

**DEATH PENALTY: IS THAT THE CASE FOR JUSTICE UNDER THE EGYPTIAN CRIMINAL JUSTICE  
SYSTEM? A NEW UNDERSTANDING**

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I. INTRODUCTION

Recently in most Middle Eastern countries, especially Egypt, the number of capital punishment (death penalty) decisions by the Egyptian courts have been significantly escalating in a manner that has not occurred before in modern legal history.<sup>2</sup> But despite the Egyptian judiciary’s contemporary fad of sponsoring executions, there is no obvious legal explanation for the amplified pace in the issuing of death verdicts in highly difficult, and controversial cases. With judges handing out the death penalty left and right to conciliate the public opinion. If judges find it so easy to dole out death sentences *en masse*, then the death penalty must be examined from both a

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<sup>2</sup> Paul Marcus, *Capital Punishment in the United States, and Beyond*, 31 MELBOURNE UNIV. L. REV. 837 (2007). See, e.g., *Egypt: 49 Executions In 10 Days, Mass Executions Follow Suspicious Prison Killings*, Human Rights Watch, Oct. 22, 2020. <https://www.hrw.org/news/2020/10/22/egypt-49-executions-10-days> (“that authorities ignored basic fair trial guarantees, including access to legal counsel and the need to establish individual criminal responsibility. [...] of “revenge” rather than law enforcement to justify executions . . .”). It should be noted that, statistics show – recently – that there are numerous individuals who have been punished to death. There is a unique bond between the unstable political situation and the sharp upsurge in courts’ use of it following several mass trials stained by totally unfair procedures, with the number of death sentences jumping. See generally Sanaz Alasti and Eric Bronson, *Death Penalty in Sharia Law* in HANDBOOK ON CAPITAL PUNISHMENT (Routledge 2017) (“explores the question of what constitute the harshest punishment in sharia law. It reviews the story of death penalty in religious criminal justice systems of Islamic countries, focusing on the current practice of capital punishment and execution methods. It provides a background of the evolution of death penalty policy in the political and Islamic criminal justice systems and offer an analysis of the factors that may influence the future of capital punishment as a criminal sanction in the Middle East and other Islamic countries. The comparative study of the death penalty in Islamic countries is a relatively new discipline, and few of the existing studies focus on regional rather than global comparison of the death penalty.”).

humanitarian and legal perspectives so that the public can be more knowledgeable about where the rest of the world stands on this sort of criminal sentence.<sup>3</sup>

#### A. THE LEGAL AND RELIGIOUS STATUS QUO

The 2014 Egyptian Constitution reads that the principles of Islamic (*Sharie‘a*) law are the main source of all legislation. There are numerous statutory provisions that stipulate the death sentence as a punishment, including Egyptian Criminal Law, Military Law, Firearms Control Law, Anti-Drug Law, and the Anti-terrorism Law.<sup>4</sup> According to Article 2, the criminal acts that are punishable by the death penalty were mainly derived from the French legal system (the Napoleonic Code), prior to the adoption of the Constitution, and not from Islamic law.<sup>5</sup> Therefore, arguing that the death penalty should be maintained in Egyptian law, because the laws are founded on *Sharie‘a* norms, is not adequate with the time when these legislation were enacted.<sup>6</sup>

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<sup>3</sup> See *Death Sentences and Execution 2014*, Amnesty International, Mar. 31, 2015, <https://www.amnestyusa.org/reports/death-sentences-and-executions-2014/> (“An alarming number of countries used the death penalty to tackle real or perceived threats to state security linked to terrorism, crime or internal instability in 2014, [...]. The USA continued to be the only country to put people to death in the region, although executions dropped from 39 in 2013 to 35 in 2014 – reflecting a steady decline in the use of the death penalty in the country... Only seven states executed in 2014 (down from nine in 2013) with four – Texas, Missouri, Florida, and Oklahoma – responsible for 89 % of all executions. The state of Washington imposed a moratorium on executions...Methods of executions in 2014 included beheading, hanging, lethal injection and shooting. Public executions were carried out in Iran and Saudi Arabia. People faced the death penalty for a range of non-lethal crimes including robbery, drug-related crimes, and economic offences. People were even sentenced to death for acts such as “adultery,” “blasphemy” or “sorcery,” which should not be considered crimes at all. Many countries used vaguely worded political “crimes” to put real or perceived dissidents to death.”).

<sup>4</sup> See *Constitution of Arab Republic of Egypt*, 18 Jan., 2014, art.2, <http://www.sis.gov.eg/Newvr/Dustor-en001.pdf>. See Law No.58 of 1937 (Criminal Code of 1937, reformed in 1952), *Al-Jarida Al-Rasmiyya*; Military Law No.25 of 1966, Firearms Control Legislation No.394 of 1954, Anti-Drug Law No.182 of 1960, and Anti-terrorism Law No.95 of 2015.

<sup>5</sup> Mohamed ‘Arafa, *Middle East Legislative Insight: Egyptian Antiterrorism Laws*, *Egypt Law No.22/2018*, *Egypt Law No.8/2015*, *Egypt Law No.94/2015*, LEXISNEXIS MIDDLE EAST COMMENTARY (2019) (on file with author). (attached)

<sup>6</sup> It should be noted that they have been issued before the 1971 amendment declared by president el-Sādāt. From the constitutional perspective, the 1971 Constitution initiated a new provision that – for the first time – expressly declared Islamic law principles as a source of legislation and, was subsequently amended in 1980 to provide that *Sharie‘a* is the main source. So, Egyptian criminal code(s) that were codified before 1971 were not required to be pursuant to Islamic law sources. In other words, the constitutional duty that requires all laws to be in line with the *Sharie‘a* norms began with the 1971 constitution, after most of the Egyptian codes had been enacted. See generally Massimo Campanini and Mohamed ‘Arafa, *Islam and Democracy: Appreciating the Nuance and Complexity of Legal Systems with a Basis in Religion* 26 BARRY L. REV. 1, at 8-9 (2021) (“Much of the frustration with the traditional

Furthermore, arguing that these criminal activities should be penalized by capital punishment is an unequivocal violation of Article 2, as Islamic criminal law prefers leniency in cases that may permit for the death sentence as a feasible punishment.<sup>7</sup> This lenity principle is proven by the fact that Islamic criminal justice system only prescribes this sentence for heinous crimes such as, premeditated homicides, and provides for alternative penalties.<sup>8</sup> Further evidence that Egyptian death penalty statutes are not derived from Islamic criminal legislation is that Egyptian criminal law does not follow the rigorous criminal procedures – of more than beyond reasonable doubt standard – for implementing the death penalty which are required by Islamic penal system.<sup>9</sup> For instance, Egyptian criminal procedural law does not allow the victim’s family the right to choose a reconciliation process such as blood money, even though this is considered an important procedural rule for the imposition of the death penalty under Islamic law.<sup>10</sup> Thus, Egyptian criminal law, as well as other codified laws that include the death penalty, were primarily derived from non-Islamic legal systems. Hence, the religious argument for the death penalty, that are claimed by proponents, is not compatible with the genuine origins of the Egyptian legal system.

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interpretations of religious capital punishments is the lack of necessary understanding of the text...Many of the theories for the death penalty, such as retributive and deterrence effects, have been challenged by social scientists, who make the claim that the death penalty does not sufficiently accomplish these goals to justify continued executions. Therefore, when the casual reader finds quotes in the *Qur’an* or the *Hebrew Bible*, and they read it with the [...] or literal interpretation with little to no context, they understandably grow concerned.”)

<sup>7</sup> M. Cherif Bassiouni, *The Islamic Criminal Justice System* 63-65 (Ocena Publications 1982).

<sup>8</sup> Mohamed ‘Arafa, *Corruption and Bribery in Islamic Law: Are Islamic Ideals Being Met in Practice?* 18 GOLDEN GATE ANN. SURVEY OF INT’L & COMP. L. 189-190 (2012) (“There are five *Qesas* crimes: murder, voluntary or intentional killing or manslaughter, involuntary killing, intentional physical injury or maiming, and unintentional physical injury or maiming. These criminal acts are defined both in the *Qur’an* and *Sunnah* and establish two kinds of sanctions: retaliation (the principle of “*Talion*”) and *Diyya* (“legal compensation”). Therefore, crimes of blood are punished either by retribution or by compensation. Only victims and their representatives possess the right to prosecute the criminal; the public authorities have no power to intervene, unlike the Western legal system. This achieves the goal of realizing both general and specific deterrence as well as reparation to the victim to terminate the conflict between the criminal and the injured party.”).

<sup>9</sup> Bassiouni, *supra* note 7, at 230-232.

<sup>10</sup>*Id.*

In fact, these divine claims should be used by opponents of the capital punishment to restrict its scope.

Under *Sharie'a* penal system, the only criminal offense that may be penalized by the death sentence is the crime of premeditated murder.<sup>11</sup> Nevertheless, this sentence is commonly disfavored; it is mainly associated with the lenity norm, and is often set aside in favor of an alternative penalty such as *diyaa* (blood money).<sup>12</sup> The *Qur'an*, which is the first source of Islamic criminal law, uses the capital punishment as a means to attain the principle of retaliation; but, it also stated that forgiveness, mercy, and lenity are much preferred over such punishment.<sup>13</sup> Also, *Sunnah* (Prophet Mohammad's teachings) – as a second source – directed and urged the victim's family to forgive and forget (pardon) and accept blood money instead of seeking the death sentence in all cases that were presented before him.<sup>14</sup> Also, he said, “[a]void punishment in case of uncertainty or doubt[,]” and that is the key norm for the special procedural rules that must be pursued to impose such penalty in the Islamic criminal system.<sup>15</sup>

Muslim scholars developed on this *doubt maxim* principle to add many of the other complicated and highly standard procedural rules that make the application of death penalty as difficult as possible and inspire alternative punitive measure or pecuniary sanctions such as the blood money, to execute the principle of doubt in punishments.<sup>16</sup> Moreover, these scholars have worked on developing both substantive and procedural rules for the application of the death

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<sup>11</sup> See generally Robert Weisberg, *The Death Penalty Meets Social Science: Deterrence and Jury Behavior under New Scrutiny*, 151 ANN. REV. L. AND SOC. SCIENCES 1 (2005). See generally, e.g., Alasti & Bronso, *supra* note 2.

<sup>12</sup> See generally Muhammad Abu Zahra, *Crime and Punishment in Islamic Jurisprudence* (1974).

<sup>13</sup> See generally Nasser Al-Kholaify, *Mitigating and Aggravating Circumstances for Penalty of Ta'azir in Islamic Jurisprudence* (1992).

<sup>14</sup> *Id.*

<sup>15</sup> Abu Zahra, *supra* note 12, at 92-98.

<sup>16</sup> Sanaz Alasti, *Comparative Study of Stoning Punishment in the Religions of Islam and Judaism*, 4 JUST. POL'Y J. 1, at 2-7(2007).

penalty. For instance, there are some categories that have been excluded from being subject to it, such as minors or the mentally incapacitated.<sup>17</sup> On the procedural level, several requirements prescribe for the cross examination (witnesses), the confession, the culpability (circumstances of time and place), among many others, to save individual lives. Islamic penal system places the decision of whether to seek the capital punishment in the hands of the victim's family, and the family may choose to either relinquish or wave the sentence and receive the *diyyaa* (compensation).<sup>18</sup>

Therefore, Islamic criminal justice system aims to limit the scope of the capital punishment to very narrow criminal acts in which the wrongdoer indicated explicitly his *means rea* (full intention) for his actions that led to the victim's death. Islamic schools of jurisprudential thought understood the core philosophy of punishments and the *Sharie'a* essential *maqasid* (objectives). They worked on evolving criminal procedure theories to reach the goal of evading the capital punishment with alternative means based on the community's needs (common good). Against this succinct backdrop, this chapter will attempt to answer this question in Part II by briefly investigating the current *status quo* of this punishment in both the Egyptian, and French legal systems. Comparing them to the Islamic system in Part III, based on the concepts of human rights, justice, and *maslahaa(h)* (protected interests), which institute the basis of the criminal justice reform. Finally, it concludes that the axiomatic view of Islamic criminal justice system is fashioned by religious theories, laws, and divine practices. Also, it is more than appropriate to create a comprehensive reform of the death penalty to be entirely compatible with the constitutional and universal norms, but national statutes must meet its condescending criteria and lofty standards.

