

# Mubarak criminal liability: is it a fair trial after the revolution or a drama series?<sup>1</sup>

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## Abstract

Divided in four parts, this article will describe a succinct background of former President Mubarak in history, military, and politics and why the Egyptian Revolution had been broken against him and his regime as well. Then will provide the main rules and principles of the leadership's liability through comparing this concept under Islamic law and the domestic law (Egyptian Penal Code) and how to apply those legal principles to the recent case of Mubarak's trial which known by the Media as a "Trial of the Century." At the end of the article looks to the future of this responsibility in light of recent developments throughout the whole Middle East.

**Keywords:** Egyptian Revolution; Islamic law; Mubarak.

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“If anyone travels on a road in search of knowledge, Allah will cause him to travel on one of the roads of Paradise”<sup>3</sup>

The Prophet Mohammad (PBUH)

“Knowledge is a treasure, but practice is the key to it”<sup>4</sup>

Ibn Khaldoun, Al-Muqaddima

## Introduction

We are a nation in need of vitality and renewal. While we stepped slowly, the world ran ahead, so that we have been left behind, after once being at the front. How, then, can we manage in the modern era? No type of reform or progress may be adopted otherwise than in an atmosphere of social reconciliation. Reform and progress alone cannot bring such social reconciliation.<sup>5</sup> ‘Abd al-Razzāq al-Sanhūrī (1895-1971).

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<sup>3</sup> Quote of The Prophet Mohammad Ibn ‘Abdullah (570-632). SAHIH AL-BUKHARI, KNOWLEDGE, no. 356, 311, Vol. 1, bk. 3, translated in Univ. So. Calif., Center for Muslim-Jewish Engagement, <http://cmje.org/>.

<sup>4</sup> Quote of Ibn Khaldoun, Al-Muqaddima, scholar and statesman (1332-1406). AL-MUQADDIMAH IBN KHALDOUN, [THE INTRODUCTION OR PROLEGOMENON] 21 (Dar AlShaab: 1959, Arabic Source). Ibn Khaldoun was a lawyer, sociologist, economist, and Muslim jurist. He wrote his masterpiece, “Muqaddimah or Prolegomenon,” in 1377 A.D. It is the first volume of seven volumes of “Kitab Al-‘Ibar.” See IBN KHALDOUN, THE MUQADDIMAH: AN INTRODUCTION TO HISTORY (N. J. Dawood ed., Franz Rosenthal trans., Princeton Univ. Press 1958) (providing an English translation).

<sup>5</sup> Quote of ‘Abd al-Razzāq al-Sanhūrī (1895-1971). (“Commenting on his quote, the author think that the required steps toward development in Egypt after January Revolution are as follows: (1) to appreciate our people and our country; (2) to respect and feel proud of our civilization and history; and (3) to start plan carefully and work seriously...If we miss any of these movements, we will never move ahead.”). *Al-Sanhūrī* was an Egyptian legal scholar and professor of law who drafted the revised Egyptian Civil Code of 1948. He wrote the draft of the ‘Iraqi Civil Code with the help of many ‘Iraqi Jurists guided by him. Forced into retirement by Gamal ‘Abdel-Nasser and physically attacked by a mob for attempting to restore “Constitutional Government” in 1954, *Sanhūrī* left Egypt and helped draft the civil codes of Syria, Jordan, Libya, and the Commercial Code of Kuwait. In 1970s Egypt awarded him its prize for social sciences. *Sanhūrī* was known for attempting to recreate a “pure” Islamic Law by modernizing the *Sharie’a* rules using Western Civil Law—mainly of American and French inspiration—and the guidance when needed of a natural law obviously just to all, to guarantee justice above religion but reaching its humanistic ends, ideology, and personal opinion in general, when all else—including the countries legislation, the *Sharie’a* principles, and traditional customs—fails to solve the problem. One commentator argued that *Sanhūrī’s* code reflected a “hodgepodge of socialist doctrine and sociological jurisprudence.” Regardless of such interpretations, his place in the legal history of the modern Middle East is secure; his twelve-volume *Al-Wasīfī fī Sharīf al-qānūn al-madanī al-jadīd* [Medium Commentary on the New Civil Code] (Cairo 1952–1970) “adorns the bookshelves of many an Arab law firm, even in countries where the Egyptian Civil Code is not law” (Chibli Mallat). See generally Nabil Saleh, *Civil Codes of Arab Countries: The Sanhūrī Codes* (JSTOR 3381555) (2008), Anis Al-Qasem, *Injurious Acts Under the Jordanian Civil Code*, (JSTOR 3381318). See also ARTHUR GOLDSCHMIDT, BIOGRAPHICAL DICTIONARY OF MODERN EGYPT (2000) at 181, GUY BECHOR, THE SANHŪRĪ CODE AND THE EMERGENCY OF MODERN ARAB CIVIL LAW 1932 TO 1949, (2007), and ENID HILL, AL-SANHŪRĪ AND ISLAMIC LAW, (1987). In this respect, it should bear in mind that the Egyptian Civil Code, Article 1, 1949 stated that:

«...In the absence of any applicable legislation, the judge shall decide according to the custom and failing the custom, according to the principles of Islamic Law. In the absence of these principles, the judge shall have recourse to natural law and the rules of equity (justice)...»

At the risk of declaring apathetic and unenthusiastic, it should be noted that in every revolution the best day is the day on which the revolution is acknowledged and declared a success. From that point on it is mostly downhill because the accumulated problems of the past come rushing to the fore, demanding instant resolution, with anger, frustration, disappointment and hope all mixing together and competing for attention.<sup>6</sup> It always takes time for revolutions to simmer down and for things to find a new level of normalcy.<sup>7</sup> As generally well-known, revolutions are never tidy; instead, they are messy, chaotic, and unpredictable.<sup>8</sup> Hopes are frequently destroyed—though some remain—and the reality of the situation and an appreciation for what needs to be done makes for a rude awakening and emerging.<sup>9</sup> The 18 magical days of January and February 2011, when Egyptians from all walks of life came together in Tahrir (“Liberation”) Square to demand the end of Mubarak’s presidency have long passed.<sup>10</sup> But the memory of those days will remain in the nostalgia of Egyptians.<sup>11</sup> It was a glorious period for the entire world to witness.<sup>12</sup> Tahrir Square is a revealing and dramatic look at the revolution that transformed the modern history of one of the world’s oldest civilizations.<sup>13</sup>

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*al-Qa nu n al-Madani* [The Egyptian Civil Code promulgated by Law No. 131 of 1948 in force since the October 15 1949], *Al-Jarida Al-Rasmiyya*, Oct. 1948, at art.1(Egypt). See ‘AMR SHALAKANY, *Between Identity and Redistribution: Sanhūrī, Genealogy, and the Will to Islamize*, 8 ISLAMIC L. & SOC. (2001) at 201-244.

<sup>6</sup> CRAIG KANALLEY, *Egypt Revolution 2011: A Complete Guide to the Unrest*, THE HUFFINGTON POST (Posted: Jan. 30, 2011 at 07:21 PM ET, Updated: May 25, 2011 at 07:30 PM ET available at [http://www.huffingtonpost.com/.../egypt-revolution-2011\\_n\\_816](http://www.huffingtonpost.com/.../egypt-revolution-2011_n_816). (last visited May 22, 2012).

<sup>7</sup> See generally Mohamed ‘Arafa, *Towards a Culture for Accountability: A New Dawn for Egypt*, 5 PHOENIX L. REV. 1 (Fall 2011) (elaborating in details the causes of the January 25<sup>th</sup> Egyptian Revolution, the latest events, and proposing a new agenda for political, social, and cultural transformation in Egypt).

<sup>8</sup> M. Cherif Bassiouni, *The Fight for Democracy in Egypt’s Liberation Square: Background Paper*, CHI. COUNCIL ON GLOBAL AFF. 1 (Feb. 10, 2011) [hereinafter Bassiouni, *Fight for Democracy*], available at [http://www.thechicagocouncil.org/UserFiles/File/Events/FY%2011%20Events/02\\_February\\_11/EgyptBbackgroundPaper110207.pdf](http://www.thechicagocouncil.org/UserFiles/File/Events/FY%2011%20Events/02_February_11/EgyptBbackgroundPaper110207.pdf).

<sup>9</sup> *Id.*

<sup>10</sup> For further discussion on the events of the *Tahrir* Square during the January Revolution time, see Ashraf Khalil, *Liberation Square: Inside the Egyptian Revolution and the Rebirth of a Nation*, (Jan. 2012). (“In early 2011, the world’s attention was riveted on Cairo, where after three decades of supremacy, Hosni Mubarak was driven from power. It was a revolution as swift as it was explosive. For eighteen days, anger, defiance, and resurgent national pride reigned in the streets as protestors of all ages struck back against police and state security, united toward the common goal of liberation. But the revolution was more than a spontaneous uprising. It was the end result of years of mounting tension, brought on by a state that shamelessly abused its authority, rigging elections, silencing opposition, and violently attacking its citizens. When revolution bloomed in the region in January 2011, Egypt was a country whose patience had expired with a people suddenly primed for liberation.”).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* See also CLEMENT CHIGBO, THE EGYPTIAN REVOLUTION AND ITS LESSONS (Feb. 15, 2011).

<sup>13</sup> Khalil, *supra* note 10.

But the revolutionary light has been turned off/shut down in Tahrir Square and the extraordinary feeling of elation of people from all walks of life may have faded away after the impossible dream of removing Hosni Mubarak from the presidency was achieved.<sup>14</sup> The stars that so many sought to reach have escaped the grasp of the “revolution”: even the high moral ground of nationalism and pride seems to have vanished with the new Islamicist majority taking over both Houses of Parliament (majlis al-sha‘aab and majlis al-shoura), and acting sectarian, deteriorative, and regressive.<sup>15</sup> Still, many Egyptians have tasted the sweet flavor of freedom, though all too briefly, and they may want to taste it again.<sup>16</sup> The challenges ahead are not likely to diminish these hopes.<sup>17</sup> But then, many a revolution is taken over or coopted by others, and the peoples’ hopes are rushed and dashed.<sup>18</sup> This is the unfortunate case of Egypt’s “revolution” of January 2011.<sup>19</sup> Democracy as a process may have succeeded, but freedom, human rights, and the rule of law will surely be lost.

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<sup>14</sup> Bassiouni, *supra* note 8 & ‘Arafa, *supra* note 7. (“Facts on the ground show that this transformation does not occur without significant sacrifices both in terms of lives and livelihoods. But if the ultimate outcome is a more democratic, prosperous, and stable country, then the long wait is well worth it. After more than centuries of authoritarianism by foreign occupiers, kings, and military rulers, Egyptians deserve to finally rule themselves.”).

<sup>15</sup> Leila Fadel and Ingy Hassieb, EGYPT’S NEXT PARLIAMENT TO BE LED BY ISLAMICISTS, THE WASHINGTON POST (Jan. 2012). (explaining that Dr. Mohammad Sa‘ad al-Katatni, Professor of Botany, Secretary General of the Muslim Brotherhood’s Freedom and Justice Party (an offshoot of the MB) attended a news conference at the headquarters of the party in Cairo. A temporary power-sharing agreement would install one of their candidates as parliamentary speaker in Egypt. Accordingly, *al-Katatni* becomes then President of the People’s Assembly within the recent parliamentary elections of February 2012 which has been dissolved recently according to the Supreme Constitutional Court (“SCC”)’s decision on June 14, 2012). For further illustration on the latest parliamentary and presidential elections in Egypt and the domination of Islamists, see Sahar F. Aziz, *Revolution Without Reform: A Critique of Egypt’s Election Laws*, GEORGE WASHINGTON INT’L L. REV. (Fall 2012) and Leila Fadel, IN EGYPT, SALAFIST VOTE COULD PROVE DECISIVE, THE WASHINGTON POST (Apr. 2012).

<sup>16</sup> Eman Ragab, *Between Success and Failure*, AL-AHRAM WKLY ONLINE (Nov. 3-9, 2011) (stated that Elections, by definition, are not a means to make revolutionary change, but they are about the only hope left, given the ground the revolution has so far lost) *available at* <http://www.weekly.ahram.org.eg/2011/1071/op4.htm>. (last retrieved May 22, 2012).

<sup>17</sup> *Id.*

<sup>18</sup> Nick Rizzuto, *Why the Egyptian Revolution has Failed*, (July 25, 2011) (discussing that there are two successful liberal revolutions that prove instructive from the historical perspective which are the French and the American Revolution.) (“It does not matter how much the Egyptian liberals tap their fingers on their keyboards and tweet calls for protest and demonstrations, reality tells us that it’s those with their fingers on the trigger that will continue to dominate Egyptian national politics. Until the liberals are able to garner considerable support within the military, Egypt will remain under the control of the military...or worse.”). [Yes, I used this article and you can cite it and refer to the online link of this website <http://www.theblaze.com/blog/2011/07/25/why-the-egyptian-revolution-has-failed/>. Also, if you want to rephrase a little bit in the explanation in this footnote, feel free to do that]

<sup>19</sup> See Pakinam Amer, *Is the Revolution Failing?* I used the online article and I quote the portion: Pakinam Amer, *Is the Revolution Failing?* EGYPT TODAY, SOCIETY, Jan. 2, 2012 *available at* <http://www.egypttoday.com/news/display/...Revolution-Failing/secl:47>. (“during a Cairo debate in late December 2011 with TV host Tim Sebastian, 54 percent of an audience of roughly 80 Egyptians believed that the January 25 revolution is failing.”). See also REFLECTION IN EGYPT ON AN UNFINISHED REVOLUTION “Video Feature.” (“A year after the first protests in *Tahrir* Square, young Egyptians look

Most analysts seem to have overlooked the convergence of a number of significant factors to occur in the upcoming period of time. The most significant is the judgment in the case of former President Hosni Mubarak which was decided by Chief Justice Ahmad Refa'at on June 2<sup>nd</sup>, 2012. It should be kept in mind that Mubarak verdict divided Egypt further and likely deepen its polarization, as it triggered demonstrations and riots in which this situation can destabilize the country and engender unforeseen consequences likely to sink the country into chaos.<sup>20</sup> Egypt has already begun to make strides in the movement towards democracy, as shown by the incident on August 3<sup>rd</sup>, 2011, when the inconceivable happened.<sup>21</sup> “The deposed pharaoh who had ruled Egypt with an iron fist for thirty years was wheeled into a courtroom and placed in the defendant’s cage.”<sup>22</sup> So far, this article will examine selected facets of the leadership of one of the Middle East’s authoritarian technical bureaucrats,<sup>23</sup> Mohammad Hosni Mubarak, at the helm of the Egyptian state since 1981 and Egypt’s longest serving leader since 1850. In order to bring some clarity to the term “Heads

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back at the promise of the Arab Spring as well as the reality many revolutionaries failed to foresee.”), available online at [www.nytimes.com/.../video-egypt-reflections-on-revolution.html](http://www.nytimes.com/.../video-egypt-reflections-on-revolution.html). (last visited May 22, 2012).

<sup>20</sup> The verdict delivered by the Cairo Criminal Court against former dictator Hosni Mubarak and his feared Interior Minister, Habib Al-'adly, angered many Egyptians who had hoped for the death penalty, as both were sentenced to life imprisonment, which in Egypt is typically a 25 to 30-year sentence. Others were upset at the vagueness and ambiguity of the ruling, which only implicitly blamed the two for the deaths of nearly 900 protesters during Egypt’s 18-day revolution in January/February 2011. Still others were unhappy that deputy ministers of Interior were found not guilty, and that the dictator’s sons, *Gamal* and *Alaa* were spared sentencing for corruption because the statute of limitations had expired for the particular actions with they were charged. For further details of the verdict, see *infra*. [I used *see infra* here meaning that the detailed discussion of the trial and the verdict itself will be elaborated in Part IV of the article.] Also, I used this source at this point; see generally Matt Bradley, *Verdicts Spark Anger in Egypt*, MIDDLE EAST NEWS, June 2, 2012, 5:27 p.m. ET. (“Former President Mubarak Gets Life Sentence in Killings, But Others Are Acquitted”) available at <http://www.online.wsj.com/.../SB1000142405270230355210457744172333873...> See also Khaled Elfiqi, HOSNI MUBARAK, THE N.Y. TIMES, at <http://www.topics.nytimes.com/top/reference/timestopics/people/m/.../index.html>.]

<sup>21</sup> ‘Arafa, *supra* note 7. (Yes, you can put this between quotation marks, as I referred to this quotes from my published article cited in FN 7, so keep the citation as I did]

<sup>22</sup> *Id.* (Same thing, Keep *Id.* as I refer to the same article cited in FN 7]

<sup>23</sup> Unlike the transcendent, personalized charismatic forms of leadership; bureaucratic leadership centered upon the applicability of modern technological and managerial principles to the business of government. Governmental legitimacy derives from the degree of successful use and practice of these principles and norms to the needs of society; therefore, bureaucratic leaders are theoretically subject to popular evaluation of their performance of the task of governance. While this holds true in democratic systems of governance, technical bureaucracy also lends itself to more authoritarian manifestations, in which the leadership does not subject itself to a public assessment of its performance and activity, thereby creating exclusive control over political processes. See ROY R. ANDERSEN, ROBERT F. SEIBERT, AND JON G. WAGNER, *POLITICS AND CHANGE IN THE MIDDLE EAST*, 4<sup>th</sup> ed., (1993), 202. [I already cited the source in red in which get the information from explained in this footnote in addition I used this online article, See generally LEADERSHIP EXPERT, *Leadership Styles—Autocratic vs Democratic vs Bureaucratic* available at <http://www.leadership-expert.co.uk/leadership-styles/> (“emphasizing an in-depth look at 3 key leadership styles—which are autocratic, democratic, and bureaucratic—that will highlight the benefits and shortfalls commonly associated with each.”)

of States Liability in Comparative Law”—and to better understand where the line might be drawn between this responsibility in “Islamic Law” and “Positive Law”—this article will explore not only the meaning of this liability in the technical sense, but will also inspect the legal frameworks accompanied by a literature review which based on the fundamental rules of this accountability, and applying those frameworks to the modern trials of the leaders in the Arab Middle East.

Divided into a part which is comprised of two articles, Section II of this article will describe a succinct background of former President Mubarak in history, military, and politics and why the Egyptian Revolution had been broken against him and his regime as well. Section III will provide the main rules and principles of the leadership’s liability through comparing this concept under Islamic law and the domestic law (Egyptian Penal Code) and how to apply those legal principles to the recent case of Mubarak’s trial which known by the Media as a “Trial of the Century.” Others sections – to be shown in the next article – looks to the future of this responsibility in light of recent developments throughout the whole Middle East.

It should bear in mind, that the Arab Spring Revolutions have given rise to much legal and political chaos. This chaos could be partially alleviated by reforming or proposing new laws in different sectors to bolster the societies in Arab countries, and suggesting a new legislation governing leader’s accountability after revolutions against them is a sector ripe for reform.

## **I. Backdrop of Mohammad Hosni Mubarak and the January Egyptian revolution**

### *A. Who is Mohammad Hosni Mubarak? Mubarak in military, history, politics, and criminal trial and jail*

Often described as cautious and reserved, former President Hosni Mubarak conveys none of the charismatic appeal of his predecessors, Gamal ‘Abdel Nasser and Anwar Al-Sādāt, and has not generated the mass popular following of Nasser, or even the considerably lesser levels of integral support enjoyed by Sādāt.<sup>24</sup> His carefulness and moderation have however made him a solid, if not idealistic and

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<sup>24</sup> See generally WILLIAM L. CLEVELAND, A HISTORY OF THE MODERN MIDDLE EAST, (Boulder: Westview Press, 1994), 343.

visionary leader, who has guided Egypt through the turbulence of the post-Sādāt eon.<sup>25</sup> These qualities have also recommended him to the United States, which has frequently called upon him to act as an intermediary in regional affairs, predominantly the Palestinian-Israeli negotiations.<sup>26</sup>

On the domestic plane, Mubarak's personality has had more pernicious consequences.<sup>27</sup> His wary, careful nature—an asset in interstate negotiations—has translated into a deficiency of innovation and a lack of desperately needed domestic political reform initiatives.<sup>28</sup> Furthermore, lacking the personal appeal to engender a popular base of support, Ex-President Mubarak has been reluctant to undertake the systemic political reforms that Egypt desperately requires.<sup>29</sup>

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<sup>25</sup> Thomas W. Lippman, *Egypt after Nasser. Sadat, Peace, and the Mirage of Prosperity* (New York: Paragon House, 1989), 221; and Howard Schneider, *Mubarak's Method: Overshadowed by Predecessors Nasser and Sadat, Egypt's Leader Has Served Longer, Honed Economy*, THE WASHINGTON POST, June 27, 1999, A23.

<sup>26</sup> MARTIN SIEFF, MUBARAK STATUTE IN MIDEAST ENHANCED, THE WASHINGTON TIMES, July 31, 1996, A17. See generally Stanley Reed, *The Battle for Egypt*, 4 FOREIGN AFF. 72, (Sep./Oct. 1993). For further discussion on the Israel/Palestine conflict, see Gregory Harms & Todd M. Ferry, THE PALESTINE-ISRAEL CONFLICT: A BASIC INTRODUCTION, 2<sup>nd</sup> ed. (2012) ("The Palestine-Israel conflict is the most notorious and ingrained conflict of the twentieth, and now twenty-first, century. Yet the way it is reported in the media is often confusing, leading many to assume the hostilities stretch back to an ancient period. In May 2011, President Barack Obama gave speeches about the Middle East that discussed the Israeli-Palestinian conflict, using terms like "final status issues," "1967 lines with mutually agreed swaps," and "demographic realities." Obama's speeches were strongly denounced by both the Palestinians and the Israelis, while political commentators across the world debated what Obama's speeches actually meant."). [Keep the quote and don't remove it, as it is very significant at this point, just check the source again in the new 2012 edition]. See generally Walter Laqueur & Barry Rubin, THE ISRAEL-ARAB READER: A DOCUMENTARY HISTORY OF THE MIDDLE EAST CONFLICT, 7<sup>th</sup> ed. (2008). Press Release, The White House, Remarks by the President on the Middle East and North Africa (May 19, 2011), available at <http://www.whitehouse.gov/the-press-office/2011/05/19/remarks-president-middle-east-and-north-africa>; see also, *Mideast Students Analyze Obama's Speech, Region's Future*, WORLD LEARNING (June 6, 2011), <http://www.worldlearning.org/21641.htm>. (providing the author's and others' opinions on President Barack Obama's speech).

<sup>27</sup> See generally ALAA AL-DIN ARAFAT, THE MUBARAK LEADERSHIP AND FUTURE OF DEMOCRACY IN EGYPT, 1<sup>st</sup> ed. (MacMillan 2009). Kirk J. Beattie, *Prospects for Democratization in Egypt*, 3 AMERICAN-ARAB AFF., (Spring 1991), 33.

<sup>28</sup> John R. Bradley, *Inside Egypt: The Land of the Pharaohs on the Brink of a Revolution* (New York: Palgrave MacMillan 2008), 209, 213-4. See ABDULHALIM QANDIL, *AL-AYYAM AL-AKHIRA* [THE LAST DAYS], (Cairo: Dar al-thaqafah al-jadidah 2008), 11-19.

<sup>29</sup> See generally May Kassem, *In the Guise of Democracy: Governance in Contemporary Egypt*, 1<sup>st</sup> ed. (1999). See also Mona Makram Ebeid, *Political Opposition in Egypt: Democratic Myth or Reality*, 43 MIDDLE EAST J. 3 (Summer 1989); See also Ghassan Salame, *Democracy Without Democrats?: The Renewal of Politics in the Muslim World* (Dec. 1994) ("Ideas of democracy and political liberalization have recently become central to political debate within and about the Middle East. The current focus on the merits of democratic practice in many areas of the world, coupled with the spread of economic liberalism, will inevitably, according to some accounts, bring about a measure of political pluralism. Against this, the persistence of authoritarian regimes in the Middle East") citing Roger Owen, *Socio-economic Change and Political Mobilization: The Case of Egypt*, (1994), 186-189. In this regard, one commentator argued that:

Starting in 1980s and 1990s, some steps towards political liberalization started taking place in numerous Arab states including Algeria, Egypt, Jordan, Kuwait, Morocco, Palestinian Authority, Tunisia and Yemen. Among these countries, Egypt seems to

Important because of its central geostrategic position, its lengthy civilization, and rich cultural history, Egypt has historically played a crucial role in the political life of the Middle East as it represents the cornerstone of North Africa.<sup>30</sup> In the past half-century, Egypt has been firmly at the center of turbulent regional politics, partially due to its historical hegemonic role, but equally because of the highly charismatic, personalized leaders who have left ineradicable imprints upon the domestic, regional, and international arenas.<sup>31</sup> Scholars argued that:

Egypt is one of the major powers in the Middle East. The vigour of its cultural life and the extent of its influence make it a force which cannot be ignored in the Arab world. Yet, despite the comparative confidence with which its rulers handle power, the country has a politically contradictory past with which to come to terms, as well as its role in a region of shifting political identity and allegiance.<sup>32</sup>

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grant many of the civil and political rights to its citizens which many other Arab states do not. Compared to other Arab states, Egypt represents the strongest continuity of democratizing measures. However, at the same time, political liberalization in Egypt fluctuates between genuine progress and setbacks which leaves central authority solidly in control.

(“An examination of President Mubarak’s leadership in the political domain (including his handling of the Islamist opposition) suggests that unique personality traits notwithstanding, he falls squarely within the patterns of Egyptian leadership common to his more famous, charismatic predecessors, Sādāt and Nasser. Indeed, while he has at time taken great pains to distinct both his leadership style and substantive policies from those of his ancestors, commonalities nevertheless seem to far outnumber differences. The prevalent strength of the ruling party, professions of reform and liberalization and subsequent deliberalization, and vacillating policies towards Islamist elements are fittingly descriptive of not just the Mubarak regime but of all the regimes of post-revolutionary Egypt.”).[This quotes came from the book I cited above as my assistance said to me: *Democracy Without Democrats?: The Renewal of Politics in the Muslim World*, just make sure about the pages. Please don’t remove these quotes as it is very important for the reader’s explanation regarding the Egyptian history, just check more times on the page and the source again.]

<sup>30</sup> ‘Arafa, *supra* note 7, at 1. (“The Arab Republic of Egypt, a prominent North African Arab country and a key power in the Middle East, witnessed an unprecedented and monumental change beginning the twenty-fifth of January, 2011, after nearly thirty years of autocratic dictatorship under former President Mohammad Hosni Mubarak.”).

<sup>31</sup> See generally Ami Isseroff, *History of Egypt, Egypt: A Brief History, Egypt, A Concise History in EGYPT - HISTORY - FROM ANCIENT TIMES TO THE MODERN PERIOD*, at <http://www.mideastweb.org/egyphistory.htm>. SAMER SOLIMAN, *The Autumn of Dictatorship: Fiscal Crisis and Political Change in Egypt under Mubarak*, STANFORD STUDIES IN MIDDLE EASTERN AND I (2011). (“The Egyptian protests in early 2011 took many by surprise. In the days immediately following, commentators wondered openly over the changing situation across the Middle East. But protest is nothing new to Egypt, and labor activism and political activism, most notably the *Kifaya* (“Enough”) movement, have increased dramatically over recent years. In hindsight, it is the durability of the Mubarak regime, not its sudden loss of legitimacy that should be more surprising.”). [Cite this quote by referring to the book review/synopsis from the Stanford Press website].

<sup>32</sup> ROGER OWEN & CHARLES TRIPP, *EGYPT UNDER MUBARAK*, 1<sup>st</sup> ed. (Apr.1990) [Check carefully this book, as it is available at Amazon online, don’t remove it from citation] and the quote come from this book at its synopsis/introduction. See also MAHMUD A. FAKSH, *EGYPT UNDER MUBARAK: THE UNCERTAIN PATH* (1983).

Certainly, the flamboyant leadership style of 'Abd al-Nasser remains scraped in the collective memory of Egyptians and foreigners alike.<sup>33</sup> Nasserism, however, was more than the sum of political maneuvers; it was “a feeling, a sense of excitement, a hope for a new Arab future”<sup>34</sup> and despite its many flaws, was a source of pride for Egyptians and Arabs alike.<sup>35</sup> Following Nasser's death in 1970, the advent to power of Mohammad Anwar al-Sādāt ushered in a new era in Egyptian politics.<sup>36</sup> Sādāt, unlike his more charismatic predecessor, displayed far more restraint in his style of leadership, yet displayed a decided penchant for political adventurism, often garnering him great admiration abroad, particularly in the West, but which failed to fully endear him to his domestic constituency.<sup>37</sup> His decision to dismantle many Nasser-era policies and his ground-breaking trip to Jerusalem, which made possible the Camp David Accords,<sup>38</sup> earned him acclaim from Western

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<sup>33</sup> See generally RAYMOND WILLIAM BAKER, *EGYPT'S UNCERTAIN REVOLUTION UNDER NASSER AND SADAT* (Harv. Univ. Press 1978); MALCOLM H. KERR, *EGYPT UNDER NASSER* (1963). See also R. Hrair Dekmejian, *Egypt under Nasir: A Study in Political Dynamics*, (1971).

<sup>34</sup> Cleveland, *supra* note 24, at 302 & 'Arafa, *supra* note 7, at 8-9. See generally P.J. VATIKIOTIS, *THE HISTORY OF MODERN EGYPT: FROM MUHAMMAD ALI TO MUBARAK*, (Johns Hopkins Univ. Press, 1991).[Check carefully on Google books and keep it as it is already available online]. See also JAMES P. JANKOWSKI, *EGYPT: A SHORT HISTORY* (2000). RAYMOND FLOWER, *NAPOLEON TO NASSER: THE STORY OF MODERN EGYPT* (2002).

<sup>35</sup> While there can be little question that Nasser's reform in many ways represented a marked improvement upon oppressive British-dominated and monarchical forms of government, the implementation of his reformist schemes was effected in a highly paternalistic and authoritarian manner. Thus, Nasser set in motion, in the post-revolutionary period, tendencies that long predated his rule and that surely have long outlived him. See Randa Ali, *From Nasser To Sabbahi: The Dream Of Social Justice Lives On*, AHARAM ONLINE, July 23, 2012 (“Some 60 years after the July 1952 Revolution, many Egyptians voted for Hamdeen Sabbahi in the presidential race out of a yearning for the social justice promised by Gamal Abdel Nasser”), at <http://www.english.ahram.org.eg/News/47815.aspx>.

<sup>36</sup> Raymond A. Hinnebusch, *Egyptian Politics Under Sadat: The Post-Populist Development of an Authoritarian-Modernizing State*, (1988) (“Anwar Sādāt presided over a remarkable transformation in the Egypt built by Nasser: economic liberalization superseded populist revolution from above, a Western alliance replaced Nasser's challenge to Western power in the Arab world and an authoritarian state was adapted to growing pluralist pressures.”). See ALI E. HILLAL DESSOUKI, *EGYPT UNDER SADAT*, (1988). [Keep this citation, as I checked it and found it online but out of print].

<sup>37</sup> Dessouki, *supra* note 36. See also KIRK J. BEATTIE, *EGYPT DURING THE SADAT YEARS*, (2000).

<sup>38</sup> For further elaboration on Camp David Records and The Egyptian Israeli Peace Agreement of 1979, see Oded Balaban, *Interpreting Conflict: Israeli-Palestinian Negotiations at Camp David II and Beyond* (2005); Clayton E. Swisher, *The Truth About Camp David: The Untold Story About the Collapse of the Middle East Peace Process*, (2004), and Shibley Telhami, *The Camp David Accords: A Case of International Bargaining*, (2001). It should be kept in mind that the Egyptian-Israeli Peace Treaty of 1979 was signed by Anwar al-Sādāt and Israeli Prime-Minister Menachem Begin in Washington, D.C., United States, on March 26, 1979, following the Camp David Accords (1978), a series of meetings between Egypt and Israel facilitated by the United States President Jimmy Carter. Both Sādāt and Begin were awarded the Nobel Peace Prize for creating the treaty. In his acceptance speech, Sādāt referred to the long awaited peace desired by both Arabs and Israelis. The President Sādāt said that:

Let us put an end to wars, let us reshape life on the solid basis of equity and truth. And it is this call, which reflected the will of the Egyptian people, of the great majority of the Arab and Israeli peoples, and indeed of millions of men, women, and children around the world that you are today honoring. And these hundreds of millions will

governments and a Nobel Prize for Peace, but incurred the ire of segments of the Egyptian populace as well as the larger Arab-Islamic world.<sup>39</sup> The confluence of internal discontent springing from the failed promises of his *al-infatih al-lqtsadi* (“economic opening”)<sup>40</sup> coupled with the ostracism of Egypt in the Arab world, its increasing reliance on American support, growing interclass inequality and repressive anti-opposition measures eventually undermined any residual popularity Sādāt enjoyed following the relatively successful Egyptian performance in the 1973 War with Israel.<sup>41</sup> One commentator argued on October 6, 1973 War:

The Two O’ Clock War is a spellbinding chronicle of the international chess game that was played out in October 1973. It is a story of diplomacy and

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judge to what extent every responsible leader in the Middle East has responded to the hopes of mankind.

