

However, the Journal of Judicial Judgments contains a provision where it explained that a judge could be disqualified for kinship considerations, Article 1808 of said journal stipulates as follows:

“It is required that the judgment creditor shall not be an ancestral ascendant or descendant of the judge, his spouse or partner in the property under judgment, or hired by him; therefore, a judge shall not consider or decide a claim filed by one of these persons”.

Accordingly, a judge shall not render a judgment in favor of any of his ascendants, descendants, relatives, his principal or representative, or one of the persons working for him, or a person for whom the judge has a sentiment, or has an interest with him.

A judge shall not issue a judgment in favor of himself, his ascendants or descendants, or his spouse. It is reported in Al-Mughni as follows: “The decision of the judge for himself, or for persons in favor of whom his testimony shall not be acceptable, such as his wife, and his kins (Ibn Qudama,1990), even though the dispute is between his parents or between his father and his son”. (Ibn Qudama,1990)

Accordingly, both Islamic Law and the law agree that a judge shall be incompetent to consider a claim in any of the cases involving a kinship relation between the judge and any of the parties to the case.

## **6 The Impact of Kinship on proving a Public Criminal Case**

### **6.1 The Concept of Proof in a Public Criminal Case**

Proof means providing sufficient evidence, before the competent courts by way of the methods specified by law, with respect to the validity of the claimed incident, which is the subject of dispute, with the purpose of reaching the legal results related to the validity such incident, or the invalidity thereof (Al-Mursi et al., 2016). An important principle of proof before the criminal judiciary, is the principle of “free conviction” on the side of the judge, which is an integral party of the theory of criminal proof. The principle of judicial conviction means that the judge may accept all the evidences which are provided by the parties to the claim, unless they are contrary to the applicable law. However, the judge may exclude any evidence that he is not comfortable with. The judge also has full discretionary power to assess the value of each evidence separately. Eventually, the judge may correlate all the evidences, presented to him, to reach a logical conclusion, in or to decide either conviction or acquittal based on such evidence collectively. This principle does not mean that the judge is strictly controlled, but he is required to observe accurate reasoning and logic to reach a conclusion (Makki,2000). Whereas the public prosecution assumes the power of prosecution, it shall bear the burden of proof, in application of the rule that “he who alleges, must prove”, because a person is originally innocent; therefore, a plaintiff will have to substantiate his allegation by evidence. (Makki,2000). The prosecution authority bears the burden of proof, that is to say it shall establish the existence of the elements of the crime. Furthermore, the prosecution authority will have to prove the facts of the crime and the responsibility of the accused for the same. It shall also look for any reason that is likely to prevent accountability or penalty (Al-Mursi et al., 20016). There is also the presumption of innocence, which simply means that a person is expected to be innocent regardless of all

evidence or suspicion; therefore, if the judge is not provided with conclusive evidence, he shall decide that the accused is innocent (Makki,2000) Proof can be established before the criminal courts, as recognized by the Saudi legislator, by testimony, confession, experience, writing, or presumption. (Tawfeeq,2001)

## **6.2 The Impact of Kinship on Proving the Public Criminal Case under the Law**

The legislator has relieved certain categories from giving testimony in criminal cases, in order to avoid the impact of human sentiment on such testimony, such as is the case of a mother testifying against her son, or husband or vice versa. These categories do not tolerate giving testimony against their relatives, either to avoid embarrassment or conflict between the family members and family break up. In this regard, the Law of Criminal Procedure and its Implementing Regulations contain no relevant provision; however, the general rules of criminal proof require taking this matter into account. Article 124 of said Law provides as follows:

“If the investigator finds, upon completion of the investigation, that there is no sufficient evidence or grounds to file a case, he shall recommend to the head of the relevant department to close the case and release the accused, unless he is detained for another reason. The order of the head of the relevant department supporting the same shall be effective, except in major crimes where the order shall not be valid unless endorsed by the Chairman of the Bureau of Investigation and Public Prosecution or designee. Said order shall state the grounds therefor and be communicated to the private right claimant notifying him of his right to claim private right before the competent court pursuant to Article 16 of this Law, or to his heirs at his place of residence in case of his death. Said notification shall be in accordance with a form designed for such purpose and signed by the investigator and the head of department. A certified copy of said notification shall be delivered to the claimant of private right, or his heirs, after signing the original acknowledging receipt, for submission to the competent court. This shall also apply to the order for closing the case provided for in Article 64 of this Law”

## **6.3 The Impact of Kinship on Proving the Public Criminal Case under Jurisprudence**

The jurists have set forth the controls that the judge should rely on to distinguish between the plaintiff and the defendant with respect to proof. These rules are likely to depict their relationship with the judge, as well as their common relation. It is, however, necessary, to know each of them, and what makes him different from the other. (Al-Sarkhasi,1980) It is of great benefit, because the legislator requires that the plaintiff shall bear the burden of proof, and the defendant shall defend regarding the case. Meanwhile, the plaintiff shall produce conclusive evidence to prove his claim, and that burden is more difficult than defense, which can be performed by taking oath. Therefore, if the judges fail to distinguish between these parties to the case, he will definitely end up by doing injustice, contrary to what is decreed by Allah the Almighty (Al-Sarkhasi,1980). In accordance with controls, it is possible to indicate the impact of kinship of proof. The controls set forth by the jurists include as follows:

Some Hanafi scholars define the plaintiff as follows: “whoever abandons the litigation, he shall not be compelled to pursue it; while the defendant is one who if he abandons the litigation, he shall be compelled to pursue it”. – these two controls are derived from the native of the claim which is a voluntary action.

To sum it up, it can be said kinship has a paramount impact on the parties to the criminal case; namely the offender and the victim; or in other words the plaintiff and the defendant; therefore, they will have to be accurately identified so that justice can be done properly.

## **7. Conclusion**

The Most Important Results and Recommendations of this Study are:

### **7.1 Results**

1. The Saudi legislator has not addressed the reasons of the judge’s incompetence to consider the public criminal case under the law of criminal procedure, which matter has been dealt with in the Law of Civil Procedures.

2. The Saudi legislator has not tackled the impact of kinship on proof, and has left this aspect to the rules which are prescribed by Islamic Jurisprudence.

## 7.2 Recommendations

1. It is necessary to amend the Law of Criminal Procedure to match the amendment to the name of the Bureau of Investigation and Public Prosecution, to "The Public Prosecution".
2. It is necessary to provide in the Law of Criminal Procedure for the reasons which render the judge incompetent to consider the public criminal case, and he will be barred from considering it, and not to leave the same for the reasons contained in the Saudi Law of Civil Procedures

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