Contemporary Mechanisms to Reform Islamic Criminal Law: Between Legal Doctrine and Positive Law

The Case of Morocco

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Abstract

This essay analyzes the contemporary evolution of Islamic criminal law, focusing primarily on the case of Morocco. It investigates the hermeneutical strategies employed by Islamic scholars and modern Muslim states to avoid the implementation of certain punishments drawn from ḥudūd*,* qiṣāṣ*, and* taʿzīr*. The essay highlights, for instance, the role of "contextual and eclectic ijtihād" in adapting Islamic criminal law to modern contexts, and emphasizes the shift from* ḥudūd *to* taʿzīr *punishments across many Muslim countries. By focusing on the evolution of criminal law in Morocco and its connection to Islamic law, the essay explores the influence of Western legal systems and internal reform efforts, showing how traditional Islamic terminology and penalties have been mainly secularized while keeping the "Islamic" offenses. It sheds light on the dynamic interplay between tradition and modernity. The essay also addresses ongoing debates surrounding the death penalty in Morocco and its link to Islamic criminal law, particularly in light of the Kingdom's recent vote in favor of a universal moratorium at the United Nations. Through this case study, the essay also highlights the role of modern Muslim states in balancing Islamic legal heritage with contemporary human rights standards, as well as the strategies used to "Islamize" the secularization of Islamic criminal law.*

Introduction*

In the context of what we called "State *ijtihād*,"[1] many modern Muslim states have used different strategies, such as contextual[2] and eclectic *ijtihād*, or switching from *ḥudūd* to *taʿzīr*,[3] in order to justify the non-application of Islamic criminal law.

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* The author wishes to thank Ghada Amer for her excellent editorial assistance.

1 "State *ijtihād*" refers to a contemporary phenomenon in the Islamic world whereby the modern nation-state integrates elements of Islamic law into the framework of positive law. As a result, the state and its institutions have become practically part of the Islamic law-making process, especially with regard to family law. The phenomenon reflects how the state has become an actor in *ijtihād*, integrating Islamic scholars in the process only as one actor among others. Thus, Islamic scholars have lost the monopoly over historical hermeneutical authority in Islamic law. See Yannis Mahil, L'ijtihâd Collectif: L'Évolution du Droit Musulman 88–97 (2024).

2 A hermeneutical method that has become very common in contemporary times is what we call "contextual *ijtihād*" (*ijtihād siyāqī*). Some scholars instead refer to it as "*ijtihād* in the context" (*ijtihād fī-l-wāqiʿ*). It consists of reinterpreting the Qurʾān and Sunna or certain rules of *fiqh* in light of the context in which they were "revealed" and/or produced, as well as the new circumstances of application, to produce new rulings. This practice of accounting for the context of the revelation of a Qurʾānic verse or the enunciation of a *ḥadīth* in the lawmaking process can be found from the earliest Islamic sciences, notably in *asbāb al-nuzūl* (circumstances of revelation) for the Qurʾān and *ʿilm asbāb wurūd al-ḥadīth* (the science of the circumstances of the enunciation of the *ḥadīth*) for the prophetic traditions. *See* Yannis Mahil, Les Mécanismes Herméneutiques Contemporains de Réforme du Droit Musulman 42 (2021) (Ph.D. dissertation, University of Strasbourg).

3 "Eclectic *ijtihād*" refers to the different hermeneutic tools used by Islamic scholars and then modern Muslim states to modulate Islamic law through a form of eclecticism. It is close to what Ahmed Fekry Ibrahim calls "pragmatic eclecticism." In Western Islamic studies scholarships and among Islamic scholars, it has been called *talfīq* or *takhayyur*. In the pre-modern era, the focus was on *tatabuʿ al-rukhāṣ* or *tarjīḥ*, whereas in the contemporary era, mechanisms of *takhayyur* and *talfīq* have emerged. Some Islamic scholars viewed *talfīq* negatively, such as al-Būṭī, while others, like Mawlawī, legitimized it by establishing a framework for its application. Furthermore, some Islamic scholars proposed alternatives intended to be more "legitimate Islamically" such as "selective *ijtihād*" (*al-ijtihād al-intiqāʾī*). For our part, considering that they are first of all hermeneutic methods, we classify them as forms of *ijtihād*, although debate persists as to whether eclecticism falls under *ijtihād* or *taqlīd*, with Malcolm Kerr, for example, referring to it as limited *ijtihād*. The main idea behind "eclectic *ijtihād*" is the selection of a specific legal opinion better suited to some modern needs and reflects legal pluralism, not being limited to a single Islamic law school. *See* Mahil, *supra* note 2, at 246–92; *see also* Ahmed Fekry Ibrahim, Pragmatism in Islamic Law: A Social and Intellectual History (2015); Norman Anderson, Law Reform in the Muslim World 42–82 (1976); Wael B. Hal-

For example, the King of Morocco, through his traditional and constitutional status as *amīr al-muʾminīn*,[4] is endowed with the status of *mujtahid*.[5] From this position, Hassan II[6] advanced a kind of *ijtihād*, using original arguments to justify the non-application of the *ḥudūd* in matters of theft. He stated that, due to a change in context and a practical reality that would lead to more negative elements by implementing these rules, in particular, the social costs for the state of creating "materially destitute and manually incapable people," these penalties should not be applied.[7]

In the same vein, in Malaysia, Mahathir Mohamad[8] also opposed the application of the *ḥudūd* punishments, especially those promoted by the Malaysian Islamic Party (PAS).[9] The Malaysian case is particularly tied to the 1993 adoption of a criminal law implementing *ḥudūd* in the state of Kelantan, in the framework of their federalism. This issue generated many controversies.[10] Mahathir affirmed that the primary penal objective in Islam is justice. However, in his view, applying classical Islamic criminal law in the Malaysian context, namely, a multicultural country with a significant non-Muslim population,

laq, *Talfīḳ*, Encyclopedia of Islam (2015); Wahba Zuḥeylī, *al-Ijtihād fī ʿaṣrinā hadha min ḥaythu al-naẓariyya wa-l-taṭbīq*, 4 Kyoto Bulletin of Islamic Area Stud. 1–9 (Mar. 2011); Syed Moinuddin Qadri, *Tradition of Taqlīd and Talfīq*, 57 Islamic Culture 2 (1986).

