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**The American University in Cairo**

**School of Global Affairs and Public Policy**

**UNJUSTIFIED PUNISHMENT:  
A RECIPE FOR FAILURE IN EGYPT**

**A Thesis Submitted to the**

**Department of Law**

**in partial fulfillment of the requirements for  
the LL.M. Degree in International and Comparative Law**

**By**

**Hend Hanafy**

**June 2016**

The American University in Cairo  
School of Global Affairs and Public Policy

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A Thesis Submitted by

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to the Department of Law

May 2016

in partial fulfillment of the requirements for the  
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The American University in Cairo  
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UNJUSTIFIED PUNISHMENT:  
A RECIPE FOR FAILURE IN EGYPT

Hend Hanafy

Supervised by Professor Jason Becket

ABSTRACT

Since the beginning of a new phase of governance in Egypt on the 3<sup>rd</sup> of July 2013, there has been a remarkable trend of using punishment as a mechanism for repression to control of the public realm in relation to protests, civil society organizations' work, and political opposition dissent, especially regarding Muslim Brotherhood organization. This paper argues that such use of punishment though possibly successful in the short run is likely to fail in the long run. Such failure is due to the lack of moral and philosophical justifications of punishment, whether based on consequentialism or retributivism theories of punishment. Further, such unjustified punishment decreases the legitimacy of the Egyptian regime, thus increasing the likelihood of political instability and dissent.

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## I. Introduction:

In a book assessing the Arab Spring series of revolutions, David McMurray and Amanda Ufheil-Somers describe the use of law in the Mubarak era as a repression mechanism to control dissent and political opposition as being one of the leading reasons to the revolution:

The law was another tool of repression under Mubarak, used to cudgel dissenting political voices and to institutionalize the power of the executive branch. Civil society groups were heavily restricted by laws controlling their funding and the nature of their operations. Anti-terrorism laws gave cover to the regime's attacks on Islamist groups such as the Muslim Brothers.<sup>1</sup>

The problem with this description of Mubarak's era, is that it still equally applies to Egypt now five years after the Revolution.

In the 25<sup>th</sup> of January Revolution, Egyptians ate, slept, and demonstrated in the streets for 18 consecutive days demanding the fall of Mubarak's regime.<sup>2</sup> Thirty years of non-democratic governance, deterioration of public services, institutionalization of corruption, high rates of inflation and unemployment finally triggered people's public anger.<sup>3</sup> They demanded freedom, social justice and democracy.

Five years on - 2016 - and worries remain about Egypt's path towards democracy. One of the main reasons behind these worries is the state's use of punishment as a mechanism of repression in dealing with perceived stability-related issues. Whether such instability threats are seen as coming from the press, the youth who participated in the revolution, political opposition groups, Muslim Brotherhood or civil society organizations.

To clarify, when protests continued against the government following the Revolution, the interim president Adly Mansour as acting legislator, issued the protests law with severe punishment for those who demonstrated against the public order or interfered with the course of justice.<sup>4</sup> Further, when the state wanted to eliminate the existence of civil society organizations in Egypt, to avoid their monitoring of the status

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<sup>1</sup> MCMURRAY, DAVID, UFHEIL-SOMERS, AMANDA THE ARAB REVOLTS: DISPATCHES ON MILITANT DEMOCRACY IN THE MIDDLE EAST 58, ( Indiana University Press, 2013)

<sup>2</sup> See *Hatem Maher, Wael Eskandar, Timeline: Egypt's year of revolution, ahramonline, 2015*

<sup>3</sup> AMIN GALAL, EGYPT IN THE ERA OF HOSNI MUBARAK (I.B.Tauris 2012)

<sup>4</sup> Law 107/2013, Article 7, *Aljaryda Al Rasmya*, issue 47 bis, 24<sup>th</sup> Nov 2013

of freedom and democracy in Egypt, it amended article 78 of the penal code to criminalize the receiving of foreign funds, arms or “any other thing”<sup>5</sup> for the purpose of harming national interests, unity of the country or public peace.<sup>6</sup> The punishment for this crime became lifetime imprisonment with the death sentence in certain cases.

Moreover, after the ouster of Muhammed Morsi and the subsequent sit-in in Rabaa’ by Morsi supporters, which ended in mass casualties and deaths,<sup>7</sup> the state faced the problem of the Muslim Brotherhood’s claims of Morsi’s legitimacy which threaten the current governing authority. Accordingly, it declared the Muslim Brotherhood a terrorist organization and issued the anti-terrorism law which included severe punishment in the form of long sentences, lifetime imprisonment and the death penalty.<sup>8</sup>

The more the Egyptian state is threatened with a loss of control, the more it issues laws with severe levels of punishment in attempts to maintain control of the social and political situation in Egypt. Such use of punishment triggers worries and questions about how and why the Egyptian regime is using punishment as a means of repression and control. Further, it incites asking whether this punishment is justified and legitimate, and if not, what the effects are over the long run.

This paper claims that the Egyptian regime is using punishment as a repression mechanism to maintain control of the public realm in the short run, however such use of punishment will likely fail in the long run. This failure is due to the lack of moral and philosophical justifications for punishment, whether in terms of achieving greater good consequences such as deterrence and/or moral reform, or in terms of applying just deserts and achieving justice. Further, the lack of justification renders punishment illegitimate. Such illegitimacy is likely to result in an increase in dissent and potential revolts against the government.

The paper is divided into two main parts. The first part is devoted to an analysis of the political situation in Egypt as a way of establishing the context within which punishment is being assessed, as well as an analysis of how the Egyptian regime uses

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<sup>5</sup> Egyptian Criminal Law, Second Book, First Section, article 78

<sup>6</sup> *Id.*

<sup>7</sup> See Menan Khater, *607 protesters died in Rabaa’ Al-Adaweya sit-in: Committee report*, Daily News Egypt, 2014, available at <http://www.dailynewsegypt.com/2014/11/26/607-protesters-died-rabaa-al-adaweya-sit-committee-report/>

<sup>8</sup> Law 94/2015, First Part, Second Chapter, Aljaryda Al Rasmia, issue 33 bis, 15<sup>th</sup> Aug 2015

punishment to control the public realm and the possible purposes it intends from this use. The second part analyzes the two main schools of thought in the justification of punishment, namely: consequentialism (especially deterrence and moral reform) and retributivism, with the overall aim of proving that the Egyptian regime's use of punishment fails to satisfy these theories' requirements for justification. Further, it explores the illegitimate nature of unjustified punishment as a means of repression and why it is likely to increase the possibility of dissent against the government.

## **II. Democracy, Authoritarianism & Punishment**

The Arab Spring revolutions generally and the Egyptian revolution specifically has triggered a great number of scholarly writings to describe and analyze what happened, how and why it happened as well as to speculate on the future outcomes of these massive political movements. Five years after the Egyptian revolution, I believe it is an appropriate time to analyze what has transpired since the events of January 2011.

Is Egypt moving on the way towards achieving democracy? Or is it moving back towards an even more autocratic form of governance than under Mubarak? What is the role that punishment plays in this context? And how does it affect the manner in which Egyptians are governed? Answers to these questions are analyzed in the two upcoming sections.

### **A. Egypt Path Towards Democracy**

It is indeed too soon to answer whether Egypt have achieved democracy yet or not. The development of such a model of governance, requires years of building strong institutions, political participation, transparency, accountability and trust between the government and the people. However, it is not too early to examine whether there is a movement towards building a democratic foundation versus drifting towards reviving an old dictatorship.

This analysis focuses on the period after the 30 June 2013 protests following the ouster of Morsi for two reasons. First, the first two years post the revolution do not provide a stable enough political governing authority to judge, as this time was filled with struggles concerning the shape of the state, the constitution, the formation of parties, of parliament and the contributions of the young generation in governance. It also witnessed the ouster of the first elected president as a result of his attempts to monopolize state powers for the sake of Muslim Brotherhood interests.<sup>9</sup>

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<sup>9</sup> See Brian Dunlap, *What were the primary reasons that the Egyptian military removed Morsi from the Presidency?*, Quora, ( Aug 2013) available at <https://www.quora.com/What-were-the-primary-reasons-that-the-Egyptian-military-removed-Morsi-from-the-Presidency> and, Mark Gollom, *Analysis: How Dictatorial is Egypt's Morsi*, CBC News, (Nov 2012) available at <http://www.cbc.ca/news/world/how-dictatorial-is-egypt-s-morsi-1.1181795>

Secondly, the 30 June protests marked a moment of renewing people's faith in their ability to change the governing authority and to fight threats of authoritarianism. This is seen in the mass number of protesters and the diversity of those participating. It also witnessed the introduction of a new road map towards democracy as announced by El-Sisi with support from several parties and public figures.<sup>10</sup>

Accordingly, in order to analyze whether Egypt is moving towards democracy, it is indeed important to first settle what is meant by democracy as the term's meaning is highly contested in the literature.

The common understanding usually associated with democracy is its being a form of governance that includes the exercise of the power of the people through a system of representation as illustrated in periodic free elections.<sup>11</sup> However, this common meaning is in fact subject to disagreement among scholars. Rather, what most of them do agree on is that democracy is a contested concept by nature, and that it cannot be applied on all nations in the same form.<sup>12</sup>

In fact, according to Bernard, democracy can never mean the same to all; it is a concept that reflects, in every definition, the different social, moral and political agendas of each culture and nation.<sup>13</sup> Whitehead as well agrees recognizing that the concept of democracy resists the idea of a universally applicable definition as "all worthwhile conceptions of democracy must incorporate a cognitive capacity to challenge reigning orthodoxies."<sup>14</sup> Accordingly, what she concludes is that what we can agree on is that democracy has some indispensable elements without which the concept would be vacuous, for example; accountability, citizenship and deliberation. However, what these elements mean should be left open to a range of various

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<sup>10</sup> Alaa al-Aswany, *Morsi's Ouster a Triumph for Democracy*, Al-Monitor, (July 2013), available at <http://www.al-monitor.com/pulse/politics/2013/07/alaa-aswany-morsi-overthrow-threat-mubarak-regime.html>

<sup>11</sup> Payne, James L., *Making the World Safe for Muddle: The Meaning of Democracy in American Foreign Policy*, 13 *Independent Review* 601, 604 (2009)

<sup>12</sup> See CRICK, BERNARD, *DEMOCRACY : A VERY SHORT INTRODUCTION 1*, (Oxford University Press, 2002), and Laurence Whitehead, *The vexed issue of the meaning of 'democracy'*, 2 *Journal of Political ideologies* 121, 130 (1997) (2007)

<sup>13</sup> CRICK, BERNARD, *DEMOCRACY : A VERY SHORT INTRODUCTION 1*, (Oxford University Press, 2002)

<sup>14</sup> Laurence Whitehead, *The vexed issue of the meaning of 'democracy'*, 2 *Journal of Political ideologies* 121, 130 (1997) (2007)

configurations determined according to the particular cultural, historical and customary conditions.<sup>15</sup>

Then, if democracy has no definite meaning and is subject to each culture's conception and history, how to use such a flexible concept to judge Egypt's political governance? The answer lies in going back to the Egyptian history and circumstances, to the revolution itself.

During the revolution, what people demanded by endangering their lives in the streets for 18 consecutive days shouting for Mubarak's regime to fall, was regaining their ability to change the governing authority and the rules and way of governance. An ability that has been lost for the prior thirty years under Mubarak.<sup>16</sup>

In fact, the threat of losing this ability for another thirty years was one of the triggers of the revolution as the last years before the revolution witnessed the promoting of Gamal Mubarak as a successor to his father, thus denying Egyptians' ability to choose a president.<sup>17</sup>

Further, the 2010 parliament was a clear illustration of corruption and fraud, hindering people's ability to choose their representatives. It was reported that the 2010 elections witnessed "breathhtaking"<sup>18</sup> levels of fraud whereby organized violence was used by the government to ensure complete control of the elections and complete exclusion of the opposition which resulted in over 80% of the seats going to the NDP, the ruling party.<sup>19</sup>

Thus, when we compare this basic and essential demand with the literature on democracy we find that one of the first essential components agreed upon by many

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<sup>15</sup> *Id.* at 126-130

<sup>16</sup> GALAL A. AMIN, *WHATEVER HAPPENED TO THE EGYPTIAN REVOLUTION?*, 137(Oxford University Press, 2013)

<sup>17</sup> See Jason Brownlee, *The Heir Apparent of Gamal Mubarak*, 15/16 *The Arab Stud. J.* 36, 46-51(2007-2008) for a description of the climbing process of Gamal Mubarak to running the NDP and his preparation for succession to his father in presidency.

<sup>18</sup> *Egypt's rulers tighten grip amid claims of election fraud and intimidation*, *The Guardian* (Nov. 2010), available at <http://www.theguardian.com/world/2010/nov/30/egypt-poll-electoral-fraud-claims>

<sup>19</sup> *Id.* and *Egypt election: Hosni Mubarak's NDP sweeps second round*, *BBC News Middle East* (Dec. 2010), available at <http://www.bbc.com/news/world-middle-east-11935368>

scholars concerning the outline of what democracy means is people's ability to effect change in the public realm.

According to Ober, the original meaning of democracy in the Greek language is the capacity of the people to do things and that:

'the empowered demos' – it is the regime in which the demos gains a collective capacity to effect change in the public realm. And so it is not just a matter of control of a public realm but the collective strength and ability to act within that realm and, indeed, to reconstitute the public realm through action.<sup>20</sup>

Further, according to Dahrendorf, democracy is a concept that gives legitimacy to the exercise of political power through providing answers to three main questions. The first of which is how people can achieve change in their society without violence.<sup>21</sup> In his words, “the simplest definition of democracy has been given by Karl Popper: a system that makes it possible to get rid of a government without spilling blood.”<sup>22</sup>

Accordingly, as Egyptians revolted on the 25<sup>th</sup> of January 2011 to regain their ability to effect change under Mubarak and then revolted again on the 30 of June 2013 to regain it one more time from Morsi after he issued the constitutional declaration that gave him absolute powers and granted him immunity from judicial bodies.<sup>23</sup> Do Egyptians then still have the ability to effect change? The following two sub-sections explore this ability between law and reality.