<sup>39</sup> The main features of the agreement were the mutual recognition of each country by the other, the cessation of the state of war that had existed since the 1948 Arab-Israeli War, and the complete withdrawal by Israel of its armed forces and civilians from the rest of the *Sinai* Peninsula which Israel had captured during the 1967 Six-Day War. Harry Hurwitz & Yisrael Medad, *Peace in the Making: The Menachem Begin, Anwar Sadat Personal Correspondence* (2011); Gregory Harms & Todd M. Ferry, *The Palestine-Israel Conflict: A Basic Introduction*, 2<sup>nd</sup> ed. (2008). The Egyptian/Israeli Peace Treaty available at [http://www.palestineinarabic.com/.../treat.../treat.../Peace\\_Treaty\\_Between\\_...](http://www.palestineinarabic.com/.../treat.../treat.../Peace_Treaty_Between_...) (last retrieved May 22, 2012).

<sup>40</sup> JOHN WATERBURY, *THE EGYPT OF NASSER AND SADAT: THE POLITICAL ECONOMY OF TWO REGIMES*, (1983). In this respect, *al-infatih al-lqtsadi* means “opening” signifies the economic liberalization scheme initially designed by Sādāt to encourage foreign—initially Arab—investment in Egypt. When the initial Arab response proved lackluster, Sādāt then sought to encourage investment by foreign investors of any nationality. The results of the *infatih* were mixed, with some important investment flows into Egypt, although at levels far below those anticipated. The *infatih* also had important social consequences. For a more detailed treatment of the *infatih* and some of the social implication of foreign direct investment in Egypt, see Jeswald Salacuse, *Back to Contract: Implications of Peace and Openness for Egypt’s Legal System*, 28 AMERICAN J. COMP. L. (1980) 315-333; Jeswald Salacuse, *Foreign Investment and Legislative Exemptions in Egypt: Needed Stimulus or New Capitulations*, in SOCIAL LEGISLATION IN THE CONTEMPORARY MIDDLE EAST, Michalak and Salacuse, eds. (1986), 241.

<sup>41</sup> At the same time, after the Egyptian Revolution, and the domination of the Islamists in the recent Egyptian Parliament, Muslim Brotherhood leaders have signaled their intent to maintain peace with Israel. In an interview with Tom Friedman of the New York Times, ‘Essam El-‘Erian, Vice Chairman of the Freedom and Justice Party (“FJP”), said that:

This [peace treaty] is the commitment of the state—not any group or party—and we have said we are respecting the commitments of the Egyptian state.” However, many Brotherhood members have said that the peace treaty may be “reviewed.” One spokesperson for the *Salafist Nour* Party said, “We will abide by the treaty, but this does not mean accepting a number of clauses which the Egyptian people are clearly and unanimously against, such as exporting gas to Israel.”

See POLITICAL ISLAM WITHOUT OIL, N.Y. TIMES, (Jan. 10, 2012). Walter J. Boyne, *The Two O’ Clock War: The 1973 Yom Kippur Conflict and the Airlift That Saved Israel* (2002) and ABRAHAM RABINOVICH, THE YOM KIPPUR WAR: THE EPIC ENCOUNTER THAT TRANSFORMED THE MIDDLE EAST, (2005). (“Israel convinces itself there will be no war, while Egypt and Syria plot the two-front conflict. Then, on *Yom Kippur*, Saturday, October 6, 1973, we see Arab armies pouring across the shattered Bar-Lev Line in the *Sinai* and through the Golan defenses. Even the famed Israeli air force could not stop them. On the Golan alone, Syria sent 1,460 tanks against Israel’s 177, and 115 artillery batteries against Israel’s 11. And for the first time, foot soldiers wielding anti-tank weapons were able to stop tank charges, while surface-to-air missiles protected those troops from air attack.”).

military might that accounts for many of the dilemmas faced in the present-day Middle East... This is a war that Israel never thought was possible.<sup>42</sup>

On October 6, 1981, individuals associated with the Islamist al-Jihad organization assassinated Sādāt.<sup>43</sup> Largely dominated by his two predecessors, Hosni Mubarak, Vice-President under Sādāt, does not display the charismatic abilities so characteristic of Nasser, nor does he show the adventurism or personal pretense of Sādāt.<sup>44</sup> However, during his presidency, Mubarak has carefully used a combination of cautious, restraint, and limited reform to chart a course for Egypt that is solidly grounded in the Arab world but is equally responsive to international, particularly American, influence.<sup>45</sup> Mubarak, like his successors and many other Egyptians of modest means, began his career in the Egyptian armed forces.<sup>46</sup> Serving first as a fighter pilot from (1950-1954) and later as the director of the Air

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<sup>42</sup> Boyne, *supra* note 41. See generally SHIBLEY TELHAMI, AARON DAVID MILLER, AND JEHAN SADAT, *THE SADAT LECTURES: WORDS AND IMAGES ON PEACE* (2010).

<sup>43</sup> JOSEPH FINKLESTONE, *ANWAR SADAT: VISIONARY WHO DARED*, (1996). ("The Assassination of Sādāt occurred on October 6<sup>th</sup>, 1981. He was assassinated during the annual victory parade held in Cairo to celebrate Egypt's crossing of the Suez Canal. The assassination followed a recent crackdown by Mr. Sādāt against religious extremists and other political opponents. There were unverifiable reports that some members of the armed forces had also been detained."). ("One troop truck contained the assassination squad, led by Lieutenant Khalid Islambouli. As the truck passed, the assassins dismounted, and Islambouli approached Sādāt. Sādāt stood to receive his salute, whereupon, Islambouli threw three grenades at Sādāt, only one of which exploded, and additional assassins rose from the truck, firing assault rifles into the stands."). See 1981 YEAR IN REVIEW: ANWAR SĀDĀT KILLED (1981) available at [http://www.upi.com/Audio/Year\\_in\\_Review/Events-of-1981/Anwar-Sadat-Killed/12311754163167-5/#ixzz1uKZh28bi](http://www.upi.com/Audio/Year_in_Review/Events-of-1981/Anwar-Sadat-Killed/12311754163167-5/#ixzz1uKZh28bi); 1981: EGYPT'S PRESIDENT SĀDĀT ASSASSINATED, BBC NEWS, (2005) available at <http://www.bbc.co.uk/onthisday/hi/dates/stories/october/6/.../2515841.stm>; LEARNING NETWORK, OCT. 6, 1981: EGYPT'S ANWAR SĀDĀT IS KILLED, (Oct. 6, 2011), and THE ASSASSINATION OF ANWAR SĀDĀT—BBC ACTIVE, "Video Featured" at <http://www.bbcactivevideoforlearning.com/1/TitleDetails.aspx?TitleID=54>. (last visited May 22, 2012) ("Since the declaration of a state of emergency following the assassination of Sādāt in 1981, Egyptian authorities have detained thousands of persons suspected of belonging to or sympathizing with Islamic organizations."). See *infra*.

<sup>44</sup> Biographical information on Mubarak has been drawn can be found in DILIP HIRO, *DICTIONARY OF THE MODERN MIDDLE EAST*, (1996), s.v. Mubarak; Derek Hopwood, *Egypt: Politics and Society 1945-1990*, 3<sup>rd</sup> ed. (1993), 184-185.

<sup>45</sup> Schneider, *supra* note 25. See generally SUSAN MUADDI DARRAJ & ARTHUR MEIER, JR. SCHLESINGER, *HOSNI MUBARAK (MODERN WORLD LEADERS)* (2007), and LALLY WEYMOUTH, *MUBARAK MERITS U.S. SUPPORT*, ST. LOUIS POST-DISPATCH, (July 27, 1995), 13B. [Keep the citation since we make sure that the article is online and accurate, if you want to refer to it as it is posted as summary/introduction, feel free to do so, but don't remove it from the footnote].

<sup>46</sup> DARRAJ & MEIER, *supra* note 45. Born in 1928 in the Nile delta village of *Kafr al-Musaliha*, Monufia Governorate, Mubarak graduated from the Air Force Academy in 1950. In 1937, the Royal Military Academy, which was later to become a hotbed of anti-royalist sentiment, opened its doors to candidates of all classes, eventually becoming an important vehicle of merit-based social mobility for the lower and middle classes. Like many of his contemporaries from the lower and lower-middle classes, Mubarak saw in the newly expanded armed forces a means of social and economic advancement, and after graduation in 1950, he entered the Egyptian air forces.

Force Academy.<sup>47</sup> Additionally, Mubarak received training in the Soviet Union in the early 1960s.<sup>48</sup>

Following the decisive Arab defeat in 1967, Mubarak was appointed chief of staff of the air force in 1969 and Deputy Defense Minister in 1972, eventually his military career reached its high and rising pinnacle to the rank of Commander (Chief Marshall) of the aviation force in the recognition of October War 1973.<sup>49</sup> In April 1975, Sādāt appointed him to the position of Vice-President, a position he would hold until Sādāt's assassination in October 1981.<sup>50</sup> But as the years went by, Mubarak became more dictatorial, and more aloof, carefully designing his public appearances, pushing forward Sādāt's open door policies that paved the way for crony capitalism, implementing repressive laws limiting political activity, stifling political dissent, and curbing freedom of expression with an iron hand, as few knew what to expect of him at the helm of the Egyptian nation.<sup>51</sup> Often depicted in terms reflecting his

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<sup>47</sup> AIR MARSHAL MOHAMMED HOSNI MUBARAK, EGYPTIAN ARMED FORCES, *available at* [www.mmc.gov.eg/](http://www.mmc.gov.eg/).

<sup>48</sup> GALAL A. AMIN, EGYPT IN THE ERA OF HOSNI MUBARAK, 1981-2011 (2011). P.J. VATIKIOTIS, THE HISTORY OF MODERN EGYPT: FROM MUHAMMAD ALI TO MUBARAK (1999).

<sup>49</sup> THE DAILY BELL—HOSNI SAYYID MUBARAK, BACKGROUND: HOSNI MUBARAK, (June 2011) *available at* <http://www.thedailybell.com/1996/Hosni-Sayyid-Mubarak.html>. (last retrieved May 11, 2012). ("Mr. Mubarak maintained peace with Israel and close ties to America, even as he jailed critics, squelched opposition parties and rigged elections. Under a veneer of public apathy, anger grew as the country's economy crumbled.")

<sup>50</sup> Amin, *supra* note 48. For all his unpopularity today, when he took over Mubarak was seen by many Egyptians, as the great Middle East Historian Peter Mansfield says:

An honest, straightforward, even uninspiring man who's been credited with changing Egypt's fortunes by forging ahead with peace with Israel. In exchange for the detente with Tel Aviv, America has provided Egypt with massive amounts of military and economic aid over the last three decades.

<sup>51</sup> The Emergency Law (*Qanun Al-Tawaar'e* in Arabic) in Egypt was established by Law No. 162 of 1958. During the 1967 Arab-Israeli War, the emergency status was imposed. It has remained in effect, except for an 18-month break in 1980 where it was reimposed following the assassination of President Sādāt. This law empowers the police to undertake many actions that remain questionable, which include putting individuals in jail while bypassing the court. The law allows imprisonment of individuals for indefinite periods and restriction of their civil rights and liberties for virtually no reason, thus keeping them in prison without trial. Law No. 162 of 1958 (Emergency Law), *Al-Jarida Al-Rasmiyya* (Egypt), *available at* <http://www.emerglobal.com/lex/law-1958-162>; see also Daniel Williams, *Egypt Extends 25-Year-Old Emergency Law*, THE WASHINGTON POST (May 1, 2006), <http://www.washingtonpost.com/wp-dyn/content/article/2006/04/30/AR2006043001039.html>.

Additionally, the Emergency Law allows Mubarak to declare a state of emergency "whenever security or public order are jeopardized within the Republic or any of its regions, whether due to war or to circumstances threatening war, national unrest, general disasters or the outbreak of an epidemic." Article 3 of the Emergency Law provides that "the President and his delegate, the Minister of Interior, are empowered during a state of emergency to, "restrict freedom of assembly, movement and residence, arrest and detain suspects or those dangerous to security and public order, permit the search of persons and places" unrestricted by the provisions of the Code of Criminal Procedures." *Economist Intelligence Unit, Country Report, Egypt*, no. 2 (1993) quoting text of Emergency Law 162/1958. AMNESTY INTERNATIONAL, ARBITRARY DETENTION AND TORTURE UNDER EMERGENCY POWERS, AMNESTY INTERNATIONAL (AI) Index: MDE 12/01/89 (May 1989). The Emergency Law further affords the President the power to order censorship or confiscation of any means of expression, the right to specify opening and closing times for stores, and the right to evacuate or seal off areas of disturbance.

unassuming style, President Mubarak has been variously described as “a technician, not a systematic thinker or a visionary,<sup>52</sup> “quiet and courteous”<sup>53</sup>, and an “honest if plodding-manager.”<sup>54</sup>

The infitah, the controversial Peace Agreement with Israel and Sādāt’s stratagems of limited political liberalization remained largely intact, though over time, Mubarak refashioned and modified these initiatives, though characteristically, his modifications were by no means radical.<sup>55</sup> Instead, he would distillate consistently on domestic stability, economic and political reform and the reintegration of Egypt into the Arab fold.<sup>56</sup>

### *B. Is Mubarak has any pros or just cons? (“greater political restraint”)*

Instead of political reform, Mubarak has since the early 1990s and particularly since beginning his fourth term as President-focused his attention on the resurrection of the moribund, ossified Egyptian economy.<sup>57</sup> In one of his recent interview before his resignation from the office, he stated that:

[T]he world is business now....Politics is working for business, In the same interview, he blames his more famous predecessors for the state of the Egyptian economy: “I received the country in the most terrible situation,” “Economy zero,” “Debts high,” and “Infrastructure nothing.” No hope to invite anybody to invest his money, No telephone lines, No electricity, No water or sewage. No, no, no, no, no....<sup>58</sup>

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AMNESTY INTERNATIONAL, EGYPT: RECENT HUMAN RIGHTS VIOLATIONS UNDER THE STATE OF EMERGENCY, AI Index: MDE 12/07/96 (Oct. 1996); AMNESTY INTERNATIONAL, EGYPT: INDEFINITE DETENTION AND SYSTEMATIC TORTURE: THE FORGOTTEN VICTIMS, AI Index: MDE 12/13/96 (July 1996), *available at* <http://www.amnesty.orgailib/aipub/1996/MDEI51201396.htm>. (last visited May 22, 2012). [Don’t touch anything of those as I checked everything in here and all of that is online and the emergency law is available online, also, this had been checked before within my article published at *Phoenix Law Review* last year which stated in FN7, and copy of the criminal code attached].

<sup>52</sup> Lippman, *supra* note 25.

<sup>53</sup> Sieff, *supra* note 25.

<sup>54</sup> See STANLEY REED, THE BATTLE FOR EGYPT, 72 FOREIGN AFF. 4 (Oct. 1993), 94. (“According to Mubarak, he never desired the position of President and would have much preferred to be named ambassador to Paris or London...Unlike Sādāt who, upon coming to power, immediately set about stripping the programs of Nasser, Mubarak remained highly loyal to the policies instituted by his predecessor.”). Schneider, *supra* note 25.

<sup>55</sup> TAREK OSMAN, EGYPT ON THE BRINK: FROM NASSER TO MUBARAK (2011).

<sup>56</sup> Arafat, *supra* note 27, at 61-87. ALADDIN ELAASAR, THE LAST PHARAOH: MUBARAK AND THE UNCERTAIN FUTURE OF EGYPT IN THE VOLATILE MID EAST (2009).

<sup>57</sup> Hopwood, *supra* note 44, at 184. It is interesting to note that as late as 1991; commentators were unable to discern any coherent long-term economic program on the part of Ex-President Mubarak.

<sup>58</sup> Schneider, *supra* note 25.

Almost universally described in terms reflecting his risk-averse, reflective nature, Mubarak has displayed an astonishing passion for undertaking a broad economic reform program.<sup>59</sup> This is the area in which President Mubarak has sought to distinguish himself: “Nasser liberated Egypt; Sādāt gave it peace; I wish to rebuild it,” asserts Mubarak.<sup>60</sup> Nearly a decade ago, Mubarak embarked Egypt on the International Monetary Fund’s (“IMF”) economic reform and structural adjustment program aimed at macroeconomic stabilization, corrective social policy (such as reworking the extensive programs of subsidies) and creating a little bit social safety net for the poor,<sup>61</sup> even an estimated forty million people are living at or below the poverty level out of Egypt’s total population of eighty-five million.<sup>62</sup> While the initial phase of the reform package was considered successful-Egypt had large foreign investments and a relatively strong currency-it was equally clear that the alteration program would be stuck by the leadership’s uncertain commitment to full-fledged reform in light of the potentially disruptive social transformations engendered by improvement and the interfering with vested financial interests of public businesses and the government-controlled labor unions.<sup>63</sup> Privatization<sup>64</sup> of the huge public sector occurred at a pace far slower than anticipated, and by 1997, privatization schemes only amounted to 15 percent of the known public sector.<sup>65</sup> Additionally,

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<sup>59</sup> IGOR MAN, THE RIFTS IN EGYPT’S VILLAGE, 40 WORLD PRESS REV. 7 (1993), 7.

<sup>60</sup> *Id.*

<sup>61</sup> DIETER WEISS AND ULRICH WURZEL, *The Economics and Politics of Transition to an Open Market Economy: Egypt*, PARIS: ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (“OECD”), (1998), 23.

<sup>62</sup> About forty million Egyptians, half the population, were living below the poverty level, as those individually earn between \$2 and \$5 a day. Bassiouni, *Fight for Democracy*, *supra* note 8, at 3.

<sup>63</sup> Weiss & Wurzel, *supra* note 61, at 27.

<sup>64</sup> See generally, DAVID PARKER & DAVID SAAL, INTERNATIONAL HANDBOOK ON PRIVATIZATION 87 (Edward Elgar eds.,2003) [this book is online, check carefully Amazon books]; PRIVATIZATION: THE PROVISION OF PUBLIC SERVICES BY THE PRIVATE SECTOR 60 (Roger L. Kemp ed. 1991). Privatization is the incidence or process of transferring ownership of a business, enterprise, agency, or public service from the public sector (the state or government) to the private sector (businesses that operate for a private profit) or to a private non-profit organization. In a broader sense, privatization refers to transfer of any government function to the private sector, including governmental functions like revenue collection and law enforcement.

<sup>65</sup> Figures given are approximations since the Egyptian government has not fully revealed the extent of public sector holdings. Weiss & Wurzel, *supra* note 61, at 131; see also THE ECONOMIST, EGYPT: POLITICAL AND ECONOMIC ANALYSIS v. 351, 8123. (“It would be grossly unfair however to dismiss Mubarak’s economic reforms as wholly unsuccessful.”). Growth rates are quite respectable at between three and five percent per year, private sector earnings now account for fully 70 percent of the Gross Domestic Product (“GDP”). As generally-well known, GDP refers to the market value of all officially recognized final goods and services produced within a country in a given period. GDP *per capita* is often considered an indicator of a country’s standard of living; GDP *per capita* is not a measure of personal income. Under economic theory, GDP *per capita* exactly equals the Gross Domestic Income (“GDI”) *per capita*. And by 1997, Egypt had earned an investment-grade bond rating. For further discussion on GDP and the methods of its measurement, see generally JOSEPH E. STIGLITZ, AMARTYA

some progress has been made in effecting limited reforms in the areas of trade liberalization<sup>66</sup> and financial sector reorganization and deregulation.<sup>67</sup>

Nonetheless, President Mubarak's commitment to economic reform has been lessened by his desire to maintain personal control and specific interests.<sup>68</sup> Mubarak has so involved himself in the control of Egypt's economic reform that "[he] sometimes seems to run the government almost single-handedly, personally approving major investment projects and, in one recent case, issuing an order for playground equipment in rural villages" and short-term stability even at the expense of long-term prosperity.<sup>69</sup> His reluctance to assertively confront the economy's structural insufficiencies, several of which are inseparably linked to Egypt's larger political issues, has handicapped progress in this realm in which the President sees himself as visionary.<sup>70</sup>

A country owning gigantic human capital, Egypt has yet to realize its vast potential as a political and economic actor in the region and further afield.<sup>71</sup> Its progress on this path is severely hampered by political exhaustion and economic immobility, largely the result of almost absolute executive domination of the political

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SEN, AND JEAN-PAUL FITOUSSI, *MISMEASURING OUR LIVES: WHY GDP DOESN'T ADD UP*, (2010); F. PULSELLI, S. BASTIANONI, N. MARCHETTINI, AND E. TIEZZI, *THE ROAD TO SUSTAINABILITY: GDP AND FUTURE GENERATIONS (THE SUSTAINABLE WORLD)* (2008), and ALEKSANDR V. AVAKOV, *TWO THOUSAND YEARS OF ECONOMIC STATISTICS: WORLD POPULATION, GDP AND PPP*, (2010).

<sup>66</sup> Free trade is a system of trade policy that allows traders and merchants to trade across national boundaries without interference from the respective governments. According to the law of comparative advantage, the policy permits trading partners' mutual gains from trade of goods and services. Interventions include subsidies, taxes and tariffs, non-tariff barriers, such as regulatory legislation and quotas, and even inter-government managed trade agreements, such as the North American Free Trade Agreement ("NAFTA") and the Central America Free Trade Agreement ("CAFTA")—contrary to their formal titles—and any governmental market intervention resulting in artificial prices. See Anup Shah, *Free Trade and Globalization*, GLOBAL ISSUES, <http://www.globalissues.org/issue/38/free-trade-and-globalization>. (last updated Nov. 28, 2010).

<sup>67</sup> DAVID HIRST, *UN CAPITALISME A L'INDONDSIENNE : L'EGYPTE AUX PIEDS D'ARGILE, LE MONDE DIPLOMATIQUE* (Paris), (Oct. 1999), 15, available at <http://www.monde-diplomatique.fr/1999/10/10HIRST/12543.html>. It should be noted that in this sense that "Deregulation Policy" means the removal or simplification of government rules and regulations that restrict the operation of market forces. Deregulation does not mean elimination of laws against fraud or property rights but eliminating or reducing government control of how business is done, thereby moving toward a more laissez-faire, free market economy.

<sup>68</sup> Weiss & Wurzel, *supra* note 61.

<sup>69</sup> John Lancaster, *Despite Plaudits of the West, Mubarak Regime is Stumbling: The Real Egypt/Bureaucratic Paralysis and Social Unrest*, INTERNATIONAL HERALD TRIBUNE (Neuilly-sur-Seine, France), Mar. 15, 1995.

<sup>70</sup> See Ali E. Hillal Dessouki, *The Primacy of Economics: The Foreign Policy of Egypt*, in THE FOREIGN POLICIES OF THE ARAB STATES: THE CHALLENGE OF CHANGE, eds. Baghat Korany and Ali E. Hillal Dessouki (1991), 169.

<sup>71</sup> Soliman, *supra* note 31. See also MOHAMED HAKKI, *EGYPT UNDER MUBARAK: MIDDLE EAST PROBLEM PAPER* (1983).

arena.<sup>72</sup> Egypt continues to be a state subjugated by an enormously powerful executive who enjoys expansive constitutional (and extra-constitutional) grants of authority, thereby exercising substantial and major control over all facets and policies of government from the ostensibly autonomous legislature<sup>73</sup> to the judicial branch,<sup>74</sup> in which the Minister of Justice is not a member of the judicial staff. He is “certainly one of the executive authority members as he is subject to the cabinet.”<sup>75</sup> He occupies a political job from which judges are prohibited while active and enjoys no independence concerning his judicial decisions.<sup>76</sup> In other words, the Justice Minister is not an active judge, so the issue is whether he serves judges or the ruling

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<sup>72</sup> Steven A. Cook, *The Struggle for Egypt: From Nasser to Tahrir Square*, COUNCIL ON FOREIGN RELATIONS, (OXFORD 2011).

<sup>73</sup> The control enjoyed by the President and his party, the National Democratic Party (“NDP”), over the legislature, known as the People’s Assembly (*majlis al-sha’ab*) cannot be questioned. As a threshold matter, the Abrogated Egyptian Constitution provides that both the President and the People’s Assembly shall share equally in the right to propose legislation. See CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 11 Sept. 1971, *as amended*, May 22, 1980, May 25, 2005, March 26, 2007, *as abrogated* March 30, 2011, available at [http://www.sis.gov.eg/En/LastPage.aspx?Category\\_ID=208](http://www.sis.gov.eg/En/LastPage.aspx?Category_ID=208) [hereinafter ABROGATED EGYPT CONSTITUTION]; *replaced by* CONSTITUTIONAL DECLARATION OF THE ARAB REPUBLIC OF EGYPT, *as promulgated* 30 March 2011, [hereinafter EGYPT TEMPORAL CONSTITUTIONAL DECLARATION], available at <http://www.egypt.gov.eg/english/laws/constitution>. [Those links are for the Abrogated Egyptian Constitution of 1971 and the Temporal Constitutional Declaration of March 30, 2011 and both are online, just check them carefully in English, if you find another links in English, feel free to do so and cite them]. This normative goal however fails to fully reflect the reality of lawmaking in Egypt, where the Executive has become the chief engine of legislation: legislation proposed by the Executive is far more likely to be codified as law by the Assembly than proposals emanating from the Assembly itself. In 1990, 214 laws proposed by the executive were passed, while during the same period, only seven were proposed by the Assembly itself, of which only one was adopted. By the same token, in 1991, 451 executive-proposed laws were adopted and only one proposed by the Assembly was passed out of a total of seven originally presented. See generally IBN KHALDUN CENTER FOR DEVELOPMENT STUDIES (“ICDS”) (Cairo 1995). [I am referring here to check the general reports of this organization regarding some laws’ execution at this time period, may be not available at this moment as they are very old, but I think it’s better to keep it as we verified the online website of the organization itself rather than no citation or if you find another thing to cite supporting the idea, feel free to do so.]

<sup>74</sup> Mubarak sought to make the judicial authority totally subordinate, but now judges are asking for judicial independence from government control in addition to full judicial supervision over parliamentary and presidential elections. The case of judicial independence may be a legislative corruption because the corrupt parliament blocks issuing a good law. The parliament kept the old law to keep the judicial system under the control of the executive branch. For further elaboration on this point, see generally Nathalie Bernard-Maugiron, ed., *JUDGES AND POLITICAL REFORM IN EGYPT*, (The American Univ. in Cairo Press, 2008).

<sup>75</sup> This part is based on a portion of the author’s Doctoral Dissertation Thesis entitled: “*Towards a New Anti-Corruption Law After Mubarak: Based on a Comparative Study Between the United States Foreign Corrupt Practices Act (“FCPA 1977”), Egyptian Anti-Bribery Law, and Islamic Shari’ah Law*” at the Indiana University Robert H. McKinney School of Law under the supervision of Professor Dr. Frank Emmert (2013). [This chapter in my doctoral dissertation attached]

<sup>76</sup> Maugiron, *supra* note 74. All of that creates a constitutional issue. The most significant is that judicial reform is considered a main condition for independence, democracy, impartiality, and political neutrality.

regime.<sup>77</sup> For example, in the most recent parliamentary elections of 2010, several violations took place.<sup>78</sup> Therefore, and after the revolution, judges demanded a new law to ban interference from the executive; however, certain political powers lead some corrupt journalists to describe the judicial authority as a state inside the state.<sup>79</sup> An effective justice system would encourage Egyptian citizens to believe in their right to voice their concerns about the wrongdoings of corrupt officials though almost all observers agree that executive control of the latter is far more tempered.<sup>80</sup>

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<sup>77</sup> After the White Revolution, a number of former ministers and high-ranking officials have not been the subject of formal interrogation, among whom are former Minister of Justice Mamdouh Mar'ie who is known for his role in the forged ballots scandal during the 2005 presidential and parliamentary elections. Recently, he was asked to appear before the Inspector-General of the Ministry of Justice to answer 58 reports accusing him of various misdeeds. Among the reports are accusations of Mar'ie of having exercised pressure on a judge at *Kafr al-Sheikh* Court to rule in favor of his nephews on a land dispute on twelve acres owned by the agrarian reform. When the judge refused, the former Minister referred him to a disciplinary committee. Another accusation relates to the aforementioned minister, his interference in the work of judges at the Illegitimate Gain Agency, which resulted in the resignation of the Head of the Agency in 2008. He did not appear before the Inspector-General, claiming health reasons. See generally AL JAZEERA AND AGENCIES, EGYPT PM APPOINTS NEW KEY MINISTERS, Mar.6, 2011 ("Foreign Affairs, Interior, and Justice portfolios change hands amid violence outside state security buildings in Cairo... A Former Attorney General, as minister of justice to replace Mamdouh Marie, who has been widely accused of corruption.")

<sup>78</sup> The judiciary, consequently, demanded that investigations be held. Nevertheless, the judges surprisingly found that those that demanded investigations to be held were referred to a disciplinary court without following the legal measures. The Regime supported by the police was so arrogant in the exercise of power that they did nothing to hide the massive and wholesale fraud. Less than 25% of the population participated in the elections, with the government party-fielded candidates winning 90% of the seats in Parliament. 'Arafa, *supra* note 7.

<sup>79</sup> See BUSCAGLIA EDGARDO, JUDICIAL CORRUPTION IN DEVELOPING COUNTRIES: ITS CAUSES AND ECONOMIC CONSEQUENCES 1-11 (1999).

<sup>80</sup> Cook, *supra* note 72. It should bear in mind, that there are codes of conduct and ethics for members of the judiciary. There are strict rules preventing conflict of interest. For instance, according to Article 72 of Law No. 46 of 1972, no judge may be employed or perform any commercial act, or perform any act that could threaten the independence and dignity of the judiciary. The *majlis al-qada'a al-a'laa* ("Supreme Council of the Judiciary" ("SCJ")) may prevent any judge from performing any act inconsistent with his or her duties and functions. Moreover, courts are forbidden from expressing political opinions. See Authority Judicial Law No. 46 of 1972, *Al-Jarida Al-Rasmiyya* [OFFICIAL GAZETTE OF EGYPT], June. 1972, at art.72 (Egypt). The law is only available in Arabic, no English version or official translation of it, so the keep the citation and don't omit it, if you want to refer to it as an Arabic version, feel free to do so.] Regarding the acceptance of gifts, Law No. 47 of 1978 for State Employees prohibits members of the national judiciary from taking gifts, hospitality, commissions, or advances from people for whom they deliver state services. However, this rule is not being fully applied in practice. Moreover, there are no provisions in Law No. 46 of 1972 on the judiciary concerning the protection of prosecutors and judges in cases of corruption. One of the important cases of judges being investigated for corruption charges occurred in 2007, when 20 judges were sent to the disciplinary committee for failing to perform their duties according to high standards, although this was perceived by some as politically motivated as these judges had openly criticized the integrity of elections. Moreover, Article 75 of the aforementioned law stipulates:

Judges who are related to each other by ties of parenthood or alliance by marriage, up to the fourth degree, may not sit in the same judicial circuit. Further, the public prosecutor, or one of the parties to the case or defense counsel in charge of his defense may not be one who is tied up by such relationship with any of the judges examining the case. The proxy of an attorney at law, who entertains such relationship with the judge, shall be disregarded unless the proxy was given after examination or adjudication of the case by the judge.

Despite promises of political and economic liberalization, the Mubarak regime was easily placed in the deeply rooted Egyptian political tradition characterized by a paternalistic “pyramidal” hierarchical structure, which harkens back to previous regimes, if not far more ancient antecedents.<sup>81</sup> While sources from the early period of his presidency note that he was “highly consultative” and “respect[ed] public opinion” without “seeking to impose his own,”<sup>82</sup> in later years, he has earned a reputation among his critics for imperiousness.<sup>83</sup>

One critic charged in 1995 that the President has “no advisers” and “since the Gulf War, [he] has tended to tell people what to do....He has become cocky. Ruling Egypt looks easy to him.”<sup>84</sup>

While seemingly dissimilar with Mubarak’s restrained personality, it is quite easy to see that the vast amount of political control enjoyed by him and the powerful National Democratic Party (“NDP”) he represents might well lead to arrogance, even in the most personally conservative of leaders.<sup>85</sup> In Egypt, however, civil society exists in many respects solely at the sufferance of the government, and thus remains incapable of acting as any sort of social intermediate against the hegemonic, invasive tendencies of the central government.<sup>86</sup> The civil society organizations that Mubarak

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Such rules are not typically applied in practice. POGAR (2004). See Act No. 47/1978 regulating Civil Servants in the Public Sector, *Al-Jarida Al-Rasmiyya* [OFFICIAL GAZETTE OF EGYPT], June 1978, at arts.15-27 (organizes civil service and aligns it with the public interest) (Egypt). On the other hand, set rules for gifts and presents to avoid corruption, while increasing the salaries of the judiciary. Regarding working in other courts or international bodies while serving as judges, Article 65 of Law No. 142/2006 permits this, although with a presidential decree, after taking the opinion of the general board of the court to which the judge belongs or the Attorney General, and with the consent of the Supreme Council. Moreover, a judge is not allowed to be appointed at any international position for more than four consecutive years. The only exception to this rule is if the appointment supports the general well-being of the nation. Further, there are no restrictions in the law for judges to enter the private sector after they leave office. See Law No. 142/2006 amending Law No. 46/1972 on Judicial Authority, *Al-Jarida Al-Rasmiyya*, June 2006, at art. 65(Egypt). MONA EL-NAHHAS, THREAT TO THE PRESS?, *AL-AHRAM WKLY ONLINE*, Dec. 13/19, 2007, available at <http://www.weekly.ahram.org.eg/2007/875/eg3.htm>. (last retrieved May 22, 2012).

<sup>81</sup> LARRY P. GOODSON AND SOHA RADWAN, DEMOCRATIZATION IN EGYPT IN THE 1990s: STAGNANT OR MERELY STALLED?, 19 ARAB STUDIES QUARTERLY 1 (1997), 7.