4 Currently set forth in art. 41 of the Moroccan Constitution, the King serves as *Amīr al-Muʾminīn* ("Commander of the Faithful"). This role confers religious legitimacy alongside political authority within the Moroccan legal and traditional framework. See Baudouin Dupret, Jean-Noël Ferrié & Kenza Omary, Maroc: Des Réformes Substantielles et Conservatrices 41–45 (2012).

5 Hassan II & Éric Laurent, Le Génie de la Modération: Réflexions sur les Vérités de L'islam 68 (2000).

6 Hassan II (1929–1999), Former King of Morocco.

7 Caravane de Nuit, *Interview by Frédéric Mitterand*, Antenne 2, at 18:00 (Mar. 3, 1994), https://www.youtube.com/watch?v=md_WPr9gyaE.

8 Mahathir Mohamad served as Prime Minister of Malaysia from 1981 to 2003 and from 2018 to 2020. He is considered to be the "Father of Modern Malaysia."

9 The Malaysian Islamic Party (PAS) is often described as fundamentalist and governs several regions in Malaysia, such as Kelantan, where it has implemented some of the ḥudūd punishments.

10 Mohammad Hashim Kamali, *Punishment in Islamic Law: A Critique of the Hudūd Bill of Kelantan (Malaysia)*, 13 Arab L.Q. 203, 203–34 (1998).

would be unjust and contrary to the teachings of Islam.[11] He criticized PAS and its Penal Code, arguing that it created legal inequity whereby Muslims would have very harsh sentences,[12] while non-Muslim criminals would be given light penalties for serious crimes.[13] Thus, Mahathir considered that this penal law was "contrary to the teachings of Islam" and that PAS was using this law on *ḥudūd* only for political purposes. As Prime Minister, he even sought to block the penal law, which he viewed as contrary to the Malaysian Federal Constitution and the spirit of justice in Islam.[14]

This kind of argument and method can be considered as a "contextual *ijtihād*"[15] which has been applied in contemporary times to the case of *ḥudūd*. Indeed, many Islamic scholars have cited the case of ʿUmar Ibn al-Khaṭṭāb,[16] who suspended the Qurʾānic punishment for theft during a time of scarcity.[17] Even though *ḥudūd* are, in theory, not open to *ijtihād*, we observe that, through subtle mechanisms, a form of "*de facto ijtihād*"[18] has been employed to legitimize their cessation.

Today, scholars such as ʿAlī Jumʿa,[19] have stated that, as we currently live in a period of "necessity" (*ḍarūra*), *sharīʿa* does not require the application of *ḥudūd*.[20] Muṣṭafā Zarqā similarly argued that, due to contemporary circumstances, it is

11 *See* Astro Awani, *Dr. Mahathir Stands Firm in His Statement on Hudud*, Awani International, Apr. 26, 2014; *see also* Rashvinjeet S. Bedi, *Dr Mahathir: PAS Implementing Un-Islamic Hudūd for Political Gain*, Asia One, Apr. 16, 2015.

12 Such as cutting off the hand for theft.

13 Such as a short prison sentence or a monetary fine.

14 Kamali, *supra* note 10, at 207–08.

15 See Mahil, *supra* note 2.

16 Mark A. Gabriel, *Reforming Hudud Ordinances to Reconcile Islamic Criminal Law with International Human Rights Law* 169 (2016) (Ph.D. dissertation, University of Cape Town).

17 Raghīb Serjānī, *Taṭbīq al-sharīʿa: al-hudūd fī al-islām*, Islam Story (June 12, 2011), https://islamstory.com/ar/artical/386/تطبيق-الشريعة.

18 I use the term "*de facto ijtihād*" to describe different interpretive methods or processes that have a practical impact on Islamic legal rulings or implementations, even if they are not considered formal *ijtihād* methodologies in classical *uṣūl al-fiqh*. *See* Mahil, *supra* note 2.

19 ʿAlī Jumʿa was the Grand Mufti of Egypt from 2003 to 2013.

20 ʿAlī Jumʿa, Uqūbāt al-ḥudūd bayna al-taʿlīq wa al-aṭbīq (2011), cited in Gabriel, *supra* note 16, at 168.

necessary to substitute *ḥudūd* with other penalties more appropriate to context.[21] Mohammad Hashim Kamali has also maintained that *ḥudūd* should not be considered as fixed penalties, and that judges should be able to set them aside in favor of other sanctions according to practical circumstances of each case.[22] ʿAbd Allāh bin Bayyah has likewise put forward contextual arguments to justify suspending *ḥudūd*, stating in particular that their application could create greater harm.[23] Many other scholars of Islamic law, including Sayyid Abū al-Aʿlā Mawdūdī,[24] Muḥammad al-Ghazālī,[25] and Salīm al-ʿAwā,[26] have supported the view that *ḥudūd* are not truly applicable in the absence of social justice and equity in society.[27] Even in the United States, voices such as Azizah Y. al-Hibri[28] and the Fiqh Council of North America[29] have called for a moratorium on the death penalty, based upon similar arguments, particularly emphasizing the racial and social inequalities in the judicial system.

In this essay, we examine how the arguments of Islamic scholars for suspending *ḥudūd* have contributed to the secularization of criminal law while maintaining a framework grounded in Islamic principles. We focus on the case of Morocco and the evolution of its criminal law in interaction with Islamic legal traditions. For instance, we explore how the punishments prescribed by classical Islamic criminal law have been secularized and their terminology removed while retaining Islamic offenses as crimes. We then analyze the issue of the death penalty in

21 Muṣṭafā Zarqā, al-Madkhal al-fiqhī al-ʿāmm 51 (2004).

22 Mohammad Hashim Kamali, *Principles and Philosophy of Punishment in Islamic Law with Special Reference to Malaysia*, 10 Islamic Civ. Rev. 18, 18–19 (2019).

23 ʿAbd Allāh b. Bayyah, Tanbīh al-wāqiʿ ʿalā taʾṣīl fiqh al-wāqiʿ 82–99 (2014).

24 Sayyid Abūl Aʿla Maududi, The Islamic State and Constitution 8 (1983).

25 Muḥammad al-Ghazālī, Min hunā naʿlam (1948).

26 Mohamed Salīm al-ʿAwā, Punishment in Islamic Law (1982).

27 Mohammad Hashim Kamali, Crime and Punishment in Islamic Law: A Fresh Interpretation 231–39 (2019).

28 Azizah Y. al-Hibri, Capital Punishment in the United States: An Islamic Perspective (2001).

29 Mohamed Nimer, The North American Muslim Resource Guide 160 (2002).

Morocco, highlighting the balance between theoretical law and its practical application. Finally, we consider Morocco's December 2025 vote in favor of a global moratorium on the death penalty at the United Nations and its implications in the country, particularly in relation to Islamic legal references.

