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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

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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-

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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

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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

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pronounced by the highest courts of a modern nation-state such as Egypt? Fourth, the notion of a modern, tolerant, and pluralist Islam is not rendered obsolete by these trials. State institutions, such as the prosecution, often side with the accused intellectuals against the apostasy procedure of the judges. Many intellectuals, lawyers, journalists, writers, and artists opt for an understanding of Islam that encourages public debates about the way in which Islam can be harmonized with notions of freedom and democracy guaranteed by the constitutions of the modern Arab nation-states. The courts that condemn Muslim intellectuals as apostates constitute one—and for now probably the most powerful—institutional component of modern Islam at the end of the twentieth century. But the reality of modern—and classical—Islam is much more complex than the courts' reasoning allows us to understand.

III

The classical notion of apostasy is developed in the works of *fiqh,* a term often translated in Western languages as "Muslim law." The *fiqh* is a system of legal and ethical norms derived by learned specialists from the texts of the revelation. The texts of the revelation are first, the Koran, God's word; second, the Sunna, the prophet's normative praxis; and third, the much debated consensus of the learned. To these sources of the law individual schools of *fiqh* add others, such as the public interest, equity, or expediency (Johansen, 1999: 23-72).

The classical *fiqh* scholars agree that the apostate should be punished by the judiciary. They hold that an individual who declares that he no longer believes in Islam or adheres to its axiomatic articles of faith is an apostate. A Muslim's adhesion to another religion also constitutes apostasy (Peters and Vries, 1976-1977: 3-4). In both cases, the judgment is based on the speaker's explicit self-perception of his religious identity. It would appear that this is not normally the case concerning the third form of

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apostasy, which is proved by the utterance of "words of unbelief" (*kalimat al-kufr*). Neither the major works of the classical *fiqh* literature before the twelfth century nor the revealed sources of the law contains exhaustive lists or precise general rules concerning the "words of unbelief." Jurists of the postclassical age of Muslim law (the period after the twelfth century, in particular those of the Mamluk and Ottoman period, roughly from the thirteenth to the nineteenth century) produce long lists of expressions that imply unbelief. These lists have a tendency to grow from century to century. They comprise violations of theological dogma but some also see signs of unbelief in the translation of the Koran into other languages, in the questioning of the authority of courts that apply *fiqh* rules, or in the ridicule of religious scholars. No general rules limit these terms. The entire postclassical debate concerning this matter is casuistic in character: it is led in the form of lists of examples (Peters and Vries, 1976-1977: 3).

The Koran, on the other hand, discusses apostasy in a number of verses (sura 95, verse 54; sura 47, verse 25; sura 2, verse 217; sura 3, verse 80; sura 16, verses 108-109) but nowhere mentions a punishment in this world. The Koranic text threatens the apostates with punishment in the hereafter only. Verse 217 of the second sura translates well the Koranic stance on this matter: "But those of you who turn back on their faith and die disbelieving will have wasted their deeds in this world and the next. They are inmates of Hell, and shall there abide forever."

Apostasy and unbelief are here seen as a matter between God and the concerned individuals. Apostates will be punished in the world to come. Yet, many reports about the normative practice of the prophet, his Sunna, require the punishment of apostasy in this world. In all fairness it has to be said that there are more reports warning the believers that it is a mortal sin to declare the fellow Muslim an unbeliever. The *fiqh* specialists, finally, whose literature springs into existence in the second half of the eighth century, agree on the idea that the apostate has to return to Islam or be killed. The apostate has abandoned the religion and the

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community of Islam and, therefore, the *fiqh* forbids him to join any other religious community. Return to Islam is the only way open to him if he wants to survive and if he wants to be a member of a religious community. All schools of *fiqh* also hold that the apostate is legally incapable to marry or be married because marriage can be concluded only between individuals belonging to religious communities. The Muslim judge, therefore, has to dissolve the apostate's existing marriage. Many other legal consequences of apostasy exist in the *fiqh* works but need not detain us here because they do not play any role in modern Egyptian law.

In Egypt the doctrine of the Hanafi school of law is considered to be the dominant expression of the Muslim *fiqh*. The Hanafis are the oldest Muslim law school. Since the ninth century, the jurists of this school have exerted a hegemonic influence over the production and application of legal norms in the eastern stretches of the Muslim world. Later, the Hanafis became the official law school of the Ottoman Empire. The Ottomans made their doctrine dominant in its Arab provinces, including Egypt. Even with the fall of the Ottomans, the modern Egyptian state continues to recognize the Hanafi doctrine as the source of the legal norms that the judges are required to apply in personal status (cases the legislature has left undecided). Hanafi law thus represents, in Egypt, the legacy of Muslim legal thought and practice.

Classical Hanafi doctrine holds that the capital punishment of the apostate serves mainly political aims. I quote two famous Hanafi jurists from Central Asia on this matter. The first is the eleventh-century Transoxanian jurist Sarakhsi, one of the major authorities of the Hanafi school. He says:

> The change of religion and the original form of unbelief belong to the most abominable of crimes. But [their judgment] is a matter between God and his servant and the punishment [of this crime] is postponed until the hereafter. The measures advanced in this base world [and which thus precede God's judgment] are matters of political expedi-

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> ency [*siyasat mashru'a*] ordained by the law in order to protect human interests" (Sarakhsi, n.d., vol. 10: 110).