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<sup>17</sup> See generally Rudolph Peter, *Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-First Centuries* (Cambridge Univ. Press 2009).

<sup>18</sup> *Id.* See e.g., *Roberts v. Louisiana*, 428 US 325 (1976); & *McGautha v. California*, 402 US 183 (1971).

## II. DEATH PENALTY IN EGYPTIAN CRIMINAL SYSTEM YESTERDAY AND TODAY: DUTY OR DOOM?

The Egyptian legal system has included capital punishment as a criminal sanction from as early as the Pharaonic era to present day.<sup>19</sup> In the current positive jurisprudence, proponents of the death penalty must consider that punitive and therapeutic jurisprudence in the Egyptian criminal system is based on the idea that the purpose of punishment is not abuse, but rehabilitation and therapy to enable criminals to reintegrate into society.<sup>20</sup> Egyptian prisons have the motto, “[p]rison is discipline, correction, and rehabilitation,” and hence, the legal penal system permits for the capital punishment to be used cautiously for cases in which judges see no hope of offenders reverting to society as decent citizens.<sup>21</sup> This is why appeals are automated in cases where the death penalty is decided, even if they are not filed by the defendants, indicating that mass executions are an obvious interruption of fair justice and punitive jurisprudence enshrined in Egyptian law.

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<sup>19</sup> Raouf ‘Ibid, *Mabadiea Al-Qism Al’am min Al-tashrie’ Al’Iqabi Al-Masry* [The Egyptian Penal Legislation: The General Part] (Nahdet Masr Press, Cairo1964) 32-39 (on file with author). Historically, it has been noted that the death penalty was abolished two times during the Pharaonic era. First during the era of King Actisanes, who banished it entirely and secondly at King Sacabos, who abolished it, and replaced it by hard labor, and used lenient executions to reduce it.

<sup>20</sup> Taha Sakr, *The Persistence of the Death Penalty in Egypt: Why Courts Insist on ‘An Eye for an Eye’*, Egypt Independent, July 7, 2017, <https://www.egyptindependent.com/death-penalty-egypt/> (“[it]... a deterrent for criminals who threaten people’s lives and state national security. Egyptian courts have executed...death sentences...of which were issued by criminal courts for murder crimes, while...verdicts were issued for political crimes such as espionage, assassination and establishing outlawed secret organizations. [“G]iven that the death penalty comes from *Sharia* law and *Quranic* verses, there is no one – no matter their position in the state – has the power to suspend it. Hence grants the victim’s family the right to pardon the killer or receive financial compensation...that sentencing murderers to death is only “fair,” claiming that,” Islam dictates that anyone who kills an innocent person should also be killed.”).

<sup>21</sup> See, e.g., Stephen F. Smith, *The Supreme Court and the Politics of Death*, 94 VA. L. REV. (2008). See, e.g., Hagar Hosny, *Egypt Hopes New Massive Prison Complex Will Improve Country’s Image*, AL-MONITOR, Nov. 5, 2021, <https://www.al-monitor.com/originals/2021/11/egypt-hopes-new-massive-prison-complex-will-improve-countrys-image#ixzz7P246KuOD> (“Cairo has opened a rehabilitation center for prisoners designed according to American standards and big enough to serve a quarter of the country’s inmates. While some citizens have hailed the move, other say it’s meant to distract from the country’s human rights record [ . . . ] “All the new prisons that have been recently built meet human rights requirements in terms of ventilation, space, food, and rehabilitation.” [...] that “Previously, the concept of a prison according to the law meant a place for discipline and reform, but it is now a place for rehabilitation and correction.””).

Justice is fundamentally different from retaliation or revenge, and the death penalty is a relic of an outdated system based on retaliatory justice. Thus, if this system were applied to other criminal offenses, burglars would be robbed, torturers tortured, and rapists raped.<sup>22</sup> Justice has expanded this interpretation of punishment by implementing emblematic punishments, such as fines or imprisonment, in accordance with the crime's gravity, to preserve the dignity of both victims and criminals.<sup>23</sup> Also, the justice principle rests on freedom and dignity, requiring the punishment of criminals for violating the law as a result of their own free will, meaning that children and the mentally retarded should not be held accountable for criminal acts.<sup>24</sup> This shows that the concept of the death penalty is essentially ambiguous because it is irrevocable, blocking the healing and reintegration of offenders, and breaching the freedom and dignity norms.<sup>25</sup>

The possibility of error, particularly given the use of torture in some situations, makes the irrevocable nature of capital punishment very dangerous. The possibility for mistakes exists even in the most efficient, complicated, and competent legal systems, let alone those in which investigative and security bodies depend on seeking confessions through torture to close a case.<sup>26</sup> One of the most common explanations cited for this penalty is its apparent effectiveness in protecting society from its most perilous members and deterring prospective criminals.<sup>27</sup>

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<sup>22</sup> For further details on the history of capital punishment, see William W. Wilkins, *The Legal, Political, and Social Implications of the Death Penalty*, 41 RICH. L. REV. 793, 795 (2007). ("the number of crimes for which the death penalty may be given has been reduced significantly. The list of death-eligible crimes during the colonial era seems shockingly long to modern eras. [...], in addition to murder, serious crimes like treason, rape, burglary, and arson were punishable by death...In Puritan New England, a sentence of death could be imposed for adultery, as well as blasphemy, at least until the late seventeenth century.")

<sup>23</sup> See generally Corinna Barrett Lain, *Deciding Death*, 57 DUKE L. J. 1, (2007). See, e.g., (comparing with the US legal system on death penalty) *Baze v. Rees*, 128 S. Ct. 34 (Mem) (2007).

<sup>24</sup> See generally Corinna Barrett Lain, *Furman Fundamentals*, 82 WASH. L. REV. 1 (2007).

<sup>25</sup> See generally Thomas C. Castellano, *Limits of the Criminal Sanction in Controlling Crime: A Plea for Balanced Punishments* 23 S. ILL. L. J. 427, 433 (1999).

<sup>26</sup> *Id.* After learning that many individuals on death row were innocent, former Illinois governor George Ryan froze the use of this penalty and reduced the penalties of many convicts to life imprisonment. A commission assembled by Ryan prepared a report concludes "no system, given human nature and frailties, could ever be devised or constructed that would work perfectly and guarantee absolutely that no innocent person is ever again sentenced to death."

<sup>27</sup> Lain, *supra* note 23. See, e.g., *Gregg v. Georgia*, 428 US 153 (1976).

Nonetheless, the protection of society is by no way dependent on killing criminals, as nations that allow this sanction are no less susceptible to crime than those that do not, and other sentences, such as incarceration, have the same outcomes.<sup>28</sup> It should be noted that there seems to be a peculiar relationship between Islamic jurisprudence and Egyptian law. For instance, Egyptian law does not apply *Sharie'a* sanctions, yet all cases involving the death penalty must be presented to Egypt's grand *mufti* (religious leader), while simultaneously avoiding the *diyyaa* (financial compensation) aspect of Islamic jurisprudence that is not administered to the death penalty.<sup>29</sup> The *diyyaa* kind and amount depends on the crime (the allocation of a living person). Meaning that giving victims' families a choice of either insisting on sentence or take *diyyaa*, which would be calculated as a monetary value according to modern norms. This could significantly diminish the use of capital punishment while contemplating the spiritual sensibilities of Egypt's Muslim majority.

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<sup>28</sup> See generally Hugo A. Bedau & Paul G. Cassell, *Debating the Death Penalty: Should America Have Capital Punishment? The Experts on Both Sides Make Their Case* (Oxford Univ. Press 2005) (“[...] judges, lawyers, prosecutors, and philosophers to debate the death penalty in a spirit of open inquiry and civil discussion. They presented answers to questions like, is the death penalty a viable deterrent to future crimes? does the imposition of lesser penalties, such as life imprisonment, truly serve justice in cases of the worst offences? does the legal system discriminate against poor or minority defendants? Is the possibility of executing innocent persons sufficient grounds for abolition? Also, they explained why this sentence should be commuted for some prisoners and the phenomena of death row.”). In this regard, the international data show that this punishment does not decline crime. In 1975, a year before the death penalty was eradicated in Canada, the murder rate hit a record of 3.09 per 100,000 people; by 1980, it had dropped to 2.41. In 2000, while the United States reported a murder rate of 5.5 per 100,000 people, Canada reported a rate of 1.8. Also, in 1988 (updated 2002), British criminology researcher Roger Hood at the request of the United Nations concluded that “the fact that statistics still show the same results convincingly proves that countries should not fear any sudden or drastic shifts in their crime rates should they decrease their reliance on the death penalty.”

<sup>29</sup> However, religious representatives refused the eradication of this penalty in Egypt, as it is part of Islamic law and its scope is the application of God's justice, there is another possibility that should find favor with Egypt's religious community, which would permit the abolition of this sentence while upholding the imposition of divine justice.

A. CAPITAL PUNISHMENT STATUTES IN EGYPTIAN PENAL MODEL

There are five unique legislations that prescribe capital punishment as a sentence for their criminal acts: the Criminal Code, the Anti-Drug Law, the Military Code, the Firearms Control, and Anti-Terrorism laws.

1. *Criminal Law No.58 of 1937*

This act prescribes the death penalty for almost two dozen different criminal offenses.<sup>30</sup> The first category includes acts related to the state national (internal and homeland) security. This includes crimes such as establishing illegitimate groups or militias to destabilize the country's constitution or laws, prevent public institutions from doing their tasks, use terrorist means to harm national unity, and public order.<sup>31</sup> Further, capital punishment applies to the crime of gathering counterintelligence to engage in terrorist activity against the country, destabilize the political system of governance, and the use of force to damage public property.<sup>32</sup> Also, criminals will be punished to the fullest extent of the law by death, if they committed criminal acts that threaten the state's external security, such as attacking the state by acts of aggression, espionage, treason, and other activities against the state's security apparatuses (military, defense, intelligence community, and police).<sup>33</sup> Arson, premediated homicide, murder by using poison, along with intentional murder that is associated with other felony or misdemeanor, kidnapping, perjury, and rape are also subject to this punishment.

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<sup>30</sup> *Egypt: QANUN AL'UQUBAT [Penal Code]* (Criminal Code No.58 of 1937, reformed in 1952), *Al-Jarida Al-Rasmiyya* August 1937 (as amended by Laws No. 95/2003 & 50/2014).

<sup>31</sup> *Id.*, e.g., art. 86, 86(a)(b)(c), 87, 90, 91, & 93.

<sup>32</sup> *Id.*, e.g., art. 77, 78, 80, 81, & 82.

<sup>33</sup> *Id.*, e.g., art. 230, 233, 234, 257, 290, & 294.

2. *Anti-Drug Law No.182 of 1960*

This law stipulates the capital punishment for various drug-related crimes. It includes the act of importing or exporting any drug substances, producing, cultivating, extracting drug items, possessing drugs for trafficking purposes or managing a place for drug addicts. It should be noted that none of these listed criminal activities, for which the death penalty is imposed, should result in the victim's death.<sup>34</sup>

3. *Military Law No.25 of 1966 (amended by Law No.136 of 2014)*

The Military Act describes the death penalty for numerous army capital criminal actions includes the intentional failure – by knowledge – of reporting that a crime has been committed (listed in the first chapter of this code). Other situations comprise sedition and disobedience, violating the military service duties, looting, robbery, destruction of property, abusive use of power, disobedience of commands, and abandonment of military service.<sup>35</sup> In this regard, this act has been amended in 2014 to extend the military jurisdiction to “crimes perpetrated against public facilities, utilities, and properties, referred to in Article 1 of this decree by law. The Attorney General shall refer cases related to such crimes to the competent military prosecutor.”<sup>36</sup> None of these crimes necessarily results in the person's death and most of them include broad or ambiguous

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<sup>34</sup> *Egypt*: QANUN MUKAFAHIT AL-MUKHADARAT [*Anti-Drug*] Law No.182, 1960, art. 33(a)(b)(c) & 34(c).

<sup>35</sup> *Egypt*: QANUN ALAHKAM AL'ASKARIYA [*Military Law*] No.25, 1966, art. 132, 138, 139, 140, 141, 148, 151,72, 69 & 154. All judgments that were decided by a military court were irrevocable. Law No.16 of 2007 added an amendment that created a new Supreme Military Court for appeals of military rulings. Article 43 reads “The Military Appellate Supreme Court [...] has the competence of hearing the military appeals of the Military courts for all crimes either committed by the military personnel or civilians.”

