Apostasy as Objective and Depersonalized Fact: Two Recent Egyptian Court Judgments

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THE court judgments in the recent apostasy trials in the Arab world have brought about fundamental changes in the control of belief and religious affiliation that are directly related to the transformation Islamic law underwent when it became integrated into the legislative codes of the new nation-states.

From the eighth to the nineteenth century, the norms of Islamic law were the result of learned debates among independent jurists and their schools of law. Islamic law was a jurist's law. In the nineteenth and twentieth centuries, it was integrated into the codes enacted by the competent institutions of the nation-states and lost its normative authority in most spheres of modern state law. It remained dominant only in personal statute law (that is, the rules concerning marriage and divorce, family and succession). The Muslim jurists of the premodern period had assigned ethical norms an important place and had clearly distinguished purely ethical from enforceable legal norms. The notion of the individual believer as someone who takes ethical responsibility for his acts independently from the decisions of the judiciary and the political institutions found its expression in the concept of the individual's own interior forum (*batin*). This holds especially true for questions of belief and unbelief. In the last instance, these questions were considered a matter of religious conscience, even

if judicial decisions against apostates were legitimized for political reasons. When the modern nation-states' codification of the law reduced Islamic law to personal statute law, the state's written law abandoned the purely ethical norms of that tradition and with them the concept of the individual's own forum (*batin*).

The opposition against the neglect of religious norms in modern state law grew from the early 1970s of the twentieth century. But it was centered on the demand for the "codification of Islamic law" (*taqnin al-shari'a*). In other words, it did not mobilize religious opposition for a return to a jurists' law. The reason is that its leaders were jurists trained in modern law faculties to interpret and apply codified state law. These jurists wanted to insert the norms of classical Islamic law into the codes of the nation-state with which they were familiar. The ethical debates of classical Islamic law obviously did not lend themselves easily to this approach.

The jurists' movement for the "codification of Islamic law" gained in momentum during the 1980s when, in a number of states, it succeeded in assuring a place in the modern criminal codes for classical apostasy rules. In other states, such as Egypt, the highest courts opened the way for apostasy trials. The analysis of one apostasy judgment of the highest Egyptian court shows that the court understands belief and apostasy as objective facts that can be separated from the person who professes or denies them. The court effectively claims the role of the highest instance in questions of belief and unbelief. Apostasy thus becomes a depersonalized objective fact without any relation to the intentions of the individuals concerned. The court's sentence presents a radicalized version of the opposition between the individual's interior forum and the courts' exterior forum: the first loses its connection with the second. The court's definition of apostasy serves to control the ideas that can legitimately be discussed in the public sphere. It denies bold reinterpretations of Islam, but implicitly also a number of political persuasions and theories, the right of access to the public space and assigns them the private sphere as their legitimate abode. The concept of private and pub-

lic that results from this approach is developed in the detailed reasoning by which the court justifies its judgment.

I

The Cairo appeals court in 1995 and then, in 1996, Egypt's highest judicial authority, the Court of Cassation, found Nasr Hamid Abu Zayd, an Egyptian professor of Islamic studies and Arabic rhetoric at the University of Cairo, guilty of apostasy—that is, of forsaking the Islamic religion and community. Apostasy trials against professors, intellectuals, artists, and writers were by no means rare in the Arab world of the 1980s and 1990s, and their number dramatically increased during these two decades. I will mention only some of the most prominent cases: in 1985 the Muslim reformer Muhammad Mahmud Taha was executed in Sudan.[1] In 1986, a Yemenite professor of sociology, Hamud al-'Awdi, was sentenced by a Yemeni court to a capital punishment that could only have been invalidated by the court if Professor al-'Awdi had revoked the statements that the court held to be irreconcilable with Islam. Professor al-'Awdi escaped execution by fleeing to Syria and other Arab states (Al-'Awdi, 1989).

Since the mid-1980s, the number of apostasy cases pending before state courts has constantly grown in Sudan, Egypt, and Yemen. The most recent case in Iran is that of Professor Hashem Aghajari, who has been condemned to death because he suggested that the Iranians should not blindly follow their religious leaders (see "Iran Student Movement," 2002).

What is common to the Sudanese, Yemenite, Egyptian, and Iranian cases just mentioned is that those condemned are born Muslims, declare themselves to be Muslim believers, and act for what they see as a better understanding of Islam. They are condemned for their writings and publications or for words spoken in public, either in political or educational contexts. Apostasy has increasingly been treated as a crime committed in books or speeches, independently

of the religious self-perception of the author. The trial history of the intellectuals mentioned is well documented and shows how and for what purpose the mechanism of persecution is put into place.

