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Insights on Divine (Islamic) Law: Islamophobia versus Terrorism, Death Penalty, and Transitional Justice

Abstract

The Islamic religious frontrunners contended that the attitude of Muslims is in contradiction of graven metaphors of any religious figure, including Moses, Jesus, the Prophet of Islam among others, but it is also one of the foremost basics of Islam not to commit violence or attacks, as these obsessive assassins were not retaliating the Prophet. These carnages and the accompanying discussion about anti-Islamic cartoons had elevated an elusive query of free speech among the U.S. Muslims, who may feel independently upset by such caricatures but also live in a culture where freedom of speech is an elementary legal right as they witnessed that the Prophet Mohammad had reacted to abuses and invectives with forgiveness (clemency), tolerance, and prayer (mercy). In a secure stable state, social awareness is a requirement to emerging a functional system and this awareness is encompassed of public knowledge of the law (legal literacy), efficacy of the law to access justice and build civil order (legal mobilization), and evolving the values, approaches, and behaviors towards law (legal socialization). These cornerstones are all lacking in the Middle East. So, it seems that the Middle East may need to back-track to move forward. Launching the very basics of modern society (social contract, elementary literacy, with education are quite indispensable chief footsteps. It is a blatant realism. Middle Eastern and Arab countries cannot build prosperous systems without having the productive soil of an educated community along with changing cultural traditions and paranoia, then and only then, can the process of maintainable development and improvement start and activate.

Keywords: Terrorism; Islamic Law; Death Penalty; Human Rights; Egypt.

1. On Islam and International Terrorism: Why Fallacy and Delusion?

On January 6, 2015 (and also recently on January 6, 2016)—which remarks the Christmas day for Egyptian Coptic Christians, Egypt’s President ‘Abdel-Fattah El-Sisi makes noteworthy Christmas visit to Saint Mark’s Orthodox Basilica to share festivity with Christians and send a clear, recognizable, and vigorous message to fundamentalists and extreme Islamists, predominantly in light of the most

recent discrimination of Copts at the hands of radical Islamic folks.¹ El-Sisi regarding his contemporary statement said that:

Islam must reform, its dialogue need to be change, and the Muslim community need a revolution in understating their Islamic religion and apprehending the accurate and correct interpretations of the Islamic provisions either the *Qura'nic* texts or the Prophet Mohammad's teachings . . .² In addition, Sisi has advised Egyptians to "correct and renew our religious discourse" – and his recommendation amounts to an order . . . he put it, "several factors combine to create terror and radical thinking, including ignorance, poverty, and our poor religious discourse, along with isolation and refusing to recognize the other's culture."³

In the meanwhile, Sisi requests *Al-Azhar*, as he has made obvious that the indispensable improvement and renewal of the "discourse" must be realized solely by the State and religious specialists, first and foremost *Al-Azhar*. In this regard, the correct interpretation of the Islamic provisions or texts shall be done via the modest *madaress al-fiqh* (schools of jurisprudential thoughts) by implementing the recognized utensils of Islamic interpretation either *Qiyass* (analogical deduction) or *ijtihad* (individual reasoning) before the devastating attacks on Charlie Hebdo in France, Sinai attacks, the assassination of the Attorney General in Egypt Mr. Hisham Barakat, and the attacks on the foreign tourists in Sousse in Tunisia.⁴ On this Christmas day, a crime against humanity had been dedicated and stunned the whole world under the cover of religion, *ihadists* gunmen enforced their way into and opened fire in the Paris head office of Charlie Hebdo, shooting, killing, and wounding various folks (staff cartoonists, and police captains). Among the painful performance, the fanatics shouted *Allah Akbar* (God is great and the Prophet is avenged).⁵ On time, French President François Hollande designated the cruel action as a "terrorist attack of the most extreme barbarity." At this point, Muslim founders (leaders) all over the universe convicted the barbaric episode and said that Muslims may be insulted by images that mock the Prophet Mohammad, but at the same time, they condemn violence and endure the freedom of speech as an indispensable human right documented by the domestic, constitutional, and international law principles including Islamic human rights law.

In the same vein, the Islamic religious frontrunners contended that the attitude of Muslims is in contradiction of graven metaphors of any religious figure, including Moses, Jesus, the Prophet of

¹ See Al-Ghamrawi, 2015, ("Egyptian President 'Abdel-Fattah El-Sisi visited the country's main Coptic Cathedral in Cairo . . . to attend its Christmas celebrations, becoming the first Egyptian head of state to visit the cathedral to mark the occasion. Sisi made the surprise 10-minute visit to St. Mark's Coptic Cathedral—the seat of the Coptic Orthodox Church and its Pope Tawadros II—during Christmas Eve. Mass.")