### **1. Egyptians' Ability To Effect Change according to the Egyptian Constitution**

Generally speaking, people's ability to effect change in the public realm reflects two main things: people's ability to choose and change those who govern them, and people's ability to choose and change the rules by which they are governed.

Accordingly, for Egyptians to have an ability to choose and change those who govern them, they have to have the freedom to choose and change the president and the government. On the other hand, in order to have an ability to choose and change the

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<sup>20</sup> Josiah Ober, *The Original Meaning of Democracy: Capacity To Do Things, not Majority Rule*, 15 *Constellations* 3, 7 (2008)

<sup>21</sup> Ralf Dahrendorf, *A Definition of Democracy*, 14 *Journal of Democracy* 103, 103 (2003)

<sup>22</sup> *Id.*

<sup>23</sup> *Supra* note 13

rules by which they are governed, they must have the freedom to choose parliamentary members as a direct way to changing of the rules. They must also have access to indirect ways of affecting government policies through freedom to criticize and object. Such objection may be demonstrated through freedom of speech, freedom of the press, freedom to protest, freedom to form political parties and to contribute in political life, as well as freedom to form civil society organizations.

In fact, all these freedoms are granted in the Egyptian Constitution. The first article provides that Egypt is a democratic republic.<sup>24</sup> On the one hand, it assures people's right to elect a president every four years and to elect the members of the parliament who, in their turn, take the responsibility of legislating the rules of law, monitoring the government policies and holding it accountable to people.<sup>25</sup>

On the other hand, the constitution grants freedom of speech, freedom of the press, freedom of public meetings and protests, freedom of establishing civil society organizations and their ability to perform their activities freely, freedom to establish political parties and to participate in public and political life.<sup>26</sup>

However, apart from what the constitution states on paper, by analyzing the factual circumstances of Egypt, we find that these aspects are far from being realized on the ground.

## **2. Egyptians' Ability To Effect Change In Reality**

Starting from Egyptians' ability to choose and change the president. The ability to choose the president was highly affected by the strong media advocacy for El-Sisi as the only reasonable choice for presidency. After El-Sisi announcement of candidacy for president,<sup>27</sup> all media outlets were directed to promoting El-Sisi as the definite next president as El-Meshad provides:

If there was any doubt about who the presidential frontrunner would be in Egypt's May 2014 elections, the Egyptian media made sure to

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<sup>24</sup> Article 1, Egyptian Constitution for 2014, Aljaryda Al Rasmya, issue 3 bis (a) , 18<sup>th</sup> Jan 2014

<sup>25</sup> *Id.* at articles 101, 125, 129-135, 140

<sup>26</sup> *Id.* at 65, 67, 70-75

<sup>27</sup> Dina Ezzat, *Al-Sisi announces his candidacy*, Al-Ahram Weekly (March 2014), available at <http://weekly.ahram.org.eg/News/5817/17/Al-Sisi-announces-his-candidacy.aspx>

strongly suggest that then-Defense Minister Abdel Fattah al-Sisi was the only choice.<sup>28</sup>

In this regard, even if the media's advocacy for El-Sisi and the low than expected turnout of the elections -that was a result of the young generation boycott-were overlooked. The important question is whether Egyptians still have the ability to choose a president other than El-Sisi? More importantly in terms of assessing the path towards democracy, whether Egyptians still have the ability to choose their president from outside the military institution?

Unfortunately, reality and political science answer both questions negatively. The Egyptians ability to change El-Sisi as a person or as a model of governance is highly doubtful for two reasons. The first one relates to the fact that the Egyptian military will not abandon voluntarily the role it plays in Egypt as a main player and influencer in the politics that it had acquired for over 60 years.<sup>29</sup> They want to maintain their privileges and superior status which cannot be ensured or maintained under the governance of a civilian president independent from the military.<sup>30</sup> Accordingly, they have the force and the control to impede the development of any political alternative to military candidates without any equivalent opposing political force that can stop their projects.

The second reason relates to the severe restrictions of civil and political freedoms in Egypt now; objection to or criticisms of the El-Sisi is now associated with the threat of legal punishment.<sup>31</sup> Such threats kill opportunities for the development of political life, as does the close monitoring of political parties by security institutions and tying their ability to contribute in political life to their commitment not to cross the

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<sup>28</sup> Mohamed Elmeshad, *We Completely Agree: Egyptian Television Media in the Era of Al-Sisi*, Jadaliyya, (2015) available at [http://www.jadaliyya.com/pages/index/21305/we-completely-agree\\_egyptian-television-media-in-t](http://www.jadaliyya.com/pages/index/21305/we-completely-agree_egyptian-television-media-in-t)

<sup>29</sup> MILAN W. SVOLIK, *THE POLITICS OF AUTHORITARIAN RULE* 199 -202, (Cambridge University Press, 2012)

<sup>30</sup> For more information on the role of military in non-democratic governance, See MILAN W. SVOLIK, *THE POLITICS OF AUTHORITARIAN RULE* 123-138, (Cambridge University Press, 2012) and PAUL BROOKER, *NON-DEMOCRATIC REGIMES: THEORY, GOVERNMENT & POLITICS* 119-124 (MACMILIAN PRESS LTD, 2000)

<sup>31</sup> Sherif Mansour, *Stifling The Public Sphere: Media and Civil Society In Egypt*, National Endowment for Democracy – International Forum for Democratic Studies, 2-3, available at <http://www.ned.org/wp-content/uploads/2015/10/Stifling-the-Public-Sphere-Media-Civil-Society-Egypt-Forum-NED.pdf>

lines of criticism against the president.<sup>32</sup> These circumstances will effectively kill the development of any civilian alternative to El-Sisi.

Moreover, not only has the current Egyptian regime impacted the Egyptians' ability to change those who govern them, rather, it has, as well, decided to control the choice and the change of the rules of governance to ensure having complete political control.

According to reports and testimonies from current members of the parliament, the selection of the members of the parliament was achieved through close monitoring and careful choosing by the general and military secret service to ensure that whomever participates in the election process would be loyal to the president.<sup>33</sup> Several political parties were forced to join the ally formed by hidden security forces in the form of an electoral list to avoid security harassments of their individual candidates.<sup>34</sup>

Such testimonies shed doubt on the integrity of the recent parliamentary elections. This means that the governing authority manipulated the ability of the people to choose their representatives by pushing them towards a limited choice of already agreed upon candidates who would not pose trouble to the governing authority. Thus, they limited people's ability to effect change to the rules of governance and to effectively monitor the work of the president and the government.

As to the indirect ways of affecting the executive policies through controlling freedoms of speech, press, protests and civil society organizations, they are all eliminated through the mechanism of punishment.

The punishment mechanism is regularly used by the Egyptian regime to eliminate all forms of possible objections in two ways. The first one is the issuance of new amendments into the penal code and the issuance of new laws with ambiguous and broad criminalization sphere and severe punishments. These laws were issued by the presidents – Adly Mansour and El-Sisi- as acting legislators before the formation of the parliament. The second is the revival of the already existing crimes against the government which were rarely used since their enactment in the penal code.

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<sup>32</sup> Hossam Bahgat, *How El Sisi Elected His Parliament*, Mada Masr, (March 2016)

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

The amended crimes include article 78 about receiving foreign fund that was amended in scope and in punishment to criminalize receiving funds, or “any other thing”<sup>35</sup> from any local or foreign person or organization for the purpose of harming the national interest, unity of the country or public peace.<sup>36</sup> And punishment was lengthened to lifetime imprisonment, which can extend to the death penalty in certain cases. The new laws included the issuance of the protests law which bans protests if they would “disturb the security, the public order ... or affect the course of justice”<sup>37</sup> among other things. And whoever violates this ban or receives any benefits to organize demonstrations against this ban will be punished by imprisonment between 2 to 15 years.

The revived crimes from the penal code include acts threatening the national unity, public order, social peace, as well as acts demanding or advocating for the suspension of the constitution, or the change of the social or economic structures of the state. These acts are punishable whether promoted through writing or verbally, and are punishable by sentences up to life time imprisonment or the death penalty in certain circumstances.<sup>38</sup>

The effects of using punishment as a threat to whoever opposes the president or criticizes him, is that first, it created a self-censorship by the Egyptian media to avoid direct criticism as much as possible.<sup>39</sup> Second, with the increased threats of ongoing cases against many public figures, for any sort of criticism, including drawing caricature that is sarcastic about the president’s speech,<sup>40</sup> the sphere of freedom of speech and press is narrowed to a great extent.

Further, the remaining civil society organizations are subject to continuous security harassments. Some have been closed or under the threat of closure, and some,

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<sup>35</sup> *Supra* note 3 article 78

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

<sup>37</sup> Article 7, *Aljaryda Al Rasmya*, issue 47 bis, 24<sup>th</sup> Nov 2013

<sup>38</sup> Egyptian Criminal Law, Second Book, First Section, articles 77(d), 78, 80 (d) & Second Section, articles 86, 89, 102 bis

<sup>39</sup> *Supra* note 27

<sup>40</sup> *Cartoonist Islam Gawish arrested for anti-gov’t comics*, Mada Masr (Jan 2016), available at <http://www.madamasr.com/news/cartoonist-islam-gawish-arrested-anti-govt-comics>

their heads and activists have been accused of crimes from the type of disturbing national peace and the country's stability.<sup>41</sup>

According to the above analysis, even if it is too soon to judge whether Egypt achieved democracy or not, we can conclude with confidence that this way, the Egyptian regime is not building democratic foundations to strengthen Egyptians' path towards democracy. Rather, this is more of a throwback to the rules of politics under Mubarak's regime.

However, does drifting away from the road towards democracy mean by default that Egypt is being governed by an authoritarian regime? If so, what is the role that punishment plays in this context? How punishment has been used by the Egyptian regime in the political arena? Answers to these questions are provided in the next section.

## **B. Authoritarianism & Punishment**

The analysis of the current Egyptian regime and its mode of governance provided in the previous section raises questions about whether Egypt is now not only drifting away from democracy, but rather, whether it is in fact being governed by an authoritarian regime.

According to political scientists, the answer to such a question is decidedly positive. Those who wrote about authoritarianism provide that authoritarian regimes or dictatorships are both synonyms for non-democratic regimes, which are regimes that lack the essentials of democratic governance.<sup>42</sup>

In a more detailed view, Svobik defines authoritarian rule as the one lacking at least one of the essential features of a democracy, namely, free and competitive

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<sup>41</sup> See From Restriction to Closure of Public Space in Egypt: Egyptian Government Clamps Down on Rights Groups, Seeking Their Eradication, The Egyptian center for Public Policy Studies, available at <http://ecpps.org/index.php/en/news/95-press-releases/663-from-restriction-to-closure-of-public-space-in-egypt> and Egypt Orders Closure of Leading NGO Nadeem Center for 'Violations', Egyptians Streets (Feb 2016), available at <http://egyptianstreets.com/2016/02/17/egypt-orders-closure-of-leading-ngo-nadeem-center-for-violations/>

<sup>42</sup> MILAN W. SVOLIK, *THE POLITICS OF AUTHORITARIAN RULE* 20 (Cambridge University Press, 2012), NATASHA EZROW AND ERICA FRANTZ, *DICTATORS AND DICTATORSHIPS: UNDERSTANDING AUTHORITARIAN REGIMES AND THEIR LEADERS 2* (The Continuum International Publishing Group, 2011) and, PAUL BROOKER, *NON-DEMOCRATIC REGIMES: THEORY, GOVERNMENT & POLITICS 2* (MACMILIAN PRESS LTD, 2000)

legislative elections, and free and competitive executive elections.<sup>43</sup> Others provide a straight forward definition by stating that “dictatorships are not democracies,”<sup>44</sup> where democracies are defined as the one where people choose those who govern them through “contested elections.”<sup>45</sup>

In the same line, authoritarian regimes are defined with reference to two criteria, “a situation where (a) freedom is restricted in favour of obedience to authority, and (b) this authority is itself exercised with few restrictions.”<sup>46</sup>

Accordingly, based on the previous overview and analysis of the Egyptian situation, we find that all of these definitions, in fact, apply to Egypt. The integrity and contestability of the presidential elections cannot be established when the winner of the elections is known ahead of the election itself. In this regard, Svobik provides that “in many dictatorships with elections, who is going to win is a forgone conclusion.”<sup>47</sup>

The Egyptian legislative elections were restricted to the candidates who satisfied the loyalty test of the security officers before being allowed to compete for the parliamentary seats.<sup>48</sup> Freedoms are restricted now more than ever with continuous claims from the regime supporters that those who object to the governing authority are traitors to the national interests of the country.<sup>49</sup> The authority is also exercised with minimum restrictions as the president holds all of the executive powers in his hands, as well as the legislative ones are pre-ordained to obey and not to object.

The remarkable and noteworthy feature that appeared in this analysis of the Egyptian situation is how punishment has been used as a tool to create this context. The application of punishment and the fear of punishment have been used to shape the environment of civil and political freedoms in Egypt. Moreover, it has been used to

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<sup>43</sup> MILAN W. SVOLIK, *THE POLITICS OF AUTHORITARIAN RULE 22* (Cambridge University Press, 2012)

<sup>44</sup> NATASHA EZROW AND ERICA FRANTZ, *DICTATORS AND DICTATORSHIPS: UNDERSTANDING AUTHORITARIAN REGIMES AND THEIR LEADERS 2* (The Continuum International Publishing Group, 2011)

<sup>45</sup> *Id.*

<sup>46</sup> PAUL BROOKER, *NON-DEMOCRATIC REGIMES: THEORY, GOVERNMENT & POLITICS 22* (MACMILIAN PRESS LTD, 2000)

<sup>47</sup> *Supra note 41* at 23

<sup>48</sup> *Supra note 31*

<sup>49</sup> Hania Sobhy, *Secular Façade, Neoliberal Islamisation, Textbook Nationalism from Mubarak to SiSi*, 21 *Nations and Nationalism* 805, 805 (2015)

control emerging political opposition to the regime and to guarantee the regime's survival.

The questions to be asked then is how the Egyptian regime adapted punishment to control the public realm and why? Further, what are the purposes that the Egyptian regime is intending to realize from such use of punishment, whether in the short run or in the long run? The following two sections explore the answers for these important questions.