Shift from *Ḥudūd* to *Taʿzīr*: An "Islamic Secularization" of Criminal Law

Most modern Muslim states in the late 19th and throughout the 20th century secularized substantial parts of their criminal law,[30] removing many elements of *ḥudūd*. Scholars such as Noel Coulson have explained this historical evolution not only as a trend of Westernization,[31] but also as a result of the fact that classical Islamic legal doctrine had not established a criminal law system in the technical sense of modern legal codes.[32]

In this context, many Islamic Scholars, along with modern Muslim states, sought to find a middle path between Islamic law and the secularization of criminal law. Here started the phenomenon that we call "shift from *ḥudūd* to *taʿzīr*." A key historical example is the reform of the Ottoman Penal Code of 1858, which effectively replaced nearly all *ḥudūd* punishments with alternative penalties falling under *taʿzīr*.[33] While some scholars, such as Coulson[34] and Baer, interpret this reform as a Westernization or secularization, others like Ozcan[35] and Akgündüz[36] emphasize its "Islamic" character, framing it as an extension of *taʿzīr* prerogative in the form of modern law. Under Islamic law, the authority has flexibility to administer *taʿzīr* punishments. This allowed modern Muslim states, following the example of the Ottoman Empire, to enact positive laws which integrated

30 Noel Coulson, A History of Islamic Law 152–57 (1964).

31 *Id.* at 149.

32 *Id.* at 124.

33 Mehmet Özkan, *Tanzimat Sonrasi Osmanli Ceza Hukuku Düzenlemeleri*, 15 Balikesir İlahiyat Dergisi 241–77 (2022).

34 *See* Coulson, *supra* note 30, at 151; *see also* Gabriel Baer, *The Transition from Traditional to Western Criminal Law in Turkey and Egypt*, 45 Studia Islamica 140 (1977).

35 Özkan, *supra* note 33, at 241–77.

36 *Id.*

more conventional penalties such as imprisonment, thereby setting aside corporal punishments. Some contemporary Islamic scholars, directly or indirectly, have advocated for a shift from *ḥudūd* to *taʿzīr*, a move that has enabled modern Muslim states to partly "secularize" Islamic criminal law.

We can observe a similar trend in the evolution of Islamic criminal law in Morocco. According to Coulson, Morocco's traditional Islamic system has been more preserved, notably due to a French colonial presence which took the form of a protectorate. Marshal Lyautey promoted the policy of maintaining local customs and legal traditions. It was only in 1954 (two years before its independence) that Morocco adopted a penal code influenced by French law.[37] Allal al-Fassi, who played a key role in Morocco's post-independent lawmaking process,[38] concluded that *ḥudūd* could be replaced by discretionary penalties (*taʿzīr*), without formally ruling out the *ḥudūd*.[39] He developed on the prerogatives granted under *taʿzīr* to the imam,[40] noting that the imam may choose punishments (*taʿāzīr*) based on the public interest (*maṣlaḥa*) for each crime.[41]

Ultimately, with the exception of the death penalty inspired by *qiṣāṣ*,[42] *ḥudūd* punishments were largely replaced by prison sentences and fines in Morocco, as in many other Islamic countries. Replacing *ḥudūd* with *taʿzīr* was a first step in secularizing the penalties of classical Islamic criminal law while keeping the offenses as crimes. These *taʿzīr* punishments, left

37 Coulson, *supra* note 30, at 156–57.

38 Allal al-Fassi (d. 1974) was both an Islamic scholar and a key political leader in Morocco, known for his struggle against French colonialism as head of the Istiqlal Party. A close advisor to Kings Mohammad V and Hassan II, he played a major role in shaping the lawmaking process of the new independent Moroccan state in the late 1950's and early 1960's, particularly when it came to the "positivization" of Islamic law. He also served as Minister of Islamic Affairs.

39 Allal al-Fassi, Difāʿ ʿan al-sharīʿa 268 (2010).

40 In this context, "imam" refers to a political leader or a judge.

41 Al-Fassi, *supra* note 39, at 268.

42 In this regard, al-Fassi mentions the death penalty for voluntary homicide reflects "*qiṣāṣ*" which represents a universal norm found in nearly all legal systems, however, Islamic law has provided possible exemptions, such as *diya* (financial compensation) if the victim's family accepts. He further argues that the political authority (*walī al-amr*) may impose an alternative punishment under *taʿzīr*, or grant a pardon to the guilty according to the requirements of *maṣlaḥa*. He concluded by saying that concerning this crime, this is not really a problem. *See id*. at 264–65.

to the discretion of judges or political leaders, allowed case-by-case adjudication depending on the circumstances.

In trying to reconcile Islamic criminal law with the requirements of a modern legal system to validate codification from an Islamic point of view, al-Fassi paved the way for a "secularization of penalties" in Morocco.[43] We used the term "Islamic secularization" in the sense that, for many actors, the changes were done in the frame of Islam, only switching from one category to another. Even acknowledging the influence of European laws in these reforms, the use of theoretical arguments and subtle doctrinal shifts helped preserve Islamic legitimacy.

1. Islamic Law in Morocco

Beyond being the religion of the state and the majority of the population, Islam is a foundational element of national and historical identity in Morocco. It also underpins the monarchy and its legitimacy. The connection to Islamic law, therefore, extends beyond formal legislation to identity, culture and political legitimacy. Islamic law is an integral part of the pre-colonial and post-colonial Moroccan legal system. Even if the law has been partly secularized since the advent of a modern state after independence in 1956, and this process has been strengthened over time, the reference to Islamic law remains a source of legislation in several areas. Moreover, on the symbolic level, the references to *sharīʿa* and its concepts are instrumental in the foundations of power and its communication. As Tozy and Hibou observe, modern Morocco is structured around three poles in its legal culture: customary law, Islamic law, and positive law.[44] The current Moroccan state is, in its roots, inherited from the traditional Islamic caliphate system.[45] Hassan II stated explicitly that his

43 *Id.*

44 Béatrice Hibou & Mohamed Tozy, *Une lecture d'anthropologie politique de la corruption au Maroc: Fondement historique d'une prise de liberté avec le droit*, 161 Rev. Tiers Monde 23, 23–47 (2000).