² See Zvi Bar'el 2015, ("The renowned *Al-Azhar* University is closely linked to the government – so much so that both extremists and respected scholars call it the president's puppet . . . The prophet taught us to obey the ruler even if he's a black slave, . . . considers himself an authorized interpreter of religion, and . . . he has used his show to air his harshly critical views on radical Islam . . .").

³ *Id.*

⁴ *Id.* See also Smith-Spark, Paton Walsh, and Phil Black 2015; Sirgany 2015. See generally, *Charlie Hebdo Attack: Three Days of Terror*, BBC NEWS, Jan.14, 2015, <http://www.bbc.com/news/world-europe-30708237>. ("France is emerging from one of its worst security crises in decades after three days of attacks by gunmen brought bloodshed to the capital Paris and its surrounding areas. It began with a massacre at the offices of satirical magazine Charlie Hebdo . . .") (last visited Oct. 20, 2015).

⁵ See Constable 2015.

Islam among others, but it is also one of the foremost basics of Islam not to commit violence or attacks, as these obsessive assassins were not retaliating the Prophet; they were redressing their behaviors and religious illiteracy. These carnages and the accompanying discussion about anti-Islamic cartoons had elevated an elusive query of free speech among the U.S. Muslims, who may feel independently upset by such caricatures but also live in a culture where freedom of speech is an elementary legal right as they witnessed that the Prophet Mohammad had reacted to abuses and invectives with forgiveness (clemency), tolerance, and prayer (mercy).

2. Any *Status Quo* Regarding France or the European Union (“EU”) to Copy and Paste U.S. Patriot Act and Adopt more Restrictions on Arabs especially Muslims?

Recently, French authorities propelled a multi-pronged anti-terrorism campaign and on its way to pave the ground for more counterterrorism constraints especially on Muslims and Arab individuals which may hurt the civil liberties and the main constitutional rights mainly the right to movement. One of the strategies is the crackdown on radical Islamists and renovating participation in U.S.-led airstrikes against Islamic State in Iraq and Syria (“ISIS/ISIL”). The government argued that an exceptional state of affairs must be met with exceptional procedures—[illegal detention, Passenger Name Record (“PNR”) system, and confiscation of the passports of those suspected of “travelling to participate in terrorist activities” and extends the ability to arrest individuals suspected of plotting attacks...]—talented these policies would not diminish from the principles of rights and values of liberty, equality, and fraternity. The EU governments will increase processes to combat international terrorism and boost intelligence-gathering within France, and other Schengen areas to protect the national and homeland security and keep the public order while it was vague how extreme the suppression will be and if these civil rights will be infringed on suspects’ rights. It should be noted that France has prided itself on defending civil rights and public freedoms evading some of the comprehensive and perplexing provisions enacted in the United States after the September 11 attacks, such as the extensive surveillance measures undertaken by the National Security Agency (“NSA”). Furthermore, calls for new investigation and isolation of radical Muslims in prisons to prevent leaders from propagandizing had been emphasized along with crafting a special listing of those convicted of terrorist actions or belonging to fanatical groups, and monitoring terrorists’ use of the internet and social media. It will be very risky to start seeing a criminalization of French Muslim personality under the façade of counterterrorism.

In this regard, the European authorities’ reactions to the Paris attacks show that Western countries are reluctant to expressively highlight the origins of terrorism and the spread of violent extremist attitudes and practices arising out of the Middle East via investigating why groups like *al-Q’aeda* and *Da’aesh* are able to trainee several folks from across the globe. On the contrary, European public officials mollify public anger by calling for more antagonistic anti-terrorism laws, which is principally code for selectively pointing Muslims within their countries. It is significant to focus on the deep roots rather than indications. It is important for Western governments to spent resources on assisting native improvers in the Middle East (liberal or Islamist) in their energies to generate more political space for free speech, expression, and gathering. It should be emphasized that the more expressive chances that people have to obtain equal access to quality education, lucrative occupation,

and fair treatment by their nationals, the less probably they are to be enticed into obsessive groups. Supporting the dictatorial regimes in the Arab world creates fruitful atmospheres for fanaticism that rises out of the cruelty of those governments. It is complicated to keep unraveling a Western nation's foreign strategies in the Middle East from its internal national security. If the Western regimes identify that the freedom of Muslims in the Middle East affects the liberties in the West, it might be a good start to eloquently address the essence causes of international terrorism. It is essential to define whether it was a security failure (non-suitable law enforcement agents) or a policy failure?