### **1. Use of Punishment to Control the Public Realm**

Svolik, in his book about the politics of authoritarian rule, claims that every dictatorship faces two main problems; the first one is the problem of authoritarian power-sharing which concerns how the ruler divides power with the surrounding elites while at the same time avoiding their threats.<sup>50</sup> The second which concerns the focus of this research, is the problem of authoritarian control,<sup>51</sup> or what I call the problem of controlling the public realm.

For every ruler who decides to gather all powers in his hands and to work on the survival of his regime without the willingness to share such power or rotate it through contested elections -as in democracies- will face 'the original sin' of every dictatorship, which is "[t]he lack of popular consent – inherent in any political system where a few govern over the many."<sup>52</sup>

Such lack of consent is dealt with in one of two ways: repression or co-optation.<sup>53</sup> Either the regime provides positive incentives, usually economic ones, to raise public support for the regime, or it relies on repressing those who oppose its ruling.<sup>54</sup> And in some regimes, a mix of both means is applied to ensure control.

Repression is commonly handled through directing force towards the threats of the regime by the soldiers of the police and the internal security institutions. When the threats escalate to the level of potential mass led organized opposition, the military

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<sup>50</sup> *Supra* note 41 at 5-8

<sup>51</sup> *Id.* at 9-13

<sup>52</sup> *Id.* at 10

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* ( For more details on repression and co-optation as means of authoritarian control, See Ch. 5 & 6)

intervenes as the crucial force capable of saving the situation.<sup>55</sup> However, in the Egyptian context, I argue that the mechanism of punishment was used as a tool of repression to control the public realm, instead of reliance on military intervention or a clear resort to force.

In fact, the 25 January Revolution and the 30 June mass protests created a dilemma for the Egyptian governing authority. Egyptians still remember how in the near past they were able to effect change in the public realm, to change those who govern and to affect the rules of governance. Accordingly, the use of blatant force is no longer an option as it carries with it a high risk of re-triggering people's anger into revolting against the government.

Thus, the Egyptian regime had to find an alternative tool to control the political situation and the fluidity of the public realm, and it found such a suitable alternative in punishment.

To clarify further, post the 30 June mass protests, three main problems faced the Egyptian regime. The first one was the young generation who contributed to the Revolution whose main tool for effecting change was protests, demonstrations, and their use of media and press tools. The second problem was civil society organizations and their pressure on the government in monitoring the status of democratic transition, civil and political freedoms and the commitment of the Egyptian government to the respect of basic human rights. The third problem was opposition by other political forces, most notably Muslim Brotherhood members who challenged the legitimacy of the new regime post Morsi.

For each of these problems, punishment provided a solution. The first one is the problem of protests. Protestors were consistently attacked in the media as troublemakers and impediments to the stability of the country.<sup>56</sup> Under the claim of maintaining stability and promoting economic growth and against all civil society and Egyptian youth objections, law 107/2013 was issued to allegedly regulate protests. The law bans protests if they would “disturb the security, the public order ... or affect the

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<sup>55</sup> *Id.* at 127

<sup>56</sup> *Supra* note 1 at 100-106

course of justice”<sup>57</sup> among other things, and punishes those who violate such a ban with imprisonment of up to 15 years. The law effectively hollowed out the protest right of any meaning and gave the authority the *legitimacy* to ban any and all protests under wide sphere of criminalization and through an effective punishment tool.

Not only does the regime punish those who protest, but it has revived as well the crimes included in the penal code concerning acts threatening the security of the government from the inside. As detailed in the previous section, this has led to severe restrictions that downsized the sphere of public opposition through the media and the internet.

The punishment of these crimes has not only helped the Egyptian regime to get rid of its first problem of young troublemakers, but it has worked as well equally against the second problem of the civil society organizations.

In fact, the threats of punishment against civil society organizations work are highlighted in a joint press release by several civil society organizations, where they advanced that “... human rights defenders were threatened with prison sentences and at times death, leading several of the most prominent defenders to leave the country and prompting other groups to downsize their operations.”<sup>58</sup> As well, “the investigations into the receipt of foreign funding were reopened with the goal of eliminating remaining civil society organizations.”<sup>59</sup>

The last and third problem concerns opposing political parties generally and Muslim brotherhood specifically. Opposition parties generally were not the bigger problem due to the weakness of the old parties as inherited from Mubarak’s time and the youthful nature of the new parties which undermine their political strength. Accordingly, controlling these parties fell under the umbrella of punishment provided in the crimes against the government already included in the penal code. Accusations of working against the national interests were ready to face any potential threat.

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<sup>57</sup> Article 7, Aljaryda Al Rasmya, issue 47 bis, 24<sup>th</sup> Nov 2013

<sup>58</sup> From Restriction to Closure of Public Space in Egypt: Egyptian Government Clamps Down on Rights Groups, Seeking Their Eradication, The Egyptian center for Public Policy Studies, available at <http://ecpps.org/index.php/en/news/95-press-releases/663-from-restriction-to-closure-of-public-space-in-egypt>

<sup>59</sup> *Id.*

The bigger problem then was the Muslim Brotherhood members, who publicly challenge the new regime's legitimacy, and threaten to perform violent attacks on the state if Morsi did not return as a president. For that, the regime declared the Muslim Brotherhood a terrorist organization and issued the anti-terrorism law whereby the average punishment ranges between life-time imprisonment and the death penalty.

Accordingly, punishment provided an answer for each instability problem facing the regime. But, why the regime chose punishment specifically as a tool? What are the benefits that punishment brings?

## **2. Intended Purposes from the Use of Punishment**

In fact, the choice of punishment as a repression mechanism to control the fluidity of the public realm and the possible objections that may face the government served several purposes that direct repression or use of force would not have normally achieved.

First, it gave the regime the legitimacy of the legal rule. Such appearance of legitimacy grants the regime –in the eyes of the masses - the role of the protector of the rule of law and negates its linkage to the imprisonment of government opponents who get locked away by law. This legitimacy consequently ensures alleged stability of the country and possible obedience of the people.

Moreover, the punishment mechanism avoids the anger of the people triggered by the more direct form of repression as represented in the use of force. As well as it enters the opponents – who are subject to punishment – into a long legal process that keeps them away from a direct struggle against the government, which further weakens their position in the eyes of the masses who tend to believe that these are criminals accused of crimes against the country rather than to believe that they are members of the political opposition.

These benefits logically justify the Egyptian regime choice of the mechanism of punishment to repress its opponents and to control the public realm in the short run. But the question that must be asked now, is what the Egyptian regime is intending to gain in the long run from using punishment. What is the aim or purpose that the regime believes punishment will achieve?

I believe assuming that the current Egyptian regime is pure evil is kind of naïve. Sometimes nationalism or patriotic reasons may drive dictatorial behavior, especially in regimes with a military background, where militants usually question civilian politicians and believe that they are not qualified to rule nor do they understand the risks of ruling.<sup>60</sup>

Accordingly, there must be a farther purpose or goal the Egyptian regime aims punishment will achieve in the long run. By returning to the famous quote, “when you have eliminated the impossible, whatever remains, however improbable, must be the truth.”<sup>61</sup>

The truth then lies in exploring the different logical scenarios of possible purposes. These scenarios can be summarized in two main trends. Either the Egyptian regime hopes to achieve one of the aims that justify the use of punishment as analyzed by punishment philosophers, or the regime is just seeing punishment as a means to effective political control and stability. The following chapter will examine these scenarios with an aim to prove that both outcomes are likely to fail.

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<sup>60</sup> *Supra* note 42 at 39

<sup>61</sup> Sir Arthur Conan Doyle, *Sherlock Holmes: The Sign of Four* (1890)

### III. The Egyptian Regime's Philosophy of Punishment

This chapter addresses the possible two scenarios that the Egyptian regime may be aiming for in adopting punishment in the long run, and why both scenarios are likely to fail.

The first possible scenario that explains why the Egyptian regime uses punishment is that it is trying to achieve one of the aims that justify the use of punishment as analyzed by punishment philosophers. In this regard, punishment philosophers generally revolve around one of two main philosophies in justifying punishment. The first one is that punishment is evil, however we inflict it only because it achieves good consequences, such as deterrence of the criminal and other potential criminals or reform of the criminal him/herself.<sup>62</sup> The second is that punishment is an end in itself; it is inflicted because every criminal should get what they deserve, and this is what justice requires.<sup>63</sup>

On the other hand, the second possible scenario behind the Egyptian regime's use of punishment is that it believes punishment will secure political control and stability, thus ensuring the regime will endure and giving it a chance to execute social and economic development plans.

Accordingly, this chapter will be divided into three main sections; the first one is devoted to consequentialists' theories, especially deterrence and moral reform. The second addresses retributivism, and the third is about political control and stability.

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<sup>62</sup> KORITANSKY, PETER KARL, THOMAS AQUINAS AND THE PHILOSOPHY OF PUNISHMENT, 11 (Catholic University of America Press, 2011)

<sup>63</sup> R. A. Duff, *Penal Communications: Recent Work in the Philosophy of Punishment*, 20 *Crime and Justice* 1, 6-8 (1996) and Thaddeus Metz, *How to Reconcile Liberal Politics with Retributive Punishment*, 27 *Oxford Journal of Legal Studies* 683, 684-687 (2007)

## A. Consequentialism

Consequentialists believe that punishment is justified only to the extent that it produces good consequences. Accordingly, the only acceptable justification for them for inflicting punishment is that it leads to a greater good, whether for the society or for the criminal him/herself.<sup>64</sup> As R. A. Duff explains the nature of consequentialism:

Consequentialists hold that the justification of any action, policy or practice depends solely on its expected overall consequences: It is right if its consequences are good ... and wrong when its consequences are bad.<sup>65</sup>

Such a philosophy is closely connected to the work of Jeremy Bentham on utilitarianism,<sup>66</sup> where he provided that all human actions are under the sovereign of two masters: pain and pleasure.<sup>67</sup> Accordingly, every person is seeking to maximize pleasure and to minimize pain, and as this principle governs every action, then according to Bentham it includes governing every government action as well.<sup>68</sup> Thus, the government should seek to maximize the overall happiness of the society and to minimize its pain.

On application on punishment, Bentham provides that as punishment is pain and evil in itself, thus the government is originally obliged to refrain from it as much as possible under the utility principle. As such, the only situation where the government is justified in inflicting punishment is only if punishment augments of the overall happiness of the society.<sup>69</sup>

Accordingly, consequentialists and utilitarians both agree that punishment is justified only in so far as it promotes good consequences in general. Utilitarians differ

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<sup>64</sup> *Supra* note 59

<sup>65</sup> R. A. Duff, *Penal Communications: Recent Work in the Philosophy of Punishment*, 20 *Crim. and Just.* 1, 4 (1996)

<sup>66</sup> *Id.* at 5 and Bedau, Hugo Adam and Kelly, Erin, *Punishment*, The Stanford Encyclopedia of Philosophy (2015), Edward N. Zalta (ed.), available at <http://plato.stanford.edu/archives/fall2015/entries/punishment/>

<sup>67</sup> See Binder Guyora, Smith Nicholas J, *Framed: utilitarianism and punishment of the innocent*, 32 *Rutgers L. J.* 115, 115-224 (2000)

<sup>68</sup> *Supra* note 59 at 15

<sup>69</sup> *Supra* note 59 at 16-17

in specifying that the good consequences should be specifically the augment of the overall happiness of the greatest number of people in the society.<sup>70</sup>

However, in order to realistically assess whether the Egyptian regime's philosophy of punishment is aimed at using punishment only if it produces good consequences and refrains from it if it produces bad consequences, we need first to settle what are the good consequences intended here.

According to consequentialists generally, the prevention of the crime is the most central good that can be served by a system of punishment.<sup>71</sup> In this regard, some theorists advance that the prevention goal is better achieved through specific and/or general deterrence. While others provide that such prevention is better achieved by reforming the criminal into acknowledging his/her wrongdoing and refraining from returning to it on moral grounds.

In this regard, utilitarians agree with consequentialists on the general aim of punishment. Bentham proposes that preventing the criminal from harming the society again and setting him as an example for others is likely to have a positive impact on augmenting the total happiness of the society.<sup>72</sup>

Accordingly, there are two possible good consequences to assess, deterrence and moral reform. The following sub sections will analyze deterrence and moral reform theories, and whether or not the theories' requirements apply on the Egyptian regime use of punishment. More specifically, whether the Egyptian regime can justify its use of punishment against protesters, civil society organizations members and Muslim Brotherhood members by reference to the consequentialists' school of thought.

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<sup>70</sup> *Supra* note 62 at 5

<sup>71</sup> *Id.*

<sup>72</sup> *Supra* note 59 at 18

## 1. Deterrence Theory:

Deterrence in its simplest form means that punishment should work as a threat that will prevent criminals from committing more crimes and dissuade others from becoming criminals out of fear of punishment.<sup>73</sup> This simple form has been interpreted in different yet related ways by philosophers.

Bentham contended that deterrence is setting “an example”<sup>74</sup> of the criminal by punishing him so others would fear committing the crime; and this is how punishment helps in increasing the overall happiness of the society through preventing future crimes. At the same time, he specified four constraints on the application of punishment as a deterrent threat, in which instances, punishment will not achieve deterrence. Bentham provided that punishment would not set an example and would in fact increase pain and minimize happiness if it was ““groundless,” “inefficacious,” “unprofitable,” or “needless.””<sup>75</sup>

In this regard, punishment is groundless “where there is no mischief for it to prevent.”<sup>76</sup> As punishment is evil in itself and should not be inflicted unless to prevent a greater evil, then if the act to be punished does not qualify in the first place as evil, then punishment is groundless.

Secondly, punishment is inefficacious “where it cannot act so as to prevent the mischief.”<sup>77</sup> This constraint presupposes that for the crime to be prevented there must be a rational calculation in which the pain of the punishment prevails over the pleasure of the crime. Accordingly, punishment would be inefficacious if such calculation has not occurred in the first place or if it was conducted by the criminal and the pain of the punishment did not prevail.