45 *See, e.g.*, Abū al-Ḥasan al-Māwardī, Al-Aḥkām al-Sulṭāniyya: The Laws of Islamic Governance (1996); *see also* Mohamed Tozy, Monarchie et Islam Politique au Maroc 27–35 (1999).

status as *amīr al-muʾminīn* was rooted in a caliphate doctrine.[46] As a result, another element of Islamic law that remains central in the Moroccan political-social system is the *bayʿa* (pledge of allegiance). The *bayʿa* between *ʿulamāʾ* and notables and the King, modeled on the pledge given to the Prophet by his companions, is one of the foundations of the monarchy and Morocco's socio-political contract.[47]

Moreover, some parts of positive law are still based upon *fiqh*, such as family law,[48] the Code of Real Rights,[49] and even criminal law to a certain extent, as demonstrated in this essay. Official political speeches in Morocco consistently reference Islamic symbols and principles, especially when it comes to reforms related to Islamic law. These arguments are usually general, referring to *ijtihād*[50] and *sharīʿa*'s ability to adaptation,[51] to some *qawāʿid fiqhiyya*, and to concepts such as *maṣlaḥa*,[52] or to the oft-quoted notion by Mohammed VI that one cannot permit what is *ḥarām* or to ban what is *ḥalāl*.[53]

This centrality of Islam, through the institution of *Imārat al-Muʾminīn*, has served to reform positive Islamic law in a rather liberal direction. For example, during the 2004 reform of the *mudawwana* (family code), the preamble of the law explicitly referred to an *ijtihād* aimed at "development and progress,"

46 Hassan II & Éric Laurent, Mémoire d'un Roi 98 (1993).

47 Ahmed Toufiq, *The "Commandership of the Faithful" Institution in Morocco: Pertinent Points for the debate on the Caliphate (the Khilāfah)*, 57 Hespéris-Tamuda 175, 175–94 (2022); *see also* Tozy, *supra* note 45, at 27–29; and Hassan II & Laurent, *supra* note 46, at 93–94.

48 *See* Mahil, *supra* note 2, at 116–23.

49 *See* Hajar Fanadi, *al-Marjaʿiyya al-tashrīʿiyya li-mudawanat al-ḥuqūq al-ʿayniyya*, 2 Al-Fawz J. 90, 91–106 (2024).

50 Hassan II & Laurent, *supra* note 5, at 68.

51 Hassan II & Laurent, *supra* note 46, at 96.

52 For instance, in a recent message to the nation urging citizens not to perform the *īd al-aḍḥā* sacrifice ritual in 2025, King Mohammed VI invoked his religious legitimacy as holder of the supreme *imāma* (*al-imāma al-ʿuẓmā*), based upon the *bayʿa*, and cited Islamic legal maxims such as "to remove inconvenience and prejudice and to promote facilitation," along with the principles of *maṣlaḥa* (public interest) and *ḍarūra* (necessity). *See Amīr al-Muʾminīn: Risāla sāmiyya ilā shaʿbihi al-wafī*, Kingdom of Morocco (Feb. 26, 2025), https://www.cg.gov.ma/ar/node/12213.

53 Mohammed VI is the current King of Morocco. *See, e.g.*, HM King Mohammed VI, *Speech to the Nation* (July 30, 2022), https://diplomatie.ma/en/hm-king-delivers-speech-nation-throne-day.

and grounded in a "tolerant Islam" that promotes "justice" and "equality."[54] But this institution also requires maintaining a balance with certain rules and traditions, not only because of the traditional foundations of power and competition with other Islamic movements in society, but also because of the different sensitivities in public opinion.[55] Under the general supervision of the Commandery of the Faithful, the regulation of Islam is carried out through various official institutions such as the Ministry of Habous and Islamic Affairs, or through scholarly bodies such as *al-Rābiṭa al-Muḥamidiyya li-l-ʿUlamāʾ* and *al-Majlis al-ʿIlmī al-Aʿlā*.[56]

2. Changing the Punishment while Maintaining the "Crime/Offense": The Case of Morocco

Offenses from Islamic criminal law have often been maintained in the penal systems of modern Muslim states. On the other hand, the penalties prescribed under *ḥudūd* have been removed or have fallen into disuse. For example, in countries such as Morocco or Egypt, fornication and adultery remain criminalized and are punishable by imprisonment or fines, but corporal punishment is no longer mentioned in the law. In the same vein, theft is still considered as a crime, depending on its degree, but it is not punished by the prescribed *ḥudūd* penalty. In general, these punishments are no longer referenced in legal texts. The death penalty is often an exception and remains part of many criminal law systems in the Muslim world. However, it has been abolished in the successor state to the Ottoman Empire, Turkey. Moreover, in countries such as Morocco, it is almost never applied, although it remains part of the law. This phenomenon can be understood as a practical application of what we called previously the shift from *ḥudūd* to *taʿzīr*.

54 Moroccan Family Code, Bull. Offi. No. 5358, 667 (Oct. 6, 2005), pmbl.

55 *See, e.g.*, Mohamed Mouaqit, *Modernisation de l'Etat, modernization de la société civile, réforme de la Moudawwana*, L'Année du Maghreb 11–21 (2005–2006); Tozy, *supra* note 45.

56 *See* Meriem El Haitami, *Religious Diversity at the Contours of Moroccan Islam*, 28 J. N. Afr. Stud. 1265, 1265–81 (2021); *see also* Toufiq, *supra* note 47.

2.1 "Secularization" of the Punishment of "Sin" and Modification of Islamic Terminology

With regard to acts historically addressed under Islamic criminal law, there is no direct reference to religion in the current Moroccan Penal Code, even though it is obviously the source of many legal prohibitions. The legal terminology used to define criminal offenses has even been "secularized" in the sense that traditional Islamic terms have been replaced. For example, the term *zinā*, which classically refers to relations outside marriage, is no longer used, just as it is no longer used for adultery. Similarly, *qiṣāṣ* and *diya* have been modified stepwise. In this way, legal prohibition rooted in Islam has undergone a form of "secularization of punishment." Thus, the crime or offense, considered as sins on the religious level, remain legally prohibited, but the penalties provided for by classical Islamic law have been modified by more conventional penalties in modern legal systems.