3. The Proposed Agenda and the Way Ahead.

On the revival of Islam, the disgraceful status of the Middle East requires a multidimensional reform, where efforts would be applied in diverse creativities concurrently. As political philosophers thrived in disseminating a narrow approach 'of extremists, for extremists,' authorities must utilize Islamic organizations, intellectuals, and independent writers to propose knowledgeable opinions in interpreting and debating Islamic ideologies, according to the contextualized understanding of its primary sources (*Qur'an* and *Sunnah*). Therefore, the consequential texts and publications should be broadly circulated to educate the majority and guarantee that society members are immunized against any views or thoughts intimidating societal cohesion. Also, extra channels of collaboration should be created among Islamic foundations, civil society, clans, and the governments' internal security services, to retain the nationals up-to-date on terrorist enterprises, reintegration practices, confrontation strategies, and counter-ideological policies. In this domain, Arab nations should form an ethnic, functional *ad-hoc* establishment to fold state delegates, policy and lawmakers, Muslim jurists, and academics for debate; short-and long-term object-setting; and melodious growth of the region through elevated political, economic, social, and legal systems. And the most significantly, that the notions of human rights and democracy must be presented to Middle Eastern cultures from a Middle Eastern attitude via Middle Eastern *cognoscenti*, so as to assure their acceptance by Arab populaces. This is not an argument that human rights are not universal; but, it is a declaration that each area in the world requires a certain border of gratitude in its sympathetic and implementation of some sensitive perceptions.

This preliminary agenda of reform especially in battling global terrorism's causes will certainly face barriers in every probable phase of application. But the question is, why do the Arab nations have very slight to no experience in developing any intricate political or legal systems, based on comprehensive and humanistic values? In a secure stable state, social awareness is a requirement to emerging a functional system and this awareness is encompassed of public knowledge of the law (legal literacy), efficacy of the law to access justice and build civil order (legal mobilization), and evolving the values, approaches, and behaviors towards law (legal socialization). These cornerstones are all lacking in the Middle East. So, it seems that the Middle East may need to back-track to move forward. Launching the very basics of modern society (social contract, elementary literacy, etc...) with education are quite indispensable chief footsteps. It is a blatant realism. Middle Eastern and Arab countries cannot build prosperous systems without having the productive soil of an educated community along with changing cultural traditions and paranoia, then and only then, can the process of maintainable development and improvement start and activate. I'd like to quote in this respect

Pamela Constable in her recent article about terrorist scandals when she said: (“The French attacks had “added fuel to the fire” of anti-Muslim sentiment around the world. “We need a lot more water and a lot more firemen to help put it out.”).⁶

4. On Transitional Justice Mechanisms and Reconciliation Techniques: Divine Law or Secular Law?

God is not receding from public life: this has to be one of the most motivating assertions to come out of Charles Taylor’s conversation. Since religion’s public revitalization is one of the most outstanding international tendencies of our time, then the most vibrant and dramatic issues of this revival demand efforts of various countries to address genocide, war and military crimes, civil war’s atrocities, and the injustices of authoritarianism. As a public saying in Northern Ireland puts it, to “deal with their past,” is also known as “transitional justice” among legal scholars and political and human rights activists. Not only complicated and influential, the religions have even devised a distinctive model for dealing with the past (reconciliation), as an attitude that fluctuates noticeably from the perspectives of the human rights community and the international “peace building consensus.” Accordingly, transitional justice (“TJ”) means how the states transit from violence and wars and dictatorial regimes to democracy and peace and to respect the human rights. This transition can be done with different mechanisms like judicial and non-judicial processes, truth commissions, and institutional reforms. In the same vein, the office of the United Nations High Commissioner has described the transitional justice as “transitional justice must have the ambition to assist the transformation of oppressed societies into free ones by addressing the injustices of the past through measures that will procure an equitable future. It must reach to—but also beyond—the crimes and abuses committed during the conflict that led to the transition, and it must address the human rights violations that predated the conflict and caused or contributed to it.”⁷ In Morocco, The King Hassan II ruled the Kingdom of Morocco individually and eliminated all the oppositions from participating in making decisions. He committed crimes and violations against his people (human rights abuses). Then, King Hassan II died in 1999 and was succeeded by his son Mohamed VI, as he has introduced some economic and social

⁶ *Id.*

⁷ See generally Roman 2011. See also on truth commissions and reconciliation agencies, Mendez 1997. It should be noted that The first appearance of the content of the idea of transitional justice were in the Nuremberg trials is an international military tribunals established for the purpose of prosecuting officials for so many human rights violations and war crimes committed during the second world war. This shows that these trials are the basis of the idea of transitional justice. In the Republic of South Africa, the apartheid system was continued till 1994 at which the Leader Nelson Mandela was released from prison after 27 years. The negotiations between the government who applied the apartheid system and the African National Congress (“ANC”) was completed in which the appearance of the idea of transitional justice is to establish courts which called Truth and Reconciliation Commissions to inspect any violations of human rights against the black. As a part of reformation, the constitution reads: “Everyone is equal before the law and the right to equal protection and benefit of the law . . . No one may be subjected to slavery, servitude or forced Labour . . .” as the Black people was banned from political and civil rights based on racism, inequality, and discrimination which is clearly in contradiction to fundamental constitutional rights.

liberalization. In 2003, a truth commission was set up to investigate human rights abuses during the reign of his Dad.