II

In the Middle East and in other parts of the world, these trials have rightly been interpreted as a threat to the freedom of public expression. In the West, they serve increasingly as an argument to support the thesis that Islam is quintessentially intolerant and incompatible both with human rights and with an understanding of the law that guarantees freedom of religion, opinion, and scientific research. These arguments must be taken seriously. But they do not encompass some of the most important dimensions of these trials. First, they loose sight of the fact that the intellectuals who are accused and condemned in these trials endeavor to give of their religion a more tolerant and future-oriented interpretation than the one in whose name they are condemned. The trials thus show a conflict between different visions among Muslims of what Islam ought to be. Second, these trials are decided by courts that are ruling according to norms that are partly codified state law and partly a judicial interpretation of Muslim law. It is the interpretation of Muslim law in terms of a codified modern legislation and according to the methods of modern legal positivism that creates a new outlook on the legal and ethical tradition of Islam. But modern legislative law also offers its own remedies to the legal consequences of this new outlook. The fact that the judges are bound to apply the law of the state's legislature gives its particular character to the history of these trials. Third, the apostasy trials against scholars and writers date from a relatively recent period, the 1980s and the 1990s. Before that period, between 1843 and the 1980s, apostasy trials based on published opinions of writers or scholars had practically disappeared in the Middle East. What are the conditions for the resurrection of this type of apostasy judgments as

fiqh doctrine as the dominant source of legal norms in the penal code, the civil code, and the procedural and the commercial law. Modern constitutions guaranteed—since the 1920s— freedom of religious confession, of opinion, and of scientific research. Egypt was one of the forerunners of the Arab world in the constitutional guarantees of these freedoms and its present constitution, dating from 1971, guarantees all of them.

The policy of codification led to the creation of a system of law in which legal norms were either obliging or empowering. The *fiqh* notion that a legal system should contain nonenforceable ethical norms was abandoned in the process of codification. The concept of the individual's interior forum found no place in the new law codes, much as many other of the *fiqh*'s strictly ethical or ritual norms did not. So did questions of belief and disbelief. The new penal codes did not define apostasy as a crime. In fact, it seemed that the secularization of penal law in this question corresponded well with the Koranic principle that unbelief is a matter of religious conscience that concerns the relation between God and believers and not the penal law. The medieval notion that unbelief should be understood as warfare on the Islamic community did not seem to fit the political, cultural. and legal milieu of the twentieth century in countries whose constitutions guaranteed freedom of religious confessions and opinion. The generations of Muslim intellectuals writing between the mid-nineteenth century and the 1980s had no reason to suspect that the courts of the modern nation-states would submit their texts to judicial scrutiny to determine whether they corresponded to *fiqh* doctrines developed between the eighth and the eighteenth centuries.

Still, apostasy did not completely disappear from modern law. The law of personal status—marriage, divorce, family law, succession, filiations—was governed, in practically all Arab states, by the rules of the classical Muslim *fiqh*. In Egypt, all personal status cases that were not explicitly regulated by legislative texts were, after 1931, to be decided in the light of the dominant opinion of the

Hanafi school. It is through this channel that apostasy reentered the legal system: a Christian Egyptian, for example, married to a Christian woman, who converts to Islam to marry a Muslim woman, then repudiates his Muslim wife and reconverts to the Christian religion, is creating a series of problems for Egyptian family law: Is he to be considered a Muslim, a Christian, or neither of the two? The answer to this question determines a number of legal decisions on the status of his wife, his estate, and his heirs. Despite the fact that the parliament had announced legislation on apostasy since 1929, such legislation was never forthcoming. The decision on apostasy in family law, therefore, depended entirely on the judges who had to base their decisions on the dominant opinion of the Hanafi school of law. Egypt's Court of Cassation thus had to decide on apostasy cases related to matters of personal statute law. The court, until the 1990s, took great pain to define the realm in which apostasy trials are acceptable. It accepted them if the apostate himself announced that he was no longer a Muslim or if witnesses or documents showed that a former Muslim adhered to Jewish or Christian or Bahai forms of

had recognized the right to bring a case against Egyptian citizens on the basis of the *hisba* obligation. The Court of Cassation thus introduced this *fiqh* procedure into the personal statute law by judicial decision but it accepted apostasy cases only within the narrow limits just mentioned (Baelz, 1997: 143-145).