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<sup>73</sup> Dutton, Yvonne M., *Crime and Punishment: Assessing deterrence Theory in the Context of Somali Piracy*, 46 *Geo. Wash. Int’l L. Rev.* 607, 607 (2014) and Raymond Paternoster, *How Much Do We Really Know About Criminal Deterrence?*, 100 *The J. of Crim. Law and Criminology* 765, 766 (2010)

<sup>74</sup> *Supra* note 59

<sup>75</sup> *Id.*

<sup>76</sup> JEREMY BENTHAM, *INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* (London: Athlone Press, 1970 ) cited in KORITANSKY, PETER KARL, *THOMAS AQUINAS AND THE PHILOSOPHY OF PUNISHMENT*, 18 (Catholic University of America Press, 2011)

<sup>77</sup> BENTHAM, JEREMY, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* 134, (Batoche Books, 2000)

To clarify, the calculation cannot happen at all when “the penal provision is not established until after the act is done,”<sup>78</sup> or the provision is not brought to the knowledge of the public, or the criminal is suffering from insanity or he is an infant for example, thus in all these instances the rational calculation is not possible in the first place. On the other hand, punishment may be inefficacious if the pain of the punishment does not prevail in the calculation. When, for instance, the crime is committed to avoid an evil that is much greater than the evil produced by the punishment.<sup>79</sup> For example, a person who is threatened with torture unless he reveals the secrets of his country, thus committing an act of treason if he does so; his rational calculation at such a moment will not probably weigh the pain of the expected punishment to be greater than the pain of torture and “[n]either he, nor any possible future criminals in the same position, could possibly be deterred by the fear of punishment.”<sup>80</sup>

Thirdly, punishment is unprofitable “where the mischief it would produce would be greater than what it prevented.”<sup>81</sup> As Bentham contends that punishment institutions’ primary goal should always be augmenting the overall happiness and minimizing the pain, thus if punishment causes more suffering than happiness, then it would be unprofitable to apply it as per the utility principle.

In this regard, he states that one of the instances in which punishment produces greater evil than what it prevents is when it causes “[t]he displeasure of the people; that is, of an indefinite number of the members of the same community, in cases where ... they happen to conceive, that the offense or the offender ought not to be punished at all, or at least ought not to be punished in the way in question.”<sup>82</sup> For example, when a great percentage of the community agrees that the criminalized actions should not be an offense at all. This is what happened in Egypt concerning the crime of offending the president of the country, where a great percentage of the community called for the

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<sup>78</sup> *Id.* at 135

<sup>79</sup> *Id.* at 136

<sup>80</sup> *Supra* note 59 at 18

<sup>81</sup> *Supra* note 72 at 20

<sup>82</sup> *Supra* note 77 at 138

abolishment of the crime in demand of the freedom to criticize the president without fear of punishment.<sup>83</sup>

Finally, the fourth constraint is that punishment should not be needless. Punishment is needless when the alleged crime could be treated without punishment. That is, when there are less costly means than punishment -in terms of producing pain- that could prevent the crime. In this regard, Bentham uses the example of the punishment of a man who promotes harmful ideas,<sup>84</sup> he says “the pen is the proper weapon to combat error with, not the sword.”<sup>85</sup>

As for consequentialists, their main idea about deterrence is based on the assumption that individuals are rational creatures who are self-interested and who are capable of weighing the costs and benefits of each decision they make.<sup>86</sup> And as each individual is looking to maximize his benefits while bearing the least costs, then for a rational human who is assessing whether or not to commit a crime, the costs of committing the crime should be higher than the benefit of committing it.<sup>87</sup>

Thus, punishment achieves deterrence only if the pain of the punishment exceeds the benefit of the crime. This idea is closely related to the second constraint suggested by Bentham concerning inefficaciousness. Bentham suggests that punishment will not achieve deterrence if in the rational calculation between the pleasure of the crime and the pain of punishment, the pain of punishment does not prevail.

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<sup>83</sup> In fact, the government responded partially by reducing the punishment to a fine only instead of imprisonment, *See Interim Egyptian president reduces penalty for insulting his post*, Ahram Online (Aug. 2013), available at <http://english.ahram.org.eg/NewsContent/1/64/78363/Egypt/Politics-/Interim-Egyptian-president-reduces-penalty-for-ins.aspx>

<sup>84</sup> *Id.*

<sup>85</sup> JEREMY BENTHAM, INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (London: Athlone Press, 1970 ) cited in KORITANSKY, PETER KARL, THOMAS AQUINAS AND THE PHILOSOPHY OF PUNISHMENT, 20 (Catholic University of America Press, 2011)

<sup>86</sup> Raymond Paternoster, *How Much Do We Really Know About Criminal Deterrence?*, 100 The J. of Crim. L. and Criminology 765, 782 (2010)

<sup>87</sup> *Id.* at 783 and Dutton, Yvonne M., *Crime and Punishment: Assessing deterrence Theory in the Context of Somali Piracy*, 46 Geo. Wash. Int'l L. Rev. 607, 607-608 (2014)

Accordingly, regarding the Egyptian regime's philosophy of punishment, let's assume that the regime is trying to achieve deterrence in the long run as one possible logical answer for why they employ punishment as clarified in the first chapter.

In this regard, to prove that deterrence will fail as a first justification for the Egyptian regime as claimed by this paper. I need to prove that either the pain of the punishment adopted does not exceed the benefit of the crime or that the punishment fails to satisfy one or more of Bentham's constraints or both.

## **2. Application of Deterrence Philosophy on the Egyptian Regime**

As highlighted in the first chapter, the Egyptian regime post the 30 June protests faced three main problems: the youth protests, the civil society organizations, and the political opposition, or mainly the Muslim brotherhood members challenge to the legitimacy of the regime. Accordingly, the regime is trying to deter young people from engaging in protests and demonstrations; they are trying to deter civil society organizations from issuing reports that may embarrass the government – thus essentially restricting their work-, and they are trying to deter the Muslim Brotherhood members from criticizing and challenging the regime's legitimacy.

Apparently, in the short run, the regime seems to have succeeded in decreasing protests to a great extent. One after the other, civil society organizations remain under the threat of closure by administrative decisions and its members and leaders are prosecuted under a long list of accusations,<sup>88</sup> and the Muslim Brotherhood problem is contained to a great extent by locking many of its leaders and a great percentage of its members up in prison.

The important questions to ask, however, are whether such deterrence is genuine, or is it just a calm surface that hides the storm beneath it? Will deterrence sustains to work as a justification for punishment in the long run? Let's consider each problem and see whether the pain of the punishment will continue to work as a credible threat that outweighs the benefit of the crime and whether Bentham's constraints apply in the case of the Egyptian regime or not.

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<sup>88</sup> *Background on Case No. 173 - the "foreign funding case": Imminent Risk of Prosecution and Closure*, Cairo Institute for Human Rights Studies (March 2016), available at <http://www.cihrs.org/?p=18362&lang=en>

Regarding the first problem of protesting; in order to assess the calculation of the pain of the punishment versus the benefit of the crime, there is a need first to settle what the crime is and the nature of the benefit that the offender aims to achieve.

Article 7 of the protest law bans protesters from “disturbing security, public order, obstructing production or calling for it ... or affecting the course of justice”<sup>89</sup> among other things, and articles 18 and 19 punish whomever violates article 7 with imprisonment of between two to 15 years.<sup>90</sup>

In Article 7, what is meant by public order or the course of justice is ambiguous as neither the law nor the criminal courts judgments provide any definition for what is meant by these terms. This means that the regime has great discretion in tailoring them to any protest objecting the regime. Thus, the threat of punishment can be fairly said to be directed towards any person who protests against the regime. Accordingly, as the criminalization sphere includes any possible protest against the regime, then what is the benefit that those who break the law and protest aim to gain?

Protests are collective actions signaling citizens’ dissatisfaction with the government or the regime.<sup>91</sup> It aims to challenge the policies and actions of the government and to demand political change,<sup>92</sup> whether in terms of complete regime change or in terms of government or policy changes. Accordingly, the benefit that those who break the law aim to gain is the success of their protests in effecting the change whether by direct response from the governing authority or indirectly by inducing more citizens to participate, thus increasing the possibility of political change.<sup>93</sup>

The main question then is to determine the deterrent effect of punishment on preventing protests in the long run, and whether the pain of the punishment will likely continue to create enough fear that outweighs the benefit of demanding political change. Such calculation depends on many variables for each person who contributes

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<sup>89</sup> *Supra* note 4 at article 7

<sup>90</sup> *Supra* note 4 at article 18,19

<sup>91</sup> Ruth Kricheli, Yair Livne & Beatriz Magaloni, *Taking to the Streets Theory and Evidence on Protests under Authoritarianism*, 5 (Aug. 2015), available at <http://web.stanford.edu/~magaloni/dox/2011takingtothestreets.pdf>

<sup>92</sup> *Id.* and Sabine C. Carey, *The Dynamic Relationship between Protest and Repression*, 59 *Pol. Res. Quarterly* 1, 2 (2006)

<sup>93</sup> *Supra* note 91

to the protest; however, the common element which any of them will include in his/her assessment is the available alternatives for demanding change other than protests.

The rational calculation suggests that the more alternative channels there are for demanding change and signaling dissatisfaction with the government, the more the pain of punishment will prevail over the benefit of protesting. As change can be achieved in other ways without incurring the pain of punishment, then the deterrent effect of punishing protests will likely be sustained in the long run.

However, when the available channels for effecting change are very limited, leaving no other alternatives for the people, then a range of possible calculations are created. One group of people may be dissatisfied but will still fear the consequences of protesting represented in punishment; a second group will be dissatisfied and will consider taking the risk of punishment, but will not initiate the protests, and there will be a third group who will be dissatisfied enough to initiate protests despite the threat of punishment, which will be seen by them as the price for a greater cause. Once the third group takes the initiative, it will be a matter of time before the other groups contribute in expressing their long dissatisfaction.<sup>94</sup>

By application on the Egyptian case, the regime uses punishment as a means of repression to control change in the public realm as analyzed in the first chapter. Alternative channels of freedom of expression, freedom of press, and the possibility of political opposition are all being limited. Thus raising the chance that in the long run, the threat of punishment will not continue to generate enough fear to overcome people's need to signal dissatisfaction and demand change.

A clear example that illustrates the beginning of the failure of the threat of punishment to deter Egyptians from protesting is the recent protests on April 15, 2016 against the demarcation of borders between Egypt and Saudi Arabia concerning the islands of Tiran and Sanafir.<sup>95</sup> The Egyptian president, El-Sisi issued a presidential decree providing that the two islands are within the borders of Saudi Arabia, without

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<sup>94</sup> See *Supra* note 91 about how citizens are likely to contribute in protests once they know that their fellow citizens are as well willing to protest.

<sup>95</sup> *Egypt: thousands protest against Sisi's decision to give islands to Saudi Arabia*, The Telegraph (April 2016), available at <http://www.telegraph.co.uk/news/2016/04/15/egypt-thousands-protest-sisis-decision-to-give-islands-to-saudi/>

first initiating any public discussion around the negotiations, without prior recourse to the parliament (whose representation of the people is already contested as clarified in the first chapter), and without conducting a general referendum as requested by the constitution.<sup>96</sup> Accordingly, despite the threat of punishment to those who would protest,<sup>97</sup> and because people had no alternative channels to signal their dissatisfaction, thousands of Egyptians participated in protests against the regime in several governorates.<sup>98</sup>

Thus in assessing the pain of punishment versus the benefit of protesting in the long run, rational calculation suggests that even if the threat of punishment seems to be working in the short run in deterring protests, it will fail to sustain such deterrence over the long run due to the lack of alternative channels for demanding change. Signs of failure have started to appear in the recent anti-regime protests in April 2016.

Secondly, the next problem facing the regime is that of the civil society organizations. The Egyptian regime is possibly aiming to deter civil society organizations' members and leaders from engaging in any dissenting activities through their work in the organizations. Such deterrence is working through the threat of punishment in a wide range of crimes that include accusations of receiving foreign fund for the purpose of harming the national interest,<sup>99</sup> and accusations of committing crimes against the government as included in the penal code.<sup>100</sup>

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<sup>96</sup> *Egypt's president under fire over Red Sea islands transfer to Saudi Arabia*, The Guardian (April 2016), available at <http://www.theguardian.com/world/2016/apr/11/egypt-saudi-arabia-tiran-sanafir-red-sea-islands-transfer> and *Supra note 24* at article 151 stating that "electorates should be invited to referendum on all peace and alliance treaties and any other treaty in relation to the rights of sovereignty ... and in all circumstances No treaty can be concluded in violation to the rules of the constitution or that leads to the waiver of any part of the state's region."

<sup>97</sup> The Ministry of Interior issued a statement warning people from engaging in protests, *See INTERIOR MINISTRY CLOSES SADAT STATION AND WARNS AGAINST PROTESTING ISLAND DEAL*, Cairo Scene (April 2016), available at <http://www.cairoscene.com/BusinessAndPolitics/Interior-Ministry-Closes-Sadat-Station-and-Warns-Against-Protesting-Island-Deal>

<sup>98</sup> Heba Habib, *Outraged Egyptians protest deal that gave islands to Saudi Arabia*, The Washington Post (April, 2016), available at <https://www.washingtonpost.com/news/worldviews/wp/2016/04/15/outraged-egyptians-protest-deal-that-gave-islands-to-saudi-arabia/> and *Update: Teargas, arrests of protesters blaming state for Saudi island deal*, Mada Masr (April 2016), available at <http://www.madamasr.com/news/update-teargas-arrests-protesters-blaming-state-saudi-island-deal>

<sup>99</sup> *Supra note 5*

<sup>100</sup> Egyptian Criminal Law, Second Book, First Section, articles 77(d), 80 (d) & Second Section, articles 86, 89, 102 bis

In assessing whether or not the pain of punishment is likely continue to act as a credible threat that outweighs the benefit of the crime, there must be first an analysis of the scope of these crimes and the nature of the benefit that the possible offenders could gain.