<sup>36</sup> *Id.*

language to interpret, such as disobedience, power abuse, and sedition among many others, which may lead to unfair application of the criminal sanction.<sup>37</sup>

4. *Firearms Control Legislation No.394 of 1954 (amended by Law No.6 of 2012)*

In 2012, Law No.6 amended article 26 of Law No.394 of 1954 to enrich the penalties for possessing and purchasing unlicensed firearms and ammunition. The amendment punishes individuals committing the crime of obtaining or possessing in public places non-permitted weapons (and related ammunition) or explosives with hard labor or life imprisonment, and a fine that may not exceed EGP 20,000 (about US \$3,129).<sup>38</sup> The term “public places” comprises modes of public transportation and worship places, and if an individual intended to use those arms/ammunition in any act against national security, or to harm public order, or to undermine (threaten) the system of governance, the constitution, national unity and social harmony, must be penalized by death penalty.<sup>39</sup>

5. *Anti-Terrorism Law No.94 of 2015*

Unlike the 1992 law, which started by defining the crime of terrorism, Egypt Law No.94 of 2015 begins by outlining the crime of being a terrorist entity.<sup>40</sup> This act launches various

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<sup>37</sup> Yusef Auf, *A Legal Analysis of Egypt's Military Judiciary*, THE ATLANTIC COUNCIL, (Apr. 6, 2015), <https://www.atlanticcouncil.org/blogs/menasource/a-legal-analysis-of-egypt-s-military-judiciary/> (“As for the system of litigation, a second degree of litigation before military courts was added.”).

<sup>38</sup> *Egypt: QANUN AL'ASLEHA WA AL-ZAKHA'ER [Firearms Control]* Law No. 394 of 1954 *Al-Jaridah Al-Rasmiyah* No. 53 *bis*, July 8, 1954 (amended by Law No.6 of 2012), art. 2 *Al-Jaridah al-Rasmiyah* 2012, Jan. 12, 2012. Presidential Decree 90-2012, 41 *Al-Jaridah al-Rasmiyah* 2012, Oct.14, 2012.

<sup>39</sup> *Id.*, art. 28. *See, e.g.*, art. 2, 3, 4, 5, 11, & 12.

<sup>40</sup> Penal Code, art. 86 (Egypt). Egypt implemented its first antiterrorism bill in 1992, and it starts with the meaning of terrorism as follows: “Terrorism in the application of the provisions of this law [Article 86 of the Penal Code] means any use of force, violence, threat, or intimidation, to which an offender resorts, pursuant to an individual or collective criminal enterprise, with the intent to disrupt public order or endanger the safety and security of society, if doing so would: (a) harm people, frighten them, or expose their lives, freedoms or security to danger; (b) damage, occupy, or seize the environment, communications, transportation, *al-amwāl* (assets), or public or private property; (c) prevent or obstruct the work of public authorities, houses of worship, or educational institutions; or (d) thwart the application of the Constitution, laws, or regulations.”

substantial criminal penalties comprising death sentences for organizers (founders) and heads of terrorist organizations, along with a crime of spreading “ideas and beliefs calling for the use of violence” or inciting terrorism through social media, and heavy fines for broadcasting “false news” about terrorist acts or counter-terror acts.<sup>41</sup> Moreover, incitement to commit a terrorist crime shall be penalized with the same penalty as though the terrorist crime was carried out. Thus, punishments for terrorist activities include the death penalty.<sup>42</sup> Also, communication with foreign countries or associations with the purpose of committing or preparing a terrorist criminal activity in Egypt is punishable by life imprisonment and if the crime is committed, the death penalty will be implemented.<sup>43</sup> This law punishes a dozen different acts with the death penalty, making it the mandatory sanction for anyone convicted of funding a terrorist group or terrorist act.<sup>44</sup> Other criminal acts that can incur the death penalty if they result in death include manufacturing weapons; damaging a gas, water, or electricity network; or compelling another person to join or remain in a terrorist group.<sup>45</sup> The law does not require that the death be premeditated.

Article 2 of the law provides:

[A] terrorist act encompasses any use of force or violence or threat or terrorizing that aims to: Disrupt general order or endanger the safety, interests or security of society; harm individual liberties or rights; harm national unity, peace, security, the environment or buildings or property; prevent or hinder public authorities, judicial bodies, government facilities, and others from carrying out all or part of their work and activity.<sup>46</sup>

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<sup>41</sup> *Egypt*: QANUN MUKAFAHT AL-IRHAB [*Anti-Terrorism*] Law No.94/2015, art. 2, 7, 8, 11, & 12.

<sup>42</sup> *Id.* The Supreme State Security Courts have the right to hear/decide capital punishment cases. “The Supreme State Security Courts have the competence over the crimes committed in violation of the presidential executive orders.”

<sup>43</sup> *Id.* art. 12, 13, & 14.

<sup>44</sup> *Id.*

<sup>45</sup> ‘Arafa, *supra* note 5.

<sup>46</sup> *Id.* This definition is not compatible with the terrorism 2004 concept adopted by the United Nations Security Council, and that the UN Special Rapporteur on Counterterrorism and Human Rights hence endorsed.

Additionally, the law prescribes the death penalty for several crimes – including for example, the crimes of founding, regulating, managing, or being a leader of a terrorist group; financing terrorist groups; and collecting counterintelligence with the purpose of committing terrorist attacks.<sup>47</sup>

The new legislative changes covering anti-terrorism extended the definition of “terrorist entity” and imposed new measures against individuals, businesses, media platforms, and trade unions and provides life sentences and death punishment for funding terrorism.<sup>48</sup> The vague concept of terrorism under domestic criminal law explains that any act that disturbs public order with force will be treated as terrorist activity. It includes provisions to protect the security forces from accountability, establish death penalties, firmer prison sanctions for terror-related offenses, as well as heavy fines for those who publish "false/fake news" and a special judicial circuit for terrorism cases.<sup>49</sup> Egyptian criminal justice system prescribes capital punishment in various laws for several crimes in which these codes include many ambiguous definitions. This leads to various legal interpretations which may lead to the avoidance of achieving the legitimate and fair criminal justice purposes.

## B. DEATH PENALTY IN CRIMINAL PROCEDURES

The Criminal Procedural Law No.150 of 1950 includes some significant procedural rules for administering the death penalty.<sup>50</sup> The cornerstone is the sitting judges’ *ijma’a* (unanimous

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<sup>47</sup> *Id.*, at 2-3.

<sup>48</sup> *Id.* (“For instance, trade unions could have assets seized and be added to the terrorism list.”).

<sup>49</sup> *Id.* (“The law already gives heavy imprisonment sentences for criminal acts that include "promoting or encouraging any terrorist offense.””).

<sup>50</sup> See generally Aimé Karimunda, *The Death Penalty in Africa: The Path Towards Abolition* (Ashgate 2014).

consensus by the majority) including the military judges as well.<sup>51</sup> In a landmark decision the highest court in Egypt, *mahkamat al-Naqd* (Supreme Court: the Court of Cassation) decided:

Article 381 requires the court members' unanimous consensus, indicates that the legislature made an obligation upon the court to decide the death penalty within the agreement of all sitting judges, to maintain the legal guarantees of [...] surrounding its nature, [and that is] contrary to other punishments which require only the majority opinion of the justices.<sup>52</sup>

Additionally, all cases involving the death penalty must be presented to Egypt's grand *mufti* (religious leader) before the issuance of the verdict. The Codes reads, "[T]he court is obliged to send the decision of death penalty to the Egyptian *mufti* (religious clerk) before the final decision. If the clerk does not respond within ten days, the court has the right to decide the final verdict."<sup>53</sup> In the same vein, and in terms of the due process guarantees, the Court of Cassation decided:

The legislature aims, through this condition, to confirm the orthodoxy of the court ruling to the Islamic law rules [...]. The role of the *mufti* is to decide its compatibility with the *Sharie'a* norms. Furthermore, the opinion of the *mufti* gives the criminal the tranquility feeling of the divine aspect of this punishment considering the public opinion.<sup>54</sup>

It should be noted that the *Mufti's* opinion is consultative and not mandatory, as his only task is exclusively to determine whether or not the punishment is compatible with the main principles of Islamic law.<sup>55</sup> In Egyptian criminal law, execution may be suspended by a request

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<sup>51</sup> Egypt: QANUN AL'JIRAAT AL-JINAIY'AH [*Criminal Procedural*] Law No. 50 of 1950, art. 381. *Egypt Military Code*, art. 80.

<sup>52</sup> MAHKAMAT AL-NAQD MAJMUAT AL-AHKAM AL-SADIRAH MIN AL-HAYA' AL'AMMAH LIL-MAWAD AL-JINAIY'AH [*Court of Cassation: Criminal Circuit, Egyptian Judicial Review*] Appeal No. 63, April 1, 1991, Year 42, 557.

<sup>53</sup> *Crim. Pro. Code*, art. 381(2).

<sup>54</sup> MAHKAMAT AL-NAQD MAJMUAT AL-AHKAM AL-SADIRAH MIN AL-HAYA' AL'AMMAH LIL-MAWAD AL-JINAIY'AH [*Court of Cassation: Criminal Circuit, Egyptian Judicial Review*] Appeal No. 623, Oct.28, 1981, Year 32, 775 (*Revocation Session* Jan. 26 1942, C5, 607).

<sup>55</sup> Mohamed 'Arafa, *Transitional Justice, The Seeds of Change: Secular Law or Divine (Islamic) Law, Quo Vadis?* 9 CREIGHTON INT'L & COMP. L. J. 2, 32, 63 (2018) ("The Appellate Court should be done: [I]n three months of its being lodged and the court must give its decision within a maximum of two months after the appeal has been heard...the appeal process postpones the execution. If the appeal is accepted, the court may decide to set aside the verdict appealed

for retrial, as the right to request a retrial belongs to the prosecution or the defendant.<sup>56</sup> Even if the *mufti* responds with an opinion contrary to the court's decision, the court is not obligated to follow his/her decision. This opinion is due in ten (10) days, and if not received within the deadline, the court has the right to decide its final ruling.<sup>57</sup> Nevertheless, if the court decides the final verdict to execute the death penalty without consulting the *mufti's* advisory opinion, its ruling shall be void.<sup>58</sup> On the other hand, the military law does not require that military courts should follow this rule.<sup>59</sup>

Moreover, the prosecution is obliged to appeal the criminal court's ruling to invoke the death penalty before the Court of Cassation, as it must be referred – *on renvoi* – to the Court of Cassation by the Office of the Attorney General, even if the condemned person refuses to appeal.<sup>60</sup> However, the appeals are very limited. The Attorney General must submit a memorandum to the Cassation Court justifying the imposition of this penalty.<sup>61</sup> Death sentences can be appealed before the Appellate Court if the verdict is legally invalid (based on misapplication or misinterpretation of the law) or the procedural irregularities (technicalities) had an impact on the verdict.<sup>62</sup> “The irrevocable decision of the death penalty shall be sent, through the Justice Department [Ministry], to be ratified by the President [...] in which he/she has the right either to ratify the ruling, or to use his right of clemency; and if the President does not respond within 14 days, the penalty shall be

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or submitted to it for its opinion by the prosecution and to send the case back to the court of first instance for a retrial and if the appeal rejected, the ruling becomes final and the death penalty activate.”).

<sup>56</sup> *Id.* at 62.

<sup>57</sup> *Id.* The Court of Cassation decided “Article 381 enforces the court to get the clerk's opinion without obligation to follow his decision.”

<sup>58</sup> *Id.* at 61-63.

<sup>59</sup> Ramsis Bahnam, *alNathariya Al'Aama lil Qanun AlJinae'i* [*The General Theory of Criminal Law*] (Cairo 1997).

<sup>60</sup> Crim. Pro. Code, (Egypt) art. 46.

<sup>61</sup> *Id.* art. 30.