The Moroccan Penal Code of 1953 ("1953 Code") had already undergone a significant "secularization" of Islamic terminology, but the term *zinā* had been maintained in the law to designate extramarital relations and adultery. Indeed, the Code prescribed a prison sentence ranging from one month to one year for the commission of "*murtakib al-zinā*" (the perpetrator of fornication).[57] The 1953 Code also broadened the possibility of condemning fornication committed in other circumstances not specified in earlier articles (*fī ghayri al-aḥwāl al-manṣūṣ aʿlayhā fī al-fuṣūl al-sābiqa*). The expression used to describe the perpetrator of this sexual "crime" was *fāʿil al-fāḥisha*.[58] Thus, taking up another Islamic term, *fāḥisha*, which is also found in the Qurʾān to describe *zinā*,[59] has often been used in *fiqh* to denote illicit sexual acts under the *sharīʿa*, notably between persons of the same sex.[60] The Code prescribed a prison sentence

57 Al-Qānūn al-Jināʾī al-Maghribī [Moroccan Penal Code], Off. J. No. 2142, art. 258, at 3832 (Nov. 19, 1953) [hereinafter Moroccan Penal Code of 1953].

58 *Id.*

59 *See* Qurʾān 17:32.

60 *See* Qurʾān 7:80.

of six months to three years,[61] which is higher than the previous article condemning *zinā*. The 1953 Code also referred more specifically to the person guilty of adultery by using the classical Islamic legal expression of *zinā al-muhsanāt*. Indeed, it prescribed a sentence of one to five years in prison for a person found to be guilty of adultery, if the spouse filed a complaint.[62] In these three cases, we can observe that the punishments prescribed by *ḥudūd* were replaced by prison sentences and are not even mentioned in the law. In other words, they have been "secularized," though the offenses drawn from Islamic law are still recognized as crimes. While Coulson suggests that the Moroccan Penal Code of 1953, under the influence of French law, largely discarded Islamic criminal law, with the exception of *zinā*, "which incidentally retained the Islamic offence of *zinā* (fornication)."[63] There were in fact other references to classical Islamic criminal law. For example, the 1953 Code continued to use the term *diya* to designate the compensation to be given in the event of involuntary manslaughter.[64]

Then, the process of the "secularization" of Islamic criminal law terminology and punishments deepened with the 1962 Penal Code. Crimes and offenses, considered as sins on a religious level, remained legally prohibited, but the penalties provided for by classical Islamic law were replaced with penalties more compatible with modern legal systems. Indeed, the current Moroccan Penal Code, which is still the one of 1962,[65] criminalizes sexual relations between persons of different sexes who are not married using the expression *jarīmat al-fasād* (crime of debauchery).[66] The punishment is from one month to one year of

61 Moroccan Penal Code of 1953, *supra* note 57, at 3832.

62 *Id.*

63 Coulson, *supra* note 30, at 157.

64 Art. 234: *wa-yajibu dā'iman ada' al-diya ʿan al-qatl bi-ghayri ʿamd* (there is a constant obligation to give compensation (*diya*) in the event of involuntary manslaughter). *See* Moroccan Penal Code of 1953, *supra* note 57, at 3829.

65 The Moroccan Penal Code of 1962, which came into effect in 1963, remains the country's current criminal code, although it has been amended by subsequent laws.

66 Al-Qānūn al-Jinā'ī al-Maghribī [Moroccan Penal Code], Off. J. No. 2640, art. 490, at 1297–98 (June 5, 1963) [hereinafter Moroccan Penal Code of 1962].

prison.[67] Similarly, Article 491 addresses adultery under the label of *jarīmat al-khiyāna al-zawjiya* (crime of marital betrayal), prescribing a prison sentence of one to two years.[68] No mention of the term *zinā* appears in Moroccan legal texts, nor of *zinā al-muhsanāt*, as in the 1953 Code. We cannot know the exact intention of the legislator behind this modification, but we see a "terminological secularization" that softens the religious dimension of the offense, although it maintains its criminal status. As we have seen, both fornication and adultery are sanctioned by prison sentences, and there is no mention of the penalties prescribed by Islamic criminal law.[69] The same is true for theft, which is punished with imprisonment or fines, according to the severity of the offense.[70]

Even though *ḥudūd* penalties are totally absent from the law, it is obvious, as Khamlishi[71] has argued, that the offenses themselves remain rooted in *sharīʿa*. "There is no doubt that this falls within the framework of Islamic *sharīʿa* through *zinā*."[72] He reminds us that the term *zinā* in Islamic law encompasses all illicit extramarital relationships set out in the Moroccan Code as *jarāʾim al-fasād*, *ightiṣāb*, *khiyāna al-zawjiya wahatk al-ʿirḍ* (crimes of debauchery, rape, adultery, and attacks on honor).[73]

Thus, the punishments do not correspond to classical *ḥudūd*, even if the "sin" is still prohibited by positive law. The offense derived from Islamic law is therefore maintained, but the penalties have been secularized. Despite the "secularization" of sentences and terminology, particularly regarding the harsh penalties prescribed by *fiqh* in this area, the criminalization of

67 *Id.* at 1298.

68 *Id.*

69 With the exception of the death penalty, addressed *infra*.

70 *See, e.g.*, Code Pénal [Moroccan Penal Code], *Ministère de la Justice, Direction de la Législation et des Études*, consolidated version, arts. 505–607, at 201–37 (Apr. 20, 2023).

71 Ahmad Khamlishi is a prominent Moroccan jurist and scholar of both Moroccan and Islamic Law. He serves as the director of *Dār al-Ḥadīth al-Ḥasaniya*, a leading institute for Islamic studies.

72 Ahmad Khamlishi, al-Qānūn al-jināʾī al-khās al-Maghribī 229 (1986).

73 *Id.*

some behaviors related to morality is still debated in the context of the interaction between national and international law, but also because of evolving ideological trends within society. In this view, Khamlishi noted that, although some may see these prohibitions as infringements on individual freedom, the issue can also be seen from another perspective, namely, the preservation of the family, children, and society, which are also values enshrined in international agreements.[74] He stated in particular that "[t]he preservation of the family system . . . requires the criminalization of everything that threatens its structure."[75] However, some civil society bodies and international NGOs, such as the National Council for Human Rights in Morocco[76] and the Office of the UN High Commissioner for Human Rights (UNHCHR),[77] are now calling for abrogating the laws banning extramarital sex and adultery.