Starting from article 78 of the penal code, known as the foreign fund article, we find that after the current regime amendments in 2014, the crime is no longer about foreign funds only. The article has been amended to punish the members of the organizations who engage in a range of activities, including:

request, accept or receive, from a foreign country ... or a natural or legal person, or a foreign or local organization or any other entity which does not pertain to a foreign country ... fund, or equipment, or tools, or arms ... *or any other thing* for the purpose of harming the national interest, the unity of the country ... or disturbing public peace and security ... will be punished by life time imprisonment.<sup>101</sup>

Accordingly, the crime scope has extended to criminalize and punish receiving not only funds from any entity whatsoever, but as well as requesting, accepting or receiving “any other thing” as per the wording of the article. Thus, this crime realistically provides a threat of punishment against all possible means or sources of funding available to a civil society organization. It also carries a threat of punishment for any exchange of papers, reports or any sort of communication that falls under the “any other thing” scope. And the criminal nature of these acts depends on the exclusive interpretation of what the national interest is as the regime may see.

Furthermore, the other crimes which threaten the civil society members and leaders with punishment are the crimes against the government included in the second book of the penal code. These crimes include establishing organizations for the purpose of “harming national unity or social peace,”<sup>102</sup> or for the purpose of the demolition of “essential economic and social structures of the state,”<sup>103</sup> or calling for the overthrow of the regime and inciting change of the basic constitutional principles and economic or social structures by force.<sup>104</sup>

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<sup>101</sup> *Supra* note 5

<sup>102</sup> Egyptian Criminal Law, Second Book, Second Section, articles 86 bis

<sup>103</sup> *Id.* at article 98(a)

<sup>104</sup> *Id.* at Section 14, article 174

The preceding analysis of the crimes threatening the members and leaders of civil society organizations show how wide the sphere of criminalization and punishment is. These crimes can be interpreted to apply to any type of work done by the organizations as the regime monopolizes the determination of the national interest and the meaning of public peace and social and economic structures to accuse any person of violating and destroying them.

Accordingly, as the crimes possibly extend to cover any work performed by the members and leaders of the civil society organizations, then the question of the benefit of the crime becomes a question of the benefit of the civil society organization. What then are the benefits that civil society organizations aim to achieve?

Generally speaking, civil society organizations play an integral role in promoting transparency and accountability of governments. They do so by providing information to different stakeholders in the society, demanding government accountability, and encouraging formal and informal oversight actors to demand government accountability.<sup>105</sup>

More specifically, an overview of major Egyptian civil society organizations' objectives clarifies how each aims to achieve such a monitoring and accountability demanding role in different domains. Cairo Institute for Human Rights Studies specifies its objective as promoting "respect for the principles of human rights and democracy in the Arab region"<sup>106</sup> through developing and promoting policy and practice changes as well as conducting research on human rights conditions in the Arab region.<sup>107</sup> Al Nadeem Center provides rehabilitation and assistance for torture victims and women subject to violence, as well as "campaigning and mobilizing of different societal sectors"<sup>108</sup> against these practices and publishing reports on torture taking place in Egyptian police stations.<sup>109</sup> Nazra for Feminist Studies aims to promote

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<sup>105</sup> ALBERT van ZYL, *How Civil Society Organizations Close the Gap between Transparency and Accountability*, 27 *Governance* 347, 347-348 (2014)

<sup>106</sup> *About US*, Cairo Institute for Human Rights Studies, available at [http://www.cihrs.org/?page\\_id=48&lang=en](http://www.cihrs.org/?page_id=48&lang=en)

<sup>107</sup> *Id.*

<sup>108</sup> *El Nadeem Center for Rehabilitation of Victims of Violence*, available at <http://alnadeem.org/en/node/23>

<sup>109</sup> *Id.*

women's participation in the public realm with emphasize on the importance of a democratic environment of equality in rights and duties.<sup>110</sup>

Accordingly, we can conclude that what drives the Egyptian civil society organizations to continue their work despite the threat of punishment<sup>111</sup> is their aim to achieve the benefit of promoting and demanding government accountability and pushing for political change towards more democratic governance.

Thus, in the short-run rational calculation between the threat of punishment of up to life time imprisonment and the benefit of continuing their work, there are three possible scenarios of calculations. The first scenario concerns those who are not members of the civil society organizations but want to work in this field; a great percentage of them will probably be deterred by the threat of punishment and will refrain from participating. The second scenario concerns the actual members of the organizations. We can assume that some of them are deterred by the fear of punishment and some will be committed enough to continue despite the threat of punishment. The third scenario concerns the leaders of the civil society organizations who will probably continue their struggle for the survival of their organizations despite the threat of punishment.<sup>112</sup>

Accordingly, in the short run, the deterrence of civil society members seems to be partially working in deterring some of the targeted individuals. However, what is the future of such deterrence? Will it achieve complete deterrence or will it fail? Will the pain of punishment generate enough fear to overcome civil society efforts to demand accountability and political change in the long run? Will it deter current and future members and leaders from continuing their struggle?

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<sup>110</sup> *About us*, Nazra for Feminist Studies, available at <http://nazra.org/en/about-us>

<sup>111</sup> All the organizations mentioned above and 25 other organizations are facing accusations of receiving foreign fund for the purpose of harming national interests and accusations of committing crimes against the government See *Background on Case No. 173 - the "foreign funding case" Imminent Risk of Prosecution and Closure*, CIHRS Website (March 2016), available at <http://www.cihrs.org/?p=18362&lang=en>

<sup>112</sup> Such a continuation of the struggle was reflected in the joint statement released by civil societies organizations about the Egyptian regime harassment of organizations, See *From Restriction to closure of public space in Egypt: Egyptian Government Clamps Down on Rights Groups, Seeking their Eradication*, CIHRS Website, available at <http://www.cihrs.org/?p=14940&lang=en>

In fact, this calculation does not seem to be working on the side of the state. To clarify, individuals working in or aiming to work in civil society organizations – especially in such an environment of threats- most probably have interest in and knowledge of the political situation and the authoritarian practices of the regime. Such knowledge generates awareness of the importance of political change towards more equality, democracy and the eradication of human rights violations. This awareness cannot be taken away by the threat of punishment; it can be coerced into hiding, but never erased. Its reemergence may be delayed by intimidating people not to work with civil society organizations and intimidating those who are working with them to stop, but the demands of change will likely grow in the long run.

In the absence of alternative means for channeling these demands, and the continuation of authoritarian governance, even if the state manages to deter civil society organizations by using the threat of punishment, it will not be able to shut down people’s awareness and demands for change. These demands will probably return back to the state in different forms. It can explode back to the state in the form of protests as highlighted above. Individuals may continue the same civil society work of providing information to the society and demanding transparency and accountability but in an unorganized shape that the regime will not be able to coerce as an entity, especially with the existence and spread of social media. Or it may return to a more dangerous form of turning those individuals to armed struggle against the regime as a result of the regime’s coercion.

Furthermore, it is not only the calculation of pain and benefit that will not work to the side of the state in the long run, but one of Bentham’s constraints applies here as well. Punishment is unprofitable, not only in its failure to augment the overall happiness of the society who will be deprived of one of its monitoring eyes, but it is equally unprofitable for the regime itself. The application of punishment so widely and generally on almost all civil society organizations working in the domain of political accountability and change<sup>113</sup> will make civil society members fiercer in their struggle against the government, and thus augmenting political instability. In addition, it will

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<sup>113</sup> *Supra* note 111

likely increase international pressures on the state concerning the status of human rights and the path towards democracy.<sup>114</sup>

Thus, the punishment applied by the regime against the protesters and the civil society members is not philosophically justified in terms of achieving deterrence in the long run. The calculation of the prevalence of the pain of the punishment over the benefit of the crimes does not seem to be working on the side of the state. Then, is punishment justified in terms of deterring Muslim Brotherhood members? The assessment of such deterrence triggers an important preliminary question to ask, which is: *deterring them from doing what?*

The answer to this question lies in exploring the crimes that threaten the Muslim Brotherhood members with punishment. In this regard, the Cabinet decree No 579/2014 declaring the Muslim Brotherhood a terrorist organization, specifies that whoever performs any of the following activities will be punished with the legal punishment provided for the crimes of terrorism:<sup>115</sup>

- Whoever contributes in the activities of the organization or promotes the organization in saying, writing or in any other way and whoever finances their operations.
- Whoever joins the organization or remains a member of the organization after the issuance of this decree.<sup>116</sup>

Accordingly, the current Egyptian regime is not only trying to deter the Muslim Brotherhood members from challenging the legitimacy of the regime or from political opposition and dissent. Rather, it is trying to deter the Brotherhood as an organization from ever existing, especially as a political actor. The question then is what these crimes mean for the members of the Brotherhood? What is the benefit that they acquire

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<sup>114</sup> International pressures are already beginning to increase concerning the status of human rights in Egypt, See *Ongoing deterioration of human rights in Egypt and systematic suppression of rights organizations: Ban Ki-moon meets with CIHRS's Bahey eldin Hassan for second time in three weeks* ( March 2016), available at <http://www.cihrs.org/?p=18395&lang=en> and *Days Before His Visit to Egypt: Six rights groups meet with French President Hollande's advisors* (April 2016), available at <http://www.cihrs.org/?p=18497&lang=en>

<sup>115</sup> *Supra* note 8, the average length of punishment provided for terrorism crimes in Law 94/2015 about fighting terrorism ranges between 7 and 10 years minimum and up to life-time imprisonment and death penalty.

<sup>116</sup> Cabinet Decree 579/2014, Aljaryda Al Rasmia, issue 14 bis (d), 9<sup>th</sup> April 2014

as a result of continuing to be members of the organization, promoting its activities and fighting for its survival?

The Brotherhood was established in 1928 by Hassan El Banna as a socio-religious movement calling for the application of Islamic *Shariaa*'. Over the years, it has developed into a main political actor in the Egyptian political scene promoting a political agenda based on Islamic principles, and its eventual aim remained the implementation of Islamic *Shariaa*'.<sup>117</sup>

Accordingly, for the members of the Muslim Brotherhood, the membership of the Brotherhood represents their collective belief in the necessity of the application of Islamic *Shariaa*' in the governance of the state. The existence of the Brotherhood is the existence of a possible means for the actualization of this belief. Will the pain of punishment then be able to override such a belief? Will it be able to prevail over the benefit of having a means for the actualization of this belief?

The lessons of the past answers negatively. In Nasser's time, the Muslim Brotherhood suffered from very harsh repression. Their headquarters were destroyed; their leaders and members were trialed, some of them were hanged and the rest received long imprisonment sentences in isolated camps where they were subjected to torture and deprived of basic necessities.<sup>118</sup>

However, such severe pain of punishment did not prevail over the members' belief in the Brotherhood, nor it prevailed over their willingness to struggle for its survival. Rather, the harsh repression was a direct cause of the emergence of a more radical ideology within the Brotherhood who advocated that "any regime that could inflict such enormous suffering was irredeemably corrupt and could only be combated through force of arms."<sup>119</sup> The pain of the punishment thus did not deter their struggle

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<sup>117</sup> For more information on the development of the Muslim Brotherhood from a religious movement into a political actor and its political Islamic agenda See WICKHAM, CARRIE ROSEFSKY, MUSLIM BROTHERHOOD : EVOLUTION OF AN ISLAMIST MOVEMENT, Ch. 2-6(Princeton University Press, 2013) and ZAHID, MOHAMMED, MUSLIM BROTHERHOOD AND EGYPT'S SUCCESSION CRISIS, Ch. 4-5 (I.B.Tauris, 2010)

<sup>118</sup> WICKHAM, CARRIE ROSEFSKY, MUSLIM BROTHERHOOD : EVOLUTION OF AN ISLAMIST MOVEMENT, 43 (Princeton University Press, 2013)

<sup>119</sup> *Id.*

for the survival of the Brotherhood; rather, it triggered a more dangerous form of struggle, an armed one.

On application on the current Egyptian regime situation, a recent report provides that Muslim Brotherhood repression under the current regime is harsher than their repression in Nasser's time.<sup>120</sup> Accordingly, the members of the Brotherhood who are punished and those who are threatened with punishment will likely see that they are going through a new repression phase similar to the one that their predecessors underwent during Nasser's time. Their rational calculation will probably see the pain of the punishment as a cost they pay for their fight for survival.

This is correlated in reports that indicate that most of the young members of the Brotherhood advocate for the necessity of revenge and the use of violence against the regime's repression.<sup>121</sup> Thus, punishment is again creating a similar outcome to the radical ideology created by punishment in Nasser's time.

Furthermore, not only the pain of punishment will probably fail to outweigh these individuals struggle for the survival of the Brotherhood. Rather, punishment is unprofitable as well according to Bentham's constraints.

An overview of the history of the Brotherhood shows that their development away from the radical ideology of violence and towards a more reformist approach of their Islamic ideology -to be more open to inclusive democracy- has been associated with the times in which they were allowed to politically participate. Such development of course has taken long years, however it has always been impeded during times of repression. In times of repression and severe punishment, more radical conservative ideas emerged in attempts to survive. As Wickham, Carrie Rosefsky, puts it

The influence of the reformist faction waxed and waned with the fortunes of the Brotherhood. In times of political opening, the reformist impulse gained traction, but in times of repression, it lost

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<sup>120</sup> See Nathan J. Brown, Michelle Dunne, *Unprecedented Pressures, Uncharted Course for Egypt's Muslim Brotherhood* 1-2 (Carnegie Endowment for International Peace, 2015)

<sup>121</sup> *Id.* and David D. Kirkpatrick, Mayy El Sheikh, *Push for Retribution in Egypt Frays Muslim Brotherhood*, The New York Times (Aug. 2015), available at <http://www.nytimes.com/2015/08/06/world/middleeast/younger-muslim-brotherhood-members-in-egypt-bridle-at-nonviolent-stance.html>

its resonance as the focus of the group shifted to surviving under siege.<sup>122</sup>

Accordingly, in terms of the utility principle objective of augmenting happiness, the punishment applied by the Egyptian regime against the Brotherhood increases future political instability, increases the probability of violence and terrorism and as a consequence minimizes society's happiness.

Consequently, based on the previous analysis, the punishment used by the Egyptian regime cannot be philosophically justified on the basis of deterrence. In fact, the punishment adopted by the Egyptian regime mixed with the very wide criminalization sphere pushes punishment to be weighed against a survival struggle for the alleged offenders in the absence of legitimate channels through which they can achieve their aims.