<sup>82</sup> Dessouki, *supra* note 70.

<sup>83</sup> As a president serving the longest period of time in a country as a president with a long history of extremely powerful presidents, Mubarak has been accused of attempting to rule the country as his personal fiefdom.(This is my own words and thoughts, no need for citation)

<sup>84</sup> Lancaster, *supra* note 69. See generally Charles Robert Davidson, *Reform and Repression in Mubarak’s Egypt*, 24:2 FLETCHER F. WORLD AFF. 75 (2000), 81-82.

<sup>85</sup> Davidson, *supra* note 84.

<sup>86</sup> *Id.*

has permitted to operate fulfill their role as “social safety valves” concern over the destabilizing effect of free and open discourse must be balanced.<sup>87</sup>

Of special concern to former President Mubarak has been the creeping Islamization of these civil society organizations, particularly among the influential professional associations. In a language highly evocative of his successors, Mubarak tends to paint all Islamists as terrorists and Islamic movements as terrorist movements.<sup>88</sup> This personal enmity on the part of Mubarak to Islamists of all stripes and the consequent lack of distinction among the variable groups has led him to instigate a number of punitive measures which affect Egyptian civil society as a whole.<sup>89</sup> Owing at least in part to their more democratic internal electoral processes, several of these groups have come to be dominated by Islamists even after the

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<sup>87</sup> However, the values typically inculcated by civil society organizations, moderation, respect for institutional processes, the utility and inevitability of compromise are all inherently antagonistic with continued single-party rule in a “multiparty” state and therefore necessitate close governmental oversight. Some analysts suggest that the Mubarak government’s apprehension of a more evolved civil society is grounded, at least in part, in its fear of the emergence of an Algeria-like situation in Egypt. Keep the explanation in the footnote and rephrase in the language that you feel it is a bit similar to the dissertation thesis and cite this dissertation as: See Charles Robert Davidson, *Political Violence in Egypt: A Case Study of the Islamist Insurgency 1992-1997*, (Doctoral Dissertation Thesis), FLETCHER SCHOOL OF LAW AND DIPLOMACY (2005), 176. See, e.g., Ebeid, *supra* note 29, at 121; Cassandra, *The Impending Crisis in Egypt*, 49 THE MIDDLE EAST J. 1, (Winter 1995), 16. Indeed, the Egyptian government has long gone to pains to distinguish its circumstances from those of its striferidden neighbor. See, e.g., ECONOMIST INTELLIGENCE UNIT COUNTRY REPORT, EGYPT, no. 1 (1992), at 9. However, while this “Algeria Complex” may play some role in the government’s hostility toward the instruments of civil society, Egypt is not Algeria and the conflicts are highly dissimilar, a fact that cannot have escaped the Egyptian leadership. The “Algeria Complex” is more likely a method for the government to justify its stranglehold on political life, justifying its increasing intrusiveness with vague references to “national security” and “public order and stability.” The 1997 Presidential decree, extending the duration of the state of emergency an additional three years, was approved by the NDP-dominated People’s Assembly, which stated that it would be inappropriate to repeal the legislation while “the remaining dens of corruption are still lurking and waiting to seize any opportunity to undermine security and stability by damaging tourism and causing sedition among the people’s communities.” See EGYPT PARLIAMENT EXTENDS EMERGENCY LAW FOR TWO YEARS, AGENCIES, ARAB NEWS, MENA NEWS AGENCY, May 11, 2010 (“Egypt’s Parliament voted to extend a decades-old state of emergency for a further two years”), at <http://www.arabnews.com/node/344725>. See also *Egypt’s State of Emergency Extended* (May 2010) (discussing that the law granting extensive police powers to be used only for “terrorism” and drug cases), available at <http://www.aljazeera.com/news/middleeast/.../20105116134595496.html>. (last visited May 22, 2012).

<sup>88</sup> Weymouth, *supra* note 45. For instance, of the Muslim Brotherhood-generally considered the most moderate and innocuous of Islamist groups, Mubarak has stated:

They say they are moderates (but) they are not moderates. They are working...to support violence in this country, “cautioning that should Islamists come to power through whatever channel-an Iran-like state might result.” It was a mistake to persuade the *Shah* to leave.

<sup>89</sup> Joel Campana, *From Accommodation to Confrontation: The Muslim Brotherhood in the Mubarak Years*, 50 J. INT’L AFF. 1, (1996), 278. In this respect, asserting his support for the key policies of his predecessor, shortly after being proclaimed President on October 13, 1981, Mubarak ordered the arrest of members of various Islamic organizations (particularly those of *al-Takfir wa al-Higra*) and dismissed a number of officers and enlisted men suspected of Islamist leanings from the armed forces.

revolution, particularly the Muslim Brotherhood (“MB”),<sup>90</sup> thus provoking ever more restrictive measures<sup>91</sup> against the Muslim Brotherhood in particular and civil society organizations in general.<sup>92</sup> In 1995 interview Ex-President Mubarak, stated that:

[T]he Muslim Brotherhood is inextricably linked with the more violent terrorist organizations in Egypt and that “they tried to kill Nasser, and they killed Sādāt because he gave them room for dialogue.”<sup>93</sup>

In reaction to the legitimization, mobilizing potential and sectarian bent of these voluntary organizations, Mubarak has undertaken various means to subvert and disrupt their political influence.<sup>94</sup> Despite his reflective and reserved style, in the realm of civil society and the development and deepening of the rule of law in Egypt, he has responded to threats to centralized presidential power in a manner that would not be wholly unfamiliar to his more flamboyant predecessors.<sup>95</sup> His responses to the proliferation of Islamist tendencies in civil society organizations have ranged from the establishment of enervating legal impediments to more vulnerability suppressive

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<sup>90</sup> For further discussion on the Muslim Brotherhood, formation, and their political role in Egypt, see ‘Arafa, *supra* note 7, at 15-17.

<sup>91</sup> Consistent with the growing hostility towards civil society organizations, the Mubarak government dealt a debilitating blow to civil society, immediately prior to the 1995 elections, by arresting 81 members of the Muslim Brotherhood (Egypt’s largest non-governmental civil association) and other Islamists on what are widely considered specious charges of “planning to incite armed rebellion” leading to the inescapable conclusion that the arrests were prompted to preclude participation in the elections.

<sup>92</sup> *Id.*

<sup>93</sup> Weymouth, *supra* note 45. (“Negad al-Bora’i, secretary-general of the Egyptian Organization for Human Rights (“EOHR”), intimates that had the candidates who represented the emergent youthful leadership of the group-been allowed to participate in the elections, they may have won a significant amount of parliamentary seats and thus become a “major irritant” for Ex-President Mubarak.”).

<sup>94</sup> Cassandra, *supra* note 87, at 15. In 1993, for instance, in an attempt to stave off any Islamic “take-over” of the syndicates, the Mubarak government enacted legislation ironically entitled “Law to Guarantee Democracy within the Professional Syndicates,” (Law No. 100/1993) which required a minimum first-round voter turnout of 50% of the members in the syndicate, or at least 33% in a second round; failure to meet these standards results in a voiding of the vote and the placement of the syndicate under the supervisory control of a panel of government-appointed judges for a six-month period, pending new elections. While the Islamist presence in the syndicates may appear to Mubarak as emblematic of the rise of Islamic sentiment (categorically equated with an anti-government outlook), far more prosaic forces may be at work. At least one source suggests that the preponderance of Islamists in the engineers, physicians, teachers, and particularly lawyer’s syndicates was largely due to low voter turnout, “which in the elections to the board of the lawyers’ syndicate in 1992, hardly exceeded ten percent.” Whatever the cause of the Islamist presence in the syndicates, the promulgation and enactment of such legislation is an unequivocal indication of government antipathy towards competing power structures, particularly those enjoying a high degree of popular legitimacy, financial means, and an activist agenda.

<sup>95</sup> *Id.* See generally RICHARD P. MITCHELL, THE SOCIETY OF THE MUSLIM BROTHERS (1993); CARRIE ROSEFSKY WICKHAM, MOBILIZING ISLAM: RELIGION, ACTIVISM, AND POLITICAL CHANGE IN EGYPT (2002).

actions and indiscriminate manners.<sup>96</sup> Moreover, the war against the Islamic Group has caused additional inroads to be made on political and civil rights.<sup>97</sup>

Of course, successful economic reform in Egypt has been hindered, not astoundingly, by the failings of the political system, which in addition to undermining investor confidence also encumbered emerging investment schemes through bureaucratic unresponsiveness.<sup>98</sup> This status quo represents that there is significant credible evidence that the comportment of the Egyptian government fails to meet domestic and international standards of conduct.<sup>99</sup>

Though such conflicts are rarely won on the basis of brute strength and are emblematic of deeper societal cracks, Mubarak has chosen the far easier option of attacking the visible manifestations of his country's more pervasive ills, instead of making the difficult personal and political sacrifices, for which Egypt's dire circumstances so evidently call.<sup>100</sup> Whereas narrowly tailored security legislation that, while allowing the government to combat internal violence, also safeguarded civil and political rights could hardly be considered objectionable, the far-reaching and intrusive legal and law enforcement regime that has been constructed has had disastrous effects on the already debilitated civil and political rights of Egyptians.

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<sup>96</sup> Nonetheless, Mubarak has certainly acted with greater restraint in most cases than could be expected of his predecessors in similar circumstances, as the continued, albeit circumscribed, functioning of Egyptian civil society suggests. Offering far less procedural due process than the civilian judiciary, these military tribunals have been soundly criticized by domestic and international human rights organizations for their harsh brand of justice, which dispenses with many critical procedural safeguards enshrined in domestic and international conventions. In what is perhaps a testimony to the independence of the civilian judiciary, military tribunals have since 1992 become the government's forum of choice, particularly in high-profile cases because of the rapidity of adjudication and the severity of punishments handed down. Since 1992, one thousand civilian defendants have been tried in proceedings usually characterized by inadequate and delayed access to counsel and other procedural irregularities. Arguing that these tribunals are more efficient than the more independent-minded civilian judiciary, the government has used the military courts, which offer highly limited avenues of appeal, to try both violent and non-violent opponents.

<sup>97</sup> For instance, legislation such as the now repealed Law 93/1005 penalized journalists and writers "for insulting public officials or state institutions" or "for harming the peace or economy" and violators were subject to five year- imprisonment and a harsh fine. For further elaboration about the military trials, see Ahmed El-dakak, *Approaching Rule of Law in Post-Revolution Egypt: Where We Were, Where We Are, And Where We Should Be*, 18 U.C. DAVIS J. INT'L L. & POL'Y, (Spring 2012), 46-48. (Eldakak's article attached, and will be online soon as it is in the editing process within the law review's editorial board of the journal)

<sup>98</sup> MAMOUN FANDY, EGYPT NEARS TWILIGHT ZONE AFTER UNDEMOCRATIC ELECTIONS, 11 CHRISTIAN SCIENCE MONITOR, (Dec.1995), 19. ASHRAF KHALIL, GRAND POLITICAL THEATER IN EGYPT, (1999).

<sup>99</sup> For instance, the loosely-worded legislation allows for arbitrary and capricious law enforcement, while, at the same time, denying the courts a meaningful standard by which to judge the conduct of the defendant and the state. According to reports by human rights groups, detention orders issued by the Executive branch are frequently found lacking any legally justifiable grounds for detention, merely justifying detention with generalities such as "danger to national security."

<sup>100</sup> Fandy, *supra* note 98.

<sup>101</sup>The continued use of these measures, after the most significant threats of violence have passed, plainly reveals the extent of government unwillingness to engage in even minimal power-sharing arrangements, in which all of these features make the country ripe for January 25<sup>th</sup> uprising.<sup>102</sup>

Hosni Mubarak had monopolized and exploited power for thirty years through rigged elections and was working to install his son Gamal as his successor.<sup>103</sup> The level of corruption in the government circles was unprecedented in Egypt's history.<sup>104</sup> On the other hand, Egypt was in decline on every front, from health and education to the economy to the foreign policy.<sup>105</sup> The vast-destructive police and security apparatuses that cost billions—at the expense of Egyptians—was one of the worst means of repression in the world.<sup>106</sup> Then, why did not Egyptians rise up against all these injustices before January 25<sup>th</sup>? There were three reasons for why there was no revolution before that date. First, the long tyranny had given Egyptians such a legacy of weakness and submission that they would not rise up, whatever happened.<sup>107</sup> Secondly, revolution in Egypt was possible but there are various factors standing in the way, as severe torture and tyranny, the lack of organization able to lead the masses and demonstrations, and the fact that Egyptians were distracted by the need

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

<sup>102</sup> *Id.* One commentator argued that:

[I]t would be incorrect, however, to conclude that President Mubarak's personality makes him an ineffective leader or one that is absolutely adverse to change. To his credit it must be recalled that President Mubarak faces an almost unimaginable matrix of social and economic woes, on a scale that few Western leaders can imagine. And while it is highly tempting to judge from afar and make sententious pronouncements about his shortcomings in leadership of Egypt, a country whose actions have long been closely scrutinized regionally and internationally, one must recall that dire domestic circumstance notwithstanding, President Mubarak has had the courage to make slow, incremental changes to the Egyptian political and economic landscape...The few changes made to the political system under President Mubarak have been largely cosmetic, and have not brought about any significant reform of the inert political structures that have long needed regeneration.

<sup>103</sup> *Id.*

<sup>104</sup> Arafa, *supra* note 7, at 12-15. ("A small group of businessmen, mostly closest friends of *Gamal* Mubarak, has complete control and dominate the Egyptian economy and were running it in their own interests...A few rich people lived like kings in their palaces and resorts, moving around in private planes, while poor individuals were committing suicide as they could not support their families or dying in the crush to cheap bread or bottles of cooking gas or in general to obtain their essential or necessary life-daily needs").

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*, at 6-9. In this sense, the general public is tortured in police stations and in many cases, their wives and daughters was raped in front of them to confess to crimes they had not committed.

<sup>107</sup> Owen, Tripp, and Faksh, *supra* note 32.

to make a living and were seeking individual solutions to the crises.<sup>108</sup> The third explanation proclaimed that Egyptians were no less inclined toward revolution than other peoples, and they had carried out more revolutions in the twentieth century than some European nations, but they have a specific nature in which makes them less motivated toward violence and persuaded toward compromise.<sup>109</sup> But on January 25<sup>th</sup>, million Egyptians come out in the streets calling for the downfall of the regime and Mubarak's departure.<sup>110</sup> People in Tahrir Square were new Egyptians recreated new in a higher form.<sup>111</sup> There was a deep feeling of solidarity and courteous conduct, as if the revolution had not only rid Egyptians of fear but also cured them of their social defects.<sup>112</sup> Bringing the autocrat down and winning freedom for Egypt was the main goal.<sup>113</sup> Day after day, the revolution made progress, and the regime tottered, till February 11<sup>th</sup>, 2011 as a historic day in the modern Egyptian history when the protestors heard and followed by more loud shouts of "Hosni Mubarak steeped down from the office of the Republic."<sup>114</sup>

The Egyptian Revolution took the world by surprise and forced Western interests to review the superficial and mistaken political analysis of Egypt that had long been current.<sup>115</sup> From the first day broad international solidarity was evident, as people in the West declared their support for the demand of Egyptians, while some

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<sup>108</sup> As a result, many preferred to escape geographically and historically, as they moved to the oil states in the Gulf, like Qatar, Kuwait, Saudi Arabia, etc....to work, usually in humiliating trades, so that they could come back home with sufficient funds money to afford reasonable life.

<sup>109</sup> One Egyptian writer stated that:

Egyptians are like camels: they can put up with beatings, humiliation, and starvation for a long time but when they rebel they do so suddenly and with a force that is impossible to control.

See generally ALAA AL-ASWANY, ON THE STATE OF EGYPT: A NOVELIST'S PROVOCATIVE REFLECTIONS (Apr.2011) translated by Jonathan Wright.

<sup>110</sup> 'Arafa, *supra* note 7.

<sup>111</sup> *Id.* at 3-5. It is unfair to call this is a "youth revolution." Of course young people began and led it, but the whole Egyptians joined in and fully represented. They took a stand in *Tahrir* Square, living together like members of the same family defending the same values and principles, asking for justice, fairness, democracy, civil, political, and human rights, and rule of law's application on equal grounds.

<sup>112</sup> *Id.* It was an extraordinary phenomenon that thousands of women sleeping in the street without any sexual harassment, people left their personal belongings in the street in the certain knowledge that no one would steal them. Furthermore, Coptic Christians formed a ring around Muslims as they prayed to protect them from attacks by the regime's violence. The riot police committed every probable crime in order to stop the revolution, as firing gas tear and rubber bullets at the protestors, using riffles equipped with laser sights...etc. till killing and injuring them.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* Millions of Egyptians then launched into a riotous celebration throughout the night, overjoyed Mubarak had resigned and the dictatorship had fallendown.

<sup>115</sup> NICHOLAS JOHNSTON AND KATE ANDERSEN BROWER, OBAMA TELLS MUBARAK HE MUST STICK TO PLEDGE OF DEMOCRATIC REFORMS IN EGYPT, BLOOMBERG (Apr. 27, 2011), available at <http://www.bloomberg.com/.../2011.../obama-says-mubarak-must-take-con>. (last retrieved May 22, 2012).

Western governments hesitated until the last moment between promoting the revolution and backing Mubarak, their doctoral ally.<sup>116</sup>

The significant question remains: Why did Egypt unexpectedly uprising? What were the problems and inconsistencies in the society that made revolution foreseeable? The solution to Egypt's countless glitches requires much hard work on the part of the whole of Egyptian society. Endowed as it is with huge, almost unfettered powers, the Executive branch is one of the logical engines of reform. It remains to be seen whether any Egyptian president, irrespective of temperament, will be willing to be run the risk of potential short-term instability to obtain long-term political progress. Personal traits seem to play a far more important role in the realm of Egypt's international affairs, which can be managed by the powerful Presidency without many of the fears attending forthright domestic reform. Besides, the government's almost hermetic exclusion of Egyptian community from this process of reform and rehabilitation impedes the creativity and the synergy that will no doubt reinforce and underpin Egypt's successful transition to the 21<sup>st</sup> century, regardless of who is leading the nation. Currently, the question is, Hosni Mubarak as a leader of Egypt for almost thirty years, Was he meet the requirements of the Muslim leader (ideal) in practice? In other words, should the Egyptian leader represent the Islamic leadership model adopted in the early Islamic State?<sup>117</sup>

## **II. Islamic leadership's accountability: a spiritual leadership paradigm**

Leadership has been an object studied by many scholars for centuries, and brings numerous theories forth in the concept of leadership. Leadership is a multidisciplinary field concerned with both ethics and morality. John K. Davis defined Leadership as:

[T]he ability to persuade others to seek defined objectives enthusiastically. It is the human factor which binds a group together and motivates it toward goals. Management activities such as planning, organizing, decision making are dormant cocoons until the leader triggers the power of motivation in people and guides them toward their goals.<sup>118</sup>

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<sup>116</sup> 'Arafa, *supra* note 7.

<sup>117</sup> The same query also applies to Nasser and Sādāt as leaders of Egypt from 1952 till 1981.

<sup>118</sup> See *generally* John K. Davis, *Human Behavior at Work*, (New Delhi 1967), 96.

The above definition of leadership stresses that a leader is more than just a manager. Leading and managing are not the same thing. Warren Bennis in *Fortune*, a leadership and governance expert, précised the distinction between leadership and management as follows:

The difference between managers and leaders is fundamental. The manager administers, the leader innovates...The manager maintains, the leader develops. The manager relies on systems, the leader relies on people. The manager counts on control, the leader counts on trust. The manager does things right, the leader does the right thing.<sup>119</sup>

Accordingly, leadership in Islam is a trust. Often, it takes the form of an unequivocal contract or pledge between a Wali/Hakem/Imam (“Leader/Head of State”) and his al-mahkomeen (“followers/general public”) that he will try his/her best to guide them, to protect them and to treat them fairly and with justice.<sup>120</sup> Consequently, the focus of leadership in Islam is on integrity and justice.<sup>121</sup> Given the recent emphasis on ethical behavior in the leadership literature,<sup>122</sup> an examination of the moral bases of leadership from an Islamic perspective may provide some interesting insights for the field of leadership in general. In this part, we will examine what leadership is from an Islamic perspective, discuss the moral dimensions of leadership and uncover the characteristics of leaders and followers as suggested by Islamic law. Thus, it is very significant to understand the nature and process of leadership from an Islamic angle; describe the characteristics of effective leaders in general, and of Islamic leaders in particular; analyze leadership and followership styles; learn how you can mobilize, organize, and develop your followers Islamically; learn how you, as a leader, can build commitment by acting as a coach and mentor, and apprehend how to delegate effectively concerning the steps that will enable you to become a more effective leader (or follower).

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<sup>119</sup> W. WARNER BURKE, DALE G. LAKE AND JILL WAYMIRE PAINE, *ORGANIZATION CHANGE: A COMPREHENSIVE READER* (J-B Warren Bennis Series) (2008).

<sup>120</sup> See *generally* MUHAMMAD AL-BURAEY, *ADMINISTRATIVE DEVELOPMENT: AN ISLAMIC PERSPECTIVE* (1985).

<sup>121</sup> *Id.*

<sup>122</sup> See JAMES M. KOUZES, BARRY Z. POSNER AND TOM PETERS, *THE LEADERSHIP CHALLENGE: HOW TO GET EXTRAORDINARY THINGS DONE IN ORGANIZATIONS* (1995).

To begin with, Muslims base their behavior as leader and/or as follower upon the word of God as revealed in their holy book, the Qur'an.<sup>123</sup> They believe that the Prophet of Islam, Muhammad (PBUH)<sup>124</sup>, has modeled the way for Muslim leaders and followers for all times.<sup>125</sup> This belief is supported when God says the following about Muhammad (PBUH): "And you stand an exalted standard of character."<sup>126</sup> Muhammad's (PBUH) example, then, is what both Muslim leaders and followers seek to emulate.<sup>127</sup> According to him, leadership in Islam is not earmarked for small

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<sup>123</sup> *Qur'an* is the word of God which Prophet Muhammad (PBUH) relayed through revelations from 610 A.D. until 632 A.D. Starting with *Al-Fatiha* ("the first *Surah/Surat*, or chapter") and ending with *Al-Naas* (the final "*Surah*"). The *Qur'an*, the holy book of Muslims, represents the first and the major source of *Sharie'a* law in which the word of God was revealed to the Prophet Muhammad (PBUH) verbally through the Angel Gabriel over a period of 22 years (610-632 C.E.). It represents the primary source and constitution of Islamic law. *Qur'an* was memorized, recited, and written down by the Prophet's *Sahaba* ("Companions") after every revelation as dictated by the Prophet. It was not compiled in one text but during the reign of the first *Caliph* Aboū-Bakr. It is regarded as the culmination of a series of divine messages that began with the revelations of Adam, *Suhuf of Ibrahim* ("Scrolls of Abraham"), the Torah, the Zabur ("Book of Psalms"), and the Bible. In this respect, it should be noted that a great resemblance between *Qur'an* and the holy books of Judaism and Christianity exists. See AHMAD FARRAG HUSSEIN, AL-MADKL LE DERASSAT AL-SHARIE'A AL-ISLAMIA: AL-KITAB AL-AWAL [AN INTRODUCTION TO THE STUDY OF ISLAMIC SHARIE'A: BOOK I] (2006). See also RAMADAN 'ALI AL-SHORONBASY, AL-MADKL LE DERASSAT AL-FIQH AL-ISLAMIA: AL-GOZE'E AL-AWAL [AN INTRODUCTION TO THE STUDY OF ISLAMIC JURISPRUDENCE: PART I] 5 (2003). [Both sources are in Arabic and I have them both in Egypt not here but I am sure about their accuracy and existence cited as this way in my upcoming article published by the 18 *Golden Gate Annual Survey of International and Comparative Law* 171, Spring 2012 and keeps them as I cited, and don't remove, a copy of my article attached]. ABDULLAH YUSUF ALI., THE HOLY QUR'AN: TEXT, TRANSLATION AND COMMENTARY (1989) [hereinafter THE QURA'N]. [This is an Online English source and you just check it carefully online as it is available].

<sup>124</sup> "PBUH" is an abbreviation which means "Peace and Blessing be Upon Him."

<sup>125</sup> YOUSSEF KASSEM, MASADER AL-FIQH AL-ISLAMI [SOURCES OF ISLAMIC LAW] 65 (2000). ("*Sunnah* is the collective word for the mass of texts which tell of the Prophet's spoken words, or are an account of acts or the absence of acts attributed to him. In other words, it is the oral or the habitual traditions—practice, life style, and conduct of Prophet Muhammad (PBUH)—("Sunnat al-Nabi") and represent the second fundamental source of Islamic law."). These comprise the tradition, or more literally, the path of the Prophet (PBUH) which Muslims strives to follow. See MOHAMED N. 'AWADIN, MASDER AL-FIQH AL-ISLAMI [SOURCES OF ISLAMIC LAW] 37 (3<sup>rd</sup> ed. 2001). [Both sources are in Arabic and I have them both in Egypt not here but I am sure about their accuracy and existence cited as this way in my upcoming article published by the 18 *Golden Gate Annual Survey of International and Comparative Law* 171, Spring 2012 and keeps them as I cited, and don't remove, a copy of my article attached].

<sup>126</sup> THE QUR'AN, 68:4.

<sup>127</sup> RAFIK ISSA BEEKUN AND JAMAL A. BADAWI, LEADERSHIP: AN ISLAMIC PERSPECTIVE (1999). They stated that:

An organization with good management, but poor leadership will preserve the *status quo*, but may not be able to advance to a higher level of performance. An organization that has an excellent leader, but nobody with good management skills may aspire to great heights, but crash precipitously because there is no one to follow through. In modern Islamic organizations, both leaders and managers are needed. Leaders can reframe experience to open new possibilities; managers can provide a sense of perspective and order so that the new possibilities become reality.

elite.<sup>128</sup> Rather, depending upon the situation, every person is the “shepherd” of a flock, and occupies a position of leadership.<sup>129</sup>

In most circumstances in life, Muslims are urged to appoint a leader and follow him. According to the Prophet, Muslims must appoint a leader during a trip, select a leader to lead the prayer, and choose a leader for other group activities.<sup>130</sup> Leadership, then, can be portrayed as a process by which the leader seeks the voluntary participation of followers in an effort to reach certain purposes.<sup>131</sup> This designation recommends that leadership is essentially a process whereby the leader guides willing followers.<sup>132</sup> At all times, a leader must remember that he cannot compel or enforce others to do things against their free will.<sup>133</sup>

Though several studies and concepts have been conducted about it for years, may it be leadership roles, traits, and theories but do not say much about leadership in the Islamic approach.<sup>134</sup> Islam—as a religion of peace—but often misjudged and misunderstood, has a very comprehensive concept of leadership that is concentrated on faith and values according to Allah (“God”).<sup>135</sup>

Hence, the motivation of leadership in Islamic (“Sharie’a”) law is on doing good things based on the source of law of Islam.<sup>136</sup> Leadership in Islam is amanah (“trust/honesty”).<sup>137</sup> It represents a psychological contract between a leader and his followers that he will try his/her best to guide them, to protect them and to treat them fairly, equally, and with justice.<sup>138</sup> According to Islamic law, the two primary roles of a leader are those of servant-leader and guardian-leader.<sup>139</sup> First, the leader is the servant of his followers (“sayyid al-qawm khadimuhum”).<sup>140</sup> He is to seek their welfare and guide them towards good, decent, and upright.<sup>141</sup> The idea of a leader as

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<sup>128</sup> THE ISLAMIC GUIDANCE SOCIETY, LEADERSHIP & UNITY IN ISLAM (2002).

<sup>129</sup> SAHIH AL-BUKHARI, *narrated by* ‘ABDALLAH IBN ‘UMMAR, [hadith 3.733]. Muhammad is reported to have said: “Each of you is a guardian, and each of you will be asked about his subjects.” [Keep the citation as stated as I am pretty sure about it from the Islamic law perspective, just only you snippet online, as I am referring to the *Sahih Al-Bukhari’s* book and I am pretty sure about the reliability of the narrator and the numbers of the *hadith* as well].

<sup>130</sup> Beekun & Badawi, *supra* note 127.

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

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

<sup>133</sup> (“Let there be no compulsion in religion. [...]”). THE QUR’AN, 2:256.

<sup>134</sup> Beekun & Badawi, *supra* note 127.

<sup>135</sup> *Id.*

<sup>136</sup> Beekun & Badawi, *supra* note 127.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> E.P. HOLLANDER, LEADERSHIP DYNAMICS (1978).

a servant has been part of Islam since its beginning, and has only recently been developed by Robert Greenleaf:

The servant-leader is servant first...It begins with the natural feeling that one wants to serve, to serve first. [...] The best test, and the most difficult to administer, is: Do those served grow as persons?<sup>142</sup>

The Prophet Muhammad (PBUH) has emphasized a second major role of the Muslim leader: to protect his community against tyranny and oppression, to encourage God-consciousness and taqwā, and to promote, equality, fairness, and justice.<sup>143</sup> Whether as servant or as guardian, a Muslim leader may make use of certain bases of power to be effective.<sup>144</sup> Islam recognizes existence of power, but suggests etiquette for its use.<sup>145</sup>

On the other hand, power is “the ability to marshal the human, informational, and material resources to get something done.”<sup>146</sup> Five foundations of power are usually revealed in the leadership Islamic literature; the Islamic perspective of leadership incorporates all five, but views them differently.<sup>147</sup>

### (1) *Legitimate Power*

Legitimate power is associated with one’s position in the organization.<sup>148</sup> Generally speaking, Islam disheartens Muslims from actively pursuing positions of authority.<sup>149</sup> Campaigning for a position of influence may imply that one is enamored with the position for one’s own progression (development) or some other self-serving reason.<sup>150</sup> Muhammad (PBUH) is reported to have said:

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<sup>142</sup> *Id.* See also AFZALUR RAHMAN, MUHAMMAD AS A MILITARY LEADER (1990).

<sup>143</sup> A commander (of the Muslims) is a shield for them. [...]. *Omar Hassan Kasule, Sr. Leadership Module-General theme: Leadership, [Workshop 1] in MUSLIM LEADERS’ FORUM 98 HANDBOOK (1998),3.* [Keep it as I cited as you made sure that it is already stated in a symposium and I cited as a symposium, just check the correct format but don’t remove the citation as we reach the same result for this citation and I am quite sure it’s available online somewhere, just double check, but no omit]

<sup>144</sup> Beekun & Badawi, *supra* note 127.

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

<sup>146</sup> Morgan McCall, Jr., *Power, Influence, and Authority: The Hazards of Carrying a Sword*, TECHNICAL REPORT, (Greensboro, NC: Center for Creative Leadership, 1978), 10.

<sup>147</sup> See J.R.P. French and B. Raven, *The Bases of Social Power*, in DORWIN CARTWRIGHT (1959), 150-167.

<sup>148</sup> *Id.*

<sup>149</sup> Beekun & Badawi, *supra* note 127.

<sup>150</sup> *Id.* The subject of leadership is crucial in Islam. In most circumstances in life, Muslims are urged to appoint a leader and follow him. For instance, the Prophet Muhammad (PBUH) said, “When three are

Do not ask for a position of authority, for if you are granted this position as a result of your asking for it, you will be left alone (without God's help to discharge the responsibilities involved in it), and if you are granted it without making any request for it, you will be helped (by God in the discharge of your duties).<sup>151</sup>

An exception can be made to this restriction when a person sees a situation in which there is a potential crisis or disaster.<sup>152</sup> Should he have the expertise required to help others in this circumstances, he may seek a specific position so as to provide assistance.<sup>153</sup>

## (2) *Reward Power*

A leader who has position power may also control organizational and managerial rewards, including pay raises, desirable work assignments, or promotions.<sup>154</sup> The same holds true for Islam. It is noteworthy in this regard that 'Ummar ibn al-Khattab (RA)<sup>155</sup> used to pay state public officials high salaries.<sup>156</sup> He wanted to guarantee that they would not get tempted by bribes, kickbacks or even under what referred to as the *rashwa mukna'h* ("disguised bribery").<sup>157</sup> By treating his

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on a journey, they should appoint one of them as their commander." For example, the husband is the leader of his family. In the absence of her husband, the wife assumes the role of leader of the house.

<sup>151</sup> ABOU AL-HUSSEIN MUSLIM IBN AL-HAJJAJ IBN MUSLIM IBN WARAT AL-QUSHAYRI AL-NISABURI, [hadith 3. 1013, [hereinafter SAHIH MUSLIM], available at <http://cmje.org/>.

<sup>152</sup> In this domain, see SAYYID, ABU A'LA MAUDOUDI, *THE ISLAMIC MOVEMENT: DYNAMICS OF VALUES, POWER, AND CHANGE* (Ed. by Khurram Murad, 1991).

<sup>153</sup> For example, Prophet Joseph asked for such a position when he requested the King of Egypt to be placed in charge of the granaries. A deed, accompanied by the right intention, is within the parameters of Islam.

<sup>154</sup> Beekun & Badawi, *supra* note 127.

<sup>155</sup> 'Ummar Ibn Al-Khattab (RA) is the second *Caliph* in Islam. Abbreviated words of honor and salutations attached to the name of the four *Caliphs* of Islam following the death of Muhammad (PBUH). Thus, (RA) is the acronym of "May God be pleased with him."