<sup>62</sup> *Id.* In this regard, the death penalty decisions of the Supreme State Security (Special) Courts cannot be appealed, and once the president has signed the decision, the penalty is irrevocable. *See Egypt: QANUN ALTAWARIEA [Emergency] Law No.162 of 1958, art. 12.*

executed.”<sup>63</sup> Also, before execution by hanging – as stipulated by law – the culprit may enjoy the right to practice religious rituals; to be visited by his family; to hear the court’s ruling; to not have the execution in public (prison) along with the right to be represented by an attorney (defense council) appointed by the court if the convict does not have access to counsel.<sup>64</sup>

Law No.71 of 2009, amended Egyptian criminal law provisions by adding new rules related to psychogenic disorder.<sup>65</sup> The 2009 amendment reads:

In case of the absence of free will [criminal intent] during the commission of the criminal act, because of insanity, mental disorder, unconsciousness [intoxication] voluntarily or involuntarily [...] the culprit shall be accountable if the psychological or mental disorder affects his free will by diminishing it, and the court must consider all circumstances regarding the mental influence on the personal will . . . .<sup>66</sup> If the accused is incapable of defending himself due to a mental illness occurred after committing the crime, the trial shall be suspended until he is capable. If a mental disorder happens after the investigation has been concluded and before the adjournment of the case, the next procedures shall not be taken . . . .<sup>67</sup>

Additionally, the Juvenile Law No.12 of 1996 provides that children who are under the age of twelve at the time of the commission of the crime may not be held criminally liable, and should be subject to a juvenile tribunal.<sup>68</sup> This Act entirely forbids death penalties and life imprisonment

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<sup>63</sup> *Id.* art. 470. Although, some criminal law scholars argued that this procedural rule intends to diminish the imposition of the death penalty by giving the President the right to use his power to pardon the culprit or to replace it with another punishment.

<sup>64</sup> *Id.* art. 472, 59, 473, 274, 47, 366, 367, 395, 30, 12, & 475. Also, the pregnant woman has the right to avoid execution until she delivers, and this penalty should not be administered during holidays. Article 366 reads, “the Criminal Court (the Felonies circuit) is composed of three judges who have the right to decide the penalties and hear the counts.” It should be noted that the judgment *in absentia* is directly appealed by the presence of the convict (*mere* presence of the accused) invalidate the ruling. The Cassation Court oversees resolving questions of law, not questions of fact; to confirm the validity and the compatibility of its verdict with the applicable law.

<sup>65</sup> Egypt Penal Code, art. 62. The old rules stated that there is no criminal liability in cases involving “the lack of free will during the time of commission of the crime, either by insanity (mental disorder), or by unconsciousness which results from taking addictive drugs either voluntarily or involuntarily.”

<sup>66</sup> *Id.* The new amendment has distinguished between the entire and partial lack of the *mens rea* (intent or free will), in which the legal outcome will be that the accused will escape impunity and the investigation must be terminated, and the court shall decide the convict’s exoneration.

<sup>67</sup> *Id.* art. 46 & 399.

<sup>68</sup> *Egypt: QANUN ALTIFL [Juvenile] Law No.12 of 1996, art. 94.* The law said that the juvenile court is the only tribunal have exclusive jurisdiction over children’s criminal behavior. It governs the procedural rules that must be followed with children who are between the age of seven and twelve years old.

for children, and instead replaces them with preventive therapeutic measures.<sup>69</sup> One of the main philosophies of the Egyptian criminal justice system is to achieve social rehabilitation and discipline the offender, and prescription (time lapse) negates that goal. Egyptian law provides two cases – in which the state has no right to execute the criminal – for mitigating the death penalty, either by statute of limitations or by presidential pardon (clemency). The Procedural Code states “the statute of limitations for death penalty is 30 years and shall start once the verdict becomes final and irrevocable.”<sup>70</sup> On the other hand, clemency means the non-execution or mitigation of the death penalty, to be replaced by another alternative (*e.g.*, life imprisonment).<sup>71</sup>

It is worth noting that Islamic law did not play any role in the process of administering the death penalty in the Egyptian criminal justice system, as most of the acts punishable by this sentence – in positive law – are not based on the *Sharie‘a* norms.<sup>72</sup> Under this law, the application of this punishment is more limited to specific crimes and was not overused like as today. Also, the Egyptian law prescribes this sentence for several crimes that are not categorized as “heinous” or “serious” under the International Covenant on Civil and Political Rights (ICCPR).<sup>73</sup> Making

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<sup>69</sup> *Id.* art. 101.

<sup>70</sup> *Id.* art. 528, 529, 381(2), & 533. In other words, once the ruling is appealed before the Cassation Court, it becomes irrevocable, and hence, the statute of limitations begins. *See, e.g.*, Egypt Penal Code, art. 62

<sup>71</sup> Amira Mahmoud Othman, *States of Wait: The Death Penalty in Contemporary Egypt*, 4 KOHL J. BODY & GENDER RES. 1 (2018), at 106-122, <https://kohljournal.press/states-of-wait> (“The Egyptian state discourse is clear about evading its responsibility of producing killable bodies. The arrest of criminals who had received death sentences in absentia features in news reports documenting the efforts of police officers to maintain security. Even then, fantasies about the criminality of such people are enacted [...] The procedures potentially leading to a death sentence are also described in similar terms, with no emphasis on acts of killing. The diffusion of the state’s murder responsibility is further enabled by the utter bureaucracy of the Egyptian state. The people on trial for a capital crime are reduced to “papers” that are juggled between the criminal court and the *Mufti* with a “shroud of secrecy” around the content of such document-exchanges.”). It is a presidential decision either to cancel the sentence or to replace it even after the irrevocable.

<sup>72</sup> Leonard G. H. Wood, *Islamic Legal Revival: Reception of European Law and Transformations in Islamic Legal Thought in Egypt 1875-1952*, (Oxford Univ. Press 2016). Rudolph, *supra* note 17, at 8-52. Tahir Wasti, *The Application of Islamic Criminal Law in Pakistan: Sharia in Practice* (Brill 2009).

<sup>73</sup> ‘Arafa, *supra* note 55. The argument made in favor of the rule is that it gives the offender the feeling of compatibility with his faith; however, this assumes that the accused is Muslim. So, why should a non-Muslim criminal wait for a decision from the *mufti* to confirm that the death penalty is compatible with Islam?

irrevocable judicial rulings on death penalty is deeply concerning, especially to accomplish the goals of respecting human rights, dignity, and criminal justice reform. Although, the Pharaonic legal system – as one of the very ancient legal systems – has been applied in Egypt, it has been reported historically that the application of the death penalty during that era was more fair and just than at the current moment.<sup>74</sup>

### III. DEATH PENALTY IN ISLAMIC CRIMINAL JUSTICE SYSTEM: THE DIVINE JUSTICE

The *Qur'anic* texts prescribes the death penalty for specific criminal acts such as, armed robbery and armed rebellion that leads to death, and also gives the victim's family the right to choose whether to pursue the death penalty in cases of premeditated murder.<sup>75</sup>

#### A. ARMED (HIGHWAY) ROBBERY

Muslim scholars defined this crime as “waiting by the way to steal travelers’ property by the use of force, to block or obstruct travel on the road which leads to the victim’s fatality.”<sup>76</sup> Armed robbery is one of the *Hudud* (fixed) crimes, related to God’s rights and the whole community’s rights.<sup>77</sup> Islamic law mandates this punishment because this crime represents an attack on the nation’s national security and damages the community’s public welfare.<sup>78</sup> Additionally, this crime is principally aimed at the *militant* terrorist groups that assault individuals, threatening their lives, killing them, and robbing their properties. Hence, the penalty is severe, but proportionate with the crime’s gravity.<sup>79</sup> To implement this punishment the criminal must be sane

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<sup>74</sup> See generally Van A. J. Loon, *Law and Order in Ancient Egypt: The Development of Criminal Justice from The Pharaonic New Kingdom Until the Roman Dominate* (Leiden Univ. 2014).

<sup>75</sup> Bassiouni, *supra* note 7, at 204-209.

<sup>76</sup> Abu Zahra, *supra* note 12, at 133.

<sup>77</sup> See generally Khaled Abou El Fadl, *Rebellion and Violence in Islamic Law* (Cambridge Univ. Press 2006); Sherman A. Jackson, *Domestic Terrorism in the Islamic Legal Tradition*, 91 THE MUSLIM WORLD (2001), at 3-4 295; Frank E. Vogel, *The Trial of Terrorists under Classical Islamic Law*, 43 HARVARD INT’L L. J. (2002), at 58.

<sup>78</sup> Abu Zahra, at 77.

<sup>79</sup> See generally Abu Zahra, *supra* note 12.

and of age (legal capacity), and must commit a crime that leads to death.<sup>80</sup> If the culprit renounces the crime before he got arrested, the death penalty shall not be imposed, however, this abandonment will move this crime into *Ta'azir* offences, which are more lenient and subject to the judge's discretion.<sup>81</sup>

## B. ARMED REBELLION

Armed rebellion is defined as an armed uprising against the legitimate authority, as a *Hudud* crime, related to the nation's public interests.<sup>82</sup> To impose the death penalty the offenders must rebel and intentionally rise against the legitimate authority and participate in committing that act by using violence or military force.<sup>83</sup> Consequently, if an individual engages in peaceful uprisings and non-armed rebellions, then legitimate authority does not have the right to enact any penalties against him.<sup>84</sup> Prisoners of war are excluded from the scope of this crime and since the motive of this crime is political, and the armed rebellions are trying to change or overthrow the legitimate regime by using force, Islamic law obliges the legitimate government to try to convince them peacefully via dialogue to stop their criminal practices before punishing them.<sup>85</sup>

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<sup>80</sup> Vogel, *supra* note 77. See generally M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 VA J. INT'L L. 1 (2001–2002) 156. See generally, e.g., Mohammad Fadel, *Islamic Law and American Law: Between Concordance and Dissonance*, 57 N.Y. L. REV. (2012–2013) 238.

<sup>81</sup> *Id.* The accused will be liable only to the victim for the personal harm that he committed.

<sup>82</sup> 'Abd al-Qadir 'Auda, *'al-Tashri' al-Jina'i al-Islami muqarnan Bi'l-qanun al-Wad'i* [*Islamic Criminal Law: A Comparative Analysis with Secular Law*] 638 (Dar al-Katib al-Arabi vol. 2, 1969). See generally Ahmed Al-Dawood, *The Islamic Law of War: Justifications and Regulations* (Palgrave Macmillan, 2011).

<sup>83</sup> *Id.* See also 'Auda, *supra* note 82, at 673.

<sup>84</sup> Bassiouni, *supra* note 7, at 134.

<sup>85</sup> *Id.* at 95. It should be noted that for adultery, stoning-to-death is a controversial punishment in Islamic criminal law, leading most of the contemporary scholars to propose flogging rather than stoning. Also, the required criminal procedural rules (beyond reasonable doubt) make it difficult to be applied, as the *Qur'an*, does not prescribe death for adultery, and instead only prescribes lashing for both married and unmarried individuals. Muslim scholars are in dispute over the concept of apostasy. The *Qur'an* does not stipulate any specific punishment for apostasy. Also, there were various folks who declared their apostasy at Prophet Mohammad's time, and he chose not to inflict any penalty on them. However, there is a prophetic *hadith* narrated stating that the prophet said, "The one who changes his religion, must be killed." Scholars have interpreted that in numerous ways, leading some jurists to recognize the death penalty for apostasy and other moderates see it as a contradiction to the principle of freedom of religion in Islam. The *Qur'an*

## C. PREMEDITATED HOMICIDE

Intentional murder is a *Qisas* crime which justifies the use of the death penalty based on retaliation “eye-for-an eye” meaning that harming the offender in the same way that he harmed the victim.<sup>86</sup> In this respect, the *Hanafi* jurisprudence has divided homicides into five categories: deliberate, *quasi*-deliberate, accidental, equivalent to accidental, and indirect. However, all Muslim scholars agree on the death penalty as a punishment for premeditated murder.<sup>87</sup> Muslim scholars define that act explicitly as “homicide committed with full, actual, and clear intention to kill,” directly caused the killing; as omission or indirect act is insufficient.<sup>88</sup> Also, to apply this sentence the wrongdoer must be of age, sound mind, and not be under duress at the time of the commission of the crime.<sup>89</sup> Although, it is a *Qisas* (equivalence) crime, *Sharie’a* gives the victim’s family the right to choose either the death penalty, or the alternative *diyaa* (blood money).<sup>90</sup> Muslim scholars argue that governments have the right to ask the victim’s family – by enacting a law – to accept blood money from offenders including the poor, and waive the death penalty.<sup>91</sup> The reason behind that the rule that permits the whole society to replace the death penalty with

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says, “Say: “The truth is from your Lord.” So, whoever wills – let him believe; and whoever wills – let him disbelieve” and “There shall be no compulsion in religion.” *Qur’an* 2:256 & 18:29.