In addition to the penalties themselves, criminal procedure in matters of evidence in cases of *zinā* also differs significantly from classical Islamic law.[78] The Penal Code refers explicitly to Islam in several provisions, although not directly for *ḥudūd* offenses, except for one that may be seen as partly related to *ridda* (apostasy). Indeed, Article 267-5 states that "[a]nyone who attacks the Islamic religion shall be punished by imprisonment of six months to two years and a fine of 20,000 to 200,000 dirhams or one of these two penalties only."[79] Similarly, Article 220 punishes any person seeking by some means deemed unfair to "shake the faith of a Muslim" or "convert him to another religion." The sentence for this offence is six months to three years of imprisonment and a fine of between 200 and 500 dirhams.[80]

74 *Id.* at 230.

75 *Id.*

76 Youssef Ait Akdim, *Maroc: Fini les peines d'amour?*, Jeune Afrique (June 28, 2012), https://www.jeuneafrique.com/140955/societe/maroc-fini-les-peines-d-amour/.

77 Mandate of the Working Group on the Issue of Discrimination Against Women in Law and in Practice, *Letter from Alda Facio to Mr. Boukili*, Office of the U.N. High Comm'r for Hum. Rts. (Nov. 14, 2017), https://www.ohchr.org/sites/default/files/Documents/Issues/Women/WG/Communications/32/OL-MAR-14-11-17.pdf.

78 Khamlishi, *supra* note 72, at 236–48.

79 Moroccan Penal Code of 1962, *supra* note 66, art. 267-5.

80 *Id.* art. 220.

While *ridda* is not explicitly mentioned, these offenses may be interpreted as addressing attempts to promote apostasy. Moreover, the Penal Code criminalizes eating in public during Ramadan, with an explicit reference to Islam: "Anyone who, notoriously known for his belonging to the Islamic religion, ostentatiously breaks the fast in a public place during Ramadan, without a reason accepted by this religion, is punished by imprisonment of one to six months and a fine of 200 to 500 dirhams."[81]

2.2 The Issue of the Death Penalty

The death penalty remains part of Moroccan criminal law for certain crimes and continues to be applied by courts.[82] In his commentary on Moroccan criminal law, Khamlishi introduces the issue of murder by referencing the principles of *sharīʿa* and the Qurʾānic verses on the subject that prescribe *qiṣāṣ*. He also notes that nearly all the religious and positive legal systems throughout history have punished murder with the death penalty, although, for different reasons, some modern positive legislations have also prescribed temporary or life imprisonment.[83] He further explains that Muslim jurists were among the first to conduct a *dirāsa fiqhiyya* (legal study) of this crime, distinguishing between *qatl al-ghīla* (treacherous murder), *qatl al-ʿamd* (intentional homicide), *qatl shibh al-ʿamd* (semi-intentional homicide), and *qatl al-khaṭāʾ* (involuntary manslaughter). Abū Ḥanīfa also added *qatl bi-l-tasabub* (causative killing) as a fifth category. Muslim jurists have thus determined specific penalties for each of these five categories of homicide.[84] By contrast, Moroccan criminal law has reduced these categories by taking only two of them: *qatl al-ʿamd* (intentional homicide) and *qatl al-khaṭāʾ* (involuntary manslaughter). In presenting this distinction Khamlishi demonstrates the affiliation of current

81 *Id.* art. 222.

82 Moroccan Penal Code of 1962, *supra* note 66; Ensemble Contre la Peine de Mort (ECPM), Trente and de Moratoire: Une Attente Interminable (2024), *available at* https://www.ecpm.org/wp-content/uploads/Trente-and-de-moratoire.pdf.

83 Khamlishi, *supra* note 72, at 14.

84 *Id.*

criminal law with *fiqh*.[85] The retention of the death penalty in the current Moroccan Penal Code is therefore a direct legacy of the Islamic laws of *qiṣāṣ*, even if some continue to argue that criminal law in Morocco, unlike family law, has nothing to do with religion.[86]

2.3 Morocco and a Global Moratorium on the Death Penalty

Morocco has observed a *de facto* moratorium on the death penalty for 31 years. Indeed, although the death penalty remains present in the law and applied by courts, its application has been constantly set aside through different mechanisms.[87] As of March 2023, the Moroccan Penal Code still lists 48 legal provisions punishable by capital punishment, and approximately 83 individuals were in prison under a death sentence. However, through different legal mechanisms, such as the royal pardon, these sentences are routinely commuted to prison sentences.[88] Royal pardon is a prerogative given to the King by the Moroccan Constitution.[89] It is automatically requested by the Attorney General and managed by a procedure defined by law involving many actors, notably within the framework of the *lajnat al-ʿafū* (pardon committee), acting at different procedural stages. Through a royal pardon, the King may commute a death sentence to life imprisonment or even exempt the person from punishment altogether.[90] So, even if courts continue to impose the death penalty, it has been systematically commuted by royal pardons since 1993.

85 *Id.* at 15.

86 *See, e.g.*, *Death Penalty Has No Relation to Sharīʿa, It Is a Political Choice*, YouTube (Apr. 3, 2022), http://www.youtube.com/watch?v=HIPnHc0HTMg (statement of Abderrahim El Jamai, former chairman of the Moroccan bar and prominent advocate for abolition of the death penalty).

87 *See* ECPM, *supra* note 82.

88 *Id.*

89 *See* Constitution du Royaume du Maroc [Constitution of the Kingdom of Morocco], art. 58, Bull. Off. No. 5964, at 1912 (July 30, 2011).

90 Ḥātim Nahrī & Lubnā Drāz, ʿUqūbat al-iʿdām bayn al-tashrīʿ wa al-ʿaml al-qaḍāʾī 73–77 (2011).

The royal pardon, often used to resolve social crises or appease society, is also used by the Moroccan state to maintain a subtle balance between international human rights standards and the theoretical references of criminal law inherited from Islamic law. This is not only limited to the death penalty but also concerns the prohibition by Moroccan criminal law of offenses such as adultery and extramarital relationships. The use of the pardon is also a way of taking into account the different ideological forces present in society, from the most liberal to the most conservative.[91]

Royal pardon has roots in classical Islamic law through the doctrine of *ʿafū al-ḥākim*, though traditionally this mechanism has applied only to *taʿzīr* and not to *ḥudūd*,[92] except in limited cases such as *qadhf* if the offense involves the head of state himself, or when forgiveness is granted by the victim's family in matters of *qiṣāṣ*.[93] Once again, about the royal pardon, the modern shift from *ḥudūd* to *taʿzīr* has thus widened the scope for *ʿafū al-ḥākim* to avoid the application of traditional punishments from Islamic law.