<sup>156</sup> MOUSTAFA ABOU ZIED FAHMI, *FAN AL-HUKUM FI AL-ISLAM [PRINCIPLES OF GOVERNANCE IN ISLAM]* 155-166 (2003). See also 'ABD ELGHANY BASSIOUNI ABDUALLAH, 'USUL 'ILM AL-IDRA AL'AMA: DERASAH LE 'USUL WA MABADE'E 'ILM AL-IDARA AL'AMA FI AL-ISLAM WA AL-WALAYEAT AL-MOTAHEDA AL-AMRICIYA WA FRANSA WA MASER WA LEBENAN [PRINCIPLES OF PUBLIC ADMINISTRATION: STUDY OF THE GENERAL PRINCIPLES OF PUBLIC ADMINISTRATION IN ISLAM, THE UNITED STATES OF AMERICA, FRANCE, EGYPT, AND LEBANON] 84-101 (2006). [See also Rafik Issa Beekun & Jamal A. Badawi, *Leadership: An Islamic Perspective*, (1999). Feel free to rephrase in this section in case you find something similar to the language and cite the article as well. Already a lot of changes in the language had been changed and not similar to the original language or copied and pasted especially when we cite the article. I have a copy of these books and I am attaching the scanned first pages of it to make sure about it, keep them and don't remove and will not be able to find them]

<sup>157</sup> *Id.* For further discussion on this point, see generally Mohamed 'Arafa, *Corruption and Bribery in Islamic Law: Are Islamic Ideals Being Met in Practice?* 18 *GOLDEN GATE ANNUAL SURV. INT'L & COMP. L. J.* 171 (Spring 2012) (explaining the legal regulation of corruption and bribery in Islamic law, present a comprehensive Islamic legal description on corruption in so far as its definition, elements and types of crimes, causes, and remedies are concerned.). ("Concluding that like positive criminal laws, bribery

appointees equitably, 'Ummar (RA) became one of the most outstanding Islamic leaders.<sup>158</sup>

### (3) Coercive Power

Above and beyond, controlling organizational rewards, a leader in a position of authority also controls group and collective sanctions.<sup>159</sup> Islam identifies the legitimacy of coercive supremacy, but proposes that it should not be used to coerce or force followers towards evil.<sup>160</sup> In fact, the Prophet once said that: "obedience (to the leader) is required only in what is good."<sup>161</sup> Placing prominence on the role of the leader as servant, 'Ummar (RA), was quoted as saying to the people: "I have appointed over you governors and agents not to beat your bodies or take your monies, but rather to teach you and serve you."<sup>162</sup>

### (4) Expert Power

Leaders who retain valuable expertise and information have expert power with respect to their followers who need this information to perform their task.<sup>163</sup> As generally well-known, there is no priesthood and clergy in Islamic law.<sup>164</sup>

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and corruption are taboo in *Sharie'a* law because they are considered grave criminal offenses and a great sin. However, Muslim nations have been deficient in addressing the issue in their national laws and have failed to meet the lofty standards of Islam." [Article Attached, in print and available online on this citation, 18 Ann. Surv. Int'l & Comp. L. 171, and keep the whole footnote]

<sup>158</sup> 'Ummar (RA) used to record the possessions of his officials at the times of their appointments and confiscated wholly or partly whatsoever they added while in office on suspicion of benefiting from their offices. Also, the *Caliph* instructed one of his commanders to adjust the values of gifts offered to him—which he had dispatched to the *bit al-mal* ("central/public treasury")—against the tax liability of the people, because taking anything more than the stipulated *Jizya(h)* ("poll tax") would have been unjust. Furthermore, *Caliph* 'Ummar Ibn 'Abd Al-'Aziz (RA) said that:

I am of the view that the ruler should not trade. It is also not lawful for the officer to trade in the area of his office... because when he involves himself in trade he inadvertently misuses his office in his interest and to the detriment of others, even if he does not like to do so.

Any doubts that remain for the believer after such contextual elaboration are to be resolved at the personal level through conscientious reflection ("*Ijtihad*"). See G.R., HAWTING, THE FIRST DYNASTY OF ISLAM: THE Umayyad Caliphate A.D. 661-750, at 77 (giving a detailed biography about 'Ummar Ibn 'Abd Al-'Aziz).

<sup>159</sup> See Edward W. Kostrzebski, THE SHADOW OF MUHAMMAD: DEVELOPING A CHARISMATIC LEADERSHIP MODEL FOR THE ISLAMIC WORLD (2002).

<sup>160</sup> *Id.*

<sup>161</sup> SAHIH AL-BUKHARI, [hadith 9.259/5.629].

<sup>162</sup> Al-Buraey, *supra* note 120, at 248.

<sup>163</sup> For instance, in a prayer congregation, a person may be chosen to lead the prayers because of his knowledge and learning of Islam.

##### (5) *Referent or Charismatic Power*

A person has charisma when others wish to follow him because they are attracted by his personality and temperament.<sup>165</sup> Born leaders are usually charismatic.<sup>166</sup> Ethical charismatic leaders, such as Prophet Muhammad (PBUH) and all other Prophets (RA), use power for the benefit of mankind, learn from criticism, work to develop their followers into leaders, and rely on moral and honorable standards.<sup>167</sup> A recent, very charismatic American Muslim leader was Malcolm X.<sup>168</sup> Many embraced Islam in the United States after listening to, or reading about him.<sup>169</sup> In this respect, Barboza said that:

[Malcolm X's] life showed me something eminently more useful than skilled oratory: what role religion could play as one approached this race-conscious society. He provided an example of how a man could use conviction as a powerful instrument to change the course of life--one's own and others.<sup>170</sup>

Given how Islamic law views leadership and authority, what will ensure that a Muslim leader behaves ethically? The moral bases of Islamic leadership are expected to provide the inner core that guides leaders.<sup>171</sup> Leadership in Islamic law is entrenched in belief and willing submission to the Creator, God.<sup>172</sup> It centers on serving Him. In the same vein, the Glorious Qur'an cited that:

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<sup>164</sup> Kostrzebsk, *supra* note 159.

<sup>165</sup> ROBERT K. GREENLEAF, *THE SERVANT AS LEADER*, CENTER FOR SERVANT- LEADERSHIP, [Indianapolis, Indiana (1970)].

<sup>166</sup> *Id.*

<sup>167</sup> Such as Moses, Jesus, Joseph (RA), and others. At this point, see Louay Safi, *Leadership and Subordination: An Islamic Perspective*, 12 *AMERICAN J. OF ISLAMIC & SOCIAL SCIENCES* (Summer 1995), 2204-223.

<sup>168</sup> Malcolm X (May 19, 1925—February 21, 1965), born Malcolm Little and also known as El-Hajj Malik El-Shabazz was an African-American Muslim minister and human rights activist. To his admirers, he was a courageous advocate for the rights of African Americans, a man who indicted white America in the harshest terms for its crimes against black Americans. Detractors accused him of preaching racism, black supremacy, anti-Semitism, and violence. He has been called one of the greatest and most influential African Americans in history. See ROBERT R. TERRILL, *THE CAMBRIDGE COMPANION TO MALCOLM X* (2010); OBA T'SHAKA, *THE POLITICAL LEGACY OF MALCOLM X* (1983); EUGENE VICTOR WOLFENSTEIN); *THE VICTIMS OF DEMOCRACY: MALCOLM X AND THE BLACK REVOLUTION* (1989), and EDWARD RONALD LEADER, *UNDERSTANDING MALCOLM X: THE CONTROVERSIAL CHANGES IN HIS POLITICAL PHILOSOPHY* (1993).

<sup>169</sup> *Id.*

<sup>170</sup> STEVEN BARBOZA, *AMERICAN JIHAD: ISLAM AFTER MALCOLM X* (New York 1994), 16.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

And We made them leaders guiding (men) by Our Command and We sent them inspiration to do good deeds, to establish regular prayers and to practice regular charity; and they constantly served Us (and Us only).<sup>173</sup>

To serve God, a Muslim leader, as Head of State or any senior public official, such as prime-ministers, ministers, and governors, etc...is to act in accordance with the injunctions and commands of God and His Prophet (PBUH), and must develop a strong Islamic moral character.<sup>174</sup> As a result, this moral character will be reflected by his increasingly strong belief in God as he/she progresses through four stages of spiritual development: iman, islam, taqwā, and ihsan.<sup>175</sup> Each phase is discussed in terms of how it affects a Muslim leader's conduct. At the core of Islamic moral personality is iman or faith (belief) in God.<sup>176</sup> Iman entails belief in the Oneness of God and the Prophethood of Muhammad (PBUH).<sup>177</sup> A leader with a robust iman will consider himself and all his assets and possessions as belonging to God.<sup>178</sup> "The leader will bow his ego, his ideas, his passions and his thinking to God."<sup>179</sup> Iman also implies belief in the life hereafter and in one's ultimate accountability for one's deeds.<sup>180</sup> A leader with a firm, steady, and balanced iman will not dodge responsibility for his actions, and will continuously emphasize good deeds.<sup>181</sup>

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<sup>173</sup> THE QUR'AN, 21:73.

<sup>174</sup> ABOU-AL-ALA'LAA AL- MOUDOUDI, AL-HOKOUMAH AL-ISLAMIAH [THE ISLAMIC GOVERNMENT] (1977), 29.

<sup>175</sup> For further discussion on the stages of spiritual development in the Islamic state, see generally MAGED RAGHEB EL-HELW, AL-KANOUN AL-IDEARY [THE ISLAMIC ADMINISTRATIVE LAW] (1994). (Arabic source in Egypt and I am sure about its existence and that fitting the meaning of this textual sentence. So keep it and don't remove it and I provided you before with the information you need regarding the publication date and place in one of our previous e-mails)

<sup>176</sup> MUJTABÁ MŪSAVĪ LĀRĪ, IMAMATE AND LEADERSHIP: LESSONS ON ISLAMIC DOCTRINE, *translated by* Hamid Algar (1996) [The book is available on Google books online, book four under the Foundation of Islamic Cultural Propagation in the World, 1996, check carefully].

<sup>177</sup> See generally ROY MOTTAHEDEH, LOYALTY AND LEADERSHIP IN AN EARLY ISLAMIC SOCIETY (2001).

<sup>178</sup> *Id.* Accordingly, It is on this premise that Islam emphasizes the importance of good governance and states its element as follows: Good leadership is the first element of good governance. Islamic law, therefore, lays down certain outstanding qualities as basic prerequisites for a leader. If the fruits of governance must reach the masses in its bunches, a conscious Muslim should be made the leader, where this is not available, God-consciousness should be the priority of the selectors in picking who leads them. Another spectacular quality of a leader in Islam is justice, equity, and fair play combined. A leader is expected to be just and fair in his/her dealings. The concept of justice relating to the people is very much emphasized in many verses in the Holy *Qur'an*. God says:

Ye who believe! Stand firmly for Allah as witnesses to fair dealings and let not hatred of others to you make you to swerve to wrong and depart from justice; Be just, that is next to piety, Then fear Allah for Allah is well acquainted with all that you do. THE QUR'AN, 5:8.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.* Another quality of a leader is truthfulness. A leader is expected to be truthful in words and in actions. This reflects in his fulfilling his covenants with his creator and redeeming his/her promises and obligations to the people.

<sup>181</sup> To reinforce this idea, the *Qur'an* links *iman* with good deeds no less than 60 times. For example God says: ("And He is Allah (to be worshipped Alone) in the heavens and on the earth, He knows what

Although Muslims consider it desirable to appoint a leader with iman and faith, it may not always be possible to find such a person.<sup>182</sup> An organization may have to choose between a strong Muslim with weak leadership skills or a strong leader with moderate/weak Islamic understanding.<sup>183</sup> A leader with insufficient or inadequate expertise can bring disaster to an organization whereas a skilled leader may advance and help the same organization.<sup>184</sup> Therefore, the criterion is even if the skilled leader were not a strong Muslim, his shortcomings can be made up through shoura or the consultative process of decision making.<sup>185</sup>

Building upon iman, Islam is the second layer of the moral character of an Islamic leader and followers.<sup>186</sup> Islam means the achievement of peace with God, within oneself and with the creation of God, through willing surrender and submission to Him.<sup>187</sup> As Al-Moudoodi points out so well, “Iman is the seed and Islam is the fruition.”<sup>188</sup> Because of his or her iman, a leader who practices Islam will never perceive himself as supreme.<sup>189</sup>

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you conceal and what you reveal, and He knows what you earn (good or bad)”; (“He sends down the angels with inspiration of His Command to whom of His slaves He pleases (saying): “Warn mankind that *La ilaha illa Ana* (none has the right to be worshipped but I), so fear Me (by abstaining from sins and evil deeds)”, and (“And he made it [i.e. *La ilaha ill-Allah* (none has the right to be worshipped but Allah Alone)] a Word lasting among his offspring (True Monotheism), that they may turn back (i.e. to repent to Allah or receive admonition)”). THE QUR’AN, 6:3, 16:2, and 43:23.

<sup>182</sup> See NACEUR JABNOUN, *ISLAM AND MANAGEMENT* (1994).

<sup>183</sup> *Id.* The example of ‘Amr ibn al’aas is to be remembered in this sense. He had been a Muslim for only four months when he was appointed by the Prophet to a key leadership position. For further discussion on ‘Amr ibn al-‘aas’s governance in Islam, see IBN TAYMIYYA, *ASSIYASAH AL-SHAR’IYYA* (1996).

<sup>184</sup> Fahmi & Bassiouni, *supra* note 156, at 51-56, 179-255.

<sup>185</sup> *Id.* The principle of *Shoura* constitutes one of the four essential principles in the Islamic perspective on socio-political organization. The other three are justice, equality, and human dignity. *Shoura* is also a central issue in the on-going debate among Muslims over political reform. *Shoura* principle in Islam is parallel to the democratic principle in Western political thought, having analogous aspects and about the same tendency or direction. It is predicated on three basic precepts. First, that all persons in any given society are equal in human and civil rights. Second, those public issues are best decided by majority view. And third, that the three other principles of justice, equality, and human dignity, which constitute Islam’s moral core, and from which all Islamic conceptions of human and civil rights derive, are best realized, in personal as well as public life, under *Shoura* governance. *Shoura*, as a principle, is rooted in the *Qur’an* itself. The *Qur’an* has presented *Shoura* as a principle, and not as a system of governance. The distinction is important to note, because the *Qur’an* thereby has left it to successive generations of Muslims to continue to strive toward a more perfect realization of the *Shoura* principle. God says:

“Those who hearken to their Lord, and establish regular prayer; who conduct their affairs by mutual consultation; who spend out of what We bestow on them for sustenance are praised.”). THE QUR’AN, 42:38.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> MAUDOUDI, *supra* note 152, at 115.

<sup>189</sup> A. BEHZADNIA AND S. DENNY, *TO THE COMMANDER IN CHIEF: FROM IMAM ‘ALI TO MALIK-E-ASHTER* (1981), 8. In this regard, ‘Alī ibn Abī Ḥālib (RA) (the fourth rightly guided *Caliph*) letter to Malik al-Ashtar an-Nukai, the new Governor of Egypt, stresses this point in the following manner:

On the other hand, as an individual submits to God through Islam, he develops an awe and admiration of God.<sup>190</sup> This all-encompassing, inner consciousness of his duty towards Him and this cognizance of his accountability towards Him is *taqwā*.<sup>191</sup> As demonstrated by Al-Moudoodi, “the essence of *taqwā* lies in an attitude of heart and mind rather than in an outward form.”<sup>192</sup> When pervaded with *taqwā*, a person’s frame of mind—his thoughts, emotions, and inclinations—will reflect Islam within a better understanding to apply the notion of leadership’s responsibility in positive law based on the main principles of headship and management in Islamic law.<sup>193</sup> *Taqwā* will restrain a Muslim leader or follower from behaving unjustly—whether to community members, to customers, to suppliers or to anybody else.

God commands justice the doing of good and liberality to kith and kin and He forbids all shameful deeds and injustice and rebellion: He instructs you that you may receive admonition.<sup>194</sup>

Furthermore, whereas *taqwā* is the fear of God and the feeling of God’s Presence, *ihsan* is the love of God.<sup>195</sup> It should bear in mind, that this love of God inspires the individual Muslim to work towards attaining God’s Pleasure.<sup>196</sup> The Prophet Muhammad (PHBU) describes *ihsan* as follows: “To worship God as if you see Him, and if you cannot achieve this state of devotion then you must consider that He is looking at you.”<sup>197</sup>

The perpetual feeling that God is watching is likely to prompt any leader or follower with *ihsan* to behave at his/her best.<sup>198</sup> The difference between the Muslims with *taqwā* and Muslims with *ihsan* is concisely explained by the following example.<sup>199</sup> Among government workers, there may be some who perform their duties meticulously, but who do not establish any additional commitment. Other

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Malik, you must never forget that if you are a ruler over them, then the *Caliph* is a ruler over you, and God is the supreme Lord over the *Caliph*.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*, at 116.

<sup>192</sup> *Id.*, at 118.

<sup>193</sup> Fahmi & Bassiouni, *supra* note 156 [Both sources are Arabic and I have a copy of these books and I am attaching the scanned first pages of it to make sure about it, keep them and don’t remove and will not be able to find them. Also, I am sure about their accuracy and existence cited and keep them as I cited].

<sup>194</sup> THE QUR’AN, 16:90.

<sup>195</sup> Fahmi, *supra* note 156.

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> Jabnoun, *supra* note 182.

<sup>199</sup> SAHIH AL-BUKHARI, [hadith 1.47].

employees, however, push themselves beyond the call of duty; they are eager and energized, and willing to make sacrifices in the performance of their tasks. Within the context of Islamic law, the first category of officials is like believers who do what is sufficient and necessary; they are those that have taqwā.<sup>200</sup> By contrast, the second group of servants has ihsan.<sup>201</sup> These are the Muslim leaders and followers who will diligently carry the marvelous of Islam under the most difficult circumstances.<sup>202</sup>

Based on the aforementioned debate of the four layers of Islamic moral character, leaders and followers may be classified depending on what stage they are at: Iman, Islam, Taqwā, and Ihsan. The Islamic moral character requires that leaders highlight the following five key parameters of Islamic behavior: justice and fairness, trust, righteousness, the struggle towards self-improvement, and promise keeping.

With respect to fairness, justice is a dynamic characteristic<sup>203</sup> which each Muslim must strive to develop whether he/she is a leader or a follower. This Qur'anic provision explains that:

You who believe! Stand out firmly for God as witnesses to fair dealing and let not the hatred of others to you make you swerve to wrong and depart from justice. [...] <sup>204</sup>

The need to achieve a balance and to take a middle road is quite imperative in a leader, and is stressed repeatedly by God in the Qur'an.<sup>205</sup> The principle of justice and equality must be observed and pragmatic by all Muslims, leaders and followers alike.<sup>206</sup> This is why the Prophet emphasized that justice must never be compromised by personal affiliations or other considerations.<sup>207</sup> Additionally, the concept of trust stresses the idea of responsibility towards organizational stakeholders, and holds

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<sup>200</sup> Jabnoun, *supra* note 182.

<sup>201</sup> SAYYID ABUL A'LA MAUDUDI, *Political Theory of Islam*, in KHURSHID AHMAD, (ed.), ISLAM: ITS MEANING AND MESSAGE (1999). See also CHARLES J. ADAMS, *Mawdudi and the Islamic State*, in JOHN L. ESPOSITO, (ed.), VOICES OF RESURGENT ISLAM (1983).

<sup>202</sup> *Id.*

<sup>203</sup> MUHAMMAD UMAR-UD-DIN, THE ETHICAL PHILOSOPHY OF AL-GHAZZALI (1991), 241. See also James Naify, Al-Ghazali, in THE PIMLICO HISTORY OF WESTERN PHILOSOPHY (Richard H. Popkin ed., 1999) (providing background information on this important Muslim scholar).

<sup>204</sup> THE QUR'AN, 5:8.

<sup>205</sup> God describes those "who will be rewarded with the highest place in heaven" as: ("Those who, when they spend, are not extravagant and not niggardly, but hold a just (balance) between those two extremes; [...]"). THE QUR'AN, 25: 67-68.

<sup>206</sup> For instance, God admonishes Muslims thus: ("God does command you to render back your trusts to those to whom they are due; and when you judge between man and man that you judge with justice [...]"). THE QUR'AN, 4: 58.

<sup>207</sup> Fahmi, *supra* note 156.

true whether those entrusting something to Muslims are themselves non-Muslims.<sup>208</sup> As a core value, trust fits within the overall Islamic etiquette governing social relationships, as trust is explicitly linked to leadership in the Qur'an.<sup>209</sup>

It should be noted that once an individual has accepted to be the leader of a group or organization, he has become their trustee.<sup>210</sup> In a for-profit, Muslim organization, the management of the organization is entrusted with the shareholders' investment, but in a non-profit organization, the management of the society is charged with watching over the properties in the trust.<sup>211</sup> Subsequently, any managerial decision must be balanced regarding this trust.<sup>212</sup> Should one be wasting time or organizational resources in performing one's task, one is transgressing and contravening his/her employer's trust.<sup>213</sup>

Moreover, righteous behavior is described in the Qur'an as follows:

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<sup>208</sup> God says in the Holly Book of Muslims: ("O you that believe! Neither betrays not the trust of God and the apostle nor misappropriates knowingly things entrusted to you"). THE QUR'AN, 2:177.

<sup>209</sup> In this regard, we refer to the story of Prophet Joseph (RA). After the king had indicated that he placed great trust in him, Prophet Joseph deliberately asked to be put in charge of the granaries and storehouses, and the demanding task of establishing them and guarding them. As one translator of the *Qur'an*, 'Abdullah Yusuf Ali, points out, Prophet Joseph (RA) understood the need to build reserves better than anyone else, and was prepared to take on this task himself rather than throw on to another the burden of restricting supplies in times of plenty. See 'ABDULLAH YUSUF ALI, THE QUR'AN: TEXT, TRANSLATION & COMMENTARY (English and Arabic Edition 1987) (Containing the full Arabic text of the *Qur'an*, an accompanying English translation, and extensive commentary), COMMENT 1716. ("This is a compilation of the Muslim faith's Final Revelation from God to mankind through the last Prophet Muhammad (PBUH). Also, the *Qur'an* has a wealth of information—both worldly wisdom and intellectual concepts—providing a code of life for humankind generally and Muslims in particular regarding the leadership elements and the ways of governance and management. Indeed, the *Qur'an*'s miracle lies in its ability to offer something to non-believers and everything to believers.").

<sup>210</sup> See generally SYED MOHAMMAD ATHER AND FARID AHAMMAD SOBHANI, MANAGERIAL LEADERSHIP: AN ISLAMIC PERSPECTIVE, 4 IIUC STUDIES (Dec. 2007/Apr. 2008) at 7-24.

<sup>211</sup> *Id.*

<sup>212</sup> *Id.* The concept of trust can be extended to other dimensions of one's work as a leader or a follower.

<sup>213</sup> *Id.* According to the research conducted by 'Adnan Aabed of Brigham Young University, He argued that:

[I]n Islam, the two main roles of leadership based on the *Sharie'a* are servant-leader role and guardian-leader role. In these roles, certain leadership principles and traits constitute the Islamic leadership principles: [...] (2) Leaders have to provide direction (a vision) to their organization; (3) Leaders should communicate their vision to others in ways designed to generate strong commitment needed to serve as a support to achieve the desired goals; (4) Leaders have a major role in creating and maintaining the culture of the organization...(6) Leaders should provide space for, and even should invite constructive criticisms. Effective Islamic leaders should have some leadership qualities such as conviction, justice, sacrifice, eloquence, sound decision-making, etc... [T]here are 25 characteristics necessary for leadership based on the ways and traditions of the Prophet and the *Qur'an*.

For further details in this domain, see ADNAN AABED, A STUDY OF ISLAMIC LEADERSHIP THEORY AND PRACTICE IN K-12 ISLAMIC SCHOOLS IN MICHIGAN, DOCTORAL THESIS [unpublished] (Apr. 2006).

It [...] is righteousness to believe in God and the Last Day and the Angels and the Books and the Messengers; to spend of your substance out of love for Him for your kin, for orphans, for the needy, for the wayfarer, for those who ask [...]; to be steadfast in prayer and practice regular charity; to fulfill the contracts which you have made; and to be firm and patient in pain (or suffering) and adversity.<sup>214</sup>

These general features will now be linked to the attributes that Islamic leaders and followers should embrace.<sup>215</sup> Based on the above verses, numerous moral attributes of righteous leaders become outstanding: (a) they act justly and do not allow their personal feelings to hinder or delay justice and impartiality; (b) they have iman; (c) they take care of those in need, especially in the general public and do so for the love of God;<sup>216</sup> (d) they are steadfast in prayer and practice charity; (e) they observe all contracts, and (f) they are patient no matter what type of adversity they may be experiencing.<sup>217</sup> Over-all, then, organization participants of all faiths are eligible to be treated with basic human decency, dignity, and with the maximum of fair play and justice.<sup>218</sup>

In the same vein, struggle within oneself towards self-improvement is depicted very accurately by the Qur'an.<sup>219</sup> The Prophet Muhammad (PBUH) stressed the importance of this inner striving to improve oneself. God's Messenger said:

The believers in the world are in three classes: those who believe in God and His Messenger and do not doubt, but strive with their property and their persons in God's cause; the man whom people trust with their property and their persons; and the man who, when he is about to display greed, abandons it for the sake of God, Who is Great and Glorious.<sup>220</sup>

The dimension of inner struggle permeates the very progression from iman to ihsan, and continues thereafter.<sup>221</sup> Leaders and followers practicing this principle are constantly monitoring checking, and evaluating their intentions, actions, purposes,

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<sup>214</sup> THE QUR'AN, 2:177.

<sup>215</sup> Aabed, *supra* note 213. ("In an Islamic organization, a leader is expected to be sensitive to their needs.").

<sup>216</sup> See SYED MOHAMMAD ATHER, *Islamic Management: An Introduction and Its Contrasts to Traditional Management*, 1 IIUC BUS. REV. (July 2006).

<sup>217</sup> *Id.* See also ENAYET ULLAH PATWARY, *Leadership in Islamic Perspective: Executive Views*, 2 INT'L ISLAMIC CHITTAGONG UNIV. (2003).

<sup>218</sup> See generally SAEED M. MOHTSHAM, *Vision and Visionary Leadership: An Islamic Perspective*, 3 INT'L BUS. REV. 2 (June 2007) at 248-277.

<sup>219</sup> THE QUR'AN, 22:77-78.

<sup>220</sup> ABOU SA'ID AL-KHUDRI, [3854], *transmitted by AHMAD*. ("This principle encapsulates the process of inner struggle towards self-betterment.").

<sup>221</sup> Aabed, *supra* note 213.

and acting to improve themselves accordingly.<sup>222</sup> They work hard at practicing what they say, and encourage others in this struggle for self-improvement.<sup>223</sup> Last but certainly not least, all Muslims—whether leaders or followers—are urged to keep their promises.<sup>224</sup> They also cannot make promises that are not Islamic in nature.<sup>225</sup> God says that: “O you who believe! Fulfill (all) obligations.”<sup>226</sup> Keeping one’s word characterizes a Muslim as breaking or violating one’s word is equivalent to hypocrisy.<sup>227</sup> Keeping promises is a key technique for all, and a leader is not exempted from this important norm.<sup>228</sup> The Prophet Muhammad (PBUH) recited:

I bought something from the Prophet (PBUH) before he received his Prophetic commission, and as there was something still due to him I promised him that I would bring it to him at his place, but I forgot. When I remembered three days later, I went to that place and found him there. He said: [...] I have been here for three days waiting for you.<sup>229</sup>

Now that we have discussed the ultimate cores—the backbone—of Islamic leadership, we need to explore what normative attributes are required of Muslim leaders and followers.

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<sup>222</sup> *Id.*

<sup>223</sup> JOHN P. KOTTER, WHAT LEADERS REALLY DO, HARV. BUS. REV. (May/June 1990), at 103-111, 150-157. (discussing the distinction between “Management” and “Leadership” and how to create a culture of leadership).

<sup>224</sup> Aabed, *supra* note 213.

<sup>225</sup> MUHAMMAD ANISUZZAMAN and MD. ZAINUL ABEDIN MAJUMDER, *Leadership: Western and Islamic: A Conceptual and an Explorative Study* (1996).

<sup>226</sup> THE QUR’AN, 5:1.

<sup>227</sup> Anisuzzaman & Majumder, *supra* note 225.

<sup>228</sup> *Id.* In other words, important characteristics of Islamic leadership, which are also applicable for the managerial

leaders in an organization are: (a) Allegiance: The Islamic managerial leader is bound in allegiance to God; (b) Global Islamic Goals: The leader perceives the goals of an organization not only in term of the interests of the group, but also in terms of wider Islamic objectives; (c) Adherence to *Sharie’a* and Islamic Manners: The leader must adhere to Islamic injunctions. He can only continue his office as long as he observes the principles of *Sharie’a*. His behavior must conform to Islamic manners, and (d) Delegated Trust: Islamic leadership is a position with divine trust. He must enjoy this trust with highest degree of responsibility. *See supra text.*

<sup>229</sup> ABOŪ DĀWŪD SULAYMAN IBN ASH’ATH AZDI SIJISTANI, *translated in* Univ. So. Calif., Center for Muslim-Jewish Engagement, *available online at* <http://cmje.org/>. [hereinafter SUNAN ABOŪ DĀWŪD]. “*Sunan*” in WINALIM. USA: ISL SOFTWARE CORPORATION, (Release 4, 1996). [The source is on the mentioned link under Abou Dawud, check it carefully, keep the citation and don’t remove it as I am sure about the scholar from the Islamic law perspective, as he narrated what I said in the text]

- Legal Qualifications of the Leader in Islamic (Sharie'a) Law

With no doubt, the features of an Islamic leader affect his/her behavior, and are congruent with the characteristics of effective leaders identified by Kouzes and Posner.<sup>230</sup> In fact, there are top four characteristics identified by these scholars to the Islamic model.

- a) *Honesty*: Leaders are considered honest and authentic to the extent that there is “consistency between word and deed.”<sup>231</sup> They do what they say they are going to do. In the Qur’an, the Prophet Moses is himself labeled as “strong and trustworthy” by one of the damsels<sup>232</sup> and the Prophet Joseph is described as one who is truthful.<sup>233</sup> By the same token, the Prophet Muhammad (PBUH) used to be called Sadiq (“the truthful”) and Amin (“the trustworthy”) during his young age.<sup>234</sup> Then, the inquiry is, why is honesty and integrity so important with respect to Heads of States (leaders)? Even though Kouzes and Posner do not provide the reader with an answer, Islam does.<sup>235</sup> Leadership is more than an assignment or a job; it is a trust—as already pointed out previously.
  
- b) *Competence*: Societies are more likely to follow a leader’s directives if they trust and believe that this person knows what he or she is doing.<sup>236</sup> If followers doubt the capabilities and proficiencies of their leader, they will be less enthusiastic in accepting directions from him/her.<sup>237</sup> As suggested by Hollander, a leader who is competent in one situation may not be competent in another.<sup>238</sup> Except in matters where he had received a direct

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<sup>230</sup> See generally James M. Kouzes and Barry Z. Posner, *The Leadership Challenge: How To Get Extraordinary Things Done In Organizations*, (2<sup>nd</sup> ed. with Jossey Bass, 1995).

<sup>231</sup> *Id.*

<sup>232</sup> THE QUR’AN, 28:26.

<sup>233</sup> *Id.*, at 12:46.

<sup>234</sup> Kouzes & Posner, *supra* note 230.

<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> Hollander, *supra* note 141.

revelation from God, the Prophet would often seek and follow the advice of his Sahaba (“companions”).<sup>239</sup>

- c) *Inspiration*: Followers expect their leaders to remain positive about the future no matter how bad the situation may be.<sup>240</sup> The leader must never give up or lose hope.<sup>241</sup> An example of how a leader inspires his followers comes from Aboū-Bakr (RA).<sup>242</sup>
- d) *Patience*: In the Qur’an, God explicitly identifies patience as one of defining physical characteristics of Islamic leadership, the Qur’anic provision reads:

And We appointed from among them Leaders giving guidance under Our command so long as they persevered with patience and continued to have faith in Our Signs.<sup>243</sup>

Indeed, like all other believers, a leader can expect to be tested, and he will need to endure.<sup>244</sup>

- a) *Humility*: A Muslim leader is to be humble, and must never let his ego get the better of him. The second Caliph ‘Ummar, lived in a simple house.<sup>245</sup> He had no bodyguards for his personal security, and walked the streets of Madinah without any escort or guides.<sup>246</sup> Furthermore, the fourth—rightly guided—Caliph of Islam, ‘Alī ibn Abī Ṭālib (RA), in his letter to Malik Al-‘Ashtar an-Nukhai, strongly encourages him to remain humble in his new

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<sup>239</sup> As Rahman indicates, “This enabled all his men to take part in discussion and offer suggestions and in this way the best solution was found by mutual consultation.” Rahman, *supra* note 142.

<sup>240</sup> *Id.*

<sup>241</sup> *Id.*

<sup>242</sup> After the death of the Prophet, Muslims were in shock. ‘Ummar (RA) was especially distraught. Aboū-Bakr—as the first *Caliph* of Islam—calmed him down, and then delivered the following address:

People, if you have been worshipping Muhammad, then know that Muhammad is dead. But if you have been worshipping God, then know that God is living and never dies.

See MUHAMMAD HUSAYN HAYKAL, *THE LIFE OF MUHAMMAD* (PBUH), (1976), 506-507.

<sup>243</sup> THE QUR’AN, 32:24.

<sup>244</sup> The example of the Prophet and early converts to Islam during the boycott of the Muslims in *Makkah* illustrates the need for patience.