<sup>86</sup> Bassiouni, *supra* note 7, at 205-207.

<sup>87</sup> J. Norman D. Anderson, 13 BULLETIN OF THE SCHOOL OF ORIENTAL AND AFRICAN STUDIES, Univ. of London (4) 811–828 (1951), reprinted in *Homicide in Islamic Law* (Cambridge Univ. Press 2009).

<sup>88</sup> *Id.* Thus, the victim’s death must be caused by an act that is attributable to the accused, with no discontinuity between the criminal act (act of commission) and the criminal result (causation nexus requisite). The *Hanafi* jurisprudence argued that killing by poisoning or through the intentional imprisoning of the victim till death is not intentional homicide, and the accused shall not be executed.

<sup>89</sup> Bassiouni, *supra* note 7. So, minors, mentally ill, and coerced persons (under duress) are excluded from death penalty’s scope of application.

<sup>90</sup> *Id.* Some scholars justify the use of capital punishment for these crimes by categorizing them as *Ta ‘azir* acts, as a way of vesting the authority with the discretionary power to prescribe it.

<sup>91</sup> Bassiouni, *supra* note 7, at 206. It should be noted that the accused have the right to withdraw his confession at any moment of the criminal motion to save himself from death penalty or any other criminal sanctions.

blood money is that the accused is not only harming the victim's family but also damaging the whole nation and its welfare.<sup>92</sup>

#### I. DOES ISLAMIC CRIMINAL LAW SUPPORT THE DEATH PENALTY? THE SHARIE'A TENDENCY

The primary and supplementary sources of Islamic criminal law constantly urge leniency when determining whether to inflict the death penalty. Commands of forgiveness and lenity are derived from the *Qur'an*, and although the *Qur'an* prescribes the death penalty as a retaliation for intentional murder and other limited acts to be accepted by the victim's family, it maintains that forgiveness, remission, and lenity are preferable to the death penalty.<sup>93</sup> However, the death penalty is a path of reaching justice and preserving the victim's right against the criminal. Islamic law offers blood money as an optional sanction of a moral retribution on the accused – that achieves justice – while finding a way to save his life.<sup>94</sup> The jurisprudential classical schools of thought have developed many maxims, doctrines, and theories of Islamic criminal law to limit the scope of execution, thus saving human lives.<sup>95</sup> Scholars extended the reach of the maxims of uncertainty/doubt to avert the nuisance of the death penalty.<sup>96</sup>

The doubt notion is derived from the prophetic *hadiths* “[a]void imposing criminal sanctions in cases of doubt” and “[a]void *hudud* punishments to the possible extent; if there is any way out, then release [the convict], as it is better that the judge make a mistake in pardoning than

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<sup>92</sup> Susan C. Hascall, *Shari'ah and Choice: What the United States Should Learn from Islamic Law about the Role of Victims' Families in Death Penalty Cases*, 44 JOHN MARSHALL L. REV. 1, 5-68 (2010).

<sup>93</sup> Bassiouni, *supra* note 7, at 211-226.

<sup>94</sup> Abu Zahra, *supra* note 12, at 498. Prophet Mohammad encouraged individuals to accept blood money by promising several rewards in life and in the hereafter. This inspires the forgiveness values and limiting the scope of execution.

<sup>95</sup> Anas Ibn Malik narrated that “I never saw the prophet in a dispute, which involved retaliation, and brought to him and he ordered for its remission” and “No case requiring retaliation reached the prophet, he orders pardoning.” *Sunan Abi Dawud* 4497, Book 41, *Hadith* 4, *Sunan an-Nasa'i*, 4784, Book 45, *Hadith* 79. For instance, Muslim scholars require many procedural requirements for the eyewitnesses, and a detailed explicit illustration in premeditated murder.

<sup>96</sup> See generally Intisar Rabb, *The Islamic Rule of Lenity*, 44 VAND. J. OF TRANSNAT'L L. 5 (2011).

in punishing.”<sup>97</sup> This divine norm was the key tool, in the hands of Muslim scholars, to verify the criminal procedure of Islamic law that constrains the scope of severe sentences including the death penalty.<sup>98</sup> This idea was the reason behind the Islamic *fiqh* (jurisprudence) to adopt strict terms on who may be a witness in criminal matters.<sup>99</sup> Furthermore, Muslim jurists agreed unanimously that a judge cannot enforce the death penalty as a punishment for controversial crimes (no jurisprudential consensus), such as stoning to death for adultery or death for apostasy.<sup>100</sup> The reconciliation and forgiveness of the victim or his family does not mean releasing the accused of all penalties and *Sharie‘a* does not require that each member of the victim’s family must agree to waive the death penalty, so approval of one relative to waive it is sufficient to avoid execution. The key policy role of *dyaa* is to be paid by the offender, and if indigent, his family is obliged to pay it and the government is obliged to do so if neither the accused nor his family can pay.<sup>101</sup>

Exclusionary Rule: Islamic criminal law recognizes some groups who are excluded from the death penalty, even if they commit the crimes that normally call for this sanction. However, that does not avert the state from enforcing other measures. Thus, Islamic law excludes these groups as a way of accomplishing the common criminal justice policy of sentencing and preventing

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<sup>97</sup> Intisar Rabb, *Reasonable Doubt in Islamic Law*, 40 YALE J. INT’L L. 1 (2015), 41-94; *See generally* Tarek Badawy, *Towards a Contemporary View of Islamic Criminal Procedures: A Focus on the Testimony of Witnesses*, 23 ARAB L. Q. 3 (2009). *See also* ABU AL-HASAN AL-MAWARDI, *KITAB AL-HUDUD MIN AL-HAWI AL-KABIR*, 206 n.1 (Ibrahim b. ‘Alī Sanduqji ed., 1995) (listing other major *hadīth* sources, including ‘Abd al-Razzāq, Aḥmad b. Ḥanbal, Dārimī, Abū Dāwūd, Tirmidhī, Ibn Mājah, Ibn al-Mundhir, Ṭahāwī, Ṭabarānī, alḤākim al-Naysābūrī, and Bayhaqī).

<sup>98</sup> *See generally* Matthew Lippman, *Islamic Criminal Law and Procedure: Religious Fundamentalism v. Modern Law* 12 BOS. COLL. INT’L & COMP. L. REV. 1 (1989), 29-62.

<sup>99</sup> Intisar Rabb, *Doubt’s Benefit: Legal Maxims in Islamic Law, 7<sup>th</sup>-16<sup>th</sup> Centuries* (Princeton University 2009). It should be noted that witnesses must see the criminal act during its commission and not just hear about it; have integrity (not committed any crimes); and must be away from any conflict of interest(s) that may disqualify the testimony.

<sup>100</sup> *See generally* Rabb, *supra* note 97, at 90-94. The doubt principle in the history of Islamic criminal law confirms that the main purpose is to reduce or avoid the use of the death penalty and therefore Islamic schools of interpretations added several procedural rules to increase the circle of doubt and oblige judges to impose any sentence other than death.

<sup>101</sup> Hascall, *supra* note 90, at 55-62. Indeed, the victim or the family that will be compensated in lieu of seeking this penalty will necessarily give careful deliberation to the outcome of hanging the accused and the interest they will gain. The accused cannot escape paying the blood money because of insanity, minority, or death. M. Cherif Bassiouni, *Crimes and the Criminal Process*, 12 ARAB L. Q. 3, 269–286 (1997).

capital punishment. Parents and grandparents who kill their children, grandchildren or their spouses, or family members (close relatives) are excluded.<sup>102</sup>

#### IV. OFF WITH THEIR HANDS! FRANCE AND THE CAPITAL PUNISHMENT

The first great legislative debate on capital punishment took place during the discussion of a draft penal code in May-June 1791.<sup>103</sup> Le Peletier de Saint Fargeau, Duport and Robespierre argued in favor of eliminating the death penalty as it was unjust, that there was a risk of judicial error, and that it was not a deterrent.<sup>104</sup> After the election of François Mitterrand, who had always expressed his abolitionist stance, as President of France in 1981 a bill to abolish the death penalty was passed before the National Assembly on August 29, 1981.<sup>105</sup>

Is it possible for *Le Conseil Constitutionnel* (the Constitutional Council) in France to declare the unconstitutionality of the death penalty? The answer is, maybe, considering the law of October 9, 1981 *di question prioritaire de constitutionnalité* (QPC) in the French legal system (the constitutionality question).<sup>106</sup> The abolition of the death penalty is celebrating its thirty-fifth

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<sup>102</sup> The exclusion is derived from the *sunnah* tradition which says, “The Prophet said to the man who complained to him about his father who took possession of his property: ‘You and your property belong to your father’” and “parents are not punished by death for killing their children.” *Sunan Abi Dawud* 3530, *Book 24, Hadith 115 & Jami` at-Tirmidhi* 1401, *Book 16, Hadith 17*. Bassiouni, *supra* note 7, at 171-194. It has been argued that this exclusion based on the right of the victim’s family to decide whether to seek the death penalty or not; as it will be in the children’s hands, who lost one or both parents if the punishment were imposed. Also, this sentence will never apply in case of self-lawful defense (e.g., killing a rapist).

<sup>103</sup> See generally James M. Donovan, *Public Opinion and the French Capital Punishment Debate of 1908*, 32 L. & HISTORY REV. 3 (2014), 575-609.

<sup>104</sup> At this time, the Constituent Assembly denied eradicating the capital penalty but abolished torture. After the executions during the Reign of Terror, the Convention eliminated the death penalty by the Act of October 26, 1795 as of “publication of the general peace,” but death penalty was reintroduced in the 1810 Penal Code. The abolitionist movement reemerged after the Empire, including Victor Hugo and Lamartine among its zealous advocates: the provisional government of 1848 abolished death penalty, only for crimes of a political nature.

<sup>105</sup> Donovan, *supra* note 103. See generally Robert Nye, *Two Capital Punishment Debates in France: 1908 and 1981*, 29 HISTORICAL REFLECTIONS/RÉFLEXIONS HISTORIQUES 2 (2003), at 211–28.

<sup>106</sup> Philippe Testard-Vaillant, *The End of the Death Penalty Marked a Sharp Turn in French History*, CNRS NEWS, May, 20, 2021, <https://news.cnrs.fr/articles/the-end-of-the-death-penalty-marked-a-sharp-turn-in-french-history> (last visited Apr. 1, 2022) (“Later, under the impetus of François Guizot, one of the leading ministers of the July Monarchy, “the law of April 1832 eliminated capital punishment for nine types of offences, including the burning of buildings, ships, boats, stores, etc.”, Dubois recounts. “Inspired by the doctrine that one should punish ‘neither more than is fair, nor more than is necessary’, the same law limited the death penalty to crimes against persons (homicides) and

anniversary, noting that constitutional law has played a minimal role in this matter, but the eviction of this punishment from the French penal system is derived from the constitutional criminal law. In this regard, the situation has been debatable among European countries.<sup>107</sup> Indeed, several Eastern European constitutional jurisdictions argued for the abolition of the death penalty in peacetime based on the notion of dignity and the right to life as a fundamental right.<sup>108</sup> In France in 1981, through the political will, and the internationalization of criminal law, the death penalty was abolished. Since 2007, article 66-1 of the French Constitution reads "No one may be sentenced to the death penalty."<sup>109</sup>

#### A. ABOLITION OF THE DEATH PENALTY AND THE CONSTITUTION

The current question is as to whether the principles of modern criminal law *per se* can abolish the death penalty. It has been argued that the principle of necessity of punishment require the abolition of the death penalty. The Déclaration des Droits de l'Homme et du Citoyen (Declaration of the Rights of Man and of the Citizen of 1789) reads "[t]he law ought to impose no other penalties, but such as are absolutely and evidently necessary; and no one ought to be punished, but in virtue of a law promulgated before the offence, and legally applied."<sup>110</sup> Beccaria

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introduced the concept of mitigating circumstances, which considerably reduced the number of death sentences and thus of executions.”).

<sup>107</sup> Robert Badinter, *discours à l'assemblée nationale*. Sur le long combat qui a abouti à ce résultat, on se reportera au récit de l'un de ses principaux acteurs: L'abolition, (Paris, Fayard 2000).