In this regard, four processes are believed to constitute the core of transitional justice among political thinkers and legal scholars, mostly, (a) a transition encompasses a justice process, to bring perpetrators of mass atrocities to justice and to punish them for the crimes committed; (b) a reparation process, to redress victims of atrocities for the harm suffered, such as cash payments or health services, and symbolic aspects like public apologies, day of remembrance; (c) a truth and reconciliation process ("Truth Commissions") to fully investigate atrocities so that society discovers what happened during the conflict, who committed the atrocities, and to understand the causes behind the conflict and human rights violations, and (d) the Institutional Reform: aimed at the reform of institution, which has played a role in these violations (security sector, military, police, judiciary) and to get rid of the incompetent and corrupt chiefs, these reforms usually includes legislative and constitutional modifications among these sectors and others.⁸

Muslims, Christians, and Jews advocates of reconciliation's theological concept, meaning the "restoration of right relationships" and in contemporary politics, it encompasses acknowledgment (truth commissions, memorials, . . .), compensations, apology, forgiveness, occasionally retribution (punishment), via a unique restorative logic, and scores of civil society creativities to rectify wounds and alter hatred.⁹ The term "transitional justice," is not purely a Western concept or strange about the Arab culture or Islamic, or it's just a term that comes from the other civilized system, but also the basic components and mechanisms applied and rooted in various sources of Islamic law, which calls for renounce violence, urges forgiveness, tolerance, reconciliation, and the components and objectives of the concept of justice conform to the Islamic law's purposes calling for the elimination of corruption and the corrupt regimes. The notion of reconciliation is also applied in Islamic law, for instance the Prophet Mohammad encouraged mercy by asking the victim or the victim's family four times if they are willing to forgive before allowing retribution. By the same token, Islamic law has been operative in Aceh since at least the 16th century, if not earlier, and was a commonly acknowledged and thus the legitimate part of the province's coinciding legal systems prior to and during the period of Dutch colonization.¹⁰ While the purview of the divine law was abbreviated during the first decades after Indonesian independence, the salience of Islam and of Islamic law as crucial rudiments in Acehnese uniqueness did not decline and in fact became if anything more important during the struggle with the Indonesian government.¹¹ This is not to say that there have been no reports of frustration relative to Sharie'a, predominantly among the small number of subjects

⁸ For further details on transitional justice mechanisms from legal and political perspectives, see generally Teitel 2000.

⁹ See generally Kamali 2008.

¹⁰ See *Access to Justice in Aceh*; Lukito 2012, 25-26; Cammack, Feener, 2012, 13-42.

¹¹ See Avonius 2012. It should be noted that it has been criticized for not being joined to a truth-telling process and not being part of a holistic set of justice tools; for assuming that acceptance of the payments implicit that victims have forgiven and are willing to move on; for the fact that payments are given by the government while classical Islamic jurisprudence stipulates that it should come from the perpetrator's family (with supporters of *diyat* counter arguing by *qiyass* (analogical deduction) and *ijtihad* (individual reasoning) from a tradition of the Prophet that the government should pay when it did not protect the victim or identify the killer); for lack of transparency in decision-making surrounding who would receive *diyat* (compensations or damages or blood money) for occasional disruptions in payments (notably in 2010); and for favoring payments to former fighters rather than victims' families.

in such an environment. Nonetheless, relying on justice measures whose roots are Islamic, such as *diyat* ideal, which is extremely likely to be recognized as a legitimate legal source among the vast majority of citizens, these measures could significantly empower a positive improvement of a larger transitional justice process, if properly fulfilled.¹²

In this regard, understanding that Islam plays a crucial role in law and politics in the Middle East, as it includes Islamic legal basis for transitional justice such as prosecution, reparations, and reconciliation measures under *Sharie'a*, as the Prophet Mohammad said: “[I]f a relative of anyone is killed, or if he suffers *khabl* (wound), he may choose one of three things: he may retaliate, or forgive, or receive compensation.” Justice plays a dominant theme in the *Qur'an* as represents one of the Islam’s main purposes. In terms of retributive justice, Muslim *fiqh* (scholars) splits crimes and punishments into three categories: *Hudud* are prescribed offences cover specific acts (e.g., theft, adultery, slander...), *Qisas* means retaliation for murder, wounding, and mutilation and for community’s improvement, and *ta'zir* includes minor misbehaviors, crimes for which retribution is improper (or impossible), and offences not cited in the *Qur'an* and don’t have any fixed penalties as *hudud* and *qisas*, which administered at the *qadi* (judge)’s discretion.¹³ The implementation of the *diyat* program has been strongly criticized because it has not been embedded in a wider set of transitional justice processes. The various criticisms are certainly very important and suggest a program with many serious problems. For the purposes of this article, however, it is significant that the criticisms do not center upon the legitimacy of an Islamically rooted legal concept to constructively inform Acehese transitional justice.