### **3. Moral Reform Theory:**

As noted above, consequentialists and utilitarians share the view that punishment is only justified as long as it promotes good consequences and augments the overall happiness of the society. As well, both agree that one of the primary aims which can be qualified as a good consequence and a greater happiness is the prevention of the crime. Such prevention however, is not only achieved by deterrence through fear of punishment. Rather, some of them advocate that this goal can be better achieved through reforming the criminal him/herself to becoming a better person who sees the committed crime as a wrongful conduct that should not be repeated.

Bentham actually acknowledged that reforming the criminal is one of the ways in which happiness can be augmented and crimes prevented.<sup>123</sup> But it was not until later, that reform started to emerge as a strong competitor in justifying punishment against deterrence and retributivism.<sup>124</sup>

Some theorists advocate that moral reform is one of the secondary aims of punishment in addition to the main aim of deterrence or retributivism in preventing

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<sup>122</sup> *Supra note 118* at 166

<sup>123</sup> Steven Sverdlik, *Punishment and Reform*, 8 *Crim Law and Philos* 619, 621 (2014) and KORITANSKY, PETER KARL, *THOMAS AQUINAS AND THE PHILOSOPHY OF PUNISHMENT* 11, (Catholic University of America Press, 2011)

<sup>124</sup> Steven Sverdlik, *Punishment and Reform*, 8 *Crim Law and Philos* 619, 620 (2014)

crimes. While others like Morris and Hampton suggest that it should be the main justifying aim of punishment.<sup>125</sup> More specifically, Hampton advocates that:

[I]t is incorrect to regard simple deterrence as the aim of punishment; rather, to state it succinctly, the view maintains that punishment is justified as a way to prevent wrongdoing insofar as it can teach both wrongdoers and the public at large the moral reasons for choosing not to perform an offense.<sup>126</sup>

In fact, moral reform particularly is distinguished from the rehabilitation aim of punishment in that it stresses the importance of respecting offenders' autonomy. Rehabilitation theorists see criminal behavior as an illness that punishment cures, even if against the will of the offender. Moral reform theorists, on the other hand, see punishment's role is to *convince* the criminal that his/her actions are morally wrong and to induce them not to do it again because not committing a crime is the right thing to do.<sup>127</sup> In this regard, some of the most important theorists who gave considerable exploration of the idea of morally reforming criminals are Herbert Morris, Jean Hampton and R. A. Duff.<sup>128</sup>

Morris and Hampton both advocate for a paternalistic view in which they made a similarity between parents who punish their children to benefit them into being better persons and the state who should deal with criminals in the same way.<sup>129</sup> Accordingly, in such case, the state's aim should not be to treat its citizens like animals who will be deterred by fear of punishment, but – in Hampton view especially – to educate them that what they did is morally wrong.<sup>130</sup>

As to Duff, he concentrated more on the communication element. He advocated that punishment has a communication role according to which punishment should persuade offenders to regret their wrongdoing and to induce them to self-reform.<sup>131</sup>

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<sup>125</sup> Jean Hampton, *The Moral Education Theory of Punishment*, 13 Phil. & Pub. Aff. 208, 209 (1984)

<sup>126</sup> *Id.* at 213

<sup>127</sup> *Id.* at 214

<sup>128</sup> *Supra* note 89 at 620

<sup>129</sup> *Id.* and *Supra* note 90 at 218-220

<sup>130</sup> *Supra* note 90 at 216-217

<sup>131</sup> *Supra* note 89 at 621

What is common about the meaning of reform amongst these theorists is that “the psychological changes in offenders that they are interested in promoting are, roughly ...: becoming convinced that one’s action was wrong; feeling guilty for performing it; resolving not to do it again.”<sup>132</sup>

Such a view of punishment, whether as a moral educative or communicative lesson to the offender, is underlined by two main assumptions. The first one is that the state has a superior status to the individuals as a neutral institution intending their benefit. Secondly, the state is making moral declarations through the law about the rightfulness and the wrongfulness of the individuals’ actions.

In the first assumption, although the superior status of the state in applying punishment is inherent in all punishment theories to a certain degree, however, it gains an additional importance here. Here, the state exceeds its superior status of a regulator who ensures that breaking the law will have consequences to being a moral educator who aims to communicate to the offender the immorality of his/her actions for his/her own benefit. It is a picture of a state that cares for the individuals and who is above individuals’ conflict. This is especially clear in Morris and Hampton views, in which the state plays a role similar to a parent who punishes his children to morally educate them about right and wrong. As Hampton advocates “punishment should not be justified as a deserved evil, but rather as an attempt, by someone who cares, to improve a wayward person.”<sup>133</sup> As to the second assumption, it does not assume that the state should declare a set of moral laws, but rather that the existing laws themselves make moral declarations regarding the criminalized conducts.<sup>134</sup>

Accordingly, assuming that the Egyptian regime's philosophy of punishment is not deterrence at all or not deterrence only, but to teach those criminals that their acts are morally wrong, to make them admit guilty for them and to reform them into refraining from committing crimes in the future because it is the right thing to do on moral grounds. Then, the success of such an aim depends on the realization of the previous two assumptions. First, whether the state is seen by the offenders as a neutral punishment institution aiming at the offenders’ benefit. Second, determining the nature

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<sup>132</sup> *Id.* at 623

<sup>133</sup> *Supra* note 125 at 237

<sup>134</sup> Lisa Anne Smith, *The Moral Reform Theory of Punishment*, 37 *Ariz. L. Rev.* 197, 201 (1995)

of the moral messages that the Egyptian regime is declaring through its laws and whether it is consistent with the crimes.

Based on the answers to these questions, we would be able to see whether there are logical reasons to support whether a reform policy will achieve its aim. Will the Egyptian regime be able to convince the offenders that their actions are morally wrong? Will reform work as a successful justification for the regime in using punishment?

#### **4. Application of Moral Reform Philosophy on the Egyptian Regime:**

According to the moral reform philosophy, the first step towards moral reform is convincing the offender that his/her actions are morally wrong. Without the realization of the first step, the state cannot move to the second or the third steps represented in initiating a feeling of guilt and a willingness to not commit a crime based on moral grounds.

Accordingly, as highlighted above, in order to educate or communicate such a message of morality, the educator/communicator should be an institution intending the benefit of the offender through conviction, and the offender's actions should be declared immoral by the laws of the state. In our case, neither assumption is realized.

To clarify, the use of punishment as a repression mechanism -as explained in the first chapter- as much as it may produce benefits for the regime, it as well hurts and diminishes its legitimacy in the eyes of the prosecuted. The regime's acts of repression and restriction of freedoms, created a picture of the state not as an impartial party who is responsible for the administration of punishment and the reform of criminals, but, rather as an enemy who coerces those who object the regime.

Furthermore, the persuasion process that the state should be aiming to achieve to reform the offenders who broke the law, the regime is unable to conduct it with those who are law abiding citizens. The control of the means of change in the public realm regarding the simplest forms of communication and conviction represented in the power of the word,<sup>135</sup> means that the regime is unable to face public dissent with

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<sup>135</sup> See Ch.1 of this paper, at 15-16

discussions and conviction. Rather, it chooses to repress those who oppose and dissent instead of hearing, replying and, convincing.

Moreover, even if state supporters argue otherwise that the regime is fair and that punishment institutions are impartial. The importance of the picture of the state in the reform process is not in how the state sees itself; rather, it is in how the offenders see the state. It is them who we need to convince of the immorality of their actions, not the supporters who already are convinced and satisfied with the regime's actions. Thus, the picture of the state that cares for the benefit of its citizens is missing completely.

As to the second assumption of the declaration of the immorality of the criminalized conducts, it is more complex. This assumption rests on the idea that the existing laws are communicating certain moral commands to the offenders and that through the reform process, the state aims to return the offenders to the moral grounds declared by the law. However, the problem with the crimes under which protesters, and civil society members are punished, is that the wide criminalization sphere declares ambiguous messages that contradict with other moral commands declared by a higher legal instrument, which is the constitution.

Let's consider first, the problem of protesters. The constitution declares a clear moral message that "Citizens have the right to organize public meetings, processions and demonstrations, and all forms of peaceful protests, provided they do not carry weapons of any type, and upon notification as regulated by the law."<sup>136</sup> The protests law provides in its first article that "[c]itizens have the right to organize and join public meetings, processions and peaceful protests, according to the provisions and the limitations set by this law."<sup>137</sup>

Indeed, there is no absolute right; every right declared by the constitution is to be regulated within certain limits by the laws. However, a limitation means that the exercise of the right is going to be restricted with clear boundaries, not effectively prevented.

With application to the right to protest, protesting means that citizens have the right to object to the current order by peacefully demonstrating against it. However,

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<sup>136</sup> *Supra* note 24 at article 73

<sup>137</sup> *Supra* note 4 at article 1

what the protest law did is that it criminalized the conduct of protesting against the public order<sup>138</sup> without specifying what public order means. Thus, the law created a wide discretionary power that possibly equates violating public order with any dissent activity against the current regime.<sup>139</sup> Accordingly, as the law made the crime applicable on any protest of dissent, and as every protest is an act of dissent<sup>140</sup> then the law has not restricted protests, it prevented them altogether.

How the regime –then - will be able to communicate a moral message that the right to protest, to object, is immoral as a crime, while the constitution drafted by the regime itself declares it as a basic constitutional right?

Thus, when the state attempts to reform the punished protesters by educating them that their actions were morally wrong, all what the punished offenders will hear is that the state is saying protest is morally wrong and this cannot be true according to the moral commands of the higher legal instrument, the constitution.

The same problem faces the regime regarding the members of civil society organizations. Article 75 of the constitution details the right to freely establishing and operating a civil society organization:

Citizens have the right to establish associations and non-governmental organizations *on a democratic basis*, and these shall be deemed legal entities upon notification.

*Such institutions shall operate freely*, and administrative authorities may not intervene in their affairs, nor dissolve them or their board of directors or trustees without a court order.<sup>141</sup>

Accordingly, the constitution declares a moral message that organizations have the right to operate freely on a democratic basis. Such operation refers to the ability of the organizations to achieve their declared objectives. Civil society organizations'

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<sup>138</sup> *Id.* at article 7

<sup>139</sup> A clear example of the use of such discretionary power for punishing those who protest against the regime, is the recent protests in April 2016 about Tiran and Sanafir Islands, where those protesting against the regime were arrested, while those who protested in support to the regime were left free. See *Hundreds of Egyptians stage anti-Sisi protest*, AlJazeera (April 2016), available at <http://www.aljazeera.com/news/2016/04/hundreds-egyptians-protest-red-sea-island-deal-160415132918378.html>

<sup>140</sup> Protests are defined as “any confrontational activity by domestic non-governmental actors that disrupts and challenges any government actor, agency, or policy.” See Sabine C. Carey, *The Dynamic Relationship between Protest and Repression*, 59 Pol. Res. Quarterly 1, 2 (2006)

<sup>141</sup> *Supra* note 24 at article 75

objectives generally revolve around promoting transparency through providing information to different stakeholders in the society, demanding government accountability, and pushing for political change towards more democratic governance.

These objectives require the ability of the organizations to contest the usefulness and conformity of the government actions with what they believe to be the national interest of the country. Thus, when the government monopolizes the determination of the national interest and punishes whoever disagrees, then this constitutional freedom becomes meaningless.

As clarified above in the deterrence context, crimes threatening civil society members can be factually applied to any work done by the organizations under the notions of violating national interest, destabilizing general peace and, demolition of the essential social or economic structures of the state.<sup>142</sup> Accordingly, the crimes under which civil society members are being punished sends moral messages that contradicts with the essence of the higher moral message of freedom of operation provided by the constitution.

Thus, if a civil society member is accused of any of these flexible crimes gets convicted and punished. How will the state succeed in convincing him/her that the organization's work is against the national interest when there is a fundamental objection on the part of the punished individual to the monopolization of the regime to the determination of what the national interest is?

How the state will be able to convince a feminist organization member working on changes to the social male dominated culture to call for more empowerment of women that her work is morally wrong because it demolishes the basic social structures and that she should be punished for it?

Similarly, a civil society member who issues reports on the violations and torture practices of the Ministry of Interior, how will the regime be able to convince him/her that he/she should be punished for inciting the hatred and the disrespect for the

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<sup>142</sup> See Deterrence Section, This paper at 34-35

government, thus inciting the overthrow of the government<sup>143</sup> and that this is morally wrong?

Accordingly, the moral reform process of the protesters or the civil society organizations members is likely to fail due to the unreasonableness of the moral messages of the crimes and their contradiction with the higher moral messages declared by the constitution.

The last problem, which is the reform of the Muslim Brotherhood members is more complicated than the previous two. Unlike the protesters and the civil society organizations members, the Muslim Brotherhood members will not see that there is a contradiction in the moral messages declared by the laws of the state. Rather, they deny the ability of the laws of the state to issue any moral commands in the first place.

To clarify, the Muslim Brotherhood's main purpose and ideology is that the only applicable law is the Islamic *Shariaa'* and not the man-made laws of the state.<sup>144</sup> Accordingly, the only legitimate source for the issuance of moral commands, according to their ideology is the Islamic *Shariaa'*.

Consequently, when the state issues a law that criminalizes membership of the Brotherhood as a terrorist organization, which is the main vehicle demanding the application of the Islamic *Shariaa'* in the governance of the state. Then, the punished members will conceive such a message not only as an immoral one, but also as a message of refusal to those who promote the Islamic *Shariaa'*, moreover, in some extremists' views, as a message of refusal to Islam itself.

Thus, a reform process that aims to bring Muslim Brotherhood members to the moral grounds of the laws of the state will likely fail due to the fundamental contradiction on the nature and source of the moral grounds that govern these individuals' conduct.

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<sup>143</sup> *Id.* article 174

<sup>144</sup> See *Supra* note 117 at 38 "the Brotherhood propagated a vision of Islam as *din wa dawla* (religion and state), that is, not only a guide to private belief and ritual but a comprehensive system of values and governance intrinsically different from—and superior to—the secular political systems of the West."