<sup>108</sup> Testard-Vaillant, *supra* note 106. For instance, in November 2009, the Russian Constitutional Court, prohibited the application of death penalty and declared its unconstitutionality.

<sup>109</sup> Elsa Devienne, *Comparing Exceptionalism in France and the USA: A Transatlantic Approach to the Death Penalty Abolition Debate (1972-1977)*, 5 EU. J. AMER. STUDIES 1 (2010) (“[It argues] challenges on the history of the death penalty and its abolition by adopting a transatlantic framework and debunking the popular contemporary conception of the “Barbaric Americans” against the “civilised” anti-death penalty French. It focuses on the short period in the 1970s during which American executions were halted by the Supreme Court, while France was still putting prisoners to death in cases that were widely debated in public opinion. By observing the French media’s reactions to the two major decisions taken by the Supreme Court in the 1970s and their direct consequences, it analyzes not only the French gaze on American practices but also how these American decisions were manipulated by the journalists to stoke the French debate about abolition.”).

<sup>110</sup> Loi du 26 août 1789 Déclaration des droits de l'homme et du Citoyen [Law of August 26, 1789 *The Declaration of the Rights of Man and of the Citizen*] JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAIS [J.O.] [FRANCE OFFICIAL GAZETTE], Aug. 26, 1789 art. 8.

argued "so the punishment should not be violent against the offender [public citizen], it must be effectively swift, deterrent, necessary, considering the circumstances around the case [Case-by-Case basis], and proportionate to the gravity of the criminal offence, and the written laws."<sup>111</sup> He further considers the death penalty unjust and unnecessary in times of stability, public peace, and security, however, he considers it "necessary [and deterrent but disputed it] when the Nation is in the process of transition towards its democratic principles, civil rights and public liberties."<sup>112</sup> It has been argued that the necessity of punishment requires the lawmakers [or policymakers] to "[n]o longer intervene in the criminalization or penalization process but only to check on the punishment's necessity, personality, proportionality, and to reach the balance required, which is complicated . . . ." French scholars argued that "the risk of the quantitative [amount] nature of punishment is deeply concerning but not shocking as of its qualitative nature."<sup>113</sup>

#### B. THE BALANCE: ABOLITION IS NOT VERSUS THE CONSTITUTIONAL NORMS

Protocol 6 to the European Convention on Human Rights requires parties to restrict the application of death penalty to times of war or "imminent threat of war."<sup>114</sup> The first article of this protocol explicitly reads "[t]he death penalty shall be abolished. No one shall be condemned to

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<sup>111</sup> Cesare Beccaria, *Des délits et des peines*, Guillaumin et cie, 1870. ("Capital punishment is not useful because of the example of cruelty which it gives to men. If the passions or the necessity of war have taught people to shed human blood, the laws that moderate men's conduct ought not to augment the cruel example. . .").

<sup>112</sup> William A. Schabas, *International Law and Abolition of the Death Penalty*, 55 WASH. & LEE L. REV. 797 (1998) ("[...] the European Convention, it already shows the remarkable and rapid evolution of international law regarding the death penalty. Article 6 of the International Covenant also includes the death penalty as an exception to the right to life, but it lists detailed safeguards and restrictions on its implementation. "The death penalty may only be imposed for the "most serious crimes," it cannot be pronounced unless rigorous procedural rules are respected, and it may not be applied to pregnant women or to individuals for crimes committed while under the age of eighteen. "Furthermore, article 6 of the International Covenant clearly points to abolition of the death penalty as a human rights objective and implies that states that have already abolished the death penalty may not reintroduce it . . .").

<sup>113</sup> *Id.* Beccaria, *supra* note 111, at 115. ("In order to be just, a penalty should have only the degree of intensity needed to deter other men from crime. Now there is no one who, on reflection, would choose the total and permanent loss of his own liberty, no matter how advantageous a crime might be. Therefore, the intensity of a sentence of servitude for life, substituted for the death penalty, has everything needed to deter the most determined spirit.").

<sup>114</sup> See COUNCIL OF EUROPE, EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS, *as amended by Protocols* Nos. 11 and 14, Nov. 4, 1950, ETS 5, <https://www.refworld.org/docid/3ae6b3b04.html>.

such penalty or executed.”<sup>115</sup> This requirement does not violate Articles 61 or 54 of the French Constitution which reads:

If, during proceedings in progress before a court of law, it is claimed that a statutory provision infringes the rights and freedoms guaranteed by the Constitution, the matter may be referred by the Conseil d’État or by the Cour de Cassation to the Constitutional Council, within a determined period...<sup>116</sup>

Accordingly, the Constitutional Council have an obligation to make sure that any international document does not include "any clause contrary to the Constitution" and to safeguard the State’s sovereignty.<sup>117</sup> To assure the same norm, the same Constitution reads:

Where the institutions of the Republic, the independence of the Nation, the integrity of its territory or the fulfilment of its international commitments are under serious and immediate threat, and where the proper functioning of the constitutional public authorities is interrupted, the President of the Republic shall take measures required by these circumstances [...] The measures shall be designed to provide the constitutional public authorities as swiftly as possible, with the means to carry out their duties. The Constitutional Council shall be consulted regarding such measures . . . the exercise of such emergency powers . . .<sup>118</sup>

On the international level, France has worked – and still does – for abolition of the death penalty in close consultation with its European allies. Especially through ratifying the Additional Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms, which provides for eradication of this punishment in peacetime.<sup>119</sup> It has been argued that Protocol

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<sup>115</sup> See COUNCIL OF EUROPE, PROTOCOL 14 TO THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS AMENDING THE CONTROL SYSTEM OF THE CONVENTION, May 13, 2004, CETS 194, <https://www.refworld.org/docid/42ef8d0b4.html>.

<sup>116</sup> 1958 Const. art. 61(1)(2), & 54. Article 54 reads: If the Constitutional Council, on a referral from the President of the Republic, the Prime Minister, the President of one or the other Houses, or [. . .], has held that an international undertaking contains a clause contrary to the Constitution, authorization to ratify or approve the international undertaking involved may be given only after amending the Constitution.

<sup>117</sup> Schabas, *supra* note 112.

<sup>118</sup> *Id.* art.16.

<sup>119</sup> See generally André Castaldo, *Introduction Historique au Droit* (Paris, Dalloz 2000); Robert Muchembled, *Le Temps des Supplices* (Paris, Armand Colin, 1992). See, e.g., *Witherspoon v. Illinois*, 391 U.S. 510 (1968).

6 is compatible with the duty of the State to ensure that public institutions are functioning, and operating consistent with respecting and guaranteeing citizens' rights. In doing so, the Council implicitly recognizes that the President could reinstate – without violating the Constitution – the death penalty if the nation faces imminent danger or act of aggression by war, and not just a *mere* terrorist activity.<sup>120</sup> In such circumstances, the Constitutional Council confirmed that the international texts require the ratifying States to abolish capital punishment at all times and in all exceptional circumstances, including “war times or imminent danger” in which there is no violation to the constitutional principles on public rights and civil liberties.<sup>121</sup> The reason behind this ruling was the case law of the European Court of Human Rights on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.<sup>122</sup> Article 4 of this Convention says:

Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture. [...] State Party shall make these offences punishable by appropriate penalties which consider their grave nature.<sup>123</sup>

On October 8, 2010, the State Council referred a controversial question to decide the constitutionality of the National Court of Asylum that had denied the request to invalidate the decision of the Office Français de Protection des Réfugiés et Apatrides (OFPRA) director refusing to grant asylum to a foreigner, citing the question of the compatibility of Article L.712-2 of the Code de l'entrée et du séjour des étrangers (entry, residence and asylum right) with the

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<sup>120</sup> See, e.g., Michel Vovelle, *L'heure du grand passage*, chronique de la mort, Paris, Gallimard, 1993, 88. Jean Imbert, *La peine de mort*, Paris, P.U.F., Que sais-je?, 1993, 124.

<sup>121</sup> *Id.* See also Cesare Beccaria, *On Crimes and Punishment* 48-51 (Aaron Thomas & Jeremy Parzen trans., Hackett Pub. Company, Inc. 1986).

<sup>122</sup> G.A Res. 39/46, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Dec. 10, 1984).

<sup>123</sup> *Id.* art. 4. Thus, following the decision of the Constitutional Council, the legal debate on the relationship between the death penalty and the Constitution was over.

Constitution.<sup>124</sup> This Act anticipated to provide and grant protection to individuals who cannot claim refugee status when they are exposed in their country to the risk of suffering the death penalty or inhuman treatment.<sup>125</sup> The law may exclude a person from such protection, if "there are serious reasons [reasonable grounds] to believe [...] that he/she has committed a *serious* crime under domestic law; and that act may represent a serious threat to public order, country's national security interests or its citizen's safety."<sup>126</sup> On February 19, 2007, Jacques Chirac's signed an executive order adding to the Constitution a provision that reads, "[n]o-one shall be sentenced to death," making France the 17<sup>th</sup> country to involve a ban on death penalty in its Constitution. The recent amendment to the French Constitution will allow France to ratify the Second Optional Protocol of the International Covenant on Civil and Political Rights of the New York Convention of October 15, 1989 abolishing the death penalty.

It should be noted that abolition in France came a few years after the British and the Spanish experiences. In 1981, a Leftist government came into office and put an abolition bill before the French parliament.<sup>127</sup> It set out a cycle of justifications. The conclusiveness and irrevocability of the death penalty was one, which stated, "[a] freedom-loving country cannot in its laws preserve the death penalty. It is an imperative for freedom not to give anyone an absolute power so that the consequences of a decision are irremediable."<sup>128</sup> Another motivation was that capital sentence reflects badly on a society, indicating that it cannot settle issues of violence by other means. "The

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<sup>124</sup> See generally Hugo Bedau and Michael Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. (1987).

<sup>125</sup> *Id.* at 57-60.

<sup>126</sup> *Id.* at 72-74. See G.A. Res. A/RES/44/128, Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty (Dec. 15, 1989).

<sup>127</sup> Michel Forst, *The Abolition of the Death Penalty in France*, reprinted in *The Death Penalty: Abolition in Europe* 105, 113 (Council of Europe Pub., 1999).

<sup>128</sup> Robert Badinter, French Keeper of the Seals, French Minister of Justice, Speech Before the French National Assembly; Explanation of Reasons Given on Behalf of Mr. Pierre Mauroy (August 29, 1981).

death penalty confirms a weakness in society; its abolition responds to an ethical principle.”<sup>129</sup> Still another was the influence of abolition elsewhere in Europe. “The time has come for France, which so often has been in the forefront of freedom and of progress in the law, to rectify the delay it has shown in this regard in relation to the countries of Europe.”<sup>130</sup> And yet another was public opinion, which stated, “[t]he French people have several times gone for candidates who advocated abolition. It is necessary to draw conclusions from this and to translate into our laws a choice to which the voters have implicitly given approval.”<sup>131</sup>

Lastly, the French government argued against deterrence as a reasoning. “There is no correlation between trends in violent crime and the absence or presence of the death penalty.”<sup>132</sup> It called capital punishment “inhuman, degrading, and cruel.”<sup>133</sup> Capital punishment was “a remnant of another age.”<sup>134</sup> In this regard, a legislative commission reviewed the bill and reported back as it put abolition in “the humanist tradition” of France.<sup>135</sup> The commission’s rapporteur said that “studies that have been done have not established scientifically whether criminality is affected by maintenance of the death penalty at the top of the scale of punishments.”<sup>136</sup> Robert Badinter,

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<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> See Christina M. Cema, *Universality of Human Rights: The Case of the Death Penalty*, 3 ILSAJ. INT’L & COMP. L. 465,472 (1997).

<sup>134</sup> *Id.*

<sup>135</sup> See generally John Andrews & Ann Sherlock, *Extradition, Death Row and the Convention*, 15 EUR. L. REV. 87 (1990) (discussing Soering); Henri Labayle, *Droits de l'homme, traitement inhumain et peine capitale: Reflexions sur l'edification d'un ordre public europden en matire d'extradition par la Cour europienne des droits de l'homme*, 64 SEMAINE JURDIQUE 3452-57 (1990) (same); Richard B. Lillich, *The Soering Case*, 85 AM. J. INT’L L. 128 (1991) (same). See, e.g., *The State v. Makwanyane and Mchunu*, 1995 (3) SA 391, 36 (CC) (Chaskalson, President). According to President Chaskalson, “[c]apital punishment is not prohibited by public international law, and this is a factor that has to be taken into account in deciding whether it is cruel, inhuman or degrading punishment within the meaning of section 11(2) [of the interim constitution of South Africa].”