In terms of restorative justice, Islamic law endorses forgiveness, as Islamic literatures define reconciliation as flowing from God’s mercy to forgive the repentant, though forgiveness is conditional upon perpetrators’ repentance. Hence, this sort of Islamic justice is not exclusive or even favored means of punishment for killing crimes, the victim’s family always fortified to admit *addiyat* (blood money) over retaliation, based on public interests and state goals.¹⁴ There is no doubt that the three Abrahamic beliefs and traditions (Christianity, Islam, and Judaism) along with others have presented the popular of religious arguments for political reconciliation. Religious foundations for settlement, at least those in these dogmas, originate their instructions for horizontal affairs within political societies from the vertical link that God forges with humanity.¹⁵

5. Death Penalty and Transitional Justice: The Case of Egypt Constitutionally, Legally, and Internationally.

The presence of human rights assurances is the distinguishing character of a reliable judicial system; remarkably, these comprise the guarantees arising from the right to a fair trial, encompassing for instance, the denial of proofs attained through torture or other inhuman treatments. At this point,

¹² *Id.* Meaningfully, the wider application of Islamic law in the province since the 2001 law granting greater autonomy to Aceh seems to have been accepted as legitimate by the vast majority of Acehese.

¹³ Zubaidah Ismail 2012.

¹⁴ Philpott 2007.

¹⁵ Kamali, *supra* note 8.

the State along with international organizations is persuaded that the full respect of those human rights collaterals and the denunciation of legally sanctioned violence are at the core of the reliability and credibility of any criminal justice system.¹⁶ Justice, particularly when the severest criminal acts are concerned and life is at stake, should not rely on chance and fortune; an individual's life should not depend on accidental components such as the judges (or jury) selection, media pressure, the competence of a defense attorney, etc... The refusal of cruel sentences, and first and foremost the death penalty, obviously contributes to building a judicial system on universally acceptable principles, which is free of retaliation or revenge and which the population as a whole can trust.¹⁷

After the 25 January uprising 2011 and June 30 Popular Coup in Egypt, truth commissions was established by the government to find the truth and actual facts behind the violation of human rights committed in the uprisings; announce its recommendations for an efficient TJ; reparation of all victims financially and morally; hold individuals criminally liable if proof that actual and real crimes committed, and activate the Egyptian Penal code (death penalty issue) along with international agreements and universal protocols along with the (Islamic law norms).¹⁸

According to the new Egyptian Constitution along with the Egyptian criminal justice system, any citizen arrested, detained or whose freedom is constrained shall be treated in a manner associated with the preservation of his dignity. No physical or moral harm is to be imposed upon him. He may not be incarcerated or imprisoned except in places defined by laws organizing prisons. If a confession is proved to have been made by a person under any of the abovementioned forms of duress or coercion, it shall be considered invalid and futile.¹⁹ Any assault on individual freedom or on the inviolability of the private life of citizens and any other public rights and freedoms guaranteed by the Constitution and the law shall be considered a crime, whose criminal and civil lawsuit is not liable to prescription (statute of limitations). The State shall grant a fair compensation to the victim of such an assault.²⁰

The State shall be subject to law as for rule of law. The independence and immunity of the judicature are two basic guarantees to safeguard rights and liberties. Penalty shall be personal. There shall be no crime or penalty except by virtue of the law. No penalty shall be inflicted except by a judicial sentence. Penalty shall be inflicted only for acts committed subsequent to the promulgation of the law prescribing them.²¹ In addition to that any defendant is innocent until he is proved guilty

¹⁶ See generally Bassiouni 1982.

¹⁷ *Id.*

¹⁸ It is highly recommended in this field for the Arab Spring uprisings to promulgate laws to face economic, social, religious discrimination; develop the Interior Ministry and security force apparatus; establishing laws to protect and respect all human rights; launching a new administrative apparatus (no bureaucracy); establishing an organ to face the corruption (corruption commission); freedom to form political parties and media along with the reformation of the educational system and to allow the youth (political activism) to participate in the regime amelioration. Further, to ensure the rights of the victims and their parents to get fair compensation and to respect all the judicial verdicts.

¹⁹ See THE CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, [EG], Jan. 18, 2014, at arts. 54, 55, &56, <http://www.sis.gov.eg/Newvr/Dustor-en001.pdf>.

²⁰ *Id.* The current 2014 Constitution of Egypt reads: "In its first legislative term after the enforcement of this Constitution, the House of Representatives shall issue a law on transitional justice that ensures revealing the truth, accountability, proposing frameworks for national reconciliation, and compensating victims, in accordance with international standards." *Id.*, at art. 241.