Moreover, even if the regime attempted to educate them religiously that there is no contradiction between the ability of the state to issue moral commands in its laws and Islamic *Shariaa*', such reform is likely to fail. This is because the communication of morality is coming not only from the state as an enemy who coerces the individuals as explained earlier, but, more particularly, from the illegitimate authority – in the Brotherhood members view- who performed a coup against the man who could have applied Islamic *Shariaa*'. Thus, this creates an impediment against the regime's ability to issue or communicate moral or legitimate commands.

Accordingly, the Egyptian regime's use of punishment cannot be justified in terms of achieving moral reform. This is due to the lack of the state's ability to convince the offenders of the immorality of their actions due to its stance as an enemy in conflict with them, and not as an institution that is above the conflict for which they are being punished. This is in addition to the contradiction of the moral messages declared by the crimes for which the offenders are being punished, and the moral messages declared by their basic rights in the constitution.

## **B. Retributivism**

Retributivism is the opposing school of thought to consequentialism in the justification of punishment. For retributivists, the justification for punishment does not lie in some good consequences that it achieves, or the social welfare that it produces for the benefit of the greater good of some of people.<sup>145</sup> Rather, punishment is an end in itself; criminals should be punished because punishment is the just and fair response to the crime that they committed.<sup>146</sup> Punishment, in itself, is a goal as it produces justice by giving every criminal the punishment he/she deserves.

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<sup>145</sup> Thaddeus Metz, *How to Reconcile Liberal Politics with Retributive Punishment*, 27 Oxford Journal of Legal Studies 683, 684 (2007)

<sup>146</sup> David Dolinko, *Retributivism, Consequentialism, and the Intrinsic Goodness of Punishment*, 16 Law and Philosophy 507, 508 (1997)

## 1. Retributivism Theory

Originally, retributivism started in the thinking of Immanuel Kant who advocated for the principle of retribution, providing that:

What kind and what degree of punishment does public legal justice adopt as its principle and standard? None other than the principle of equality (illustrated by the pointer on the scales of justice), that is, the principle of not treating one side more favorably than the other. Accordingly, any undeserved evil that you inflict on someone else among the people is one that you do to yourself. If you vilify him, you vilify yourself; if you steal from him, you steal from yourself. Only the Law of Retribution (*jus talionis*) can determine exactly the kind and degree of punishment.<sup>147</sup>

This principle constitutes the basic element in retributivists' thought, which has evolved in different forms over the years. One of the earlier forms is the 'just deserts' interpretation, which advocates that the justification of punishment is embedded in the punishment's role in achieving justice through giving every criminal a degree of harm that is proportionate and just in response to their wrongdoing and the degree of their culpability.<sup>148</sup>

Other forms include justifying punishment in terms of satisfying punitive emotions. This interpretation advocates that punishment is an end in itself because by giving the criminal what he/she deserves, the public's feelings of vengeance and hatred are satisfied in a legal organized manner.<sup>149</sup> Others have interpreted punishment as a way of expressing the state's disapproval to the violation that the criminal committed, and such expression should be proportionate to the seriousness of the violation.<sup>150</sup>

Accordingly, it seems that all of these interpretations share common features which underlie retributivists' thinking. First, punishment is justified as a response to a past crime, not as a tool to prevent future crimes. Second, that there is a vital connection between the validity of punishment and the wrongfulness of the act punished. Such

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<sup>147</sup> Immanuel Kant, *The Metaphysics of Morals*, trans. Mary Gregor (Cambridge: Cambridge University Press, 1996), 6. 332 cited in KORITANSKY, PETER KARL, *THOMAS AQUINAS AND THE PHILOSOPHY OF PUNISHMENT*, 44 (Catholic University of America Press, 2011)

<sup>148</sup> *Supra* note 62 at 25, *Supra* note 104 at 687 and Matthew Haist, *Deterrence in a Sea of "Just Deserts": Are Utilitarian Goals Achievable in a World of "Limiting Retributivism"?*, 99 *The J. of Crim. Law and Criminology* 789, 801 (2009)

<sup>149</sup> *Supra* note 62 at 28

<sup>150</sup> *Supra* note 104 at 687--688

connection requires that for justice to be achieved that the act punished should be qualified as a wrongdoing in the first place. And second that the degree and severity of punishment should be proportionate to the wrongdoing in a way that ensures that punishment is just what the criminal deserves.<sup>151</sup>

This clearly incites asking, if punishment is only justified when it gives the criminal the just degree deserved for his wrongdoing, how to judge then when the punishment has given the criminal more or less than what he deserves? In other words, what exactly constitutes the just degree intended?

In response to these questions, the unfair advantage theory emerged as one of the most important interpretations of the retributivism thought by Herbert Morris.<sup>152</sup> Morris's theory assumes that society is composed of individuals who agreed to live together under a group of rules which serves to protect each individual's rights, liberties and bodily safety.<sup>153</sup> Under these rules, each individual enjoys equal benefits and burdens. These benefits are presented in each person's ability to have their own sphere where no one interferes with his/her liberties and safety. The burdens are presented in each person's omission to interfere with the sphere of other people by harming their liberties or safety. Accordingly, "If a person fails to exercise self-restraint even though he might have and given in to such inclinations, he renounces a burden which others have voluntarily assumed and thus gains an advantage which others, who have restrained themselves, do not possess."<sup>154</sup>

Accordingly, punishment constitutes just what the criminal deserves when it places an extra burden on the criminal that equates the burden that he escaped, with an aim of restoring the balance of benefits and burdens. Thus, punishment interferes as the appropriate means to restore the balance by removing the unfair advantage that the criminal has acquired for himself by committing the crime and freeing himself from the restrictions of the law.<sup>155</sup>

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<sup>151</sup> Thaddeus Metz, *How to Reconcile Liberal Politics with Retributive Punishment*, 27 *Oxford J. of Legal Stud.* 683, 687-688 (2007)

<sup>152</sup> *Id.* and *Supra* note 59 at 49

<sup>153</sup> *Id.*

<sup>154</sup> Herbert Morris, *The Monist* 52, no. 4 (1968): 475 – 501 cited in *Supra* note 59 at 49-50

<sup>155</sup> *Supra* note 59 at 50-51

Consequently, in order to justify punishment based on retributivism, there are two main assumptions that must be realized. The first of them and the common one amongst all versions of retributivism is the wrongfulness of the conduct for which the offender is being punished. As punishment is only deserved as just deserts for the offender's wrongful conduct, then if such wrongfulness is negated, the applied punishment cannot be justified.

The second assumption relates to the interpretation of Morris regarding the justification of the degree of punishment deserved by the offender. He provides that the burden of punishment should equate the unfair advantage that the offender acquired by the crime in a society of balanced distribution of burdens and benefits. Accordingly, there is a basic assumption of the existence of a balanced distribution of rights and obligations among the members of the society, and the lack of such balance leads to the failure of the punishment justification as a result.<sup>156</sup>

Thus, if we assume that the Egyptian regime's philosophy of punishment is to achieve justice by giving every offender the punishment he/she deserves, then, there are two main questions to address: first, whether the actions that the offenders are being punished for are wrongful. Second, whether the offenders acquired an unfair advantage in a balanced society of burdens and benefits.

## **2. Application of Retributivism Philosophy on the Egyptian Regime**

The first and foremost question to ask, is whether the acts for which protesters, civil society organizations members and Muslim Brotherhood members are being punished for, are wrong?

The wrongfulness of any action is generally contested. There is no objective truth in deciding whether a specific action is right or wrong. Those opposing the regime will certainly provide that these actions are not wrong and, that the regime is abusing the mechanism of punishment. While, supporters of the regime will advocate that these actions are wrongful by nature. How then can such a conflict be resolved in deciding the wrongfulness of the actions embodied in the crimes of protesting, the crimes against

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<sup>156</sup> *Supra* note 59 at 58-59

the government and the crimes of pertaining to the Muslim Brotherhood as a terrorist organization?

I believe, such a conflict can be resolved by returning to the document made by the regime and its supporters, and campaigned as being the protector of national interests,<sup>157</sup> it is the constitution. The regime strongly urged people to vote for its adoption as a patriotic duty, and as a sign of support to El-Sisi.<sup>158</sup>

The previous section shows how the analysis of the crimes of protesting against public order and the crimes threatening civil society organizations members are actually crimes against protesting and against the free operation of the organizations. Thus, these crimes contradict with the moral commands of the constitution, which identified these acts as being morally right.

On the other hand, with regard to the Muslim Brotherhood members, they are punished for membership of the Brotherhood as a terrorist organization, and for promoting its activities and contributing to its operations. Are these actions wrong?

The wrongfulness of the membership and the acts of promotion and contribution is derived from the characterization of the Brotherhood as a terrorist organization. In this regard, the acts of terror and violence are defined as wrong by most people, however, is the regime punishing acts of terror and violence? Is it giving just deserts for offenders who have harmed people with their actions of terrorism?

In fact, it is hard to answer affirmatively to this question because the crime is the mere membership or contribution to without requiring any additional act of violence. Furthermore, those who will be punished for being members or continuing to be members or contributing to the activities of the Brotherhood as a terrorist organization can also be characterized as being members and contributors to the acts of a former political party, whom the regime characterized as being terroristic after its overthrow from governance.

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<sup>157</sup> *Cabinet: Most voters plan to approve constitution*, Mada Masr (Dec. 2013), available at <http://www.madamasr.com/news/cabinet-most-voters-plan-approve-constitution>

<sup>158</sup> *Sisi's Egypt*, Chronicle of the Middle East and North Africa (Dec. 2015 – Feb. 2016), available at <https://chronicle.fanack.com/egypt/history-past-to-present/sisi-egypt/>

Then, is the characterization of terrorism by the regime enough to turn the membership and the contribution into a wrongful conduct and to deserve punishment for it according to the retributivism philosophy?

Returning to the original words of Kant on retribution in search for answers, we find that he said “any undeserved evil that you inflict on someone else among the people is one that you do to yourself. If you vilify him, you vilify yourself; if you steal from him, you steal from yourself.”<sup>159</sup>

Apparently, Kant is referring to a wrongful conduct that causes an undeserved evil i.e. that causes harm. Does membership qualify as harm? In the eyes of the regime, it may qualify as the harm of strengthening the organization which promotes political ideas that they object to, or believe to be dangerous. But, isn't the freedom to be a supporter of political ideas -even if in opposition to the current government policies- part of the right of political participation? Otherwise, how can it be in a democratic republic as the first article of the constitution stipulates?<sup>160</sup>

This analysis leaves us with one of two conclusions. Either we can depend on the declared intentions of the regime in the constitution, which they advocated to be the protector of the national interests<sup>161</sup> and consequently reach the conclusion that the crimes of protesting, civil society and Muslim Brotherhood contradict with the constitutional rights and their intrinsic moral goodness. Or, we admit that this constitution is just ink on paper, and thus the punishment applied is a political, and not legal. In both cases, it is hard to justify such punishment on the basis of retributivism.

As to the second question, whether this punishment can be justified as a restoration of balance between benefits and burdens in the society. A useful start to answer can be from the general criticism against the unfair advantage theory that “the view of political society it presupposes is so unrealistic as to render the theory altogether inapplicable.”<sup>162</sup> In fact, it is hard to argue that in any society, there is a balanced distribution of benefits and burdens. The law that places benefits and burdens

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<sup>159</sup> Immanuel Kant, *The Metaphysics of Morals*, trans. Mary Gregor (Cambridge: Cambridge University Press, 1996), 6. 332 cited in KORITANSKY, PETER KARL, *THOMAS AQUINAS AND THE PHILOSOPHY OF PUNISHMENT*, 44 (Catholic University of America Press, 2011)

<sup>160</sup> *Supra* note 24

<sup>161</sup> *Supra* note 157

<sup>162</sup> *Supra* note 59 at 58

between individuals is realistically made by people who have enough power and money to reach the stage of putting the rules of the game, and they one way or another, put it as to best serve their interests. The impoverished and the unprivileged, even in the most democratic societies have much smaller contribution to the creation of the rules to their favor.

Accordingly, the related idea in the theory that the criminal is punished because he “failed to ‘play by the rules’”<sup>163</sup> to which he agreed is highly contested, especially in the Egyptian case. The rules of the game are the product of the regime’s will alone; the punished individuals did not agree to play by them.

The constitution was amended by members appointed by the interim president Adly Mansour.<sup>164</sup> The protest law was issued by the interim president Adly Mansour, against the objection of almost all youth movements and civil society organizations.<sup>165</sup> The crimes against the government have been included in the penal code since 1937 during the days of the royal family, and the new amendments such as the one of the foreign fund article were introduced by a presidential decree that has the force of law under president El-Sisi.<sup>166</sup> The declaration of the Brotherhood to be a terrorist organization was issued by a Cabinet decree.<sup>167</sup>

Accordingly, it is not being even argued that people representatives do not really reflect the opinions of the impoverished or the interests of the opposing voices to the regime. Rather, the laws under which the offenders are being punished are the sole product of the regime directly. Thus, there was no agreement to these rules of the game, nor there were any balanced distribution of burdens and benefits under them.

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<sup>163</sup> *Id.* at 50

<sup>164</sup> *Supra* note 158, “With no parliament, the interim president appointed a 10-member committee of legal experts to make suggestions for modifications. They passed these on to another (appointed) 50-member committee, headed by failed presidential candidate Amr Mousa, which was responsible for drafting a new constitution”

<sup>165</sup> See *Egypt: Deeply Restrictive New Assembly Law*, Human Rights Watch (Nov. 2013), available at <https://www.hrw.org/news/2013/11/26/egypt-deeply-restrictive-new-assembly-law>

<sup>166</sup> Reem Gehad, *Egypt amends penal code to stipulate harsher punishments on foreign funding*, Ahram Online (Sep. 2014), available at <http://english.ahram.org.eg/WriterArticles/NewsContentP/1/111488/Egypt/Egypt-amends-penal-code-to-stipulate-harsher-punis.aspx>

<sup>167</sup> *Supra* note 116

Not only that, but moreover, even if we assumed that this constitution grants every individual an equal sphere of rights and obligations, infringement of which leads to punishment. We find that the offenders did not infringe others' spheres; rather the regime has infringed on their rights by using flexible criminalization boundaries and placed an unfair burden on the individuals addressed by these crimes in the first place. And by punishing them, not only is no balance restored, but rather a greater imbalance and injustice is created by placing an additional burden of punishment on those who already are under an unfair burden.