<sup>136</sup> No. 316, National Assembly, Constitution of October 4, 1958, Seventh Legislature, Second Special Session of 1980–1981, Annex to the transcript of the session of September 10, 1981, Report given on behalf of the Commission of the Republic on Constitutional Law, Legislation and General Administration on Draft Law No. 310 on abolition of the death penalty, by Mr. Raymond Forni, Deputy.

Justice Secretary [Minister] and a long-time opponent of death penalty, spoke to the National Assembly to promote implementation of the Government's abolition bill.<sup>137</sup> He put this penalty in the context of other misuses of rights noting that France had been the first country in the European Union to abolish torture and slavery.<sup>138</sup> He underscored that abolition had long been needed by the forces of the political Left in France. The draft law was approved by the National Assembly, affirming plainly and simply, "*The death penalty is abolished.*"<sup>139</sup>

V. "SOUL FOR SOUL" OR EYE -FOR- AN EYE": WHAT SHOULD THE EGYPTIAN CRIMINAL JUSTICE SYSTEM LEARN FROM ISLAMIC CRIMINAL LAW ON DEATH PENALTY?

The Egyptian criminal justice system needs to consider the reform of the death penalty based on Islamic criminal law norms, and because of its constitutional and cultural duties on the Egyptian lawmaker. Furthermore, Islamic legal – substantive and procedural – rules governing the death penalty are consistent with contemporary international human rights standards, as well as the global obligations of the death penalty reform's campaigns.

A. CONSTITUTIONAL SUPREMACY DUTY: FOLLOWING ISLAMIC SHARIE'A LAW

Article 2 of the Egyptian Constitution states, "[t]he principles of Islamic *Sharie'a* are the principal source of legislation," meaning that the Egyptian laws (written codes) must be in

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<sup>137</sup> Forst, *supra* note 117, at 114. See also Robert Badinter, Minister of Justice and Minister of Justice of the Government of Pierre Mauroy, Presentation of the Bill Abolishing the Death Penalty to the National Assembly (Sept.17, 1981).

<sup>138</sup> Robert Badinter, *Abolition: One Man's Battle Against the Death Penalty* 198–199 (2008).

<sup>139</sup> *Id.* As he finished his speech, he recalled, a strong praise and applause from National Assembly members on the political Left than those on the political Right; the prior group voted overwhelmingly for abolition, while in the latter the outcome was mixed.

accordance with the general principles of Islamic law; otherwise, it will be unconstitutional.”<sup>140</sup> In this context, the Egyptian Supreme Constitutional Court (SCC) stated:

Article 2 of the Egyptian Constitution is a constitutional duty imposed on the Egyptian legislature to [not] to enact any law that contradicts the definite [conclusive] rules of Islamic law or its interpretation(s) by the classical schools of jurisprudential thought. This Court have jurisdiction over the constitutionality of the Egyptian statutes.<sup>141</sup>

Consequently, the SCC has authority to exercise judicial review to ensure that all laws and rules conform to the Egyptian Constitution, and to interpret acts to remove any misinterpretation or vagueness regarding their meaning.<sup>142</sup> However, despite hearing several cases arguing that specific laws were clashing with the principles of Islamic *Sharie‘a* cited in Article 2 of the Egyptian Constitution, the SCC did not find it necessary to define what ‘the Islamic *Sharie‘a* principles’ meant.<sup>143</sup> The SCC came up with a complicated solution: first, if the legal texts are clear after careful examination, the plain meaning will be applied, but if they remain equivocal or vague, the Court *per se* will try to clarify the texts without contradicting the doctrines of the *Sharie‘a*.<sup>144</sup> Second, the review level is to inspect whether the challenged legislation is compatible

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<sup>140</sup> Loi 81–908 du 9 Octobre 1981 portant abolition de la peine de mort [Law 81-908 of October 9, 1981 for Abolishing the Death Penalty], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAIS [J.O.] [FRANCE OFFICIAL GAZETTE], Oct.10, 1981, 2759.

<sup>141</sup> *Constitution of Arab Republic of Egypt*, 18 Jan. 2014, art.2. Cases No. 67, 68, & 34, AL-MAHKAMA AL-DUSTORIYA AL‘ULIYA [Supreme Constitutional Court] (Sep.7, 1996, Jan.4, 1997) [Egyptian Judicial Review] no. 8, 133-209.

<sup>142</sup> Mohamed ‘Arafa, *Case 8/1996 (Egypt)*, reprinted in *Max Planck Encyclopedia of Comparative Constitutional Law* 4-5 (Rüdiger Wolfrum, Frauke Lachenmann, and Rainer Grote eds., Oxford Univ. Press 2019).

<sup>143</sup> *Id.* at 5-6. (“The tension that the Court places on the need for legislative consistency with the welfare-oriented purposes of *Sharie‘a* characterizes the Court as an institution with a liberal constitutional jurisprudence. Nevertheless, it would be wrong to believe that the Court is trying to secularize the Egyptian legal system to the extent of divorcing it from Islamic law. The approach is rather to reinterpret Islamic norms in a way that fits the needs of modern society. Several well-known Western intellectuals have acknowledged the Court’s approach as a bold attempt to introduce *Sharie‘a* as both a complete corpus of law and a concept of life that can persist in the modern era with its liberal and secular challenges.”).

<sup>144</sup> Frank Vogel, *Conformity with Islamic Shari‘a and Constitutionality under Article 2: Some Issues of Theory, Practice, and Comparison* reprinted in, *Democracy, the Rule of Law, and Islam* 535 (Coltran, E, and Sherif, AO, eds. Kluwer 1999).

with the *Sharie'a* values to promote and protect religion, life, reason, honour, and property. The development of these essential *maqasid* (objectives) was the product of Islamic scholars' interpretation and *ijtihād* (analogical deduction) with a view to enriching social welfare and justice, and to render Islamic law as a complete concept of life, not just a set of rules.<sup>145</sup> Thus, the Court held that a law that undermines justice and the common good would be unconstitutional.<sup>146</sup>

### *1. Cultural and Customary (Social) Obligation: Adhering to Islamic Law*

There are cultural and social aspects that play a crucial role in motivating Egyptian law to follow Islamic law rules. The modern history of the Egyptian legal system retains that individuals have no chance to choose their law(s) based on their cultures, beliefs, or social life, however, by recurrent accepted customs.<sup>147</sup> Since capital punishment is codified, the cultural nature of the Egyptian society requires the law and policymakers to reform this penalty according to Islamic law. Given the mandatory influence of Islamic law on the legislature, along with the United Nations pressure on its members to reform the death penalty or to abolish it – theoretically or practically – the response of the Egyptian legislator to reform this penalty will be more practical and effective if based on the cultural, moderate religious, traditional, and social nature of the Egyptian community.<sup>148</sup>

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<sup>145</sup> *Id.*

<sup>146</sup> *Awad-Allah v. Abd-El-Al* (SCC) (4 May 1985) Decision No.28, Judicial Year No.1 (Egypt); *Rector of the Azhar University v. President of the Republic* (SCC) (1985) Case No.20, Judicial Year No.1, translated in (1986). Case No. 8, SCC Judicial Year 17 (on Islamic Law, Veiling and Civil Rights) (18 May 1996). *Wassel v. Minister of Education* (SCC) (18 May 1996) Decision No.8, Judicial Year No.17 (*Niq'ab* [Veil] Case).

<sup>147</sup> Schabas, *supra* note 112. Egyptian codes are based on Western laws because of the European colonialism. For instance, the contemporary Egyptian criminal code finds its origins in the French, Italian, English, and Indian legal systems.

<sup>148</sup> Turkey is an obvious example. As a result of the EU pressure on Turkey, the death penalty has been abolished, however, the government currently considering reinstating it again. See *Turkey and EU Row: Erdogan Threatens to Back Death Penalty, Open Borders to Migrants*, MIDDLE EAST EYE, (Nov. 25, 2016). <https://www.middleeasteye.net/news/turkey-and-eu-row-erdogan-threatens-back-death-penalty-open-borders-migrants> (“in response to cheering crowds' chants of "we want the death penalty"... EU officials have repeatedly made clear that bringing back the death penalty would end Turkey's bid for membership, which sets abolishing capital punishment as

## 2. *The Contemporary Need: Following Sharie‘a Model on Capital Punishment*

The United Nations international campaigns against the death penalty, is currently playing a fundamental role in abolishing or reforming it globally. Muslim countries have resisted this campaign, arguing that their legal systems must not contradict Islamic law rules, which expressly recognizes the death penalty.<sup>149</sup> Thus, the Egyptian legislator should invoke the Islamic norms governing capital punishment to be more consistent with the international campaign reform. Middle Eastern countries should not deny the global reform campaign, nor the UN resolutions on the death penalty, by asserting their religious aspects and those countries must follow those rules.<sup>150</sup> Egyptian criminal law has numerous punishments, such as life imprisonment, that are sufficient at deterring heinous acts, such as terrorism, drug trafficking, and military crimes among many others. Such punishments are more preferable than capital punishment especially if they do not lead to the victim’s mortality. The substantial argument for keeping the death penalty in the Egyptian criminal jurisprudence – and in most Muslim nations – is based on religious claims. Even though Islamic law retains the death penalty only for premeditated homicide crimes, and not for many other capital crimes that are stated in these codes.<sup>151</sup> Islamic law narrowed the scope of

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a condition. In 2004, Ankara abolished the death penalty as part of its accession process.”). Kursat Akyol, *Will Turkey Reinstate Death Penalty? Turkey Risks Sliding Further away from the West if it Reinstates the Death Penalty after the Failed Coup Attempt*, AL-MONITOR, (July 29, 2016), <https://www.al-monitor.com/originals/2016/07/turkey-coup-attempt-death-penalty.html#ixzz6rHosofDE>.

<sup>149</sup> William Schabas, *Islam and the Death Penalty*, 9 WILLIAM & MARY BILL RIGHTS J. 1 223, 231 (2000) (explaining that Islamic states correctly argue that capital punishment is an element of Islamic law, [but] Islamic states do not recognize the more limited role of the death penalty articulated by the Islamic religion).

<sup>150</sup> See, e.g., Human Rights Watch, *World Report 2017*, [https://www.hrw.org/sites/default/files/world\\_report\\_download/wr2017-web.pdf](https://www.hrw.org/sites/default/files/world_report_download/wr2017-web.pdf). Amnesty International *Global Report, Death Sentences and Executions*, (2016). <https://www.amnesty.org/en/what-we-do/death-penalty/> (“Amnesty monitors its use by all states to expose and hold to account governments that continue to use the ultimate cruel, inhuman and degrading punishment. The use of the death penalty for crimes committed by people younger than 18 is prohibited under international human rights law, yet some countries still sentence to death and execute juvenile defendants...However, their significance goes beyond their number and calls into question the commitment of the executing states to respect international law.”).

<sup>151</sup> In other words, these severe acts do not involve deliberately taking the victim’s life should be outside the scope of the death penalty.

capital punishment to only deliberate murder, and thus, Egyptian law at least must be consistent constitutionally with the Islamic law principles and limit its the scope to intentional killings. In the same vein, Article 18(a) of Law No.150 of 1950 reads:

The victim, his agent, or successors [victim's family] may process reconciliation procedures before the Attorney General for involuntarily manslaughter, assault, and battery. This reconciliation will suspend and terminate the investigations [criminal motion] and elapsing the punishment. The Attorney General have the right to drop the penalty and release the accused based on the settlement between the offender and the victim's family.<sup>152</sup>

Although this provision gives the victim or their family the right to waive the punishment and process reconciliation, its scope is limited to crimes – not premeditated murder – that do not punish by the death penalty. The philosophy of the lawmaker aligns with the prospect of moving these categories of crimes from the public realm to be a personal right (state's right to victim's right). Therefore, the Egyptian legislator has the option to extend reconciliation/amicable settlement to include deliberate homicide.<sup>153</sup> It should be noted that modern Egyptian history highlights that until recently, the reconciliation traditions in murder cases were mainly solved among the victim's family and the offender's family without any governmental intervention.<sup>154</sup> This does not mean that the government does not have the right to punish those who commit deliberate homicide. However, the Egyptian legislature should consider the Egyptian community's philosophy in pardoning and making reconciliation as a possibility for crimes against the public.<sup>155</sup>

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<sup>152</sup> *Crim. Pro. Code*, art.18(a).