²¹ *Id.*, at arts. 94, 95, & 96.

until he is proved guilty before a legal court, in which he is granted the right to defend himself. Every person accused of a crime must be provided with counsel for his defense and any person arrested or detained shall be informed forthwith of the reasons for his arrest or his detention. He shall have the right to communicate with whoever he sees fit and inform them of what has taken place and to ask for help in the way organized by law. He must be notified, as soon as possible, with the charges directed against him. Any person may lodge a complaint to the courts against any measure taken to restrict his personal freedom. The Law shall regulate the right of complaint as well.²²

By the same token, according to Egyptian Criminal Code, the country's attorney general along with the defendants have the possibility to instinctively appeals death penalties to the Supreme Court (Cassation Court), which can order a retrial and if the retrial results in the same ruling, the defense attorney may over ask the court to grant a retrial procedure. According to Article 2 of the Egyptian Constitution 2014, "Islam is the State's religion...and the principles of the *Sharie'a* is the principal source of legislation."²³ In light of this provision's interpretation, the law of God requires that premeditated and serious offenders be put to death which means the *lex talionis* (equality principle) through sustaining the victims' feelings and then social peace and criminal justice will conserve.²⁴ Orthodox Islamic scholars argued that Islamic standards are incontrovertible, based on the Supreme Constitutional Courts' decision on the interpretation of the *Sharie'a* values.²⁵ Nevertheless, the court believes that the *Sharie'a* law include "relative" philosophies and "updated or modern" canons which are capable of being accustomed within the social future development through *ijtihad* (individual reasoning) and *Qiyass* (precedential analogy) and without any paradox to the main *maqasid* (objectives/bulk) of the Islamic *fiqh* (jurisprudence).²⁶ In this area, the most conformist religious scholars go as far as to claim the renovation of the death penalty for all criminal offenses identified in the *Qur'an* and others moderate Islamic intellectuals claimed for the restoration of the *diyyahh* whereby criminals can be (forgiven) whereby delinquents can be pardoned or acquitted by their victim's family by giving them compensation.²⁷ Egypt's Constitution stipulates that all those accused of a criminal offense are "presumed innocent until proven guilty in a fair legal trial in which the right to defend oneself is guaranteed." The Constitution does not refer to the corporal punishment but confirmed a certain number of guarantees concerning the respect of individual public rights and freedoms.²⁸

In this regard, the Egyptian Constitution makes no mention to the death penalty. It declares a definite number of assurances concerning the respectability of individual freedoms, and it forbids arbitrary detention and torture.²⁹ Furthermore, it instructs that every person should be adjudicated

²² *Id.*, at arts. 97, 98, & 99.

²³ *Id.*, at art. 2.

²⁴ Bassiouni, 1982.

²⁵ 'Arafa, 2014.

²⁶ See generally 'Arafa 2012.

²⁷ Bassiouni, *supra* note 11.

²⁸ *Id.*, at EGYPT CONSTITUTION.

²⁹ *Id.*

promptly by an independent judiciary.³⁰ One provision sets out the right to legal assistance by one's selected defense lawyer and preserves the presumption of innocence.³¹ In the same vein, the Penal Code sets this punishment for various crimes.

Crimes of this punishment are tried by the criminal circuits of the Appellate courts in which the criminal procedures does not offer a fair system of reasonable administration of justice which establishes a breach of the United Nations (UN) Safeguards guaranteeing defense of the rights of those facing the death sentence.³² The Penal code obliged the court to pass the case file to the *Mufti* (religious leader) for his opinion, before articulating this punishment decision to make sure if it is well-matched with Islamic law norms or not.³³ In Egyptian law, execution can be suspended by retrial's request, as the right to request a retrial belongs to the prosecution or the defendant.³⁴

As a question on the *Sharie'a* on the death penalty extermination, and based on the constitutional's sensible interpretation of Islamic law rules, as Islam should familiarize to the *ebb and flow* which have come about since the Prophet's period, elaborating *Talion* Law is an old-fashioned practice which should be bartered by the legislature and the judiciary to end up the debate on death penalty not only in Egypt but also in the Islamic World. For decades, act of vengeance no longer introduces the basis for punishment, as any development appears to aggregate law's secularization, the goal of which is to isolate the Prince's law from God's law. Disappointingly, the rise in numerous fundamentalism's formulas is not favorable to this approach.

Violating all of these perceptions represents a direct contravention not only to the divine law, or domestic law but also to the international law values in which the Arab and Islamic World committed to, such as the Universal Declaration of Human Rights ("UDHR") and the International Covenant on Civil and Political Rights among many others.³⁵ These international documents

³⁰ *Id.* ("The State shall guarantee fair compensation for the victims of such violations. The National Council for Human Rights may file a complaint with the Public Prosecution of any violation of these rights, and it may intervene in the civil lawsuit in favor of the affected party at its request. All of the foregoing is to be applied in the manner set forth by Law.").