Nevertheless, some voices in Morocco argue that royal pardon is insufficient and that society should move toward full abolition of the death penalty. Various Moroccan and international organizations are calling on the country to take the step of abolition.[94] On the political and social level, conservative forces generally want to retain the death penalty in the law, even if they accept its non-application in practice, on the grounds that it derives from the Qurʾān and is therefore irremovable. Others, more liberal, while welcoming this *de facto* moratorium, want Morocco to go further by completely abolishing the death penalty.[95] Interestingly, some supporters of abolition invoke

91 *See, e.g.*, Ismael Eluassi, *La monarchie marocaine et ses mécanismes d'adaptation à des situations de crise* 336–37 (2020) (Ph.D. dissertation, Université Clermont Auvergne).

92 30 al-Mawsūʿa al-Fiqhiyya al-Kuwaitiyya, 183–86 (1990).

93 Mohammad Būlūz, *Mawqif al-sharʿ min ʿafū al-ḥākim fī dhuwī al-ʿuqūbāt*, Hesspress (Aug. 2, 2013), https://www.hespress.com/136504-موقف-الشرع-من-عفو-الحاكم-على-ذوي-العقوب.html/amp.

94 *Id.*

95 Nahrī & Drāz, *supra* note 90, at 12–23; ECPM, *supra* note 82, at 15–17.

religious arguments as well, citing life as a *niʿma min Allāh* (gift from Allah) and underscoring the importance of *tawba* (repentance) in Islamic law.[96]

Thus, in 2013, a legislative proposal to abolish the death penalty was supported by many groups in Parliament but was ultimately rejected by a majority led by the Justice and Development Party (PJD),[97] a party grounded in Islamic references.[98] Islam has often been at the heart of debates on the death penalty in the country for decades. For instance, Khadija Rouissi[99] justified the necessity of abolition by arguing that, in the past, slavery was also practiced because it was not prohibited by Islam, but it was finally abolished. In the same spirit, many abolitionists argue that the death penalty should be abolished in order to move from "the era of barbarism to that of human rights."[100] Morocco's National Human Rights Council (NCHR) has also included Islamic scholars and religious authorities in its consultations. For example, during a 2008 seminar organized in Rabat, the Council invited Ahmed Abbadi.[101] On that occasion, Abbadi affirmed that abolishing the death penalty was not contrary to Islam: "Abolishing the death penalty is not contrary to the principles of Islam. . . . Capital punishment is

96 ECPM, *supra* note 82, at 17–18.

97 The Justice and Development Party (PJD) is currently the leading political party in Morocca with Islamic references. It traces its roots to a preaching movement known as the MUR, which was one Islamic actor among others in Morocco. The integration of the PJD into political life was not without difficulty, particularly regarding its relationship with its foundational matrix, the MUR. Over time, a functional division took place between those involved in religious education and those involved in politics. This transition to political action began in 1996 with the MPDC, which would later become the PJD in 1998. The PJD governed Morocco from 2011 to 2021, which is an exceptional tenure in the Moroccan political context. *See* Youssef Belal, *L'islam Politique au Maroc*, 145 Pouvoirs 71, 75–77 (2013); Tozy, *supra* note 45, 227–56.

98 Sara Ibriz, *Peine de mort. Le vote pout un moratoire: un pas symbolique, pas encore décisif*, Medias 24 (Dec. 10, 2024), https://medias24.com/2024/12/10/peine-de-mort-le-vote-pour-le-moratoire-un-pas-symbolique-pas-encore-decisif/.

99 Rouissi was the former coordinator of the network of Moroccan parliamentarians against the death penalty.

100 Khadija Rouissi, *Actes du séminaire parlementaire sur la peine de mort dans la région Afrique du Nord et Moyen-Orient*, ECPM (Oct. 9, 2013); ECMP, *supra* note 82, at 15.

101 Ahmed Abbadi was the General Secretary of *Al-Rābiṭa al-Muḥammadiyya li-l-ʿulamāʾ*.

limited to very specific cases, such as apostasy, premeditated murder or high treason. Islam always leaves the choice to the empowered imam."[102]

The country recently reached a milestone by voting in favor of a universal moratorium on the death penalty at the United Nations on December 15, 2024, after abstaining for 17 years.[103] This decision has once again sparked debates about different visions of human rights as well as the role of Islamic law within Moroccan positive law. The Minister of Justice, representing the liberal National Rally of Independents (RNI), characterized the vote as a historic step forward for Morocco's human rights culture. Similarly, the NHRC sees it as historic progress.[104] By contrast, the PJD, without totally opposing the vote in favor of the moratorium at the UN, reiterated its firm opposition to the abolition of the death penalty in the Moroccan Penal Code.[105] Indeed, the PJD, in addition to considering the death penalty as an integral part of Islamic law, believes that it is necessary to bring justice to victims of crimes.[106] The vote, although seen as a possible first step to the full abolition of death penalty in Moroccan criminal law, has created some controversies in public opinion with both positive and negative reactions.[107] For instance, unlike various actors in Moroccan civil society and even in the current government, the PJD refuses to consider this vote

102 Ahmed Abbadi, *Séminaire de Réflexion sur la Peine de Mort à Rabat*, at 22–28 (Oct. 11, 2008), https://www.cndh.ma/sites/default/files/2024-01/actes_maroc_2008-frdef.pdf; ECPM, *supra* note 82, at 17.

103 Adil Faouzi, *Morocco Votes in Favor of UN Death Penalty Moratorium After 17 Years of Abstention*, Morocco World News (Dec. 18, 2024), https://www.moroccoworldnews.com/2024/12/367056/morocco-votes-in-favor-of-un-death-penalty-moratorium-after-17-years-of-abstention.

104 *Morocco's Historic Vote In Favour Of The Universal Death Penalty Moratorium*, CNDH (Dec. 17, 2024), https://cndh.ma/en/moroccos-historic-vote-favour-universal-death-penalty-moratorium.