Accordingly, the state is neither achieving justice nor restoring balance by punishing offenders under these crimes. Rather, it is placing a double unfair burden on the punished offenders. The first burden is the manipulation of the rules that the regime advocates to be the rules of the game, and the second is the burden of being punished for exercising these rights.

Based on this analysis, it is highly unlikely that the regime will be able to justify its use of punishment on the basis of achieving justice through retributivism.

### **C. Political Control**

Criminal punishment enforced by the state is a form of violence and coercion against the offender. They capture a person against his will; lock him in a cell, deprive him of his freedom for years, his whole life stops and his world turns into a chamber of four walls. Or, moreover, they may even take away his life through capital punishment.<sup>168</sup>

However, one of the most important reasons why punishment institutions continue to endure in states is the belief that there is a justification that turns such a practice from pure violence into legitimate violence, legitimate coercion. Whether for a greater aim of promoting the greater good of the society, or for reforming the captured criminal, or for justice requirement to give every culpable wrongdoer his/her just deserts. As Dolinko highlights the importance of the justification of criminal punishment:

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<sup>168</sup> "As one commentary puts it, 'it is usually wrong to lock people up, to take their money without return, or put them to death'" See MATT MATRAVERS, JUSTICE AND PUNISHMENT: THE RATIONALE OF COERCION, 2-3 (Oxford Scholarship Online, November 2003)

Criminal Punishment involves the infliction on the offender of deprivations, restrictions, and disabilities whose imposition would in other contexts be morally improper and illegitimate. The various competing “theories of punishment” ... seek to explain why we are nonetheless morally permitted, or perhaps even required, to punish criminals.<sup>169</sup>

The previous sections have shown how punishment applied by the regime under the protest law, the crimes against the government and the criminalization of membership of the Muslim Brotherhood lack justification. The regime’s punishment of these offenders, cannot be justified in terms of achieving deterrence, nor is it justified in terms of morally reforming the offenders, and not even justified in terms of achieving public justice.

Accordingly, we are left with naked unjustified violence. This strongly provokes asking, what may be then the intention of the state from using this form of violence? What does the state aim to achieve in the long run, if not, deterrence, reform, or justice?

The only possible answer left, and which actually fits the current non-democratic nature of governance, is that the regime is trying to achieve political control of the public realm to achieve a certain degree of stability which will guarantee the durability of the regime.

Eventually, such an aim appears to have succeeded in the short run. Protests – at least prior to April 2016- were eliminated. Civil society organizations are currently working in a very restrictive environment, some have been closed and others threatened with closure. Political opposition and the media self-censor out of fear of punishment, and the problem of the Muslim Brotherhood's challenge to legitimacy is contained by imprisoning all its leaders and a great percentage of its members.

Now, the regime possibly aims that such control will be effective enough as to generate stability, to ensure the durability of the regime and, may be to allow for the development of the state. Accordingly, we need to ask; will such political control

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<sup>169</sup> David Dolinko, *Retributivism, Consequentialism, and the Intrinsic Goodness of Punishment*, 16 L. and Phil. 507, 508 (1997)

endure? Can it generate stability and restrict future dissent over the long run? In short, can unjustified punishment achieve political control and stability over the long run?

Regarding the questions of the durability of control and its relation to stability and dissent, political scientists have explored the relationship between coercive techniques and the durability of regimes through measuring how repression increases or decreases the likelihood of more dissent against the regime.

Authors begin by defining what is meant by violence or coercion. Unsurprisingly, illegitimate punishment is one of the first types.<sup>170</sup> According to Conway W. Henderson, coercion definitely includes “arbitrary arrest and detention.”<sup>171</sup> Further, Dipak K. Gupta, Harinder Singh and Tom Sprague provide that coercion include the application of punishment on dissent groups:

The literature on government coercion...implies three different aspects of coercion. First, *coercion may be overt, that is, the actual use of governmental authority to inflict punishment on the dissident groups*. Second, it can also manifest in expectations about future threats of sanctions from the regime. Third, coercion can have covert or preemptive aspects, such as surveillance and infiltration of the opposition movement by the forces of the authority.<sup>172</sup>

However, the studies conducted on the result of repression on the likelihood of dissent, and the durability of regimes are controversial in their results. They can generally be grouped into two trends opposing each other.

The first trend provides that repression can succeed in decreasing the likelihood of dissent by increasing the costs of political participation and objection.<sup>173</sup> Their analyses suggest that coercion, at first, triggers high levels of dissent out of anger from repression up to a certain point. After this point, the costs of dissent become unbearable as to lead to a replacement of anger with the fear of repression and thus lead to a

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<sup>170</sup> See Dipak K. Gupta, Harinder Singh and Tom Sprague, *Government Coercion of Dissidents: Deterrence or Provocation?*, 37 *The J. of Conflict Resol.* 301, 301- 302 (1993) and Conway W. Henderson, *Conditions Affecting the Use of Political Repression*, 35 *The J. of Conflict Resol.* 120, 121 (1991)

<sup>171</sup> Conway W. Henderson, *Conditions Affecting the Use of Political Repression*, 35 *The J. of Conflict Resol.* 120, 121

<sup>172</sup> Dipak K. Gupta, Harinder Singh and Tom Sprague, *Government Coercion of Dissidents: Deterrence or Provocation?*, 37 *The J. of Conflict Resol.* 301, 302 (1993)

<sup>173</sup> *Id.* at 303

significant decrease in dissent.<sup>174</sup> This means that control will likely endure and repression will eventually produce enough fear to overcome dissent.

On the other hand, the other group argues the opposite. Repressive techniques lead to more dissent and reduces the legitimacy of the governing authority.<sup>175</sup> Their analysis provides that coercive techniques, such as illegitimate punishment in our case, might decrease dissent in the short run, however, it likely “increases dissident behavior in the long-run, particularly when repression is applied indiscriminately.”<sup>176</sup> Accordingly, they conclude that the fear generated by repression is only temporary, and in the long run stability will not endure and more dissent is likely to arise. How then can one judge which outcome between these two opposing trends is likely to apply in the case of the Egyptian regime?

The answer may be found in exploring what is exactly at stake here. What is the element that the regime loses by specifically applying unjustified punishment as a repression technique? As discussed above, punishment is violence but only legitimate when it has moral or philosophical justification. Accordingly, what the regime loses when it loses justification is the legitimacy to use violence.

The more the regime uses unjustified punishment repetitively and indiscriminately, the more citizens will see that this punishment lacks justification, and as such is illegitimate. Such loss of legitimacy in the use of state violence in punishment certainly will eat from the regime’s share of legitimacy in governing.<sup>177</sup> As advocated by Cheria George explaining and citing Hannah Arendt on the effects of violence on power:

What power needs is legitimacy, and legitimacy is what is lost when violence is misapplied: ‘To substitute violence for power can bring victory, but the price is very high; for it is not only paid by the vanquished, it is also paid by the victor in terms of his own power.’<sup>178</sup>

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<sup>174</sup> Sabine C. Carey, *The Dynamic Relationship between Protest and Repression*, 59 Pol. Res. Quarterly 1, 1 (2006)

<sup>175</sup> *Supra* note 119 at 303

<sup>176</sup> *Supra* note 121

<sup>177</sup> PERŠAK, NINA, LEGITIMACY AND TRUST IN CRIMINAL LAW, POLICY AND JUSTICE : NORMS, PROCEDURES, OUTCOMES, 13 (Routledge, 2016)

<sup>178</sup> Cheria George, *Consolidating authoritarian rule: calibrated coercion in Singapore*, 20 The Pacific Rev. 127, 129 (2007)

Apparently, the main loss that the regime will experience from unjustified punishment is the loss of legitimacy. This clearly incites asking why legitimacy is important, and what the effects of losing legitimacy are on political control and stability.

Legitimacy generally means “the right to rule and the recognition by the ruled of that right.”<sup>179</sup> The importance of legitimacy lies in the fact that it is the engine that generates people's obedience to the authority. It guarantees that citizens will accept the forms of coercion applied to them by the state, such as imposing taxes and abiding by the rules.<sup>180</sup>

Further, legitimacy ensures stability of the state, better administration of state policies and better performance overall.<sup>181</sup> More importantly and related to political control and stability is the fact that “states that lack legitimacy devote more resources to maintaining their rule and less to effective governance, which reduces support and makes them vulnerable to overthrow or collapse.”<sup>182</sup>

Accordingly, the Egyptian regime needs legitimacy to ensure people peaceful obedience and lesser dissent. However, the use of unjustified punishment erodes the regime's legitimacy, thus lessening the likelihood of peaceful obedience. As long as peaceful obedience decreases and dissent increases, the regime will need violence to ensure obedience. The more violence is used, the less legitimacy the regime will have, and accordingly less peaceful obedience and more violence, and so on.

Consequently, violence used by the regime will open a vicious circle of violence that may end in the death of the regime itself. That is why political science theorists advocate that “there are selfish, rational reasons for even dictators to exercise self-restraint in their use of violence.”<sup>183</sup>

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

<sup>180</sup> DeRouen Karl, Goldfinch Shaun, *What Makes a State Stable and Peaceful? Good Governance, Legitimacy and Legal-Rationality Matter Even More for Low-Income Countries*, 14 *Civil Wars* 499, 504 (2012) and Bruce Gilley, *The meaning and measure of state legitimacy: Results for 72 countries*, 45 *Eur. J. of Pol. Res.* 499, 499 (2006)

<sup>181</sup> *Id.* and PRATO, GIULIANA B, DR, PARDO, ITALO, DR, PARDO, DR ITALO, *CITIZENSHIP AND THE LEGITIMACY OF GOVERNANCE*, (Ashgate, 2012)

<sup>182</sup> Bruce Gilley, *The meaning and measure of state legitimacy: Results for 72 countries*, 45 *Eur. J. of Pol. Res.* 499, 499 (2006)

<sup>183</sup> *Id.* at 130

A clear example of the beginning of this cycle is the recent protests in April 2016 on the demarcation of islands Tiran and Sanafir between Egypt and Saudi Arabia. On April 15<sup>th</sup> 2016, despite the threats of the Ministry of Interior, many protests erupted in different governorates in opposition to the demarcation of these borders.<sup>184</sup> The regime had to use the police forces to contain the protests, and many young people were arrested.<sup>185</sup> The president said that he does not want anyone to talk about this issue any more.<sup>186</sup> However, despite the arrests, and the regime threats, protesters advocated that they will protest again in 25<sup>th</sup> of April, Sinai liberation day.<sup>187</sup> Such dissenting act against the regime signals that people are starting to break the point of fear.<sup>188</sup>

To face the protests of 25<sup>th</sup> of April, the regime had to use more violence to secure obedience. The police forces started a random arrest campaigns of young people sitting at cafés, searching their mobiles and laptops for any sign of dissent against the regime.<sup>189</sup> On the 25<sup>th</sup> of April, the army forces joined police forces in fighting the protests. Hundreds of protesters were arrested.<sup>190</sup>

These incidents trigger great worry about this circle of violence created by the regime's attempts to control the public realm through unjustified punishment. This is the beginning signs of the consequences of losing legitimacy due – at least partially- to unjustified and illegitimate use of punishment.

Consequently, in answer to the main question about whether unjustified punishment can generate political control in the long run. I believe based on the previous analysis that unjustified punishment will likely fail to produce political control

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<sup>184</sup> *Supra note 95-98*

<sup>185</sup> *Update: Teargas, arrests of protesters blaming state for Saudi island deal*, Mada Masr (April 2016), available at <http://www.madamasr.com/news/update-teargas-arrests-protesters-blaming-state-saudi-island-deal>

<sup>186</sup> *'Don't talk about it': Al-Sisi on Red Sea islands*, Daily News Egypt, (April 2016), available at <http://www.dailynewsegypt.com/2016/04/13/dont-talk-al-sisi-red-sea-islands/>

<sup>187</sup> *Egypt's 25 April protests: The two islands and beyond*, Ahram Online, (April 2016), available at <http://english.ahram.org.eg/NewsContent/1/64/204290/Egypt/Politics-/Egypts--April-protests-The-two-islands-and-beyond.aspx>

<sup>188</sup> *Id.*

<sup>189</sup> *Egypt: Mass arrests in 'ruthlessly efficient' bid to block peaceful protest*, AMNESTY International (April 2016), available at <https://www.amnesty.org/en/latest/news/2016/04/egypt-mass-arrests-in-ruthlessly-efficient-bid-to-block-peaceful-protest/>

<sup>190</sup> *Egypt police suppress protests against Sisi government*, The Guardian (April 2016), available at <http://www.theguardian.com/world/2016/apr/25/cairo-protests-egypt-red-sea-islands-saudi-arabia>

or stability due to the lack of legitimacy. Such lack of legitimacy will lead to more violence from the regime to secure obedience, thus increasing political instability and the likelihood of ongoing dissent and revolt.

## **VI. Conclusion:**

This paper argues that the Egyptian regime post 30 of June 2013 used punishment as means of control of the public realm in the short run, however, in the long run, such use of punishment will likely fail.

The current political context analyzed in the first chapter suggests that now five years after the Revolution, Egypt is drifting away from democracy towards an authoritarian form of governance in which punishment is used as means to political control of the public realm. However, in the long run, such use of punishment will likely fail because it has no moral or philosophical justification and it will likely fail to guarantee political control.

Chapter two detailed these arguments by proving that the Egyptian regime use of punishment in the public realm fails to be justified according to any of the main theories of punishment whether in terms of consequentialism or retributivism. As a result, such lack of moral and philosophical justification returns punishment to being illegitimate. Such illegitimacy will deduct from the regime's legitimacy to govern, thus generating more violence to secure obedience and achieving less political stability.

Accordingly, the insistence of the Egyptian regime on using unjustified punishment as a way of dealing with its political problems is a recipe for failure.