V

Things changed in the1980s. The failure of the authoritarian Arab nation-states to win their wars and to guarantee economic development, social justice, and cultural integration mobilized a religious opposition against the secular state that called for a return to Islamic law through what is called "the codification of Islamic law" (*taqnîn al-sharî'a*). The states reacted to this demand in giving the form of legislative texts to classical or postclassical *fiqh* rules and in integrating them into their codes. In this way, apostasy laws were integrated, in 1991, in the Sudanese penal code; in 1994, in the Yemenite penal code and also, in 1982, in a penal code approved by the Egyptian parliament but never promulgated by the Egyptian president.

This development was accompanied by an increasing number of apostasy trials in the Arab world. These trials have been led against intellectuals, scientists, artists, and writers suspected of defending the political, legal, and religious culture of the secularizing state. They are led to establish the non-Islamic and heretical character of books, publications, university teaching, or public speeches. The apostasy trials form part of a political effort to deny suspect intellectuals the right to express their thought in public. Apostasy accusations, in this context, became an instrument of censorship directly related to a major political and cultural change in the Arab world. The mechanism by which they were brought about seems to indicate a certain cooperation between Islamist political movements whose members raised the *hisba*

cases against the intellectuals and the highest courts which condemned the intellectuals on the basis of the *hisba* testimony.

This mechanism is well exemplified by the apostasy trial of Cairo University professor Abu Zayd. Abu Zayd, a prolific writer, has published a series of books on classical Islamic subjects, ranging from the interpretation of the Koranic text to the teaching of ninth-century *fiqh* scholars. In his books he uses methods taken from modern linguistics to analyze the relationship between texts and readers. This approach forms the foundation for his thesis that each new generation of Muslims understands the Koran in the light of its own historical experience and thus discovers new dimensions of its meaning that allow the new generation to grasp aspects that were hitherto neglected.

In 1993, a group of lawyers, all of whom were known activists in Islamic movements, filed a legal proceeding against Professor Abu Zayd, accusing him of apostasy and asking the court to dissolve the professor's marriage with his Muslim wife. They pretended to have legal standing for such a plea because the *fiqh* orders every Muslim "to command the good and forbid the evil." In other words, they base their plea on the *hisba* rule of the classical *fiqh*. The court of first instance refused to accept their case because they did not prove their personal interest in it.

The pious lawyers appealed this judgment to the Cairo Court of Appeal. The court accepted the appeal and on June 14, 1995, condemned Professor Abu Zayd for apostasy and ordered him to separate from his wife. The Court of Cassation confirmed this judgment on August 5, 1996. Professor Abu Zayd and his wife left Egypt the same year. Abu Zayd is presently teaching at Leyden University.

VI

For the first time in modern Egypt, the writings of a practicing Muslim were used by a court to condemn him for apostasy. Abu

Zayd has on several occasions manifested his firm belief in Islam and he has sent declarations of his commitment to Islam to the courts. These declarations were not taken into consideration by the judges. The courts refused even to hear Abu Zayd. The Cairo Court of Appeal justifies its procedure by a new version of the relation between the individual's interior forum and the court's exterior forum. It states that it does not judge on the belief or unbelief of Professor Abu Zayd but on the question whether or not his books contradict the true Islam as defined by the court. The Court of Cassation, changing the jurisprudence that it had developed in the 1960s, confirms this argument. The highest state court (whose judges have no theological training) claims to be the highest religious institution deciding on matters of doctrine and belief.

The argument from the judgment of the Cairo Court of Appeal notes that:

> The court refers to the fact that there is a difference between *apostasy,* [which is] a material fact with its own essential elements (*arkan*) and conditions . . . and belief *(I'tiqad).* Apostasy must necessarily consist of material acts that have an outward form of being. These acts must show, in a way that leaves no dissent and no doubt that [the defendant] calls God a liar or calls his prophet a liar through denying what he brought into Islam. . . .Belief, on the other hand, is what the human being hides as a secret in the interior of his soul. . . . It is clearly different from *apostasy. Apostasy* is a crime with its essential and material elements. It is subject to judicial investigation. This investigation decides on whether it exists or not. *Apostasy* is a matter that the judiciary is competent to examine . . . . Belief, on the other hand, is what is in the interior of the human being's soul and belongs to the sphere of an individual's secrets. It is something in which the court has nothing to do. People do not have to investigate into it. It concerns only the relation-

matters regulated. He names, in particular, the right of women to inherit. He expresses his conviction that the Koranic regulation according to which women are entitled to half the share of men was meant as a beginning, not as a final stage in their rights to succession. He, therefore, expects Muslims to give women the same inheritance shares as men. He holds that Muslim law should give Muslim women complete equality with men as witnesses before court. He suggests that taxes that were imposed exclusively on non-Muslims should no longer be considered part of Islamic norms. Finally, he states that the Koran improved the lot of the slaves in order to encourage Muslims to abandon slavery altogether—as in fact all Arab countries did over the last 150 years.