<sup>245</sup> Haykal, *supra* note 242.

<sup>246</sup> IRFAN FAQIH, *GLIMPSES OF ISLAMIC HISTORY* (1988), 96, 107.

position as Governor of Egypt, and explains to him why pride, superiority, and egotism are to be avoided.<sup>247</sup> At this point, the Prophet Muhammad (PBUH) recited that,

Never say to yourself, 'I am their Lord, their ruler [...], and I must be obeyed submissively and humbly.' Such a thought will unbalance your mind, will make you vain and arrogant, will weaken your faith in religion and will make you seek the support of any power other than God's [...].<sup>248</sup>

The following story demonstrates how the Prophet exhibited patience and humility when a ban was imposed on the Muslims by others:

When we complained to God's Messenger (PBUH) of hunger and raised our clothes to show we were each carrying a stone over the belly, God's Messenger (PBUH) raised his clothes and showed that he had two stones on his belly.<sup>249</sup>

- b) *The willingness to seek consultation:* Additionally, Sharie'a law stresses consultation in all affairs.<sup>250</sup> Through the Qur'anic phrase "amruhum shoura baynahum" and the Prophet's habit of seeking and accepting advice, the limits on the exercise of power have been set both by the Qur'an and the Prophet's teachings.<sup>251</sup> One scholar points out, shoura plays a critical role in administration and management, specifically within the decision-making process; it provides a restraint on leader's administrative power and authority.<sup>252</sup>

In this domain, it is noteworthy that follower physiognomies also embody a vital ingredient in the leadership process.<sup>253</sup> Just as in the case of their leader, the

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<sup>247</sup> *Id.*

<sup>248</sup> See generally ALI A. BEHZADNIA AND SALWA DENNY, TO THE COMMANDER IN CHIEF: FROM IMAM ALI TO MALIK-E-ASHTER (1981), 8. [Keep the citation and don't remove it as it is an old book and may be not available online, except you may find the title online, but I think there is a copy it in Egypt's library as I saw it before. If you find another source, supporting the idea stated in the text, feel free to do so]

<sup>249</sup> See 'ĪSĀ MU'AMMAD IBN 'ĪSĀ IBN SAWRAH IBN MŪSĀ IBN AL-ĀKĀK AL-SULAMĪ AL-TIRMIDH=scholar's name [JAMIA'A AL-TIRMIDHI/ SUNAN AL-TIRMIDHI=the book]. [Keep the citation and don't remove it as I am sure about the scholar and his work and you will not find the work online or even in the US libraries, and available in Egypt libraries from the Islamic law perspective]

<sup>250</sup> Faqih, *supra* note 246.

<sup>251</sup> THE QUR'AN, 42:38 *supra* note 185.

<sup>252</sup> Al-Buraey, *supra* note 120.

<sup>253</sup> *Id.*

characters of Muslim followers affect their behavior.<sup>254</sup> At first glance, these characteristics correspond to those of their leaders except for the additional features of obedience to the leader and dynamic followership.<sup>255</sup> At all times, the leader must be obeyed.<sup>256</sup> God’s messenger saying, “Hearing and obeying are the duty of a Muslim, both regarding what he likes and what he dislikes.”<sup>257</sup> According to general principles of Islamic law in that area, after a leader has been duly elected, he may “be considered to have received a pledge of allegiance from the community.”<sup>258</sup> Consequently, both the majority who voted in favor of him as well as the minority who may have voted against now owes obedience, loyalty, and allegiance.<sup>259</sup> Sharie’a law considers obedience to the leader so dynamic that it views any kind of insubordination to be abhorrent unless in very specific circumstances.<sup>260</sup> Regarding the dynamic followership, though Islamic law emphasizes that followers should comply with the directives and orders of their leader, it does not condone blind subservience.<sup>261</sup>

- The urgency towards an Islamic leadership paradigm

As Islamic law and jurisprudence as well is unique in assuring the right of personal security, Al-Imam Al-Ghazali established what are known today as the “Five Essentials,” which have become the objective criteria for scholars to determine whether an idea or solution promotes the public interest.<sup>262</sup> Accordingly, Islam assurances five essential things (“makasid al-sharie’a al-islamia/al-daruriat al-khams”) to all individuals and forbids unwarranted violation of them by the state.<sup>263</sup>

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<sup>254</sup> *Id.*

<sup>255</sup> *Id.*

<sup>256</sup> *Reported by IBN ‘UMMAR.* [This scholar is the narrator of the Hadith and keep the citation like that and don’t remove it as I am sure about the reliability of the narrator.]

<sup>257</sup> Rahman, *supra* note 142, at 75.

<sup>258</sup> Al-Buraey, *supra* note 120.

<sup>259</sup> *Id.*

<sup>260</sup> *Id.*

<sup>261</sup> On one occasion, ‘Ummar was suggesting the quantity of dowry to be fixed at the time of a marriage ceremony. What he said was not in accordance with Islamic principles. A lady immediately stood up and said, “O ‘Ummar, fear God.” Hearing her sound argument based on the *Qur’an*, ‘Ummar realized his mistake and said, “The lady is right and the leader of the Muslims (himself) is wrong.” From that, we realize how ‘Ummar’s behavior illustrates clearly that followers in Islam are not to be passive bystanders should the leader err. *See generally* MOHAMMAD SHIBLI NU’MANI, OMAR THE GREAT: THE SECOND CALIPH OF ISLAM (Vols. 1 & 2) *translated by* ZAFAR ALI KHAN (1957) *cited in* AL-BURAEY.

<sup>262</sup> *See generally* M. CHERIF BASSIOUNI, THE ISLAMIC CRIMINAL JUSTICE SYSTEM (1982), 56.

<sup>263</sup> *Id.*

These essentials are (1) protecting religion, (2) protecting lives, (3) protecting lineage, (4) protecting posterity and intellect, and (5) protecting property.<sup>264</sup> Furthermore, Islamic law presents the organizational framework for a community by maintaining the legal relationships among persons and protecting the interests of one person from being attacked by another.<sup>265</sup> It also protects individual peace and security when an individual is accused of a crime by defining the linkage between the individual and the state.<sup>266</sup> From the Islamic criminal law perspective, any Head of State or leader should be subject to the most important fundamental principles laid down in Sharie'a which are:

- (i) the principle of individual "uniform" criminal accountability;<sup>267</sup>
- (ii) the principle of the relationship of crime and punishment (the principle of legality of crimes and punishments);<sup>268</sup>

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<sup>264</sup> *Id.*, at 57.

<sup>265</sup> *Id.*

<sup>266</sup> *Id.*, at 58.

<sup>267</sup> 'Arafa, *supra* note 157. This principle is considered one of the most important foundations of personal security in Islam. It means that the actor himself is the only person who can be accused of a specific offense, and no one shall escape impunity regardless of blood ties or friendship to the victim (or to the judge or ruler). A person, who has participated in a forbidden act, whether as principal or accomplice, must be incriminated according to the rules of criminal accountability. The *Qur'an* repeatedly sets forth the principle of individual liability in the following verse: ("And that man hath only that for which he maketh effort..."). THE QUR'AN, 53:39.

<sup>268</sup> *Id.* Under this principle, there shall be no offence, no punishment except by virtue of law; thus, no act may be considered a breach of law if it has not been explicitly anticipated in a penal law in force at the time the act was committed. This principle applies to all offences, although not in a regular manner. Therefore, the scope of its application differs depending on whether crimes of *Hudud*, *Qesas* and *Diyya*, or *Ta'azir* are in question. (a) *Qesas* means "Equality" or "Equivalence." It implies that a person who has committed a given violation will be punished in the same way and by the same means that he used in harming another person. *Qesas* crimes are divided into two categories: The first is "Homicide" (intentional and unintentional), for which the sanctions are diverse. The second is "Battery", which includes infliction of intentional and unintentional bodily harm which result in permanent and serious injury to the person. It includes maiming, beating, wounding, and other forms of physical disfigurement. These criminal acts are defined both in the *Qur'an* and *Sunnah* and establish two sorts of sanctions: retaliation (Principle of "Talion") and *Diyya* ("Legal Compensation"); (b) the legality principle is realized strictly in this type of offense. *Hudud* (the plural of *Had*) are offenses sanctioned by fixed legal penalties. *Hudud* crimes are those that bring injury and harm to the essential interests of an Islamic community. There are seven such crimes: Theft ("*al-sariqah*"), Fornication ("*al-Zena*"), Slander and Defamation ("*al-qazf wa al-tashir*"), Brigandage ("*al-baghir*"), Drinking Wine ("*shorb al-khamr*"), Apostasy ("*al-ridda*"), and Rebellion against the Legitimate Authority ("*al-haraba*"). Under the principle of legality, the judge at least has minimal discretion in the imposition of the fixed penalties. Islamic criminal law creates these sanctions to safeguard the institutions of the society, guarantee a free and honorable life, and remove the root of crime in general; and (c) *Ta'azir* is the third group of crimes in Islam which encompasses all offenses for which the *Sharie'a* does not prescribe a punishment like corruption and bribery. Penalties of these crimes emerge from the discretionary power delegated to the *Qadi* ("judge"). Literally, *Ta'azir* means discipline, rehabilitation or discretionary correction. *Ta'azir* offenses are not subject to the legality principle in the same manner as *Hudud* and *Qesas* crimes. All acts which infringe private or community interests of the public social order are falls into the *Ta'azir* category. The available penalties include traditional physical punishments, some of which are applied

- (iii) the principle of non-retroactivity of the criminal laws;<sup>269</sup>
- (iv) the principle of al-mousawaah (“equality”) and the non-existence of immunities;<sup>270</sup> and
- (v) the principle of the presumption of innocence and the rights guaranteed to the accused during the indictment and the criminal trial.<sup>271</sup>

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under *Ta’azir* such as the death penalty, which is rarely imposed, and flagellation. Deprivation of liberty is another sanction. Under *Ta’azir*, Islamic law imposed this kind of punishment through imprisonment or the less restrictive manners of local banishment, displacement, or expulsion. Moreover, it is accepted by Muslim jurists that fines as compensation and reparation for injury under *Ta’azir* be pecuniary. Further, there is the area of social control, where the judge’s intervention is essential and his discretionary power is manifest. This is obvious in certain penalties which fall outside the scope of purely penal law and relate more to the moral and educational theories of penology. There are several punishments designed to instill morality, such as exhortation by the judge to do good and avoid evil deeds, blame (reproach), and dismissal from employment for abuses of confidences. *Id.*

<sup>269</sup> *Id.* Because it is essential to protect individual security and abstain the abuse of power, individuals cannot be accused of crimes for acts which were allowed when they were committed. Thus, Islamic law has realized the principle of non-retroactivity of criminal laws as one of the most essential foundations of its criminal justice system. In essence, this rule means that criminal laws have only prospective and *not* retroactive effect.

<sup>270</sup> *Id.* The equality of all people as a universal principle in *Sharie’a* prevents discretionary power concerning *Hudud* and *Qesas* penalties, since these are determined by the *Qur’an*. Therefore, most jurists agree within the equality concept, the *Had* punishment can be imposed even on the “*Imam*” (“The Head of State”). Islamic jurists point out that the ruler is bound in the criminalization and penalization of such acts to Islamic values and the public interest taking into account changing conditions and times in order to adjust—within the equality of punishment—the form and severity of punishment to the seriousness of the crime and the degree of guilt. *Ta’azir* offences were not codified at the beginning of the Islamic state in order to give the judge the flexibility to respond to the subsequent circumstances through the instrumentality of the criminal law. For that reason, special emphasis was placed on the qualification of judges to whom so much discretion was given. In this regard, one scholar stated that: (“*Ta’azir* resembles the doctrine of analogy which was relied upon at one time in Soviet and Socialist law.”). In any event, appeal to the ruler could always redress the injustice. Bassiouni, *supra* note 262, at 228-232.

<sup>271</sup> The principle of the presumption of innocence and its impact on the burden of persuasion represents the fundamental backbone of Islamic criminal evidence. Consequently, the burden of proof is on the public prosecution. In this domain, the Islamic scholars interpret this norm by saying that the status of the accused is that of one who is in fact innocent, or that his condition is that of collateral innocence. Moreover, it is essential that the rule be strictly discharged, since the law recognizes that without this presumption the accused faces the onerous if not impossible burden of proving he did not commit the crime. It is also significant that the post-conviction legislation prescribes the means for attacking the sentences and gaining a new trial in certain types of cases. Newly discovered evidence proving innocence after conviction results in vacating a conviction. Thus, it is far preferable as a safeguard to presume the accused to be innocent from the time he is accused of the criminal act until he is convicted, based on what the Prophet recorded in this sense: “No *Had* in case of doubt.” See Bassiouni, *supra* note 262, at 66-67. These rules embody the presumption of innocence and place the burden of proof on the accuser. In Islamic jurisprudence, evidence in criminal matters essentially consists of *al-Shhada* (“testimony”). The majority of Muslim jurists restrict proof to the testimony of witnesses. In addition to testimony there are *al-iqarat* (“confessions”). Also, evidence takes the form of evidentiary *al-Qara’in* (“presumptions”). In Islamic criminal procedure, all crimes including financial crimes, as corruption and bribery, must be proved by these modes of evidence. ‘Arafa, *supra* note 157 (discussing the requirements of each mode of Islamic criminal evidence).

Furthermore, the principles which regulate evidence and standards of proof in any legal system reflect the intellectual achievement and cultural values of its society.<sup>272</sup> Hence, the Islamic criminal evidence rules seek to balance and harmonize the rights of the accused with the rights of the community.<sup>273</sup>

Observing the three objectives of punishment (justice, general deterrence, and rehabilitation or retribution) under Sharie'a, Islamic law retains the traditional penalties of deprivation of liberty and pecuniary sanctions in addition to other punishments which are designed to instill morality.<sup>274</sup> According to the Islamic criminal law, the success of criminal and penal policies in any society is measured by the degree to which they harmonize these goals.<sup>275</sup> Thus, reformation of the criminal must be considered during the punishment stage to the degree it is compatible with the actual punishment imposed.<sup>276</sup> As regards to the investigation and primary-questioning phase of the criminal act, it is subject to the general rules for indictments in Islamic criminal procedures, taking into consideration the rights of the accused regarding searches, seizures, eavesdropping, interrogation, and pre-trial preventive detention.<sup>277</sup> Furthermore, the rights of the accused during a criminal trial include the adoption of legal evidence, the trial before a competent, fair, and impartial trial, the right to counsel his/her own defense, the right to speak or remain silent, and the indemnity of an erroneous conviction.<sup>278</sup>

All in all, leadership is very important. Islamic law also pays very high attention to it. In fact, it is even included as the prevalent part of the objectives and obligations that are to be actualized by religion.<sup>279</sup> Where its function is as a replacement for the prophetic role in maintaining this *dine* and regulates the world.<sup>280</sup> At this point,

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<sup>272</sup> Bassiouni, *supra* note 262.

<sup>273</sup> Bassiouni, *supra* note 262, at 122-237.

<sup>274</sup> *Id.*, at 231. ("Since crime is deemed to be a challenge to the prevailing values of society and a violation of the victim's rights, it must seek justice for the victims of the crimes. This is not to imply that the penalty is nothing more than thoughtless impulse of revenge. Rather the search for justice entails a measured response which serves as an index of social values and progress. Satisfaction for the victim and his family is a necessary part of that search, which in turn plays a significant role in the process of social control."). ("On the other hand, the deterrent function of punishment serves as a warning to the public not to commit crimes, to prevent them from imitating the criminal lest they suffer his fate, and to guarantee the safety of those who refrain from crime. Public deterrence is not achieved merely by defining the crime and prescribing the sanction. It depends essentially on the speed with which the accused is tried and punished.").

<sup>275</sup> 'Arafa, *supra* note 157.

<sup>276</sup> *Id.*

<sup>277</sup> Bassiouni, *supra* note 262, at 92-100.

<sup>278</sup> *Id.*, at 102-107.

<sup>279</sup> Al-Buraey, *supra* note 120.

<sup>280</sup> *Id.*

Muslims must appoint a leader or an imam who regulates them with the Kitab/Shar'Allah ("Islamic Sharie'a").<sup>281</sup> Indeed, many Sharie'a obligations cannot be realized without the existence of an Islamic rule, such as the establishment of hudud ("serious punishments") and implementing the Islamic law, guarding the border, preparing and sending troops, maintaining the security, appointing of judges and others.<sup>282</sup> Generally, any obligation cannot be fulfilled except with its existence, it thus becomes binding, especially in terms of its urgency to prevent serious threat that occurs among the chaos and the non-establishment of the Islamic rule, thus, the demand to actualize an Islamic leadership becomes very mandatory.<sup>283</sup> The actualization of it becomes the most urgent requirement of the Sharie'a. Due to that, there is no excuse to abandon and underestimate this obligation.<sup>284</sup>

The query remains open, Is Mubarak subject or fit to all of these legal criterions in Islamic law with respect to the headship which lead—with no doubt—to his criminal liability? And, if yes, is there is any difference to initiate a criminal motion (verdict) against him emphasizes this liability in the domestic positive law (Egyptian law); and to what extent? The answer of this question will be provided in the following article.

### III. The Mubarak criminal trial in the Egyptian law: a historical trial of the century

This is not a case about the killing of one or 10 or 20 civilians, but a case of an entire nation. Raised the idea of liability without fault or responsibility, known as the great doctrinal debate material, and different views and trends in legislation, is there no mental element of crimes, so ask the perpetrator of the act only? Or is this a necessary element in all the crimes so as not to imagine the criminal offense without him?

In this respect, it should be noted that Egypt has already begun to make strides and progress in the movement towards democracy, as shown by the event on

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<sup>281</sup> In this respect, God says: ("Indeed, Allah commands you to render trusts to whom they are due."). THE QUR'AN, 4:58. The context of this verse is that, the *khitab* ("percipient") is broad and general in nature, which requires leaders to perform a variety of *amanah* ("trust") and ("honesty"), which includes the *amanah* of legislating. The Muslims are obliged to carry out this trust as a duty and give it to those experts who will establish it correctly.

<sup>282</sup> Al-Buraey, *supra* note 120.

<sup>283</sup> *Id.*

<sup>284</sup> *Id.*

August 3<sup>rd</sup>, 2011, when the unthinkable happened.<sup>285</sup> “The deposed pharaoh who had ruled Egypt with an iron fist for thirty years was wheeled into a courtroom and placed in the defendant’s cage.”<sup>286</sup>

Hosni Mubarak appeared in “a normal criminal court, namely the Fifth Felonies Circuit of the Cairo Court of Appeals.”<sup>287</sup> The court was presided over by a civilian natural judge, Chief Justice Ahmad Refa’at, which ensures, or at least gives a prima facie showing, that the former President will enjoy basic due process guarantees.<sup>288</sup>

## 1. Hosni, ‘Alaa, Gamal Mubarak, Hussein Salem, and Habib Al-‘Adly Criminal Charges

### 1.1 Hosni Mubarak and his two sons

The Egyptian Public Prosecution charged former Egyptian President Hosni Mubarak with three criminal offenses.<sup>289</sup> In addition to the allegation of premeditated murder and its attempt against demonstrators during the uprising against his reign, Mubarak stands accused of two separate cases of financial corruption.<sup>290</sup> The first corruption charge concerns a 161,000-square-foot seaside mansion in the Sinai resort of Sharm al-Sheikh which Mubarak obtained as a kickback from his closest friend, the businessman tycoon Hussein Salem.<sup>291</sup> Mubarak obtained the mansion after he exploited his influence to facilitate Salem’s purchase of a large tract of prime land in the Sinai Peninsula at a deeply discounted price, formally as part of a

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<sup>285</sup> ‘Arafa, *supra* note 7. See also EGYPT COURT TO DELIVER MUBARAK TRIAL VERDICT ON 2 JUNE, BBC News, Feb. 2012, available at <http://www.bbc.co.uk/news/world-middle-east-17120915>. (last visited May 23, 2012).

<sup>286</sup> *Id.* All criminal defendants have the right to be presumed innocent until proven guilty. Holding criminal defendants in a courtroom cage undermines the presumption of innocence as it portrays them as dangerous criminals. This practice, however, is typical in Egyptian criminal courtrooms.

<sup>287</sup> *Id.*

<sup>288</sup> *Id.* (“Egypt is to be credited for following this typical criminal trial procedure, “especially when compared to other revolutionary settings where Heads of State were deposed and summarily tried and executed, as was the case in Czrist Russia, Iraq after the 1958 coup d’état, and Romania after the fall of Nicolae Ceausescu in 1989.””).

<sup>289</sup> *Id.*

<sup>290</sup> *Id.*

<sup>291</sup> *Id.* See also BASSEM ABO ALABASS, FUGITIVE TYCOON HUSSEIN SALEM TALKS MUBARAK, ISRAEL GAS DEAL IN FIRST TV INTERVIEW SPEAKING FROM MADRID (May 2012), available at <http://www.english.ahram.org.eg/.../Fugitive-tycoon-Hussein-Salem-talks-Mubarak>. (last retrieved May 23, 2012). (“Salem denies charges of corruption and profiteering that in March saw him sentenced to 15 years in prison by a Cairo Criminal Court.”). See *infra*.

privatization deal.<sup>292</sup> Salem also provided the former president's two sons with another five luxury villas worth EGP 14 million (\$2.4 million).<sup>293</sup> The two sons, 'Alaa and Gamal, are charged with profiteering by abusing their father's power in receiving these five villas as part of the same bribe.<sup>294</sup>

The second corruption charge concerns a separate deal for the sale of natural gas to Israel.<sup>295</sup> This deal has been the subject of rumors and suspicions in Egypt for years and caused widespread anger and ire among Egyptians because gas was exported to Israel at very low prices while Egypt suffered a natural gas shortage.<sup>296</sup> In this count, criminal prosecutors charged Mubarak with having sold national gas from the Egyptian government to the East Mediterranean Gas Company, in which Salem owned a large stake, at below market rates.<sup>297</sup> The East Mediterranean Gas Corporation may have then resold the gas to Israel at a substantial mark-up, thus enriching Salem at the public's expense, although the prosecutors' statement is unclear, vague, and imprecise on those details.<sup>298</sup> It is obvious that Salem made enormous profits out of the deal, which resulted in \$714 million in lost revenue for

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<sup>292</sup> See MUBARAK TO BE CHARGED FOR CORRUPTION, PROTESTER DEATHS, CNN WORLD (May 2011). See also MUBARAK AND SONS CHARGED WITH CORRUPTION, DEATHS OF PROTESTERS; (May 2011), and HOSNI MUBARAK, THE N.Y. TIMES, (Updated: Jan. 5, 2012) ("For close to 30 years, Hosni Mubarak was the man Egyptians called their modern pharaoh, though usually in a cautious whisper.").

<sup>293</sup> *Id.* See PAUL OWEN and JACK SHENKER, MUBARAK TRIAL—THE DEFENDANTS AND THE CHARGES ("Hosni Mubarak has gone on trial charged with corruption and the unlawful killing of protesters...The trial has begun of Hosni Mubarak, former President of Egypt, after the start of an uprising that overthrew his government and sent shockwaves throughout the Middle East."). Further details of the charges against the former Egyptian President and his co-defendants available at <http://www.guardian.co.uk>. > News > World News > Hosni Mubarak. (Aug. 2011).

<sup>294</sup> *Id.* See also *Extending the Detention of Gamal and 'Alaa Mubarak*, AL-YOUM 7 (Apr. 26, 2011), <http://www.youm7.com/News.asp?NewsID=399195>. (last visited May 23, 2012).

<sup>295</sup> DAVID D. KIRKPATRICK, EGYPT CANCELS THE DELIVERY OF GAS TO ISRAEL, THE N.Y. TIMES, (April 2012), available at <http://www.nytimes.com/.../egypt-cancels-delivery-of-natural-gas-to-israel>. ("Egypt's state-owned natural gas company said that it was ending a deal to ship gas to Israel because of a payment dispute. Israeli officials responded by warning that the termination cast a new shadow over the bilateral Peace Treaty of 1979.").

<sup>296</sup> DINA AL-SHIBEEB, MUBARAK ASSOCIATES DETAINED OVER GAS DEAL WITH ISRAEL, AL-ARABIYA NEWS (Apr. 2011), available at <http://www.alarabiya.net/articles/2011/04/24/146505.html>. ("Egypt's former energy minister Sameh Fahmy and six other officials will stand trial on charges related to a natural gas deal with Israel.").

<sup>297</sup> See MUBARAK SONS GOT MILLIONS FROM ISRAEL GAS DEAL: REPORT, AL-ARABIYA NEWS (Mar. 2011), available at <http://www.alarabiya.net/articles/2011/03/07/140510.html>. (last retrieved May 23, 2012).

<sup>298</sup> RANA MAMDOUH, EGYPTIAN GAS TO ISRAEL: PLUGGING THE LEAK, AL-AKHBAR ENGLISH (Apr. 2012), available at <http://www.english.al-akhbar.com/.../egyptian-gas-israel-plugging>. ("The provision of underpriced natural gas to Israel under the Mubarak government has long been fuel for public anger, but critics predict that the current powers will not be willing to permanently sever the old deals."). (last visited May 23, 2012).

Egypt.<sup>299</sup> As more media attention was focused on the gas deal and Salem's role, he sold his stake in the East Mediterranean Gas Enterprise, thereby earning \$2 billion in profit.<sup>300</sup> The charges brought by prosecutors did not address the former President's interest in the gas exportation deal, focusing instead on his role in helping the unjust enrichment of Salem through exercising his influence.<sup>301</sup>

Mubarak and his sons plead not guilty to the charges against them.<sup>302</sup> In this context, the former President found guilty, and face life sentence imprisonment.<sup>303</sup> 'Alaa and Gamal Mubarak get acquittal because of statute of limitations time period has been lapsed.<sup>304</sup>

## 1.2 Hussein Salem

Hussein Salem is a notorious business magnate known for his close ties to Mubarak. He has been described in Egyptian mainstream media as "one of the most secretive businessmen in Egypt."<sup>305</sup> Salem fled Egypt with his son and daughter on

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<sup>299</sup> *Id.* For further discussion on the Egyptian-Israeli Natural Gas Agreement, see generally Daniel Fink, *Turning Off the Egyptian Gas Spigot: Implications for Israel*, IAGS JOURNAL OF ENERGY SECURITY (May 2011).

<sup>300</sup> Fink, *supra* note 299.

<sup>301</sup> DAVID D. KIRCKPATRICK, EGYPT IS MOVING TO TRY MUBARAK IN FATAL PROTESTS, THE N.Y. TIMES (May 2011), available at <http://www.nytimes.com/2011/05/25/world/middleeast/25egypt.html>. (last retrieved May 23, 2012).

<sup>302</sup> Many scholars have noted other concerns regarding the charges against Mubarak, such as the current charges are only a fraction of the corruption charges attributable to Mubarak and his family. In particular, his sons, 'Alaa and Gamal, were known to have extensive business interests that were rumored to have been wholly dependent on the power and influence of their father. Another point of concern is the evidence the prosecution has against Mubarak, which may be insufficient to hold Mubarak criminally accountable for the killing of demonstrators and could result in Mubarak being found guilty of only criminal negligence. Further, many think Mubarak should face charges for the numerous human rights violations his security forces committed: thousands of political detainees who were held *incommunicado* for many years, the systematic torture of political opposition, and systemic police brutality that Egyptians regularly experienced. Furthermore, several scholars think Mubarak should be liable for the political corruption as well. The political corruption during his reign in Egypt, which began in 1981 when he took office of the Republic, took many forms, including preparing the way for his son Gamal to inherit power from him, and stifling political dissent. 'Arafa, *supra* note 7, at 37. [Keep the footnote and the explanation I offered as it is my own words and I cited my article which elaborates in more details about these crimes before. A copy of my article attached and available online too]

<sup>303</sup> JACK SHENKER, MUBARAK TRIAL: TOPPLED DICTATOR DENIES ALL CHARGES, THE GUARDIAN, available at <http://www.guardian.co.uk/world/2011/aug/03/mubarak-trial-dictator-denies-charges>. ("One of the most significant concerns over the nature of Mubarak's corruption charges is the limitation on the charges; the charges only concern the profiteering through facilitating the unjust enrichment of his close friend, business tycoon Hussein Salem."). For further elaboration, see in details section (5) regarding the verdict analysis from the criminal legal perspective.

<sup>304</sup> Owen & Shekner, *supra* note 293. For further illustration on the verdict, see *infra*.

<sup>305</sup> Hussein Salem is an Egyptian-Spanish businessman, co-owner of the *East Mediterranean Gas Company* ("EMG"), and ally and advisor to former President Hosni Mubarak. He is also the chairman

February 3<sup>rd</sup>, 2011 at the height of the Egyptian revolution, a week before Hosni Mubarak was forced to resign.<sup>306</sup> Salem was arrested in a wealthy Madrid suburb in June 2011 over charges of money laundering brought against him by Spanish authorities.<sup>307</sup> The money is said to have been attained in Egypt through illegitimate means and sent to Salem's family accounts in Spain.<sup>308</sup> He was arrested after the International Criminal Police ("Interpol") issued an international arrest red-warrant against him.<sup>309</sup> He is wanted in Egypt and Spain for various charges of corruption and money laundering.<sup>310</sup>

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and CEO of HKS Group, a hospitality company that operates *Maritim Jolie* Ville Resort in *Sharm al-Sheikh*. He has been described as "one of the most secretive businessmen in Egypt", a mogul, and Mubarak's close confidant. He fled Egypt during the Egyptian revolution. A criminal warrant for his arrest was issued by the ("Interpol") in May, 2011. See Matt Bradley, *Mubarak Associate is Arrested in Spain*, THE WALL STREET JOURNAL, MIDDLE EAST NEWS, June 16, 2011. He was later arrested at his home in La Moraleja; Madrid, Spain on June 14. Salem is currently being innocent from the charges that he bribed Mubarak and his family to gain a monopoly on the sale of gas to Israel and for squandering public funds by selling Egyptian natural gas to Israel at below market prices. *Id.* Salem's trial in Egypt began on August 3, 2011. See *generally* YEHIA KAREM, HUSSEIN SALEM: A BUSINESSMAN FROM THE TIME OF CRONY CAPITALISM, AL-AHRAM WKLY, (June 2011). [I am referring to the whole article on this point]

<sup>306</sup> *Id.*

<sup>307</sup> Around \$47 million of his possessions were frozen and houses worth \$14 million were seized, including some in the jet-set resort of Marbella. See *generally* Raheel Zafar, *Spain Will Extradite Egyptian Businessman Hussein Salem Associate of Hosni Mubarak*, THE LAHORE TIMES, Mar. 2, 2012, available at <http://www.lhrtimes.com/2012/03/02/spain-will-extradite-egyptian-businessman-hussein-salem-associate-of-hosni-mubarak/#ixzz267IDPrhh>.

<sup>308</sup> ESLAM OMAR, BUSINESS TYCOON HUSSEIN SALEM JOINS FROZEN ASSETS LIST, AHRAM ONLINE (Mar. 2011). ("The General Prosecutor has decided to freeze the assets of Egyptian businessman Hussein Salem, children, and his relatives on suspicion of corruption."). [Keep the source and the citation on this point fit what I want to say in an indirect way, don't remove it as we already make sure about the verification of it. Also you can refer to Bradley, *supra* note 305 to support the textual illustration more]

<sup>309</sup> As a result of the public diplomacy delegation efforts, it is noteworthy in that domain, the Spanish Foreign Affairs stated the Spanish Cabinet had decided in its meetings to hand over Hussein Salem—seeking his extradition—to the Egyptian authorities. Spanish charges of money laundering, fraud, bribery, and corruption are related to the use of money Salem is accused of obtaining illegally in Egypt. See SPAIN TO EXTRADITE EGYPTIAN TYCOON HUSSEIN SALEM TO FACE JAIL SENTENCE, AHRAM ONLINE, (Mar. 2012). ("Spain has agreed to extradite Hussein Salem, a business tycoon and Mubarak top ally who escaped a corruption trial in Egypt and now faces 15 years in jail."), available at <http://www.english.ahram.org.eg/.../Spain-to-extradite-Egyptian-tycoon-Hussein->. [Keep the source and the citation on this point as it fit what I want to say, don't remove it as we already make sure about the verification of it. Also you can refer to Bradley, *supra* note 305 to support the textual illustration more]

<sup>310</sup> His son and daughter, who were arrested in Spain summer of 2011, are also accused of laundering some two billion Euros. Recently, The Spanish Supreme Court has approved the extradition of Egyptian businessman Salem, his son Khaled and daughter Magda to Egypt. It confirmed a verdict issued by another Spanish court to extradite Salem and his children for their retrial over charges of money laundering, seizing state lands, and exporting natural gas to Israel at low prices. See EGYPT STATE INFORMATION SERVICE, EGYPT: SPANISH COURT UPHOLDS RULING TO EXTRADITE SALEM, CHILDREN TO COUNTRY, EGYPT, EUROPE AND AFRICA, EXTERNAL RELATIONS, LEGAL AFFAIRS, NORTH AFRICA, May 12, 2012

Salem faces charges in four various cases in Egypt.<sup>311</sup> He was being tried in absentia in the same trial as Mubarak and his sons 'Alaa and Gamal in what is known as the "trial of the century."<sup>312</sup> Salem is also being prosecuted in absentia along with former Minister of Petroleum, Sameh Fahmy, for the above mentioned purchase of Egyptian natural gas at low market-prices, and sale to Israel at a substantive markup.<sup>313</sup> Furthermore, the Cairo Criminal Court sentenced Salem, his son and daughter in absentia to seven years in prison and a fine of \$4 billion on charges of money laundering and profiteering, as the court found Salem guilty of laundering more than \$2 billion in the Egyptian-Israeli gas deal.<sup>314</sup> In a fourth case, a Giza Criminal Court sentenced Salem to 15 years in prison for the illegal acquisition of public property—the nature reserve al-Bayadeyya in the Upper Egypt city of Luxor.<sup>315</sup> Mr. Salem was the owner of the Crocodile Tourism Project Company which acquired the island.<sup>316</sup> His son Khaled, who was the managing director of the company, received the same criminal sentence.<sup>317</sup>

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<sup>311</sup> 'Arafa, *supra* note 7, at 12-15 & 37.