<sup>153</sup> See generally Charles Brower and Jeremy Sharpe, *International Arbitration and the Islamic World: The Third Phase*, 97 AM. J. INT'L L.3, 643–656 (2003).

<sup>154</sup> *Id.* See generally J. Norman D. Anderson, *Law Reform in the Muslim World* (Athlone Press 1976).

<sup>155</sup> See generally Cherine Foty, *The Evolution of Arbitration in the Arab World*, Kluwer Arbitration Blog, (July 1, 2015, <http://arbitrationblog.kluwerarbitration.com/2015/07/01/the-evolution-of-arbitration-in-the-arab-world/>).

Some Muslim nations adopted this policy (consent of the victim's family) without distinction between permitted murder and manslaughter.<sup>156</sup> In other words, the legislature should give the judge the authority to allow for reconciliation between the disputant parties (accused and the victim's family), so that will drop the administration of death penalty. Most of the Muslim nations have a legal provision for blood money as a penalty, so that the accused can pay compensation with consent (approve to waive the death sentence) from the victim's family. The Egyptian criminal law does allow for some monetary compensation to the victim's family even if no blood money right is established by filing a civil lawsuit.<sup>157</sup> One of the most crucial lessons that the Egyptian legislature should learn from Islamic law is the endless evolution of its rules, based on the community needs and public welfare (common good). Although *Sharie'a* law specifies capital punishment is exclusively for murders – as in some states in America – under the philosophy of revenge and retaliation that obligated societies back then to kill the accused only when he killed the victim, i.e. a *soul for soul*.<sup>158</sup> Moderate Muslim scholars understood the *Sharie'a maqasid*, its punishment's policy and hence, they began to develop legal theories responding to

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<sup>156</sup> See UAE Criminal Procedural Code Law No.35 of 1992, art. 20, Saudi Arabia Criminal Procedural Law [Royal Decree No. M/39], art. 23, (2); Sudanese Code of Criminal Procedure of 2003, art. 264, 276; Kuwait Criminal Procedural Law No. 17 of 1960, art. 240, 241 (discussing the opinion of the victim's family in deliberate murder).

<sup>157</sup> Bassiouni, *supra* note 7. It should be noted that modern Muslim scholars argued that the literal concept of "family" should be interpreted to mean "the state." If the accused or his family are unable to pay the blood money to the victim's family, the government is obliged to do so. If the Egyptian law consider a bill on blood money rules, it should include responses to quires as, what amount (directly or by installments)? when is the family or the government enforced to pay? Shall the state oblige the accused to work to pay back the amount and that his family to accept it and waive the death penalty? See generally, e.g., John F. Manning, *Second-Generation Textualism*, 98 CALI. L. REV. 1287 (2010) (outlining the tenets of old and new, or second-generation, textualism); John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 420-21 (2005) (same).

<sup>158</sup> During this time, the victim's tribe used to kill tens of people to retaliate for killing one of its members, then the other tribe countered this revenge with another, that led to endless wars among tribes for decades. The *Qur'an* obliges individuals to adopt retaliation policy, enforcing the sanction only against the accused not to anybody else (punishment personality), considering that pre-Islamic societies did not recognize the principle of equality of punishment. The *Qur'an* says "O you who have believed, prescribed for you is legal retribution for those murdered – the free for the free, the slave for the slave, and the female for the female. But whoever overlooks from his brother anything, then there should be a suitable follow-up and payment to him with good conduct" and "And We ordained for them therein a life for a life, an eye for an eye, a nose for a nose, an ear for an ear, a tooth for a tooth, and for wounds is legal retribution. But whoever gives [up his right as] charity, it is an expiation for him." Qur'an, 1:178 & 5:45.

the society's evolving needs.<sup>159</sup> Comparing the Egyptian criminal rules *status quo* on the death penalty with the situation a hundred years ago demonstrates that the current state is more harsh and this sentence should be restored to be coherent with the current changes of the international human rights law.<sup>160</sup>

## VI. CONCLUSION: GRADUAL REFORM AND MOVING FORWARD

The contemporary catastrophic application of the death penalty in the Egyptian criminal justice system entirely contradicts and misuse both the origins of the codified legal system, the modern evolution of the Constitution, and Islamic law in sentencing. Capital punishment is irreversible and irrevocable; errors occur, execution is the worst, and the risk of executing an innocent person can never be eliminated. Since 1973, for instance, more than 160 prisoners sent to death row in the United States have shortly been exonerated or freed from death row on innocence grounds.<sup>161</sup> Others have been executed despite grave suspicions about their guilt.

It does not deter crime. Nations – with skewed justice systems – who implement the death penalty frequently cite that the death penalty deters individuals from committing criminal acts. This argument has been constantly disputed, and there is no evidence that this sentence is any more efficient in reducing criminality than life imprisonment. In several situations, individuals were executed after being convicted in utterly unfair trials, based on torture-tainted evidence and with

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<sup>159</sup> Jasser Auda, *Maqasid Al-shariah as Philosophy of Islamic Law: A Systems Approach*, (London: International Institute of Islamic Thought, 2008). For instance, in Islamic criminal context, the victim's consent; witnesses' terms; the offender's confession; the blood money right; judicial independence; the doubt maxim just to name, has evolved.

<sup>160</sup> Rabb, *supra* note 97, at 41-60, *supra*, note 98, at 1299-1351. Bassiouni, *supra* note 7, at 109-123. *See, e.g.*, Wael Hallaq, *An Introduction to Islamic Law* (Cambridge 2009); Noah Feldman, *The Fall and Rise of the Islamic State* (Princeton 2008). Wael Hallaq, *The Origins and Evolution of Islamic Law* (Cambridge 2005).

<sup>161</sup> *See generally* John Quigley & S. Adele Shank, *Death Row as a Violation of Human Rights: Is it Illegal to Extradite to Virginia?* 30 VA. J. INT'L L. 241 (1989); Christine Van den Wyngaert, *Applying the European Convention on Human Rights to Extradition: Opening Pandora's Box?* 39 INT'L & COMP. L. Q. 757 (1990); Colin Warbrick, *Coherence and the European Court of Human Rights: The Adjudicative Background to the Soering Case*, 11 MICH. J. INT'L L. 1073 (1990).

improper legal representation.<sup>162</sup> In some countries, death penalties are inflicted as the mandatory punishment for certain crimes, meaning that judges are not able to consider the crime's circumstances or of the defendant before sentencing. Capital punishment is discriminatory. Its weight is disproportionately carried by those with less advantaged socio-economic backgrounds or belonging to a racial, ethnic, or religious minority. This involves, for instance, having limited access to legal representation, or being at more disadvantage in their familiarity of the criminal justice system. It is used as a political tool by some countries to punish political opponents.

The evolution of international and criminal law(s) is moving toward abolishing the death penalty. Global movements have recently intended to limit or suspend the use of the death penalty, and decline the number of crimes punishable by it. UN Security Council Resolutions along with the Rome Statute of the International Criminal Court (ICC) that established international criminal tribunals did not cite the death penalty in sentencing, despite the seriousness of the crimes in many cases (*e.g.*, Former Yugoslavia or Rwanda).<sup>163</sup> In June 1998, a European Union policy – along with universal and regional protocols – was adopted in conformity with the E.U.'s ambitions to abolish the death penalty worldwide and require that countries in which it is still applied gradually decline its cruel use, as it violates the right to life as a fundamental right. Vague legal provisions on the death penalty are deeply concerning and represent a serious threat for reform. History has

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<sup>162</sup> For further details, *see, e.g.*, *Report of the Human Rights Committee, Kindler v. Canada* (No. 470/1991), § 15.2; *UN Human Rights Committee* (UN-HRCee), *Geneva & New York, Extradition to the United States to Face the Possible Imposition of the Death Penalty Not Considered to Violate the CCPR/Cox v. Canada*, 15 HUM. RTS. L. J. 410 (1994). *See, e.g.*, (*in the United States*) *Gomez v. U.S.- Dist. Ct. for the N. Dist. of Cal.*, 503 U.S. 653, 654-59 (1992) (Stevens, J., dissenting) (discussing view of United States courts on this question).

<sup>163</sup> *See generally* Edward F. Sherman, Jr., *Comment, The US. Death Penalty Reservation to the International Covenant on Civil and Political Rights: Exposing the Limitations of the Flexible System Governing Treaty Formation*, 29 TEX. INT'L L.J. 69, 69-93 (1994); David P. Stewart, *US. Ratification of the Covenant on Civil and Political Rights: The Significance of the Reservations, Understandings and Declarations*, 14 HUM. RTS. L. J. 77, 77-83 (1993). *Extrajudicial, Summary or Arbitrary Executions: Report of the Special Rapporteur*, U.N. ESCOR, Comm'n on Hum. Rts., 53d Sess., Agenda Item 10, § 79, at 22, U.N. Doc. E/CN.4/1997/60 (1996). John M. Goshko, *Helms Calls Death Row Probe "Absurd U.N. Charade"*; *Senate Foreign Affairs Chief Demands Explanation of Rights Investigation from U.S. Envoy*, THE WASH. POST, Oct. 8, 1997, at A07.

proven this often does not last very long. The extreme use of this penalty encourages more violence, and hence, it is highly recommended that government policy and its lawmakers should investigate other legal and jurisprudential alternatives that would allow for the death penalty's very narrow use, and perhaps leading to its entire abolition. As well as maintaining the criminal's human dignity, giving them a chance to prove innocence or to change their conduct, and become a productive community member.

Due to certain Muslim government's position on the death penalty, the global campaign claims that *Sharie'a* law is an obstacle to reform the death penalty. Indeed, using the death penalty improperly in these nations – with the alleged religious claims – led many to believe that Islamic law is the major hurdle to reform this sentence. The international call for the abolition or restriction of the death penalty in Muslim nations is neither an easy call to be tolerated, nor welcomed, due to cultural, historical, and religious factors associated with these communities. However, if the call for reform is based on accurate divine messages and moderate interpretations, it will be more successful. Islamic law neither calls for absolute abolition nor absolute retention, it takes a middle ground between both. In other words, before urging the victim's family to pardon, forgive, and waive the death penalty, Islamic law consider first the victim's right of life that would be deprived by the conviction, and then offer them (or their family) either to keep it or approve (waive) it. Blocking individuals from the right to decide whether to forgive or not would result in reform failure. This philosophy seems to be consistent with both the Egyptian Constitution and the forgiveness environment, thus, enough to support the reform movement.

Human rights organizations must consider that moderate Muslim scholars must take the first step in the reform process. They should engage with Islamic law scholars and religious institutions, because they have the power to convince the Egyptian – legal – community, of the

necessity for reforming the death penalty. It is a great shared responsibility among legal professionals (scholars, activists, judges, practitioners, law professors); however, the Egyptian legislature bears the biggest share of that duty; to raise legal awareness about the death penalty. Middle Eastern communities need to understand that the current *status quo* of capital punishment is in contradiction with the general principles of Islamic law, especially of the due process in sentencing, and that reform is a religious duty. The history of Islamic philosophies of doubt discloses how fundamental social political and institutional frameworks were to Muslim scholars' structures of Islamic law in this ostensibly *textualist* legal tradition. Muslim jurists established a textual doctrine of doubt in response to the eleventh-century political context of extreme state violence that conveyed the breakup of the empire and weakening of institutional constructions for which they sought to systematize the law. These *Fuqaha'* (scholars) managed to convert a judicial practice articulating a preference for recognizing doubt to evade dubious punishments into an initial text requiring it. The growth of the Islamic policy of doubt, and its alteration from a practice-based canon into a textual rule of extensive scope, reveals the close link between textual interpretation, social context, and institutional legitimacy in old-fashioned classical Islamic law and society. In the end, Islamic criminal law and penal policy was less about what the "text" said, and more about how Muslim scholars assumed institutional authority to dynamically construct Islamic law when challenging innumerable contexts about which the text did not say much. Eastern and Western communities should understand that Islamic *Sharie'a* law plays no role within the abusive use of capital punishment, but by those in power, as they must be aware of "[a]nd whoever saves one – it is as if he had saved mankind entirely." *Qur'an* [5:32].