³¹ *Id.*, at art.100 ("Court judgments shall be issued and enforced in the name of the People. The State shall guarantee the means of the enforcement thereof as regulated by Law. Refraining from or delay in the enforcement of such judgments by the competent public servants is a crime punishable by Law. In such a case, the party in favor of whom the judgment is passed shall have the right to bring a direct criminal action before the competent court. The Public Prosecution shall, at the request of the party in favor of whom the judgment is passed, initiate criminal action against the public servant refraining from executing the judgment or interrupting such execution.").

³² 'Arafa 2015.

³³ In this respect, 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. In all cases, the appeal process postpones the execution. If the appeal is accepted, the court may decide to set aside the verdict appealed 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.

³⁴ *Id.* ("On the other hand, the Egyptian Penal Code along with the terrorism laws defines terrorism as: [A]ny recourse to force, violence, threats or intimidation falling within the context of a criminal itinerary [criminal conspiracy] by an individual or a group aimed at disrupting public order, risking public security and safety, if this results in injuring, terrorizing individuals or endangering their lives, freedoms, security or causing damage to the environment, means of transport [communication], public or private property, ... [or] hindering authorities, places of worship, ... from carrying out their functions, or deterring the application of the [c]onstitution, laws or regulations").

³⁵ See THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, (*opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 and entered into force Mar. 23, 1976), http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-

authorizes the State Party to implement unilateral processes which exempted it temporarily from definite duties incumbent on it by virtue of the Covenant. These procedures must nonetheless be of an extraordinary nature and provisional. For instance, in some applications, the case must pose an exceptional public threat which threatens the survival of the nation and the State Party must have declared officially an emergency status.³⁶ Of the number of items of the charter from which there is no derogation, as right to life especially, proscription of torture and other cruel, inhuman or degrading treatment or punishment and the principle of legality of crimes and punishment in the field of criminal law should be noted.³⁷ Additionally, it is also specified that States Parties may in no circumstances invoke the Covenant's provisions as justification for acting in defilement of humanitarian law norms or peremptory norms of international law, for example through arbitrary deprivation of freedom or by conflicting from fundamental principles of fair trial that comprise the presumption of blamelessness.³⁸

6. Whither Egypt? Conclusion and Practical/Policy Considerations.

In conclusion to its inquiry into the death penalty, the human rights activists along with domestic and international organizations are disappointed to echo that the obliteration of the death penalty is not a foremost concern for Egyptian human rights defenders and the Egyptian legislator. The opponents normally appeal that the Islamic law is in favor of the death penalty; and as *Sharie'a* presented by the Egyptian Constitutional charter as an incontrovertible spiritual doctrine and the basis of all genuine statutes and legal rules. This claim makes any argument on this punishment meaningless, as it cannot be contended on its principles since it is reflected to be consistent with God or divine law. On the other hand, there are a substantial number of liberal and open-minded scholars who argue and feel that Islam should adapt to the fluctuations which have come about since the Prophet Mohammad's time and based on a flexible interpretation of the textual provisions either of the *Qur'an* or the *Sunnah* (primary sources of the law) or via other secondary sources as *qiyyass* (analogical deduction) and *istihsan* (juristic preference) for instance.

These academics and well-known jurists elaborate that the *Tailon* Law, in which the Islamic norms explicitly refers to validate the death penalty, is an outdated practice which should be switched by the Judiciary. Contemporarily, reprisal no longer creates the basis for criminal penalty or chastisement. Any progress seems then to be contingent specifically on the aggregating secularization of the law, means to separate the law of the Prince from the law of God. Regrettably, the expansion in various forms of extremism is not beneficial to this attitude.

9&chapter=4&lang=en & THE UNIVERSAL DECLARATION OF HUMAN RIGHTS, Dec. 10, 1948, <http://www.unhcr.org/refworld/docid/3ae6b3712c.html>.

³⁶ When a state of emergency is declared which may include an exemption from any section of the Convention, the States must perform within the framework of its Constitution and the legislative articles which govern the exercise of exceptional powers. The provisions of the Covenant make an obvious statement that any exemption from the commitments incumbent on the State Party by virtue of the Covenant is only allowed "to the extent strictly required by the exigencies of the situation."

³⁷ *Id.*, at the ICCPR at arts. 4, 5, 7, & 15.

³⁸ 'Arafa 2013.

It should be noted that the emergency status provided by the Constitution, in principle it can only be professed “in exceptional circumstances such as war, threat of war, disorder and disaster which constitute a threat to national security or public order” and “for a specific [definite] period of time.” Thus, regarding the criminal terrorist occurrences happened not only in Egypt but also in other Arab countries or all over the world, there is nothing to defend, the persistence of exceptional procedures which are *flagrant* transgressions of human rights and international law principles (international conventions and covenants) codified. Furthermore, the criminal laws in force permitting the death penalty for a various number of criminal offenses, permit terrorist deeds to be penalized without the need to worry about the punishment’s legality which is not accepted in the recent criminal policy.