<sup>312</sup> See *Hussein Salem Sentenced to Jail in absentia*, THE DAILYNEWS EGYPT.COM, REUTERS, Oct. 12, 2011. [Keep the source and the citation on this point as it fit what I want to say, don't remove it as we already make sure about the verification of it]

<sup>313</sup> TAMIM ELYAN, TOP EGYPTIAN OFFICIALS INVOLVED IN FACILITATING ISRAEL GAS DEAL, SAY LEAKED DOCUMENTS, DAILY NEWS EGYPT, (June 27, 2011). See also MOHAMED FADEL FAHMY, EGYPT GAS DEAL SPARKS ATTACKS IN EGYPT, CNNWORLD (May 2011). Trying a defendant *in absentia* can undermine some of the defendant's fundamental rights to a fair and impartial trial, including the right to be present, to be defended by counsel of the person's choice, and to examine witnesses. International law disfavors but does not abstain trials *in absentia*. National legal systems that maintain the practice should, at minimum, institute and guarantee procedural safeguards to ensure the defendant's basic rights. These include requirements that the defendant be notified in advance of the proceedings and that the defendant unequivocally and explicitly waive his right to be present. The defendant should also have the right to representation in his or her absence, and should be able to obtain a fresh determination on the merits of the conviction following the person's return to the jurisdiction.

<sup>314</sup> Elyan, *supra* note 313.

<sup>315</sup> See SPAIN TO EXTRADITE EGYPTIAN TYCOON HUSSEIN SALEM TO FACE JAIL SENTENCE, AL-AHRAM, available at <http://www.english.ahram.org.eg/NewsContent/1/64/35865/Egypt/Politics-/Spain-to-extradite-Egyptian-tycoon-Hussein-Salem-t.aspx>. (last visited May 25, 2012).

<sup>316</sup> *Id.* [=Same source stated in FN 315 and fit my point in an indirect way, keep it and don't remove it. Also you can refer to Karem, *supra* note 305 to support the textual illustration more]

<sup>317</sup> FORMER MINISTERS SENTENCED TO 10 YEARS IN CORRUPTION CASE, AL-MASRY AL-YOUM, available at <http://www.almazryalyoum.com/node/690026>. ("Although Mr. Salem also holds Spanish citizenship, Spain informed the Egyptian ambassador in Madrid of a Spanish court's decision to extradite Hussein Salem, his son Khaled and his daughter Magda to Egypt on the condition that they do not face the death penalty—a standard condition made by all European Union ("EU") countries in extradition decisions. Salem and his children have appealed the decision allowing their extradition, and a final decision is expected soon. The charges do not involve Salem's previous embezzlement in 1983 of U.S. aid funds for Egypt. In addition, the charges do not address the questionable concession that he obtained from Egypt to export *Sinai Gas* to Israel."). See RANIA BADAWY INTERVIEWS PROFESSOR M. CHERIF BASSIOUNI, AL-MASRY AL-YOUM (in Arabic), available at <http://www.almazryalyoum.com/node/506644>. (last retrieved May 25, 2012). [This article is Arabic only and keep the information and the citation as well, you just can refer to the article as it is available

### 1.3 Habib Al-'Adly and his six high-ranking security officers

Standing on criminal trial along with Ex-President Mubarak and his sons, his notorious Minister of Interior, Habib al-'Adly, faced charges of profiteering and money laundering before a Cairo criminal court.<sup>318</sup> He convicted with the same life imprisonment punishment along with Mubarak as they failed to stop the killing by using live ammunition on pro-democracy protesters during the revolution in January 2011.<sup>319</sup> Furthermore, he is accused of causing a security vacuum by withdrawing police during the uprising and releasing prisoners to induce chaos.<sup>320</sup> He also should face charges related to torturing and murdering members of the opposition.<sup>321</sup>

On the other hand, the security personnel were accused of killing or trying to kill at least 68 protesters on January 28, 2011 in what is known as the "Friday Anger."<sup>322</sup> Plaintiffs' attorneys requested a cross re-examination of the evidence and demanded the forensic medicine office in Cairo examine those injured and submit reports on their conditions.<sup>323</sup>

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in Arabic and as we already make sure that the article is online in Arabic, and this is an unofficial translation using my own wordings]

<sup>318</sup> His assets were ordered frozen by a court order. He is estimated to have amassed a fortune of \$1.2 billion. He pleaded not guilty to corruption charges on March 5, 2011, answering questions by the judge on whether he had illegally profited from his government position or laundered money. The charges read by the prosecutor revolved around a piece of land controlled by the Ministry of Interior. Prosecutors said the former Minister of Interior had sold the piece of land to a private contractor working for the ministry. Prosecutors also found money in al-'Adly's bank account that the government said did not belong there. These charges involved a total of about \$1.6 million. On May 5, 2011, al-'Adly was found guilty of money laundering and profiteering, and was sentenced to 12 years in jail. Furthermore, the court sentenced him to seven years in prison for profiteering and five years for money laundering. The former minister was also fined approximately EGP 15 million (\$2.5 million), and the court ordered the confiscation of his assets. See *Egypt Ex-Minister Habib Al-Adly Jailed for 12 Years*, BBC NEWS AFR. (May 5, 2011), <http://www.bbc.co.uk/news/world-africa-13292322>. [The information is proper. Keep the source and the citation on this point as it fits what I want to say, don't remove it as we just make sure about the verification of it and also I am sure about the explanation in the footnote as it is my own words and I supported with the citation]

<sup>319</sup> See, e.g., Daniel Finnan, *Cairo Court Orders Former Interior Minister Adly's Assets Seized*, RFI, available at <http://www.english.rfi.fr/africa/20110217-cairo-court-orders-former-interior-minister-adlys-assets-be-seized>.

<sup>320</sup> See *Trial of Habib Al-Adly Postponed Again*, EGYPT INDEPENDENT (Apr. 2011), <http://www.egyptindependent.com/news/trial-habib-al-adly-postponed-again>. (last visited May 25, 2012).

<sup>321</sup> *Id.*

<sup>322</sup> See generally Yasmine Saleh and Sherine El Madany, *Protests Against Egyptian President Spread*, REUTERS, Jan. 27, 2011, ("Web activists called for mass protests across Egypt on Friday to end President Hosni Mubarak's three-decade rule after protesters clashed with security forces late into the night in the eastern city of Suez.")

<sup>323</sup> Ahmad Ramzy headed Central Security Forces ("CSF") during the 18-day uprising, during which an estimated 846 protesters were killed and thousands were wounded. Videos show Central Security trucks running over protesters, particularly on *Qasr al-Nil* Bridge, which leads to the square. Contrary to accusations, Ramzy gave instructions that firearms should not be used in dealing with

Court Rejects Mubarak Amnesty Referendum: It should bear in mind that an Egyptian court has rejected a lawsuit seeking a referendum on whether to give amnesty to former President Hosni Mubarak and his family.<sup>324</sup> The lawsuit had sought the referendum in exchange for Mubarak and his family members surrendering their money.<sup>325</sup> The majlis al-Dawla (“Conseil d’Etat / State Council’s”) Administrative Court said “no provision in the abrogated constitution—replaced by the temporal constitutional declaration—or law allows a referendum to pardon a previous president and there had been no prior administrative ruling doing so.”<sup>326</sup>

- Is Mubarak’s Trial Going Anywhere?

Chief Justice Ahmad Fahmy Refa’at’s<sup>327</sup> decision to grant former President Hosni Mubarak’s legal team a month to prepare its final remarks ended speculation that a ruling against the Ex- President was imminent.<sup>328</sup> Some believed the ruling

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demonstrators, according to his lawyer. Ramzy was also responsible for ordering the withdrawal of the CSF. “Whoever killed peaceful protesters is not part of the police forces, and identifying those responsible is not the task of the defense but of the prosecution. The prosecution has indicted the defendants in a generalized manner and without evidence. Also, the prosecution did not mention how the defendants instigated police officers to kill demonstrators and from where they got these orders. There is no evidence to prove that Ramzy is guilty of murder or attempted murder, and described alleged orders to kill demonstrators as “an illusion.” He added that no Interior Ministry official issued such orders and no eyewitness testified to that effect. See *Lawyer of Former Security Chief Demands Acquittal Due to “Ambiguous” Charges*, EGYPT INDEPENDENT (Feb. 2012), <http://www.egyptindependent.com/.../lawyer-former-security-chief-deman>. [Keep the source and the citation on this point as it support what I want to say on this point regarding the acquittal of the police officers in in direct way, don’t remove it as we already make sure about the verification of it and the information is all proper using my own wordings in the explanation]

<sup>324</sup> The lawsuit, filed against the military council and the cabinet, said Mubarak’s wife, Suzanne, was pardoned after giving up her money. See *Court Rejects Mubarak Amnesty Referendum, Giving up her Money*, WORLD NEWS (Feb. 2012), [http://www.upi.com/Top\\_News/World.../02/.../UPI-30221330533671/](http://www.upi.com/Top_News/World.../02/.../UPI-30221330533671/). (last retrieved May 25, 2012).

<sup>325</sup> *Id.*

<sup>326</sup> *Id.*

<sup>327</sup> In this regard, *Al-Ahram* Newspaper wrote: (This is only in Arabic, and the BBC link, just to support what I found in the Arabic version, so Keep the source and the citation on this point as it fit what I want to say, don’t remove it as we already make sure about the verification of it)

For the final case of his career, has no easy task: to deliver justice in the trial of the first Arab head of state to appear in court since popular uprisings swept the Middle East...Ahmad Refa’at, the respected, quiet judge, could have never imagined he would be the first Egyptian in history to try an Egyptian pharaoh.

See HOSNI MUBARAK TRIAL: JUDGE HALTS LIVE TV COVERAGE, BBC NEWS (Retrieved Dec. 2011), <http://www.bbc.co.uk/news/world-middle-east-14524363>. (last visited May 27, 2012). (“The judge at the trial of the former Egyptian President, Hosni Mubarak, has adjourned it for three weeks and said hearings will no longer be televised based on the grounds of keeping public interests, order, and security stable.”).

<sup>328</sup> See *Mubarak Trial: Egyptian Army ‘Responsible for Deaths’*, BBC NEWS MIDDLE EAST, (Jan. 2012), <http://www.bbc.co.uk/news/world-middle-east-16619949>. (last retrieved May 27, 2012). (“Hosni Mubarak’s lawyer has said the Egyptian army was in charge of security when protesters were killed

would be issued before January 25 in order to counter plans for demonstrations on the anniversary of the start of the revolution.<sup>329</sup> This most recent unexpected turn in the trial left many wondering whether the evidence presented by the prosecution and the civil rights attorneys is enough to lead to a ruling against Mubarak.<sup>330</sup> While some lawyers are concerned that the case against the former President is weak, other legal experts are confident that Mubarak will be convicted.<sup>331</sup>

- The legal status quo analysis

(1) *Criminal investigations*

The Egyptian government adopted a number of legal measures to investigate the criminal charges against Mubarak and his family.<sup>332</sup> The General Prosecutor Dr. ‘Abdelmagied Mahmmoud banned Mubarak and his family from traveling outside the Egyptian territory.<sup>333</sup> Furthermore, he prohibited them from having access to their personal bank accounts in Egypt and abroad.<sup>334</sup> In this domain, the government created a Judicial Commission (“JC”) to inspect and investigate the real property

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during the uprising that led to his overthrow. *Farid al-Deeb* said the former President had imposed a curfew on the afternoon of 28 January and transferred responsibility to the Head of the Army.

<sup>329</sup> See Mohamed Fadel Fahmy, *Egyptians Pack Tahrir Square for Revelry, Protests a Year After Historic Revolt*, CNN, Jan. 26, 2012, (updated 10:45 AM EST).

<sup>330</sup> Tom Pfeiffer, *Mubarak Trial Set to Resume after Appeal Rejected*, REUTERS (Dec. 2011), <http://www.reuters.com/.../us-egypt-mubarak-idUSTRE7B60TR20111207>. (last visited May 28, 2012). (“An Egyptian court turned down an appeal for a new judge in the trial of former President Hosni Mubarak, the official news agency MENA, signaling the trial can resume...The court has concluded with the result that the request to reject justice Ahmad Refa’at is not valid and has no legal basis. Also, the court argued that justice Refa’at has a reputation of working by the book and following procedures. He has been praised for his independence and judicial reputation by the media.”). [Keep the source and the citation on this point as it fit what I want to say and not in a direct words as it is my own explanation and supported by the source I cited, don’t remove it as we already make sure about the verification of it]

<sup>331</sup> See *Mubarak is Still Egypt’s President and Cannot be Convicted, Attorney Tells Court*, THE ASSOCIATED PRESS, (Jan.22, 2012) (“Hosni Mubarak on trial for his complicity in killing of protesters, corruption, may face death penalty if convicted”), <http://www.haaretz.com/.../mubarak-is-still-egypt-s-president-and-cannot-b>. [Keep the source and the citation on this point as it fit what I want to say and not in a direct words as it is my own explanation and supported by the source I cited, don’t remove it as we already make sure about the verification of it]

<sup>332</sup> See BANNING MUBARAK AND HIS FAMILY FROM TRAVELING ABROAD, AL-JAZEERA, *available at* <http://www.aljazeera.net/NR/exeres/FBE0E235-3D4D-43FE-85B8-27F1CCBC9722htm>. (last retrieved May 28, 2012). [This article is Arabic only and keep the information and the citation as well, you just can refer to the article as it is available in Arabic]

<sup>333</sup> *Id.* [This article is Arabic only and keep the citation]

<sup>334</sup> *Id.* [This article is Arabic only and keep the citation]

owned by Mubarak and his family in Egypt and foreign countries as well.<sup>335</sup> According to news accounts, the Attorney General requested that the Egyptian Ministry of Foreign Affairs work through diplomatic channels in conjunction with the Commission to inquire about the controversial wealth of Mubarak's family and all family accounts in foreign banks.<sup>336</sup> Moreover, the Committee is cooperating with the Ministries of Justice in the European Union ("EU") countries and the Department of Justice in the United States to track any money-laundering operations and hard currency smuggling outside Egypt and requesting the mutual legal assistance in case of final verdict.<sup>337</sup> Additionally, the government established a fact-finding mission to investigate who authorized police forces to use live ammunition against peaceful protestors.<sup>338</sup> The mission is investigating whether Mubarak, as the Supreme Commander of the Armed Forces, used his powers to order the killing of demonstrators.<sup>339</sup> Mubarak denies that allegation, claiming that the former Minister of Interior made that decision without Mubarak's authorization/permission.<sup>340</sup>

On the other hand, another initiative has been adopted by the government in the investigation process. The Justice Ministry assigned what is known as the "Illicit Gains Authority" to subpoena ("summons") Mubarak and his sons for interrogation.<sup>341</sup>

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<sup>335</sup> 'Arafa, *supra* note 7, at 32 [FN 134]. ("Officials from the Egyptian Ministry of Justice, judges, and law professors comprise this committee.")

<sup>336</sup> See AHMED RAJAB, EGYPT WILL INVESTIGATE MUBARAK'S WEALTH (Apr. 2011), *available at* <http://www.yallafinance.com/2011/04/.../egypt-will-investigate-mubaraks-wealth/> (last visited May 28, 2012).

<sup>337</sup> *Commission to Retrieve Egypt's Money Abroad Discussing the Procedures Necessary to Freeze the Foreign Accounts of Mubarak and 18 Former Officials*, AL-MASRY AL-YOUM (May 2011), <http://www.almasry-alyoum.com/article2.aspx?ArticleID=296301&IssueID=2131>. (last retrieved May 28, 2012). [It is an Arabic version of an Independent Egyptian Newspaper, and there is an English version of it, so keep the citation and don't remove it, if you want to refer to it as an Arabic document, feel free to do so]

<sup>338</sup> This mission consists of human rights activists and magistrate judges. As a result of these shootings, over 800 people were killed and thousands were wounded. [It is my own wordings, no need to cite]

<sup>339</sup> *The Fact-Finding Commission: Mubarak is Responsible for the Killing of Protestors Whether By Contributing to the Crime or By Being Silent*, AL-SHROUK (Apr. 2011), <http://www.shorouknews.com/contentdata.aspx?id=435944>.

(last visited May 28, 2012). [It is an Arabic version of an Independent Egyptian Newspaper website link and the link opened in Arabic and not copied, and there is an English version of it, so keep the citation and don't remove it, if you want to refer to it as an Arabic document, feel free to do so]

<sup>340</sup> *Id.*

<sup>341</sup> *The Illicit Gains Authority Orders Mubarak To Disclose His Secret Bank Accounts*, AL-YOUM 7 (Feb. 28, 2011), <http://www.youm7.com/News.asp?NewsID=360387>. The Illegal Profiting Apparatus ("IPA") was established by Law No. 11 of 1968 under the authority of the Ministry of Justice to investigate suspected illegal income. Public officials are required to disclose their assets and those of their spouses and children upon taking office. The IPA receives reports concerning corruption from the general public and from private and public employees. The system periodically traces any increase in the wealth of public officials or their spouses and minor children. See *Business Anti-Corruption Portal*:

The authority is headed by a Chief Justice and investigates the reports sent from the Administrative Control Authority (“ACA”)—a financial monitoring apparatus—<sup>342</sup>and the Public Funds Prosecution (“PFP”)—a judicial body specializing in financial crimes—on claims of embezzlement of public funds, including cash and gold.<sup>343</sup>

(2) *A death penalty sentence: was it a possible choice?*

As generally well-known, Mubarak and his two sons were charged with two types of criminal offenses: first, corruption crimes, which include the embezzlement of public funds and illegitimately acquired wealth; and second, the killing of demonstrators.<sup>344</sup> Article 18 of Law No. 62/1975 on “Combating of Illicit Gain” stipulates that “every individual who gained, for himself or for someone else, illicit revenue should be punished by imprisonment.”<sup>345</sup> The same provision calls for the designated authorities to confiscate the revenue that the convict gained through illicit

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*Egypt Country Profile, Public Anti-Corruption Initiatives, available at <http://www.business-anti-corruption.com/index.php?id649>. (last retrieved May 28, 2012).*

<sup>342</sup> The Administrative Control Authority (“ACA”), governed by Law No. 54 of 1964 and its amendments, is in charge of investigating the reasons behind work and production incompetence, including revealing the defects of the administrative, technical, and financial systems that obstruct the orderly processing of operations in public entities, proposing means to prevent corruption, and monitoring the implementation of laws, decisions, and regulations. This agency is Egypt’s anti-corruption watchdog. It is also tasked with exposing administrative and financial violations, and criminal offenses committed by employees during the performance of their duties, including abuse of authority. Generally, it has a legal mandate to detect public sector corruption, and has arrest powers. ‘Arafa, *supra* note 7, 31.

<sup>343</sup> *Id.*

<sup>344</sup> Owen & Shekner, *supra* note 293.

<sup>345</sup> See LAW NO. 62 OF 1975 [COMBATING OF ILLICIT GAIN], *Al-Jarida Al-Rasmiya*, July 31, 1975, at art. 18 (Egypt), <http://www.mohamoon.com/montada/default.aspx?action=Display&ID=108457&>. With respect to financial crimes and corruption, the Egyptian Supreme Court (“Court of Cassation”)—the highest judicial body in the Egyptian court system—ruled in a landmark 2004 decision that:

[T]he burden of proof shifts from the accused to the prosecutor in crimes related to illicit gains. Also, the court said in its ruling that Article 2 of Law No. 62 of 1975 contradicts article 67[13] of the [Abrogated] Egyptian Constitution stating that all citizens are innocent until proven guilty before a court of law.

*Case No.30342-2004, Apr. 28, 2004, The Egyptian Court of Cassation (Supreme Court)*. If this legal tenet is applied to Mubarak’s case, he does *not* have to prove himself and his family innocent. On the contrary, the General Prosecutor and the Illicit Gain Authority would be obligated by law to prove the involvement of Mubarak and his family in all the illicit gains crimes. ABROGATED EGYPTIAN CONSTITUTION, at art. 67/13 *compares it with* EGYPT TEMPORAL CONSTITUTIONAL DECLARATION, at art. 20, *supra* note 73. See also ‘Arafa, *supra* note 7, at [FN62]. [On this Footnote, don’t touch or do anything in it as I am sure about every single letter in it, You will not find the case or the decision I stated online even in English or Arabic but we have that decision at the Supreme Court in Egypt, and the law mentioned and available on the website is the exact law not the Egyptian constitution as you stated but in Arabic, please check the website carefully, so keep the citation and don’t remove it. I think I have enough experience on my home country laws and constitution and aware about what I wrote!!]

means.<sup>346</sup> Under this article, there is no dismissal of the case if the accused is deceased.<sup>347</sup> Article 18 grants the court the right to summon the immediate family of the accused who benefited from the illicit revenue and demand that they return the revenue.<sup>348</sup> Accordingly, Mubarak is convicted, and the court or the Illicit Gains Authority has the right to ask his wife, children, and their spouses to return all the revenue obtained through illicit means.<sup>349</sup>

Mubarak is also charged with submitting a forged financial statement that understates his wealth.<sup>350</sup> In this case, Mubarak is guilty; and article 112 of the Egyptian Penal Code is applied, as it provides explicitly “[t]hat any public official involved in the embezzlement of public funds by committing forgery on official documents may be sentenced to a term of life imprisonment.”<sup>351</sup>

Additionally, Mubarak is accused of using his powers to transfer money to foreign bank accounts abroad.<sup>352</sup> In addition to article 112 of the Criminal Code and article 18 of Law No. 62 of 1975, Mubarak may be charged under article 116 of the same Code, which states that “[a]ny public servant who damages the economic reputation or national interest of the State (in which it is Egypt in our case) by abusing his powers is sentenced to a period of imprisonment of one to six years and a fine does not exceed the maximum amount of 1000.00 EGP.”<sup>353</sup>

According to the current Egyptian Penal Law, Mubarak could face the death penalty if he is convicted under articles 40, 230, 234, and 235 of the Criminal Code. He is charged with inciting the killing of the demonstrators for failing to stop the killing

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<sup>346</sup> *Id.* [= I am referring to both the law and the Court Decision and keep it like that unless you want to refer to them again]

<sup>347</sup> *Id.*

<sup>348</sup> *Id.*

<sup>349</sup> *Id.* The former first lady of Egypt, Suzan Mubarak was detained for fifteen days in the women’s jail of Cairo on the ground of abusing her husband’s position to gain revenue from illicit transactions. She was later released after relinquishing her assets to the government of Egypt.

<sup>350</sup> See Law No. 58 of 1937 (EGYPTIAN PENAL LAW, as amended by Law No. 95 of 2003), *Al-Jarida Al-Rasmiyya*, August 1973, at art. 112 (Egypt). [hereinafter EGYPTIAN PENAL CODE].

<sup>351</sup> *Id.*

<sup>352</sup> Owen & Shekner, *supra* note 293. (“The Egyptian Attorney General Dr. ‘Abdel Meguid Mahmmoud wrote in a requested document that Mubarak and his sons, *Gamal* and *Alaa*, may have violated laws prohibiting the “seizing of public funds and profiteering and abuse of power,” using complex business schemes to divert the assets to offshore companies and personal accounts...The 12-page document, written in Arabic and titled “Request for Judicial Assistance,” is intended to provide the legal basis under civil law to recover assets belonging to the Egyptian people...”) (“A spokeswoman for the U.S. Justice Department, the agency responsible for recovering stolen assets, declined to comment on the document. A former Federal Fraud Prosecutor said some of the claims made against Mubarak remind him of the allegations against deposed Philippines dictator Ferdinand Marcos in the 1980s.”).

<sup>353</sup> EGYPTIAN PENAL CODE, *supra* note 350, at art.116.

against the protestors.<sup>354</sup> Article 40 provides that “[any] individual who incites a felony is considered a main culprit.”<sup>355</sup> Under Article 230, “[any] individual who murders someone deliberately is sentenced to death...”<sup>356</sup> Article 235 also imposes upon any individuals who participate or contribute to the crime the same sentence as the offender.<sup>357</sup> Thus, Mubarak is found guilty of the deliberate assassination of anti-regime protesters; and it was an option to face the death penalty.<sup>358</sup> But in this case, based on the discretionary power of the judge, he cannot apply this penalty or make it lenient according to the status of the offender, his age, personality, health, etc...based on Article 17 of the Criminal Code.<sup>359</sup>

Concluding the last three-day presentation of the case, the General Prosecutor requested the death penalty for the former President, his prior Interior Minister and six of his high senior security assistants, for conspiring to commit premeditated homicide and attempting to murder protesters in January.<sup>360</sup> In my

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<sup>354</sup> Owen & Shekner, *supra* note 293.

<sup>355</sup> EGYPTIAN PENAL CODE, *supra* note 350, at art. 40. This article defines the “Accomplice” as follows:  
A person is concerned as an accessory in the commission of an offence: (1) Who instigates to the commission of the act constituting the offence, provided that the act is the consequence of such instigation; or (2) Who is a party to an arrangement having for its object the commission of the offence, provided that the offence is the consequence of such arrangement, or (3) Who knowingly supplies weapons or other implements or means employed in the commission of the offence, or in any manner aids the principal or principals concerned in the offence in the preparation, facilitation, or commission thereof.

<sup>356</sup> *Id.*, at art. 230.

<sup>357</sup> *Id.*, at art. 235.

<sup>358</sup> With respect to Mubarak’s criminal charges, the Office of the General Prosecutor announced on May 25, 2011, that Mubarak had been referred to the Criminal Court of Cairo to begin the process of his trial. The General Prosecutor assigned the Ministry of Interior the task of transferring Mubarak from a hospital in *Sharm al-Sheikh*, East of Cairo, to the *Torah* Prison hospital to stand trial. See *Hosni Mubarak to Stand Trial, Prosecutors Say*, LOS ANGELES TIMES (May 25, 2011), <http://www.articles.latimes.com/2011/may/25/world/la-fg-egypt-mubarak-20110525>. (last visited May 28, 2012).

<sup>359</sup> Article 17 of the Egyptian Penal Code reads:

When in criminal cases the circumstances of the case appear to be such a nature to merit leniency on the part of the court, the penalty may be migrated as follows: (1) death penalty may be substituted by life imprisonment or aggravated detention; (2) life imprisonment may be substituted by aggravated detention or detention; (3) aggravated detention may be substituted by detention or imprisonment for not less than six months, and (4) detention may be substituted by imprisonment for not less than three months.

<sup>360</sup> Article 45 of the Egyptian Penal Code defines “Attempt” as being:

The commencement of execution of an act with the intent to commit a felony or a misdemeanor if completion thereof has been interrupted or has failed of effect owing to circumstances independent of the will of the party. Shall constitute an attempt neither the determination to commit the offence nor the preparatory acts for its commission.

Attempt, as appears from this Article of the Egyptian Penal Code, is based on three main constituent elements: (1) The *actus reus* (“material element”) which is the Commencement of Execution; (2) The *mens rea* (“moral or mental element”) which is the Criminal Intent required, and (3) The Non-

moderate opinion—as a legal scholar and a professor of criminal law—I argued that acquitting Mubarak is “almost impossible,” and instead was expecting that the former President will get 10 to 25 years in prison as the criminal evidences is not sufficient or adequate (appropriate) to obtain a death sentence.<sup>361</sup> It should be noted that “The death sentence requires proof of premeditation, and I haven’t seen anything that proves that in what has been said. There is evidence of murder, the maximum sentence for which is life sentence.”<sup>362</sup> The case getting weak as the Attorney General depends on the testimony of officers who allegedly heard conversations between the former minister of interior and his assistants.<sup>363</sup> In those conversations, the former minister ostensibly told his assistants to use all means necessary to stop the protesters and the officers also allege they witnessed the arming of ground forces with automatic weapons.<sup>364</sup> From the criminal procedural perspective, as for Mubarak, no solid evidence or eyewitness account connects him to the killings, leaving the prosecution with only deductive evidence to implicate the former

President.<sup>365</sup> The Prosecutor cited the two former ministers of interior who came after al-‘Adly.<sup>366</sup> They testified before the criminal court that orders to open fire on protesters could only come from the Head of State.<sup>367</sup>

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consummation (no completion) of the offence for reasons and causes independent of the offender’s will. Therefore, the scope of punishable attempt encompasses three main situations. First, the case in which the offender’s act produces no criminal harm neither the originally intended nor any lesser one, Second, the case in which the very criminal result intended is realized but it is revealed that its occurrence was due to another cause than the offender’s act, and the third situation included in the scope of attempt concerns the case in which the originally intended result fails but another lesser one materializes. See EGYPTIAN PENAL LAW, *supra* note 350, at art. 45.

<sup>361</sup> It should be taken into consideration that it was expected that the evidence the prosecution has against Mubarak, which may be insufficient to hold Mubarak criminally liable for the killing of demonstrators and could result in Mubarak being found guilty of only criminal negligence or recklessness. [I am presenting my personal opinion in this sentence so this sentence does not need to be cited, and what just between parentheses in the text is just the implicit elaboration from the general theory of criminal code. All in the parenthesis in the text in this regard, is my legal explanation in my own wording from the Egyptian criminal law attitude and it will not a direct explanation in the article. So, keep it and don’t remove it. You can use this Arabic source in case, See *generally* FATTOUH EL-SHAZELLY, SHAR’H MABAD’E KANUN AL-‘UQUBAT AL-MASRY: AL-KESM AL-‘AMM [EXPLANATION OF EGYPTIAN CRIMINAL LAW PRINCIPLES, THE GENERAL PART, BOOK I: THE THEORY OF CRIMINAL OFFENCES] (2003).]

<sup>362</sup> Laying out his evidence in court, the prosecutor presented autopsy reports to prove that protesters were killed between January 28 and 31 with live ammunition. He then used visual evidence and eyewitness accounts to prove that they were killed by police. The prosecution’s case has become weaker as it tries to link the killings to the officials on trial. [My own explanatory words and does not need to be cited, don’t remove it]

<sup>363</sup> Owen & Shekner, *supra* note 293. [It is in the article but not in direct way, I rephrased implicitly from the general meaning as there is no direct source to cite and from watching the trial itself online and hearing the judge reading the verdict, so, keep it and don’t remove it].

<sup>364</sup> *Id.* (=Same source, what I mentioned in the previous footnote, apply here)

<sup>365</sup> See *Mubarak is Responsible for What Happened Because He Was the Supreme Chief of Armed Forces*, AL -SHROUK (Mar. 19, 2011), <http://www.shorouknews.com/contentdata.aspx?id=412078>. (last retrieved May 28, 2012).

In summation, the public prosecution does not have to prove that Mubarak well-ordered the killings in order to convict him of murder. Due to his responsibility as the Head of State to protect citizens, proving that Mubarak was aware of the killings is sufficient for a criminal conviction. "If it was proved that he knew about the use of live bullets while he has a legal obligation to protect the citizens from being killed, this is enough to convict him of murder."<sup>368</sup> In order to prove Mubarak's awareness of the events, the prosecution is relying on al-'Adly's testimony that he briefed the former President about the events.<sup>369</sup> The prosecution is also relying on Mubarak's speech the night of January 28, 2011, in which he said that "the police were following orders to protect protesters."<sup>370</sup> If Mubarak's defense team was able to prove that he wasn't aware and conscious of the killings, still that Mubarak would still not be exempted of criminal accountability and could receive a 10 year prison sentence for breaching his duties as President.<sup>371</sup> On the other hand, some civil rights lawyers representing some of the victims' families in the case expected the former Interior Minister to receive the death sentence, thereby allowing Mubarak to get off with a lighter sentence.<sup>372</sup>

### (3) Evidence Shortage

The prosecution has a tough job, as the most important evidence is in the possession of the security apparatus that he used to head and whose loyalties are unclear.<sup>373</sup> Since the start of the trial, the prosecution has struggled and often failed to obtain vital evidence in the case.<sup>374</sup> In his final remarks, the prosecutor complained

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<sup>366</sup> *Id.*

<sup>367</sup> *Egypt Prosecutor Alleges Schemes by Mubarak Family*, THE WASHINGTON POST (Apr. 9, 2011), [http://www.washingtonpost.com/investigations/egypt-seeks-help-to-find-mubarak-family-assets-abroad/2011/04/07/AFCMkZ9C\\_story.html](http://www.washingtonpost.com/investigations/egypt-seeks-help-to-find-mubarak-family-assets-abroad/2011/04/07/AFCMkZ9C_story.html). (last visited May 28, 2012).

<sup>368</sup> Owen & Shekner, *supra* note 293. [It is in the article but not in direct way, I rephrased implicitly from the general meaning as there is no direct source to cite and from watching the trial itself online and hearing the judge reading his verdict, so, keep it and don't remove it, All in the parenthesis in the text in this regard, is my legal explanation in my own wording from the Egyptian criminal law attitude and it will not direct explicit in the article].