The Cairo Court of Appeal and the Egyptian Court of Cassation decided that all of these approaches constitute apostasy. Wherever the courts find a reference to mythical language (*ustur/asatir*), they define it as meaning legends, fiction. They completely ignore the twentieth-century discussions of myth in anthropology, religious studies, or Christian theology. They do not ask experts to explain to them the changes in terminology and interpretation that characterize the debate on myth in these disciplines over the last 80 years.[3] The courts state that the Koran does in fact say that God is sitting on a throne, is called a king, and created angels and jinn. Abu Zayd, of course, has never denied this. The courts condemn him as an apostate for his efforts to reinterpret these texts in the light of modern theories. It seems obvious that what is at stake here is the prohibition of the application of modern theories to the text of the Koran and, in particular, of the interpretation of revealed texts in the light of the modern debates on the elements of myth in monotheistic religions (Court of Cassation, 1996: 21, 23).

Even more surprising is the way in which the courts declare Abu Zayd's discussion of the Koranic norms as apostasy. They state that Abu Zayd's persuasion that modern Muslims could produce better rules than those formulated by the Koran in the

matters of succession, the testimony of women, and the status of non-Muslims and that of slaves constitutes apostasy (Court of Cassation, 1996: 21-22; Cairo Court of Appeal, 1995: 14-15, 16, 29). It is difficult to imagine that Egypt's highest court really con-

fall, for that reason, under the court's control. This control is exerted in the name of an objective religious truth whose guardians the judges are. The public is entitled to be protected from apostasy. The Court of Cassation thus becomes the country's highest decision maker in matters of the dogmatic truth of Islam. In this function, it controls the access of thoughts and persons to the public sphere.

For precisely the same reason, the Court of Cassation decides that freedom of religion does not entitle a Muslim to interpret his or her religion in the light of modern theories if these contradict the court's understanding of the religious truth. The freedom of religion is thus, as Kilian Baelz (1997) has clearly seen, reduced to the interior forum of the individuals. For the same reason, the condemnation of apostates does not, according to the two courts, violate freedom of opinion (Cairo Court of Appeal, 1995: 6).[4]

The classical Hanafi doctrine defined the punishment of apostasy as a punishment for warfare against the Muslim community, not as a punishment for unbelief. This approach, unique among the schools of *fiqh*, spells out the jurists' hesitation to directly interfere with questions of belief. The Court of Cassation basically tries to follow this reasoning, thus transforming the writing of a book or the teaching of a professor into an act of war. In fact, both courts, in their reasoning, use the terms "warfare" and "aggression" to define the character of public utterances on the interpretation of religion that do not meet with their approval. The courts thus pretend that they are not judging the individual's personal belief, but only his public acts. They try to draw a line of distinction between the private sphere of belief or unbelief and the public sphere in which the wrong opinion constitutes apostasy. The private sphere is left to the individual's internal forum; the public sphere is tightly controlled by the external forum of the courts. This means that the constitutional right of freedom of religion is restricted to the individual's inter-

contest over the role of Islam in the public and the private spheres will continue for many years to come. It will be characterized by tense conflicts between contradictory positions. Islam is a living religion with many aspects and components that will find expression in these discussions. The efforts by courts to separate a judicially controlled and unchanging dogmatic exterior forum from the interior forum of the individual Muslim intellectual will not be the last word in this debate.

Notes

[1] For the reintroduction of Islamic penal law into the penal code of Sudan, see Layish and Warburg (2002: 55-60, 177-180).

[2] I quote the text from 'Ayni because Hamilton's translation contained in Marghinani's *Hedaya* (vol. 2: 227-228) is an interpretation rather than a correct translation from the Arabic.

[3] For the changes in the understanding of myth and mythology, see the articles by Beisser (1994); Goetz (1980); Holz (1994); Schmidt (1994); Stolz (1994); and Utley (1973).

[4] See Baelz (1997: 150): "Effectively, freedom of religion is limited to privately holding a belief, whereas it does not protect against prejudice when practicing that belief in a manner not officially recognized."

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