105 PJD, *Official Statement of the Moroccan Party of Justice and Development* (Dec. 12, 2024), https://www.pjd.ma/208426-حزب-العدالة-والتنمية-يجدد-تأكيده-على-م.html.

106 Safaa Kasraoui, *PJD: To Serve Justice, Serious Crimes Deserve Death Penalty*, Morocco World News (Dec. 11, 2024), https://www.moroccoworldnews.com/2024/12/366928/pjd-to-serve-justice-serious-crimes-deserve-death-penalty.

107 ʿĀbid ʿAbd Al-Munʿim, *Ilghāʾ ʿUqūbat Al-Iʿdām fī al-Maghrib wa-Ḥaqq al-Qaṣāṣ li-l-Maẓlūmīn*, Howiyapress (Dec. 15, 2024), https://howiyapress.com/إلغاء-عقوبة-الإعدام-في-المغرب-وحق-القص/.

at the UN as a step towards the abolition of the death penalty in Moroccan law. According to them, this vote is only carrying on Morocco's existing *de facto* moratorium in place since 1993.[108] The party emphasized its traditional position of maintaining the death penalty for the most serious crimes linked to intentional homicide and attacks on human life as established by the Qurʾān through *qiṣāṣ*. Trying to present their position as balanced, the party pointed to its 2013 support for a penal reform that reduced the number of cases of death penalty by military courts from 16 to 5, aiming to curb excesses while respecting the *qiṣāṣ* from the Qurʾān.[109] Liberal critics such as ʿAbd al-Raḥmān al-Jāmiʿī challenged the PJD's position on the vote, urging the party to acknowledge it as a step toward full abolition.[110]

For decades, it appears that Morocco has been trying to strike a balance between maintaining the death penalty in the criminal system, in order to remain faithful to a legal legacy, and suspending its practical application in order to satisfy certain international and national human rights requirements. The additional step taken in favor of the universal moratorium on the death penalty has put back on the agenda debates about abolition of the death penalty from the Moroccan Penal Code. For now, despite calls from some NGOs and political actors to formally abolish capital punishment, the Kingdom of Morocco appears reluctant to take that step, particularly because of the symbolic importance given to Islamic law and its connection to the roots of the monarchy based upon the Islamic legal and political principle of *bayʿa*.[111] As Hassan II once said, "Islamic law sticks to

108 Although it maintains its own agenda, the PJD, like most Moroccan political parties, generally accepts the main directives set by the monarchy. This dynamic often tempers its positions on issues linked directly or indirectly to religion. *See* Mohamed Tozy, *Islamists, Technocrats, and the Palace*, 19 J. Democracy 38, 38–39 (2008).

109 PJD, *supra* note 105.

110 Yusef Yakubi, *al-Jāmiʿī Yunāqiš Bin Kīrān Ḥawl al-Iʿdām*, Hespress (Dec. 19, 2024), https://www.hespress.com/1483698-الجامعي-يناقش-بنكيران-حول-الإعدام.html.

111 Idrīs Khalīfa, *ʿAqd al-bayʿa min khilāl al-sīra al-nabawiya wa-aḥkām al-fiqh*, 336 Majallat Daʿwat al-Ḥaqq (Wizarat al-Awqāf wa-Shuʾūn al-Islāmiya 1998).

our skin, whether we like it or not, both in terms of public law and private law."[112]

Conclusion

The dynamic evolution of Islamic criminal law and its interaction with modern legal systems and social change highlights the significant interpretive challenges faced by both Islamic scholars and modern Muslim states. Through diverse and subtle hermeneutical strategies, such as contextual and eclectic *ijtihād*, Islamic scholars and modern lawmakers in the Muslim world are moving away from rigid legal formalism towards more nuanced and context-sensitive interpretations. These approaches allow for the integration of Islamic legal principles into contemporary frameworks, making them more compliant with certain human rights standards and societal expectations. The shift from *ḥudūd* to *taʿzīr* was a way to practically secularize Islamic criminal law while trying to keep it within an Islamic framework, using legal and symbolic strategies to reconcile tradition and modernity. In this respect, the case of Morocco is particularly illustrative. Key scholars of Islamic law, alongside the monarchy, promoted an *ijtihād* to legitimate the cessation of *ḥudūd*, leading to the secularization of those punishments and its terminology while keeping the "Islamic" offenses. We referred to this process as "Islamic secularization." Indeed, some can argue that this secularization process, while diverging from classical Islamic law, is not necessarily un-Islamic. As Sherman Jackson has argued, this can be considered as "Islamic secularization" since "secular," even if falling outside the framework of Islamic law, can still be Islamic.[113]

Morocco's recent vote at the UN for a global moratorium on the death penalty revived domestic debates on its abolition, even though it has practically not been applied since 1993 due to various legal tools, particularly the royal pardon. Those

112 Jacques Bensimon, *Interview of Hassan II in Carnets du Maroc – Au sujet du roi* (Nat'l Film Bd. of Can. 1987), https://www.youtube.com/watch?v=cq9jgohJD90.

113 *See* Sherman A. Jackson, The Islamic Secular (2024).

who seek to keep the death penalty in the law defend its Islamic roots in the Qurʾān, through *qiṣāṣ*, while opponents argue that it is only a political and legal issue in an attempt to secularize the discussion. Morocco's experience reflects a broader trend in many countries of the Muslim world. Indeed, the secularization of Islamic criminal law was originally an attempt, by different means, to be faithful to Islamic law (at least theoretically). Moreover, most of the *ḥudūd* punishments, with the exception of the death penalty, have been abolished in practice across most of the Muslim world. Theoretically, however, many scholars of Islamic law justify this practical non-application by invoking contextual arguments to advocate for a kind of "endless temporary" suspension. This gap between legal theory and practice reveals a need for renewed legal, religious, and intellectual answers. In this regard, collective *ijtihād* and its global institutions[114] could play a key role in solving those issues. With a strong global Islamic legitimacy, it can aim to offer a kind of contemporary *ijmāʿ* while being connected to the different states and societies of the Islamic world. By fostering collaboration among scholars, jurists, and policymakers, such institutions could make a significant contribution in addressing modern legal challenges facing the Muslim world today.[115]

114 *See* Mahil, *supra* note 1, at 107–26 (discussing the role of the International Islamic Fiqh Academy in Jeddah, which is affiliated with the Organization of Islamic Cooperation and gathers scholars from across the Muslim world).

115 *Id.*