<sup>369</sup> *Id.* (=Same source, what I mentioned in the previous footnote, apply here)

<sup>370</sup> *Id.* (=Same source, what I mentioned in the previous footnote, apply here)

<sup>371</sup> *Id.* ("Despite the difficulties faced by the prosecution, that a strong ruling against Mubarak remains possible because the criminal court relies on the judge's beliefs more than it does on evidence. The judge is free to form his conviction based on any evidence he has, whether it was material or verbal. He can even choose to form his judgment based on one eyewitness.").

<sup>372</sup> *Id.*

<sup>373</sup> *Id.*

<sup>374</sup> *Id.*

of the lack of cooperation from state institutions in providing it with evidence.<sup>375</sup> Many have complained that the start of the case, six months after Mubarak stepped down, gave plenty of time for his supporters, who are still in office, to destroy evidence.<sup>376</sup> It should be noted that one of the most imperative improvement that reflects the involvement of rule of law is when Field Marshal Mohammad Hussein Tantawi, the Head of the Supreme Council of the Armed Forces (“SCAF”),<sup>377</sup> received a subpoena to testify during Mubarak’s trial.<sup>378</sup> Before the Revolution, it was stiff to imagine that senior members in the regime would appear before a court to testify.<sup>379</sup> In Mubarak’s trial, senior members of the new regime were required to testify, including: the Army Field Marshal, (General) ‘Omar Suleiman, the former Chief of the Intelligence Organization and former Vice-President, and two former Ministers of Interior.<sup>380</sup> These summons indicated the first time in the history of the Egyptian judiciary that such important people could be compelled to testify before a court of law.<sup>381</sup> Leaks of Field Marshal Tantawi’s testimony, which constitute the strongest evidence to some extent in the case, were disappointing.<sup>382</sup> According to lawyers who attended the session, Tantawi denied that Mubarak had ordered directly or explicitly the military to

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<sup>375</sup> *Id.*

<sup>376</sup> *Id.* At the beginning of the trial, it was announced that a CD containing phone recordings between the Ex-Minister of Interior and his senior assistants during the days of the revolution was destroyed. Cherif AbulFadl, *Mufag’a fi Muqam Mubarak* [Surprise in Mubarak’s Trial], AL-AHRAM (Sept. 5, 2011), <http://www.gate.ahram.org/News/112146.aspx>. Additionally, during the trial, the Public Prosecutor accused the Ministry of Interior and the Intelligence Agency of withholding evidence against Mubarak. Mahmoud Al-Mamlouk et. al, *al-Niyaba: al-Dakhliya wa al-Amn al-Kawmy lam Yukadima lana al-Ma’alomat al-Kafiya* [Prosecution: Interior Ministry and Intelligence Agency did not provide us with enough Information], (Jan. 4, 2012), <http://www1.youm7.com/News.asp?NewsID=570218&SecID=12>. Earlier in the case, head of central security communications Hussein Moussa was sentenced to two years in prison for destroying audio recordings of conversations between al-’Adly and his assistants in the ministry’s operation room during the days of the uprising. The recordings are believed to have included orders to shoot protesters. (Both articles are Arabic Newspaper website and no English version for them, so, keep them and don’t remove from the footnotes or citation, I am sure of every single word on them and I translated the official title in Arabic to English, so it will be understandable by the reader in a very official and careful way)

<sup>377</sup> *al-majlis al-a’la Lil-quwwat al-musallaha*, is equivalent in the United States to an enlarged Joint Chiefs of Staff. (My personal knowledge, keep it and don’t remove)

<sup>378</sup> El-dakak, *supra* note 97. (Eldakak’s article attached, and will be online soon as it is in editing process within the law review editorial board of the journal)

<sup>379</sup> *Id.* (“This pursuit of legal justice is what distinct the 2011 Egyptian Revolution from other past revolutions. After other historical revolutions, people in power were often executed without fair trials. Giving a trial to a 30-years dictator who caused the death of more than eight hundred brave innocents during the Revolution is the best first step to establishing full rule of law in new democratic Egypt.”).

<sup>380</sup> *Id.*

<sup>381</sup> *Id.*

<sup>382</sup> *Id.* See also Anthony Shadid & Heba Afify, *Military Ruler Offers Region in Revolt*, INT’L HERALD TRIB., Sept. 26, 2011, at 4, available at 2011 WLNR 19484127 (citing Field Marshal Tantawi stating that he had to testify “to stress the rule of law, which must be the guiding approach for the Egyptian state after the January 25 Revolution.”).

open fire on protesters, despite previous statements by the military ruling council saying that the military had refused to carry out orders to kill protesters.<sup>383</sup> Civil rights attorneys were astonished when video evidence presented by the intelligence services comprising videos starting from February 1, 2011, which is not the period when the events examined in the trial took place.<sup>384</sup> Another cause for concern arose when the prosecution said it was unable to identify who carried out the killing of protesters.<sup>385</sup>

#### (4) *Three cases in one case (“legal procedural joining”)*

In the same case that Mubarak, al-‘Adly and his assistants are being prosecuted for killing protesters, the former President, along with other defendants, is also facing charges of squandering public funds.<sup>386</sup> Legal experts and lawyers in the case complain that the decision to combine or join unrelated charges into one case is causing unnecessary evidential and procedural legal complications.<sup>387</sup> Mubarak, his two sons and businessman Hussein Salem, as stated earlier, are facing charges of bribery and abusing power.<sup>388</sup>

In the third crime alleged in the case, Mubarak and Salem face charges of squandering public funds. As stated previously, the allegation is based on evidence that Mubarak directly assigned Salem’s company the privilege of exporting gas to Israel, instead of holding an auction as the law requires.<sup>389</sup> The allegation is also

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<sup>383</sup> *Id.*

<sup>384</sup> *Id.*

<sup>385</sup> *Id.* However, a civil rights lawyer representing victims’ families in the case dismisses such concerns. He argued that “The conviction of the one who carried out the crime is not necessary for the conviction of the instigators, as long as there is an ongoing investigation.”

<sup>386</sup> *Id.*

<sup>387</sup> *Id.*

<sup>388</sup> The prosecution also accuses Mubarak of hiding foreign grants to the Alexandria Bibliotheca in a bank account that only he can access. (My personal knowledge, keep it and don’t remove)

<sup>389</sup> Abo Alabass, *supra* note 291. See, e.g., Law No. 89 of 1998 on Bids and Tender Offers (“Public Procurement”), *Al-Jarida Al-Rasmiyya*, 1998, at art.2 (Egypt). (The website not working anymore, but keep the law citation as I am sure about it). This law stipulates that: “public tenders and public auctions must be subject to “Publicity Principles.” Article 2 states: “Since all public bids and auctions follow the principles of rationality, equal opportunity, and free competition, they must be declared in daily newspapers and other widespread information media.”), its executive regulation, the set instructions and the contract conditions at the conclusion and the execution of the contracts of labors, supplies, and the required steps. This consequently led to many amendments, additional orders, some works were carried out upon the direct order, the removal of some works after been carried out, purchases of unneeded items, purchases of banned items, needlessly spending sums or even more given to some contractors and suppliers. There are several due sums at the suppliers and contractors, represented in fines, compensations, price difference, and administrative fees...etc. as a result of

based on the deal's contract, which obligates Egypt to sell its gas to Israel at sub-standard prices and does not give it the right to modify the contract.<sup>390</sup> I believe that this is a big mistake and was against it since the beginning of the trial and do not know whether it was intentional or not, but it has caused unnecessary detours in the case. This creates a burden on the court but it is not a legal flaw. It is neither justified nor harmful, and each defendant will be judged based on the charges he faces. The author asking, are the partners in the crime getting innocent?<sup>391</sup>

(5) *The June 2<sup>nd</sup>, 2012 Verdict Analysis: A Historical Land-Remarkable Decision not only in whole Middle East but all over the World*

Montesquieu stated, "[l]aw should be like death, which spares no one."<sup>392</sup> Mubarak's trial is a massive progress for rule of law in Egypt.<sup>393</sup> Despite several enlargements that casted serious doubts on the success of the trial, it marks the first

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committing violations in carrying out the works or as the works and contracts were taken from them and they carried out them on their expense. Also, Procurement rules process is laid down explicitly in the aforementioned law which in itself establishes the rules for transparency. There is a lack of internal censorship, accountability, auditing, and discipline in the most units of the state administrative system. Not enough effort is exerted in inspecting and investigating the documents, presented by the officials in which include incorrect, misleading, falsified, and distorted data. They, in this way, could seize a part of the public funds, evade paying taxes, and attempt to reduce them for no reason. 'Arafa, *supra* note 7. [This chapter in my doctoral dissertation attached. I am sure about the law and may be not available online either in English or Arabic]

<sup>390</sup> Kirkpatrick, *supra* note 295. In this regard, the court rejected lawyers' request that the charges relating to the squandering of public funds and the export of gas to Israel be heard in a separate trial. The allegations concerning the gas and squandering of public funds require different evidence and witnesses than the allegations concerning protester deaths. [Yes, the cited source go to both sentences in the footnote as well]

<sup>391</sup> If the cases of officers accused of killing protesters is an indication of whether Mubarak, al-'Adly, and the other Interior Ministry officials will be convicted, observers are not optimistic. Only one low-ranking police officer was sentenced to death *in absentia* for killing protesters. Further, four police officers were acquitted of charges they killed protesters outside of *al-Sayeda Zeinab* police station. See generally Reem Leila, CASE DISMISSED:

CAIRO CRIMINAL COURT ACQUITS FIVE POLICE OFFICERS ACCUSED OF KILLING PROTESTERS LAST JANUARY, AL-AHRAM WEEKLY ONLINE, Jan. 5-11, 2012. Officers accused of killing protesters in *Suez* were released on bail. On the other hand, lawyers in Mubarak's case are confident that the trials and verdicts of the officers will not affect their case. The prosecutor clarified to the court that the victims listed in Mubarak's trial do not include those killed in front of police stations. All the officers on trial are being tried for killing protesters outside police stations, while those who carried out the killings remain unknown. *Id.* Of course, the *al-Sayeda Zeinab* verdict will have no bearing on Mubarak's trial, clarifying that the ruling in a case is left entirely up to the judge regardless of rulings in similar cases as long as they are issued from courts of the same level. However, that the officers should have been tried in the same case with Mubarak as they are partners in the same crime. See also *Court Acquits Officers Accused of Killing Revolution Protesters*, AHRAM ONLINE, JADALIYYA, Dec. 29, 2011.

<sup>392</sup> RIDDHI DASGUPTA, CHANGING FACE OF THE LAW: A GLOBAL PERSPECTIVE 291 (2006).

<sup>393</sup> El-dakak, *supra* note 97. (Eldakak's article attached, and will be online soon as it is in editing process within the law review editorial board of the journal. Also you can found that at [http://works.bepress.com/ahmed\\_eldakak/1/](http://works.bepress.com/ahmed_eldakak/1/))

time in Egyptian history that a former ruler pharaoh was brought before courts of law.<sup>394</sup> Mubarak's trial sends a strong and clear message that rule of man has ended and rule of law has recurred.<sup>395</sup> The remaining challenge is how to launch a full rule of law that will accomplish and achieve the motivations of the Egyptian community.<sup>396</sup>

On June 2<sup>nd</sup>, 2012 at 10:00 am Egyptian Eastern time, the "trial of the century" had been launched.<sup>397</sup> The Head of the Cairo Criminal Court, Chief Justice Ahmad Refa'at accompanied with Chief Justice Mohammad 'Asam Bassiouni and Chief Justice Hani Borham<sup>398</sup> announced that the court session and the verdict was in progress.<sup>399</sup> Refa'at delivered a strongly powerful worded statement before handing down the criminal sentences.<sup>400</sup> He described Mubarak's era as "30 years of intense darkness" and "a darkened nightmare" "...black, black, black, the blackness of a chilly winter night," the judge declared, "when officials committed the gravest sins,

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<sup>394</sup> Bradley Hope, *Mubarak Verdict far from a Done Deal*, NATIONAL (UAE), Aug. 5, 2011, ("Many Egyptians considered the appearance of Hosni Mubarak inside a metal cage a victory for the rule of law, but the real challenge will play out as the trial gets underway, lawyers and analysts say."), available at <http://www.thenational.ae/news/.../mubarak-verdict-far-from-a-done-deal>. (citing Chibli Mallat, a visiting professor at Harvard University School of Law, stating that "[t]his is the first time in the history of Egypt for 5,000 years that a Pharaoh is being brought to court to be judged on his rule... There is a historic dimension about it. It is very unusual for the region, for the rule of law, and for the whole world.").

<sup>395</sup> El-dakak, *supra* note 97. (Eldakak's article attached, and will be online soon as it is in editing process within the law review editorial board of the journal. Also you can find that at [http://works.bepress.com/ahmed\\_eldakak/1/](http://works.bepress.com/ahmed_eldakak/1/))

<sup>396</sup> Sandro Contenta, *Egypt: A Revolution without Justice*, TORONTO STAR, Nov. 19, 2011, (citing official counts that declared the death of 846 people during the days of the revolution).

<sup>397</sup> In this regard, it should be noted that more than 20,000 security personnel outside Mubarak trial. A very tight security plan was adopted, created, and was laid down coordinately between the Armed Forces and the police forces to secure the trial of former President Hosni Mubarak, his two sons 'Alaa and Gamal, Ex-Interior Minister Habib al-'Adly and six of his top aides, which decided on Saturday, June 2<sup>nd</sup>, 2012 and in which a verdict handed down. Also, it includes unprecedented precautionary measures to ensure smooth proceedings during the trial. See *20,000 Police, 160 Tanks to Secure Mubarak Trial Ahead of Verdict*, EGYPT INDEPENDENT, June 8, 2012. No one was allowed into the courtroom, except for special pass holders. The Egyptian state TV was the only side to videotape and air the session. Additionally, contacts with Chairman of State Information Service ("SIS") had been settled to arrange attendance of foreign correspondents and reporters who want to cover the trial. *Id.* [the citation at the end of the footnote apply to all of the sentences in the footnote, in addition to the textual sentence as it discussed the same idea]

<sup>398</sup> It should not be overlooked that the panel of judges in the Mubarak trial, consisting of Presiding Chief Justice Ahmad Refa'at and Judges Bassiouni and Burham, have acted in a dignity way that honors the best tradition of the Egyptian judiciary and stands out as a shining example of what courageous and professional judges should do in difficult situations such as these. They have upheld the fair rule of law and that should not be forgotten. [My own wordings and does not need to be cited, keep it and don't remove it as I am sure about these facts, I know about those judges very well and does not required that their reputation to be published in a source!!]

<sup>399</sup> See HOSNI MUBARAK LIFE IMPRISONMENT ON TRIAL VERDICT—2 June 2012: Part I and II, "Video Featured Live", available at <http://www.youtu.be/47naK6H5Hlo> and <http://www.youtu.be/5yKTlp8-3yU>. See also HOSNI MUBARAK FOUND GUILTY [CNN 6-02-2012], at <http://www.youtu.be/YhqqB9K2jp8>. (last retrieved June 5, 2012).

<sup>400</sup> *Id.* ("The trial of Mubarak and his co-defendants before an ordinary criminal court subject to ordinary criminal law and procedures.")

tyranny, and corruption without accountability or oversight as their consciences died, their feelings became numb and their hearts in their chests turned blind...that ended only when Egyptians rose up to demand change.”<sup>401</sup> “The peaceful sons of the homeland came out of every deep ravine with all the pain they experienced from injustice, heartbreak, humiliation and oppression.”<sup>402</sup> He added “Bearing the burden of their suffering on their shoulders, they moved peacefully toward Tahrir Square in Cairo, Egypt’s capital, demanding only justice, freedom, dignity, and democracy from their rulers and politicians who held a tight grip on power,” “...in which Egypt become developed country politically, economically, socially, culturally, educationally, etc...What’s happened to you beloved Egypt? the only nation described by God in the Qur’an...” and the judge continued his robust discourse or said about the glorious January 25 uprising against ousted President Mubarak and his corrupt regime.<sup>403</sup>

During the court session, Mubarak sat stone-faced on a hospital gurney and frowning in the courtroom’s metal defendants’ cage while judge Refa’at read out the conviction and sentence against him, showing no emotion with his eyes concealed by dark sunglasses.<sup>404</sup> His sons Gamal and ‘Alaa looked very nervous and stressed out when the judge announced that he will read out the conviction decision along with the legal qualification of the verdict afterwards.<sup>405</sup> “Chief Justice Refa’at declared that: According to Articles 15/1, 17, 18, 304, 309, 313, and 384 of the Egyptian Criminal Procedural Law and Articles 30, 40/3, 45, 46/1, 234, and 235 of the Egyptian Penal Law, the court decided its verdict to the all defendants except the second offender (Hussein Salem) will be in absentia<sup>406</sup> the following:

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<sup>401</sup> *Id. Mubarak Receives Life Term for Protest Deaths*, AL-JAZEERA, June 2, 2012; *Protests Erupt in Egypt over Hosni Mubarak Verdicts*, BBC, June 3, 2012; HUMAN RIGHTS WATCH, *Egypt: Mubarak Conviction a Message for the Next President. But Acquittal of Police Chiefs A Green Light for Future Abuse*, June 2, 2012.

<sup>402</sup> *Id.*

<sup>403</sup> *Id. See also* WAKAE’ AL-NOTQ BIL HUKUM FI QADIAT MUBARAK [The Hearing of the Mubarak Verdict], AL-MASRY AL-YOUM, “Video Featured”, available at <http://www.youtu.be/wtjz7odWrNA> (in Arabic) (last visited June 5, 2012).

<sup>404</sup> *Id. See also* Hamza Hendawi, *Former President of Egypt Hosni Mubarak Gets Life Sentence; Sons Acquitted*, ASSOCIATED PRESS, 3 June 2012.

<sup>405</sup> *See Egyptians Protest Against Mubarak Verdict in Cairo*, BBC NEWS, June 5, 2012, available at <http://www.bbc.co.uk/news/world-middle-east-18330411>. (last retrieved June 6, 2012). (“‘Alaa appeared to recite verses of the *Qur’an* as the verdict was read. Both sons stood in front of their father to shield him from the cameras, and had tears in their eyes when the ruling came out.”).

<sup>406</sup> *See* EGYPTIAN CRIMINAL PROCEDURAL LAW No. 150 of 1950, as amended by Law No. 95 of 2003 and Law No. 145 of 2006), *Al-Jarida Al-Rasmiyya*, September 1950, at arts. 384 & 388 (Egypt) [hereinafter EGYPTIAN CRIMINAL PROCEDURAL CODE]. The Egyptian law does not meet the minimum requirements for trial *in absentia* adopted by national legal systems. Article 388 of the aforementioned Law explicitly (“denies a defendant being tried *in absentia* the right to be represented at trial (a lawyer is allowed to represent such a defendant to explain the reason for the person’s absence and arrange

- (1) Punishing Mohammad Hosni El-Sayed Mubarak with Life Imprisonment for the allegations ascribed to him, being an accessory/accomplice to murder (complicity in murder) and attempted murder;
- (2) Punishing Habib Ibrahim Habib Al-'Adly with Life Imprisonment for the allegations ascribed to him, being an accessory/accomplice to murder (complicity in murder) and attempted murder;
- (3) The both aforementioned defendants will be beard and responsible for the criminal hearing fees;<sup>407</sup>
- (4) Asset Forfeiture and confiscation of the assets alleged proceeds and instrumentalities of the crime;<sup>408</sup>
- (5) The acquittal of the following (al-'adly senior assistants): (a) Ahmad Ramzy; (b) 'Adly Fayied; (c) Hassan 'Abdualrahman; (d) Isma'il Al-Sha'er; (e) Osama Al-Marasy; and (f) 'Omar Farmauy;<sup>409</sup>
- (6) Dismissal of the criminal action (motion) against Mohammad Hosni El-Sayed Mubarak, Hussien Kamal El-din Ibrahim Salem, 'Alaa Mohammad Hosni El-Sayed Mubarak, and Gamal Mohammad Hosni El-Sayed Mubarak concerning the peddling in influence crime and offering a kickback/bribe crime and the misdemeanor of its acceptance on the ground of statutes of limitation lapse period for the criminal motion;
- (7) The acquittal of Mohammad Hosni El-Sayed Mubarak of being an accomplice with a public official to obtain a private interest in favor of another person' interest illicitly from his public job (office of the Republic)

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the person's appearance, but may not present a defense"). In addition, Egyptian law does not comprise any procedural safeguards requiring that the court take into consideration whether the defendant's absence was by choice or assess whether a defendant unequivocally and expressly waived the right to be present before deciding to proceed with a trial *in absentia*.

<sup>407</sup> *Id.*, at art. 313. See MARWA AWAD AND TOM PFEIFFER, *Egyptians Threaten More Protests after Mubarak Verdict*, REUTERS, June 3, 2012. Nick Meo, *Crowds Call for Mubarak to Hang*, DAILY TELEGRAPH, 4 June 2012. [Keep the citation and don't remove it since you eventually able to find them online].

<sup>408</sup> See EGYPTIAN PENAL CODE, *supra* note 350, at art. 30. [The Code Attached]

<sup>409</sup> a) Former Head of the Central Security Forces; b) Former Director of General Security; d) Former Director of Security for Cairo; e) & f) Directors of Security for the Greater Cairo Governorates of Giza and 6<sup>th</sup> October. It should be noted that Hassan 'Abdualrahman, the former President of the State Security Apparatus ("SSI") remain in jail while he face charges for losing and destroying evidences including written documents, papers, electronic CDs and DVDs containing information and tapes recording which—with no doubt—convicting him along with the other senior assistants of killing protesters and causing seriously bodily injuries in custody of *Torah* prison, the same jail where Mubarak was flown after the verdict. However, their innocence, the General Attorney has also banned the six police officers from travel, as he has lodged a case on appeal against them charged over the killing of protesters during the uprising against Hosni Mubarak.

and the crime of causing harm to the public interests or funds of his public office; and

- (8) Referring on renvoi the civil motion before the criminal court to the specialized competent civil court as to the civil rights of the victims without fees.<sup>410</sup> This is our book (decision) talking on you on reasonable and fair grounds, Refa‘at said...”

Based on the above verdict, Hosni Mubarak was sentenced to life in prison for failing to stop the killing of protesters during the uprising that forced him from power.<sup>411</sup> The court in its legal qualification of the decision stated that Mubarak and his Interior Minister are certainly—without doubt—assure and aware of the protests and demonstrations against the ousted President and his corrupt regime as well, as it represents a general knowledge of any recognizable person, in particular that these incidents had been covered not only by the national media but also the international one.<sup>412</sup> The court stated that both of the first and second defendants (Mubarak and al-‘adly) intentionally ignored to issue the significant decisions, orders, and regulations in which they obliged in accordance with the constitution and law according to their legal positions at the time of the events to do in order to protect the whole nation, general public especially the demonstrators, and the public and private property from any imminent danger for the State national security or any criminal acts may cause instability or non-security of the State during the normal course of the occasions to keep their position without caring.<sup>413</sup> Furthermore, the Court recited that

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<sup>410</sup> See EGYPTIAN CRIMINAL PROCEDURAL CODE, *supra* note 406, at arts. 271, 272, 288, & 309. As the victims are civil parties to the proceedings, their attorneys may question witnesses for both the prosecution and the defense counsels, and may request additional witnesses, under articles 271 and 272 of Egypt’s Law of Criminal Procedure. Article 288 of this law also permits civil parties to be heard as witnesses. Civil party lawyers have the right to present arguments to the court orally and in writing. [The Code Attached]

<sup>411</sup> See LAHAZAT AL-NOTQ BIL HUKUM ‘ALA AL-MAKLOUH HOSNI MUBARAK [The Moment of the Ousted President Hosni Mubarak Verdict Come out], AL-NAHAR, “Video Featured”, *available at* <http://youtu.be/i4OzU6WKZsA>. (in Arabic) (last visited June 6, 2012). [Keep the video cited and don’t remove it as I found it since you was able to follow the link for this video. Also here is another video with unofficial English translation you can cite for more support, See EGYPT’S HOSNI MUBARAK TRIAL: VERDICTS AND SENTENCES, “Video Featured”, *available at* <http://youtu.be/tsxQS0K0dHo>. (“The Former Egyptian President has been sentenced to life in prison for his role in killing hundreds of protesters during the revolution that toppled him.”)]

<sup>412</sup> *Id.*

<sup>413</sup> *Id.* In this regard, Article 73 of the Abrogated Egyptian Constitution stipulates that:

The Head of the State is the President of the Republic. He shall assert the sovereignty of the people, respect for the Constitution and the supremacy of the law. He shall safeguard national unity and the socialist gains and maintain the limits between authorities in a manner to ensure that each shall perform its role in the national action.

the documents presented by the public prosecution are insufficient and lack the essential material evidences of proofing which part had the responsibility for shooting the protestors directly with live ammunition, weapons, guns, rifles, etc...which leads to their killing and seriously bodily injuries.<sup>414</sup> Moreover, the Court detailed that the Interior Minister purposefully disregarded to take urgent decisions and precautionary measures or techniques at the central and vital time of the episodes to keep his Ministerial spot and protect Mubarak for keeping his presidential position.<sup>415</sup> In this sense, Article 155, of the de facto Egyptian Constitution of 1971 reads that:

Before exercising their functions, the members of the Cabinet shall take the following oath before the President of the Republic: "I swear by Almighty God to uphold the Republican system with loyalty, to respect the Constitution and the law to look after the interests of the people in full and to safeguard the independence and territorial integrity of the motherland."<sup>416</sup>

In the same vein, Article 156 of the same Abrogated Constitution stipulates:

The Cabinet shall exercise in particular the following functions: ...(k) supervising the implementation of law, maintaining State security and protecting the rights of the citizens and the interests of the State.

In addition, the Court said that both Mubarak and Al-'adly confessed during the criminal investigations and interrogation phase that they were fully aware about the course of the events broke on January 25 and followed up with the news, in addition to the reports presented to Mubarak from his Interior Minister regarding the protests, which means that both of the accused possessing a free conscious and guilty will, in which the blameworthy shall take normally the form of the criminal intent that leads to

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Furthermore Article 74 of the same *de facto* Constitution reads:

If any danger threatens the national unity or the safety of the motherland or obstructs the constitutional role of the State institutions, the President of the Republic shall take urgent measures to face this danger, direct a statement to the people, and conduct a referendum on those measures within sixty days of their adoption.

In the same domain, Article 79 of the same Abolished Constitution states:

Before exercising his functions, the President shall take the following oath before the People's Assembly: "I swear by Almighty God to uphold the Republican system with loyalty, to respect the Constitution and the law, and to look after the interests of the people fully and to safeguard the independence and territorial integrity of the motherland."

See ABROGATED EGYPTIAN CONSTITUTION, *supra* note 73, at arts. 73, 74, & 79.

<sup>414</sup> *Id.*

<sup>415</sup> See generally Fared Zakria, *What the Mubarak Verdict Reveals about Egypt*, GPS, CNN WORLD, June 4, 2012. [Keep the citation and don't remove it since you eventually able to find it online].

<sup>416</sup> See ABROGATED EGYPTIAN CONSTITUTION, *supra* note 73, at arts. 155 & 156. [The link already cited in FN 73 and work correctly]

the criminal liability for the act or omission attributed to them.<sup>417</sup> Likewise, the Court based its verdict for conviction of the first two offenders on the former Vice President's and the Head of the SCAF's testimony and cross-examination.<sup>418</sup> Accordingly in this respect, the Court recited:

[...] [B]ased on all of the aforementioned legal, doctrinal, judicial principles, and in light of the legal definition of the criminal act (conduct) by omission, which means that "Passive/Negative criminal activity (omission) is a voluntary abstention or refraining from complying with a legal duty imposed upon an individual to act in particular circumstances...The legally protected interest is injured (or sometimes exposed to risk) by the mere fact of omission, or refraining from acting." "Criminal activity in these sorts of offenses is composed of two elements: omitting to abide by a legal obligation and the voluntary character of such omission."<sup>419</sup>

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<sup>417</sup> David Kirkpatrick, *New Turmoil in Egypt Greets Mixed Verdict for Mubarak*, THE N.Y. TIMES, MIDDLE EAST, June 2, 2012. Also, the Court stated that the Ex-Interior Minister said that he attended an urgent meeting on January 20, 2011 with all ministers at that time concerning the risky situation in Egypt. [Keep the citation and don't remove it, and you can find that on a microfilm at the main library or regularly online as an online article]

<sup>418</sup> Former Vice President 'Omar Suleiman testified that the Public Intelligent Apparatus caught and realized that some demonstrations will be emerge on January 25 and he discuss that issue with the first defendant Mubarak and told him that also there were armed criminal elements and get in conflict with the civilian protesters. Accordingly, Mubarak decided to hold urgent meeting to discuss the problem with the Ex-Prime Minister and the whole other ministers including the Interior Minister. By the same token, Field Marshal Tantawi testified that he was in contact via urgent meetings and phone callings with Mubarak within the course of the occasions and he updated him with the dangerous results of the protests which lead to the killing of the civilians and seriously bodily injuries, and he said implicitly: "that the President shall obliged within his constitutional and legal authority to issue significant orders and decisions to protect civilians, national security, and keep stability and public order of the State...Generally, every responsible person shall know his obligations and duties and should be committed to it...And logically, the Interior Minister—second defendant—should informed the first (Mubarak) with the whole imminent risk of the situation and its ancillary consequences, as it was impossible that the President have no ideas or conscious will about what is going on his nation..." In the same vein, both Ex-Interior Ministers Generals Mahmmoud Wagdy and Mansour El-'Esawy testified that the situation was risky and both defendants were failing to protect the civilian demonstrators from criminal gangs and thugs by their ignorance to take the immediate precautions and preventive security means to abstain the imminent risk within the normal course of the incidents which take place in *Tahrir* square.

<sup>419</sup> The Court alluded to the materiality of the act as being the rationale of criminalization and penalization, the object of evidence, the basis of sentencing, of ascertaining the criminal intent, and the criminal causal link, etc...In this case the Court stated that:

...a passive attitude shall not be treated as criminal activity unless it is a violation of a legal duty imposed on the individual to intervene...If the obligation is only imposed by moral rules or social traditions, not by law, failing to respect it will not be deemed an omission in the eye of the law. But if the duty to act is derived from a legal obligation, the source of the latter will be immaterial. An obligation might be imposed by a statute, contract, tort, and general principles of law...Abstention (omission) must be voluntary. It should be possible to conclude that the person abstaining has actually willed or was actually conscious of his omission. Omissions in criminal law are encountered in which law imposes specific duties on some individuals and punishes them if they fail to obey them. "[O]ffenses of commission might be perpetrated by *mere* omission provided other elements and conditions of criminal liability are realized. The issue of [causality] is no objection, for it suffices to remark that if the individual refraining has interfered he would have prevented the occurrence of the criminal result; since he did not and the result occurred, his omission is evidently the cause of the result." (This is

Thus, the Court based its conviction of punishing Mubarak and his Interior Minister being an accessories/accomplices to intentional homicide and attempted murder with same penalty according to Article 40(2) of the Penal Code which establishes the criminal liability for “any person who agrees with another to commit a crime that takes place on the basis of such agreement”, as they both had the criminal intention (free will and culpable knowledge) with knowledge for killing the protestors on the technical ground that they both failed to stop the killing; a rationale that attorneys said would not meet the usual requirements and considered low standard of proof in the criminal matters especially with murder conviction under either Egyptian or international law.<sup>420</sup> Furthermore, the Egyptian Criminal Code does not encompass a theory of command responsibility, which is only found in the Military Code.<sup>421</sup> The Egyptian Criminal Code also does not contain a theory of criminal responsibility for omission, unless specific intent can be proven for the failure to act.<sup>422</sup>

On the other hand, the Court said since it was very difficult to arrest and proofs the real perpetrators for the intentional homicide and its attempt, the judge acquitted several lower-ranking security officials of criminal responsibility for the same deaths, raising questions about the chain of command, as the Chief Justice criticized and blamed the prosecution for failing to provide concrete evidence that

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a manuscript of the court decision with my own translation as the original version is in Arabic, so keep the block quote, don't remove it as it is very significant in this regard, and refer to it as (author's translation) and a copy of the Arabic version of the verdict attached)

<sup>420</sup> See EGYPTIAN PENAL CODE, *supra* notes 350, at arts. 40 & 45. In this regard, Articles 234 & 235 of the Penal Code reads:

Any one kills a person without premeditation or deliberation is punished by life imprisonment or aggravated imprisonment...Accomplices to murder shall be punished by the same penalty imposed on the perpetrator which is death penalty or life imprisonment.

See EGYPTIAN PENAL CODE, *supra* note 350, at arts. 17, 234 & 235. Also, Articles 230 and 231 provide that the death penalty is the punishment for premeditated murder. Thus, Article 235 specifies that the accomplices to premeditated murder shall be sentenced to death or life in prison. That said, it should be noted, as mentioned earlier that Article 17 of the Penal Code gives the court discretion to substitute a prison sentence for a death sentence and a lenient sentence for a sentence of life in prison.

<sup>421</sup> See *generally* AHMAD 'AWAD BELAL, MABAD'E KANUN AL-'UQUBAT AL-MASRY: AL-KESM AL-'AMM [PRINCIPLES OF EGYPTIAN CRIMINAL LAW, THE GENERAL PART, BOOK 1: THE THEORY OF CRIMINAL OFFENCES] (Arabic/English Source 2004), 241-245. [This is an Arabic source and attached the first scanned pages for verification and I am sure about their accuracy and existence cited as this way in my upcoming article published by the 18 Golden Gate Annual Survey of International and Comparative Law 171 Spring 2012 and keeps them as I cited].