Accordingly, it is highly recommended to adopt a cessation on executions, as a first footstep to promote the closure of the death penalty in all cases, to be in consistent with the international law standards as the resolution of the United Nations Human Rights Commission, the resolution of the African Commission for Human and Peoples’ Rights among others. Also, the reduction of the number of criminal acts punishable this penalty by restraining them to those which have serious, lethal values, in accordance with Article 6 of the International Covenant on Civil and Political Rights (ICCPR) and to guarantee that the Code of Criminal Procedure applied in well detailed manner concerning those sentenced to death, by counselling them of the decision of the Supreme Court (Court of Cassation). Moreover, setting up a judicial remedy to challenge the decisions of the Supreme State Security Criminal Courts, within the United Nations Protections ensuring protection and the defense of the rights of those facing the death penalty. Make sure that the conditions of custody for those condemned to death, and also for all other convicts, are well-suited regarding the intrinsic dignity of any human being; train judges and law enforcement executives in the severe respect of the principle of the inadmissibility of confessions attained under torture or cruel act, as provided for in the national legislations and in international law norms.

It should be noted that Islam—like Christianity, Judaism, Hinduism, or any other religion either Abrahamic or not—is not only about peace nor is it about war. Every faith is about utter belief in its own dominance and the divine right to enforce its version of truth upon others. Various Islamic law schools sprung up in numerous regions, with fluctuating allegations for future development. When the *Qur’an* (God’s words) and the *Sunnah* (the Prophet’s teachings) were lastly expressed, there were already several conflicting interpretations of these texts. With the ensuing further relocation of the faith to as far away as China, the Americas, and Indonesia, Islam found itself taking on a crowd of forms and tones, with no single authority to govern which among them was “accurate and correct.” The uniformity’s problem get more complicated due to the introduction of new languages, living styles, and advanced technologies. Today Islam encompass a massive diversity of beliefs and performances. What is habitually practiced by one group may be prohibited by another.

Classical Muslim scholars were rigorously harsh toward revolutionaries who used what the jurists designated as furtiveness attacks and, thus, spread terror. Muslim intellectuals considered terrorist attacks against innocent and unarmed victims as dreadful and immoral severe criminal acts, and treated the culprits as the worst sort of criminals. In this respect, it should be emphasized that the Constitutional Rights Foundation notes that:

In the 19th Century, many Muslim countries came under the control or influence of Western colonial powers. As a result, Western-style laws, courts, and punishments began to appear within the *Sharie'a*. Some countries like Turkey totally abandoned the *Sharie'a* and adopted new law codes based on European systems . . . Modern legislation along with Muslim legal scholars who are attempting to relate the will of *Allah* to the 20th Century have reopened the door to interpreting the *Sharie'a*. This has happened even in highly traditional . . . countries with fundamentalist Islamic regimes . . . have attempted to reverse the trend of westernization and return to the classic *Sharie'a* . . . ³⁹

All in all, Islamic law has been implemented in numerous forms by several nations, fluctuating from a stringent interpretation in Saudi Arabia and others, to a moderately liberal interpretation in other places. Further, *Sharie'a* law is anticipated to be only applicable to Muslims and the non-Muslims are invented to be exempt from the provisions of the law; and this norm should universally followed. It should be obvious that there is a likelihood that Islam can advance throughout much of the world toward more democratic, diverse humanities along with sharing the goals of endorsing rationalism, secularism, democracy, and human rights within Islamic society. But what is misplaced is a genuine and real action plan to achieve this. Of course, this need first to discover conducts and techniques to influence an adequate room with all those Muslims whose notion of their religion and whose personal routines (styles) are companionable now with humanity's ongoing synchronicity. This won't materialize if we admit to Osama bin Laden the indication that his Islam is the "only true Islam" or postpone for the alteration of a billion Muslims to humanism. To enquire for all this at once is to ask for too much, too soon. One of the main essentials that humanists should do fine to lengthen a supporting and inspiring hand to those millions of Muslims who discard bin Laden's mentality on brand of angry, revengeful political policy and welcome them affectionately and gently into the modern world. It is just important do even better if we work hard to eliminate political, economic, and social inequalities to authorize the immobilized, nourish the hungry, clothe the naked, house the homeless, teach and educate the young, and heal the sick. This is a message that everyone can and must understand.

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³⁹ See generally *The Origins of Islamic Law*, Constitutional Rights Foundation, at <http://www.crf-usa.org/america-responds-to-terrorism/the-origins-of-islamic-law.html> ("But most Muslim legal scholars today believe that the *Sharie'a* can be adapted to modern conditions without abandoning the spirit of Islamic law or its religious foundations. Even in countries like Iran and Saudi Arabia, the *Sharie'a* is creatively adapted to new circumstances.") and <http://www.crf-usa.org/>.

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