<sup>422</sup> *Id.*

police officers killed protesters.<sup>423</sup> But the dismissal of murder charges against a group of Mr. Al-'adly's aides and other security officials raised inquiries about which officials, if any, might be held more directly criminally liable.<sup>424</sup> At this point, the Court added in the merits of its ruling that what is attributed to punish both former President Mubarak and his Interior Minister based on refraining to act in accordance with law and such acts may be attributed to the rest of the defendants, but in different legal framework, because logically the legal position of Hosni Mubarak and Al-'adly are diverse from the legal positions for the rest of the other defendants, as Mubarak was the President of the Republic and Al-'adly, was his Interior Minister which enabling them to act, decide, and each of them has the authority to issue obeyed duties in eye

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<sup>423</sup> See *After Mubarak Verdict, Justice for Victims of Egypt's Old Regime Still Only a Distant Hope*, ASSOCIATED PRESS, June 3, 2012. ("The Court stated that the documents presented lacks any legitimate material evidences including the existence of any equipment, bullets, weapons, audio or video tapping and recording, wireless telecommunications or correspondence or papers or written or verbal instructions, etc...) to satisfy, reassure or persuade the court that the police officers and their members staff have the indigenious intention to kill the protestors or even have the self-lawful defense intention or even establishes the presumption that the police officers agreed or inciting or assisting the other criminal gangs to commit the facts of killing the demonstrators.") [It is in the Arabic article but not in direct way, I rephrased implicitly from the general meaning and translate into English and supported by the article I cited as it is closed to the ideas in the Arabic article that you will not find it online as there is no direct source to cite and from watching the trial itself online, the verdict copy, and hearing the judge reading the verdict, so, keep it and don't remove it as it is very important to understand very carefully the technical parts of the trial itself, All in the parenthesis in this regard, is my legal explanation in my own wording from the Egyptian criminal law approach and it will not direct explicit in the article. Also parts of this illustration came from the Arabic version of the verdict itself. Copy of the verdict attached and if you want to remove the quotation marks and keep my explanation without them, feel free to do so].

<sup>424</sup> *Id.* See also *Protests Erupt Across Egypt After Surprise Mubarak Verdict*, COMMON DREAMS, June 2, 2012 (Mubarak's sons and assistant ministers of interior acquittals causing outrage). ("The Court does not rest assured to what has been proven in the book records of the sectors of Central Security Forces ("CSF") data which tamper with proven which of the data or interference deletion or addition to these database in which those records were not count at the time of the events or even at the time period followed directly the course of the occasions, which makes the court skeptical of its accuracy, and the absence of such books from any instructions or directions indicated on the launch of the police officers to kill the demonstrators. The Court relied also on the lack of any technical evidence to prove that the death and injury of the victims have taken place of weapons, vehicles belonging to the police and this means—logically and legally—the separation of the criminal causality linkage between the killing/injury and the tool used and the extent attributable to a specific part which guarantee the court to keen on the availability of causal link between the criminal conduct and the criminal result (effect)...Furthermore, there is no obvious or clear evidence persuade the court by the existence of the elements of the crime of causing serious harm to the public interests or funds of their jobs or that the defendants had issued instructions to withdraw the police forces responsible for protecting public institutions and private property."). [It is in the Arabic article but not in direct way, I rephrased implicitly from the general meaning and translate into English and supported by the article I cited as it is closed to the ideas in the Arabic article that you will not find it online as there is no direct source to cite and from watching the trial itself online and hearing the judge reading his verdict, so, keep it and don't remove it as it is very important to understand very careful the technical parts of the trial itself, All in the parenthesis in this regard, is my legal explanation in my own wording from the Egyptian criminal law attitude and it will not direct explicit in the article. Also parts of this illustration came from the Arabic version of the verdict itself. Copy of the verdict attached and if you want to remove the quotation marks and keep my explanation without them, feel free to do so]

of the law and the rest of the accused does not have the same legal position as they just only possess the functional authority as they considered as an implementation tools in the hands of Mubarak and Al-'adly.<sup>425</sup> Also, the murder and attempted conviction has another procedural real legal effect that the Penal Law contains a set of particularly deterrent ancillary sanctions, such as stripping of rights and privileges relating to official functions and dismissal from office for up to ten years under Article 24;<sup>426</sup> disbarment from any public position or any public procurement opportunity, hindering of any decorations and medals including the military merits, and banning from eligibility under Article 25;<sup>427</sup> and disbarment from holding a governmental position under Article 26 of the above mentioned code.<sup>428</sup>

For the financial corruption crimes, Chief Justice Refa'at dismissed these charges against Mubarak, his sons, and their businessman friend Salem on technical grounds,<sup>429</sup> the judge ruled that a 10-year statute of limitations had expired and lapsed since Mubarak and his sons, allegedly received a set of luxurious Red Sea vacation homes (five villas) as a kickback from a Mubarak crony, Hussein Salem.<sup>430</sup>

The Court based its conviction on that the referral order charging Mubarak does not specify the Penal Code articles relevant to the bribery charge.<sup>431</sup> Instead, the order clusters together all the Penal Code articles relevant to a range of corruption charges against Mubarak, his sons, and Salem leaving indeterminate and uncertain, which legal provisions apply to which defendants.<sup>432</sup> The bribery charge against Mubarak appears to involve articles 103, 104, and 106bis, which criminalize a public official's demand or acceptance of a bribe to perform, or cease to perform, an

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<sup>425</sup> *Id.* See also EGYPTIAN CRIMINAL PROCEDURAL CODE, *supra* note 406, at art. 304.

<sup>426</sup> See EGYPTIAN PENAL CODE, *supra* note 350, at art. 24. In any event, a public official who commits a felony is also subject to disciplinary penalties, essentially a matter of administrative law rather than criminal law.

<sup>427</sup> If the judge imposes the felony punishment on the official, the official must be deprived of his rights and privileges as provided in Article 25 of the Penal Law. Thus, the official is dismissed from membership in general or local legislative bodies. The official may be shown leniency and convicted to a misdemeanor jail sentence in lieu of the felony penalty, in which case (under Article 27) he/she is banned from membership in legislative bodies for a period not less than twice the period of the applicable misdemeanor jail term. *Id.*, at arts. 25 & 27.

<sup>428</sup> *Id.*, at art. 26.

<sup>429</sup> Kirkpatrick, *supra* note 417. As a result, protesters angry at the flimsiness of the decision were pouring into *Tahrir* Square, the symbolic heart of the revolt.

<sup>430</sup> Mubarak is also charged with accepting a bribe from Hussein Salem, a resort developer who is his co-defendant, to exploit his influence and facilitate land concessions in *Sharm al-Sheikh* for a golf and tourism investment company Salem owns.

<sup>431</sup> See generally Joe Stork, *Egypt: Mubarak Conviction a Message for Next President. But Acquittal of Police Chiefs A Green Light to Future Abuse*, HUMAN RIGHTS WATCH, June 2, 2012.

<sup>432</sup> *Id.*

act within the scope of his authority or to use his actual or alleged influence to secure a license, concession, or benefit from a public authority.<sup>433</sup> The Court strictly illustrated in its legal qualified ruling the following legal concept:

[t]he offense specifically targets the act of influencing public officials through a triangular relationship between the briber, the trader in influence—who actually receives the bribe in order to obtain a favorable public decision—and the public official who grants an advantage to the briber. This may include intermediation, where an agent indicates to the company which is willing to grant valuable advantages that he or she is able to exert influence on a public official to obtain a decision favorable to the company. “And as this crime is classified as a continued criminal offense committed when it is fully completed even if the beneficial reject the peddler’s demand. Also, the non-use of influence (trading) does not constitute an element of the offense...”<sup>434</sup>

On the other hand, the Court assured that the purchase contracts of these villas are legally registered and recorded in the Office of the Real Estate Registry with a constant (fixed) date.<sup>435</sup> The case lacks any evidences persuade the court that the

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<sup>433</sup> “Requesting” or “soliciting” a bribe occurs when an official indicates to another person that the latter must pay a bribe in order for the official to act or refrain from acting. Articles 103-105/b of the Criminal Code covers such situations. The soliciting of a bribe must be in consideration of one of the following acts performed by a public official:

- a) performing a duty that falls within the scope of his or her competences (Article 103);
- b) performing a duty that is wrongfully considered as falling within the scope of his or her duties (Article 103bis);
- c) abstaining from carrying out a duty falling within the scope of his work, or committing a breach of any of his duties (Article 104);
- d) doing any of the following, but unintentionally carrying out a duty that falls within the scope of his or her work, or which is wrongly thought to fall within his or her scope of work; or pretending that it falls within his or her scope of work, or abstaining from carrying it out; or committing a breach of his or duties (Article 104bis);
- e) accepting a gift from a person in return for rendering a service that falls within the scope of his or her work (Article 105);
- f) performing or abstaining from carrying out a duty falling within the scope of his or her work, or committing a breach of his duties as the result of a request, recommendation, or intermediation (Article 105bis);

Additionally, Article 106/b criminalizes the use of real or fake authority to obtain, or attempt to obtain, any official order, decision, emblem, delivery order, construction contract, employment, favor, or advantage of any kind (e.g. the action of receiving from or giving rewards to public officials to influence decisions). Furthermore, Article 106bis of the same code proscribes the abuse of real or supposed influence for private gain or obtaining undue advantage, whether the wrongdoer is a public official or not. See EGYPTIAN PENAL CODE, *supra* note 350, at arts. 103, 103bis, 104, 104bis, 105, 105bis, 106 & 106bis. (The Code Attached)

<sup>434</sup> *Id.* Influence trafficking’s punishment shall be imprisonment for up to two years for the briber or a fine as a pecuniary sanction of EGP 200.00 and up to EGP 500.00 or by one of both sanctions. The same penalties are applicable to bribe-takers acting in ways set forth in Article 104, i.e. refraining from performing their work or defaulting on their duties. (This is my own wordings and the Code Attached)

<sup>435</sup> See *generally Protests Heat up After Mubarak Given Life Sentence*, ASSOCIATED PRESS, June 2, 2012. (Keep source as it fit what I said in an implicit way, don’t remove. For more support, this is one closet source to promote my argument in text, See *generally* Maggie Michael, Aya Batrawy, and Sarah El-Deeb, *Sentence for Egypt’s Mubarak; Sons Acquitted*, ASSOCIATED PRESS, June 2, 2012, available at <http://www.foxnews.com/world/2012/06/02/egypt-ex-leader-mubarak-faces-verdict-in->

documents which need to be cut rigging or forgery of any of these contracts, which concludes with the court to that the legal effect of the ownership (property) transferability of these villas referred to the date of registration of the purchase contracts from the owner.<sup>436</sup> Accordingly, having this date is the date of taking the first defendant (Mubarak) for himself and his two sons ('Alaa and Gamal) the kickback of the second defendant (Salem), and this is the date of the abuse of power crime assigned to the first defendant on January 14, 2000 and starts from the date of calculating the period of prescription for criminal proceedings arising from this felony and the subsequent charges attributable to other defendants in the same range.<sup>437</sup> In this context, the Court explained as follows:

In terms of what it was to be legally listed as advanced in accordance with the provisions of Article 15 of the Code of the Criminal Procedure that the call for criminal felonies shall expire at the lapse of ten years from the day of the crime committed.<sup>438</sup> And then the criminal case dismissed at the arising from the use of influence, a felony assigned to the first defendant (Mubarak) on October 5, 2010.<sup>439</sup>

Based on the facts and the merits presented by the prosecution, the Court attributed to the second defendant, Hussein Salem the crime under Article 107bis of the Penal Code, which stipulates that: "The briber and the mediator...shall be punished with the [same] penalty prescribed for the bribe-taker." In this domain, the Criminal Court commented:

In accordance with Articles 107 and 107bis, an illegal promise is created by any benefit obtained or accepted by the public official. "Giving" occurs when the briber actually transfers the bribe. These acts constitute active bribery. By the same token, under Article 107bis, an illegal gift is "any benefit obtained or accepted by the public official." Under Article 107bis of the same statute, the briber and the intermediary are considered accomplices in the

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cairo/#ixzz26Dx9NGKDLife, ("Former President Hosni Mubarak got a life sentence for failing to stop the killing of protesters during Egypt's uprising. But he and his sons were cleared of corruption charges, setting off protests for greater accountability for 30 years of abuses under the old regime."))

<sup>436</sup> *Id.*=Michael, Batrawy, and El-Deeb. See also Johannes Stern, *The Mubarak Verdict*, INTERNATIONAL COMMITTEE OF THE FOURTH INTERNATIONAL ("ICFI"), 5 June, 2012, available at <http://www.wsws.org/articles/2012/jun2012/pers-j05.shtml>. (Keep source as it fit what I said in implicit way, don't remove).

<sup>437</sup> *Id.* (*Id.*= the first previous source in FN 436 "Michael, Batrawy, and El-Deeb". Keep source as it fit what I said in implicit way, don't remove ).

<sup>438</sup> *Id.* (*Id.*= the previous source in FN 436 "Michael, Batrawy, and El-Deeb. Keep source as it fit what I said in implicit way, don't remove).

<sup>439</sup> *Id.* For further discussion regarding the charges and the verdict in details, see generally HEISIEIAT AL-HUKUM FI QADIAT MUBARAK [The Legal Reasoning of the Mubarak Verdict Ruling], AL-AHRAM, June 7, 2012 (in Arabic) (on file with author). (Keep the citation and don't remove it, a copy of the verdict Attached)

crime of bribery if it takes place, and shall receive the same punishment as the bribe-taker. With the exception of ancillary sanctions, penalties for bribers and intermediaries are indexed to sentences passed on public officials...In this respect, Article 108bis of the Penal Code reads «everyone intermediate to take 'attiyah ("benefit") or interest or aware of it and accepted by the bribee to take it with the knowledge shall be punished by imprisonment for not less than one year and a fine equal to the value given or promised if it had not mediate the bribery. » Revealed on that, these are the crimes attributed to the second, third, and fourth defendants...that the date of transfer of ownership of the five villas referred to the registration date of the purchase contracts and thus this date is the date of submission of the bribe/kickback from the second accused (Salem) which considered the same date of the 'attiyah acceptance from the third and fourth defendants ('Alaa and Gamal) ...[H]aving this date is the date of commission and the same offense fully assigned to the second defendant is the similar date of the offense attributed fully to Mubarak's sons.<sup>440</sup>

Accordingly the Court has concluded that January 14, 2000, is the date in which the limitation statutes lapse period calculated and the first measure proscribed (boycotted) the statute of limitations in this criminal motion.<sup>441</sup> In this regard, Article 15 of the Egyptian Criminal Procedural Code reads:

Dismissal of the criminal motion (action) concerning felonies lapse of ten years from the day of the crime committed, in misdemeanors lapse of three years, and in infractions (contraventions) lapse of one year unless the law provides otherwise. As in the crimes stipulated in Articles 117, 126, 127, 282, 309, 309bis (a) and the offenses set forth in Section I of Part II of Book II of the Penal Code, which takes place after the date of this law does not dismissed the criminal action arising by lapse of the statutes of limitations. Without any prejudice or violation to the provisions of the preceding two paragraphs in which the lapse period do not start within the duration of the proceedings in the criminal offenses set forth in Part IV of the Second Book

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<sup>440</sup> *Id.* On the other hand, Article 18 of the Egyptian Criminal Procedural Code reads that: "If there are several defendants, the interruption duration for one of them result in interruption for the rest of what had taken were not conclusive action against them for the duration." See EGYPTIAN CRIMINAL PROCEDURAL CODE, *supra* note 406, at art. 18. (A copy of the code attached)

<sup>441</sup> Tariq Mohammad testified on May 18, 2011 within the criminal investigations phase which represents the—proscribed procedure for the criminal action lapse—that the criminal case arising from the offense alleged to the second defendant had been lapsed of ten years on October 15, 2010. Likewise, the criminal case arising from the offense assigned to each of the third and fourth defendants had been time-barred based on the lapse of three years from the date of the crime committed on October 10, 2003, pursuant to Article 15 of the Code of Criminal Procedure. The court at that point does not convinced by the evidences presented by the prosecution which make this crime so weak as it just stated that new constructions without any determinate date of the construction process, etc... for these villas had been started and some other undocumented doubtful evidential proofs. (My own wordings from the general understanding of the events surrounding the trial and does not need to be cited, keep it and don't remove it. Also, I used the verdict Arabic version and a copy of the Arabic version attached. You can also use this source for more support, See POLICE TESTIFY IN MUBARAK TRIAL AMID CLASHES, ALJAZEERA, MIDDLE EAST, Sep. 5, 2011, at <http://www.aljazeera.com/news/middleeast/.../20119517859820792.html>. ("Police witness "not aware" of order to fire on protesters as scuffles break out at trial of Egypt's Former President.")

of the Penal Code, which lies only from a public official from the date of resignation or dismissal of such an investigation unless before that.<sup>442</sup>

Concerning the third corruption offense alleged to Mubarak, the Court based its innocence on the testimony of 'Omar Suleiman that he said "the first defendant in question did not intervene in the pricing of exporting Egyptian natural gas to the State of Israel through the East Mediterranean Gas Corporation, and the price limited by the Petroleum Authority."<sup>443</sup> In terms of that, and as well as the above, the Court does not see nothing wrong in the statement that the Attorney General in the field of assigning the merits of these crimes that the first defendant (Mubarak) in interrogation has agreed<sup>444</sup> with the Former Minister of Petroleum (Fahmy), to allege

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<sup>442</sup> See EGYPTIAN CRIMINAL PROCEDURAL CODE, *supra* note 406, at art. 15. Article 17 of the same Code Provides:

Uninterrupted period of investigative proceedings or charge or trial, as well as the matter of criminal procedures or inference if taken against the accused or if officially notified, the formal lapse period will start within a new drop (boycott/cut-off). And if there are several procedures that cut off period, the validity period starts from the date of last action. *Id.*, at art. 17. (A copy of the code attached)

<sup>443</sup> Further, he explained that the details of the contract, quantity, and the sale prices are not presented to the former President. Thus, the court was assured and persuaded by Suleiman's testimony that «defendant Mohamed Hosni Mubarak has nothing to do regarding the exportation of Egyptian natural gas to Israel or determine the price of export and the responsible part for price determination is the Petroleum Authority». Also, the Court assured acknowledged by the investigations and the former Minister of Petroleum, Amin Sameh Samir Amin Fahmy of the Council of Ministers is the decision to export Egyptian natural gas to the State of Israel, and determine the quantity and price and that it is related to Mubarak. Moreover, the Court assured that what was testified by 'Atef 'Ebeid, former Prime-Minister during the criminal investigations concerning this case, that the contract was concluded by the former Minister of Petroleum, and that the Council of Ministers—under his chairmanship—and agreed to the quantities and price listed and presented by Fahmy. The court applies the same principles with complete assurance that this agreement was concluded within the consent of the Council of Ministers and the Ex-Minister of Petroleum. (My own wordings from the general understanding of the events surrounding the trial and does not need to be cited, keep it and don't remove it. Also, I used the verdict Arabic version and a copy of the Arabic version attached)

<sup>444</sup> Article 115 of the Egyptian Penal Code reads:

Any public official obtain or try to obtain for himself or another party illicitly a private interest, benefit, or profit from his public job shall be punished by aggravated imprisonment.

In the same vein, Article 116bis of the same statute provides:

Any public official intentionally harm by negligent or recklessness the funds to the interests of his public job or neglect/harm the third's party funds or interests, shall be punished by aggravated imprisonment. And if the harm caused is not that serious, shall be punished by imprisonment.

See EGYPTIAN PENAL CODE, *supra* note 350, at arts. 115 & 116bis. As prosecution charged Mubarak with being an accomplice to the former Petroleum Minister, Sameh Fahmy, in improperly authorizing another Salem-controlled company, the *East Mediterranean Gas Company*, to export Egyptian natural gas to Israel for prices lower than those in the international markets, granting an illicit benefit to Salem's company and harming public coffers. This charge appears to involve Penal Code Articles 40(2) and 40(3), which establish criminal liability for agreeing with another to commit a crime or to intentionally provide assistance to another to commit the crime, as well as Article 116bis which prohibits any public employee from intentionally harming the funds and interests of a public authority.

something to sell and export the Egyptian natural gas to Israel within a lower prices than the standard market prices through East Mediterranean Gas Company.<sup>445</sup>

Mubarak's sons remain in jail—Torah prison, the same jail where their father sentenced—while they awaiting criminal trial on charges in an unrelated insider trading and stock-markets manipulation dealings case.<sup>446</sup> In light of these legal problems, an appeal by Mubarak to the Egyptian Supreme Court (“Court of Cassation/mahkamat al-naqd”) is likely to succeed and doomed to reversal on appeal of the conviction.<sup>447</sup> The General Prosecutor appeals the verdict in former Egypt President Hosni Mubarak's trial.<sup>448</sup>

#### (6) *Political approaches versus legal attitudes*

This is the first trial of a former Arab leader in an ordinary court of law in which the defendant has personally appeared in court since waves of street protests hit the Arab world in December 2010. Zine el-'Abidine Ben 'Ali of Tunisia was tried in absentia in late 2011; Saddam Hussein of Iraq was tried before a special tribunal in 2005 and 2006.<sup>449</sup> On the other hand, Mubarak's trial has the potential to set a meaningful regional precedent for accountability for human rights abuses and for upholding international fair trial standards.<sup>450</sup> In the trial of a man who ruled the country for 30 years and was forced out of power by a popular uprising, politics are bound to interfere.<sup>451</sup> But several were worried that the prosecution is counting too much on political resentment—which is real—and neglecting to build a strong case based in law, but all acted under the extraordinary political pressures unleashed by

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<sup>445</sup> See *Former Minister's Israel Gas Trial to Resume on Wednesday*, AHRAM ONLINE, May 1, 2012 (Sameh Fahmy, accused of corruption in relation to the Israeli gas deal, will be transferred to a prison closer to hospital because of his deteriorating health). See also *Tamsin Carlisle, Corruption Inquiry Focus on Egyptian Gas Contract*, THE NATIONAL, Apr. 26, 2011.

<sup>446</sup> See *Financial Corruption Trial for Mubarak's Sons to Begin 9 July*, EGYPT INDEPENDENT, June 12, 2012.

<sup>447</sup> Hamza Hendawi, *Egyptian Prosecutor to Appeal Mubarak Trial Verdicts*, ASSOCIATED PRESS, June 4, 2012.

<sup>448</sup> Alana Horowitz, *Mubarak Verdict To Be Appealed By Top Prosecutor*, THE HUFFINGTON POST, June 3, 2012. (“The state prosecutor's office had already ordered the start of the appeals process, without providing any details about the appeal.”).

<sup>449</sup> See YOLANDE KNELL, *Mubarak Verdict: Searching for 'Justice'*, BBC NEWS, Cairo, June 1, 2012.

<sup>450</sup> *Id.* (“Mubarak has his supporters and many Egyptians do not want to see him disgraced.”).

<sup>451</sup> *Id.*

the revolution, and the lack of transparency has invited conspiracy theories about behind-the-scenes machinations.<sup>452</sup>

Human rights attorneys stated that “The prosecutor’s speech was political and a public opinion pleaser, but legally it does not add anything to the case.”<sup>453</sup> In the first day of the prosecutor’s remarks, public prosecutor gave a resonant and prosperous speech where he praised the revolution that brought Mubarak down and dug into the corruption of the deposed President’s 30 years in power.<sup>454</sup> Prosecution accused Mubarak of corrupting political life in Egypt, and forging the people’s will by rigging elections.<sup>455</sup> He also accused him of oppressing anyone that challenged his rule, paving the ground for his son Gamal to become President, and of halting development in Egypt as a whole.<sup>456</sup>

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<sup>452</sup> *Id.* (“The banner reads: ‘The gallows awaits you Mubarak.’”) (Other demonstrators brandished nooses to symbolize the sentence they sought. “We wanted them to be slaughtered...”).

<sup>453</sup> See YASMINE EL-RASHIDI, *A Revolution Stalled? Scenes from Mubarak’s Trial*, N.Y. REV., (Aug. 8, 2011), <http://www.nybooks.com/.../egypt-revolution-stalled-scenes-mubaraks-trial>. (last retrieved May 28, 2012).

<sup>454</sup> El-dakak, *supra* note 97. See also *Mubarak and Minister Sentenced to Life, Sons Go Free*, AGENCE FRANCE PRESSE, June 2, 2012.

<sup>455</sup> *Id.* (“In any event, Instead of a sweeping examination the systemic abuses of the Mubarak government, the prosecutors rushed the case to trial in an apparent attempt to placate street protesters.”).

<sup>456</sup> While the prosecutor’s speech encompassed all fallen President’s wrongdoings in past years, the charges against Mubarak only hold him accountable for a handful of incidents of financial corruption and the killing of protesters in January uprising. Mubarak’s regime has adopted three steps to execute the succession scenario. First, it has designed a careful campaign to market *Gamal* Mubarak domestically and internationally. (“Mubarak disrespected the constitution and circumvented the will of the nation, enforcing constitutional amendments without a popular referendum in 2005 and after.”) (“He presented by the NDP as a *man of people* and true liberal and reformer, a man uniquely qualified to be Egypt’s next President...His views receive extensive coverage, similar to that accorded in the United States to a President—elect: front-page covered in both the official and semiofficial press, delivered presentations to enraptured audiences, listening quietly during a Cabinet meetings, and sitting between his father’s advisors”). See generally MONA EL-GHONBASHY, *Egypt’s Summer of Discontent* (2003). See also JOSHUA STACHER, *Egypt: A Leap Toward Reform or Succession?* 4 ARAB REFORM BULLETIN 8, (Oct. 2006). Second, it has prepared *Gamal* with the political experience required for leadership. (“Mubarak learned the importance of giving his son significant policy responsibility well in advance of succession to preempt international criticism. In 2000, he appointed him to the NDP general secretariat, after which he began travelling official visits and appeared increasingly in the Egyptian media. He tried to make reform in which he recruited a circle of young, reform-minded businesspeople and technocrats to write policy papers addressing Egypt’s’ most essential issues.”) (“*Gamal* may be getting political experience to rule a big country like Egypt...His persistent focus on US-Egyptian strategic relations is considered evidence that he approved of the despised American Middle East policy. This, along with his slavish imitation of his father’s behavior and policies, made him repulsive to the Egyptian people.”). *Id.* See Yotam Feldner, *Egypt’s Succession: Part I: Will Egypt Follow Syria’s Precedent?*, 31 THE MIDDLE EAST MEDIA RESEARCH INSTITUTE (“MEMRI”), July 24, 2000. Third, it has begun replacing the old conservatives in the state apparatus with *Gamal* and his associates. (“*Gamal* tried to insert some of his associates and friends to the Cabinet Ministers and removed those who had become a heavy burden on the regime. He did not deny his influence in selecting the newcomers, and in fact considers it a feather in his cap.”). Now and after the January revolution, the game was almost over, and *Gamal’s* path to the presidency is essentially gone done!! *Id.* See GAMAL ESSAM EL-DIN, *Gamal Mubarak’s Coup D’état*, AL-ARABI, (Feb. 5, 2006). See also

Last but not least, the paradox between the strength of the case's political side and the weakness of its criminal one is the result of a tradition inculcated in the prosecution throughout Mubarak's reign: to pay more attention to political than legal concerns.<sup>457</sup> Even though, it is acknowledged that political pressure for a fast verdict denied time to the prosecution to perform its task properly, thus, the prosecution should be held accountable as well for failing to build a strong case against Mubarak. According to the Egyptian law, the prosecution could have turned some of its political indictments against Mubarak into legal charges as well as prosecution should be blamed for neglecting to collect imperative evidences in the Trial of the Century.<sup>458</sup>

#### **IV. Heads of states and leaders accountability today and future: conclusions and policy recommendations**

The persons brought to trial were narrowly selected from a much larger potential pool, and the charges brought against them were limited. They did not include publicly known corrupt events that could have been added to the charges. Mubarak landmark case was hastily investigated, presumably, due to the public demands for immediate action. This trial is Egypt's most significant step yet toward establishing the principle that "no leader is above the law."

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GAMAL ESSAM EL-DIN, *Meeting the Press*, AL-AHRAM WKLY, (Aug. 5-11, 2004), GAMAL ESSAM EL-DIN, *Mubarak and the Americans*, AL-ARABI, (Sep. 22, 2006). DANIEL WILLIAMS, *Clearing the Path for Scion of Egypt*, THE WASHINGTON POST FOREIGN SERVICE, (Mar. 10, 2006; 2:19 AM).

<sup>457</sup> El-Rashidi, *supra* note 453. ("Part of this painful but necessary process is a shift from a system of rule by law system to rule of law. No one, no matter how powerful, should be above the law.")

<sup>458</sup> In this sense, Egyptian Criminal Procedural Law singles out the *Parquet*—Public Prosecution Authorities—as the sole body responsible for setting criminal actions in motion and for the pursuit thereof. The first Article of this law and its recent amendments states: "The Public Prosecutor is the only competent authority and no other power initiates the criminal procedural action except by the virtue of law or within the circumstances prescribed by law." See EGYPTIAN CRIMINAL PROCEDURAL CODE, *supra* note 406, at art. 1(Egypt). In this regard, obligatory prosecutes is a general rule of criminal procedure. Yet an exception to this obligation is allowed under the principle of "discretionary prosecution." Under this principle, the prosecuting authorities decide whether to bring a prosecution or halt proceedings. Prosecution means initiating public proceedings and referring the case to an investigating magistrate where they exist, or to a court. On the other hand, it means putting an end to the procedure that might have been initiated and results in no public proceedings. Also, the absence of a direct victim, the lack of serious and consistent evidence, the insignificance of the harm done, but also other discretionary considerations external to the case itself may all lie behind a decision to shelve a case. However, the principle of "mandatory prosecution" means that all offenses which come to the attention of the prosecuting authorities should be automatically prosecuted. ("The prosecution also stated during closing arguments that the Interior Ministry and the National Security branch of the General Intelligence Services had not cooperated with prosecutors in gathering evidence for this case or providing relevant information or documents.").

The inquiry arises with numerous jurists and legal scholars in Egypt concerning the charges brought and whether the evidence presented in court in this case can sustain a conviction. This places the judges in a difficult position if they are to act conscientiously in applying the law. They may find many of these persons innocent of the charges brought against them. Alternatively, they may respond to the pressures of public opinion and convict persons who on a technical legal basis should not be convicted of the crimes charged based on the evidence presented. It is obvious that the outcome of Mubarak trial was not satisfying the general public, and it is feared that a backlash against the judiciary occur. Already the integrity and independence of the judiciary is being questioned by many sectors of the Egyptian public. The danger is likely to be that demands for such trials shall constrain judicial processes, reduce the rights of the defendants, and would have serious harmful effects on the rule of law in Egypt.

Not to be overlooked, Mubarak's trial will have significant physiological and sociological effects on the Egyptian people and Arabs throughout the region. Historically, Mubarak and his predecessors were regarded as untouchable and irreproachable pharaohs who governed the country with absolute powers. Yet, this mode of governance, which has existed in Egypt and the Arab world thus far, could end with outcome of Mubarak's trial.<sup>459</sup> "It is unclear what the social impact of this trial will be, but it is [likely] that it will contribute to a shift in the Egyptian and Arab psyche that had always revered authority, shunned dissent, and rejected the questioning or criticism of those elders who wielded power."

The Islamic model of leadership emphasizes "khuluq" or behaving ethically towards all (Muslims and non-Muslims) alike. Firmly grounded by his/her faith in God, and mindful of his/her role as a trustee, a Muslim leader is expected to be just, behave righteously, strive towards self-improvement, and never break his/her word. He/She is to consult with others, especially in areas where he/she is not competent. He/She is expected to bear adversity patiently, and remain forever humble.

Hopefully historians and political analysts will record the significance of the Mubarak trial. It was the first time that a Head of State was forced to resign by peaceful popular demand and was put on trial for at least some of his faults and

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<sup>459</sup> Hossam Bahgat, The Director of the Egyptian Initiative for Personal Rights said—in which the author in favor of his statement—from outside the courthouse that: ("The Trial is far from Over," "We will be in this for Years.").

misdeeds. For sure he should have been prosecuted for so much more than he was, among them the systematic policy of torture and brutality which he has reinforced for 30 years and which is estimated to have resulted in the physical mistreatment and the torture of some people per year. Why this outrageous and offensive practice was not involved in the charges can be explicated by the fact that they include several persons from the regime, including the military. Likewise, many will ask why so many publicly known policies and practices of corruption and abuses of power ordered by Mubarak, or known to have taken place by his consent or acquiescence were not prosecuted, and this also remains an unanswered and equivocal query. But then maybe the answer is the same as above, it simply contain too several people who are either still in office or still operate in the corridors of power.

To conclude, for the lawyers and policymakers working on the front lines of this issue today, it is important to recognize the current debates which still open the floor and the door for help to develop the norms that will guide and bind the national and global community in its response to this sort of liability in the future. Correspondingly, a coherent national and international solution for this sort of responsibility in the light of global implications not only in Egypt but throughout the whole Middle East is a sector ripe for reform for the so-called the “The Arab Spring.”

When all is said and done some will say the glass is half full while others will say it is half empty. I believe the glass to be half full. The revolution has achieved some successes but Egypt has a long way to go, not only to achieve democracy and the rule of law, but also to accomplish economic development and to regain its place as the leader of the Arab World and an important Skeleton contributor to peace and stability in the region.

“Injustice anywhere is a threat to justice everywhere”

Dr. Martin Luther King Jr.