In the same vein, the twelfth-century Hanafi jurist Marghinani, whose book *al-Hidaya* exerted a lasting influence on the Hanafi jurists of the Near East, states his position with the following words:

> In principle, punishments are postponed to the hereafter and the fact that they are advanced [so that they precede the hereafter] violates the sense of probation [as the sense of human life in this world]. One deviates from this principle in order to defy a present evil and that is warfare [against the Muslims] ('Ayni, vol. VI: 702-703).[2]

Both authors argue that the apostate's punishment is not due to his belief but to the military and political danger that this belief may cause. They use this argument to show that women, even if they abandon Islam, should never be condemned to death because they are, according to Hanafi doctrine, physically not able to lead war on the Muslim community. The jurists conclude from this that capital punishment is not imposed for disbelief and apostasy but as a means to prevent the military and political dangers connected with it. They justify this punishment in terms of political expediency. Sarakhsi gives a systematic explanation of this reasoning, saying that it is not unbelief that is punished but that the *ratio legis* (*'illa*) of the capital punishment is the political danger that results from unbelief (Sarakhsi, vol. 10: 110). In other words, the Hanafi jurists do not feel competent to judge belief or unbelief but transform the crime to be punished into the crime of political rebellion, a crime more accessible to judicial decisions than belief or unbelief. The individual Muslim's belief or unbelief is thus left for God to judge.

The distinction between facts and intentions that are to be judged by God alone, and those that are to be judged by the human judiciary, does not concern apostasy only. The *fiqh* schol-

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ars had assigned ethical norms an important place in their normative system 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 political institutions found expression in the concept of the believer's interior forum (*batin*). According to the Muslim jurists, the believer's *batin* is her or his religious conscience (*damir*) that is inaccessible to other human beings and, therefore, not subject to judicial or political control. As was noted earlier, before this interior forum, the believer justifies his acts and beliefs in front of his lord (*baynahu wa-bayna rabbih*) in terms of the religious and legal ethics of Islam. This instance preserves the individual's ethical autonomy vis-à-vis unjust judicial or political judgments concerning his person, even if it does not protect him from the unjust judiciary punishment connected with them. It limits the religious validity of the sentences of Muslim judges. Judges have neither access to God's knowledge nor to the individual believer's conscience and motivations. The judges or political authorities can base their decisions solely on exterior appearances (*zahir*) and cannot be sure that their judgments correspond to the facts or to the intentions and memories of the individuals concerned (Johansen, 1997: 1022-1065). This is especially true for questions of belief and unbelief. In the last instance, these questions will be decided in the hereafter between God and the individual believer.

IV

During the nineteenth and twentieth centuries, the new Arab nation-states changed their laws, adopting a legal system based on codified legislative texts enacted by the competent state institutions. In their codification of legal texts, the Arab states followed European models and, while retaining individual norms of and references to the *fiqh* in their new codes, no longer followed the

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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

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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 religion. The most important sanction in such trials is the dissolution of the apostate's marriage if he or she is married to a Muslim spouse. The court did not accept other cases of apostasy. Within this framework, the Court of Cassation accepted, following classical *fiqh* doctrine, the testimony of *hisba* witnesses—that is, the testimony of those who have no direct personal interest in the case that they bring to court but who invoke the Muslim's religious obligation "to order what is good and to forbid what is evil" as the motivation for their testimony. According to classical *fiqh* rules, a Muslim who acts to see the norms of the sacred law applied fulfills this *hisba* obligation. He has to be accepted as a witness and his testimony is sufficient reason for the judge to open a trial against the person accused of violating God's norms. The Court of Cassation, in 1966, accepted this *hisba* concept as a valid rule of procedure in Egyptian law. Since 1955—the year in which the religious courts were abolished in Egypt—no Egyptian law

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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*

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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

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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-

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> ship between the human being and his Creator. Apostasy is an attack on the Islamic order at its highest degrees and at the summit of its foundations by way of a visible material acts. In positive law the attack on the state and its order or high treason comes close to it. On apostasy the judge (*qadi*) and the expert on religious law and ethics (*mufti*) have to decide. The punishment of the attack on Islam through [acts of] apostasy does not contradict freedom in the personal life [of the defendant]. The freedom of belief (*'aqida*) requires that the person be a believer in his acts and words and that he have a sound logic in his attack on the belief system. But an attack on Islam is always due to corruption in the thought [of the individual who does it] or due to the fact that [the perpetrator] follows his material, sexual or other worldly desires. To lead war [against the religion and the community of Islam] in this way is not fighting for the freedom of belief. And to lead war against the like of this is not a fight against the freedom of belief, but rather a protection of belief against these frivolous and corrupt ideas (*adwa'*). (Cairo Court of Appeal, 1995: 5-6; compare also the judgment of the Court of Cassation, 1996: 29).

In other words: what people believe in private is their own business. The courts do not have to interfere. The Court of Cassation states explicitly that had Abu Zayd not taught his thoughts to his students and had he not published them in print, nobody would have cared (Court of Cassation, 1996: 31). The matter would have been between him and God in the hereafter. But if a person pretending to be a Muslim attacks, in public, elements of what is considered by the court an essential element of Islam, he is punished as an apostate. The apostasy rule in combination with the *hisba* rule on witnesses provides the highest courts of Egypt with an efficient instrument for the control of thought in the public sphere. This instrument allows them to exclude from the public sphere all religious, scholarly, artistic, or political thought that the courts

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hold to be irreconcilable with Islam. At the same time, the courts do not give the accused intellectuals the slightest ability to defend their ideas during the trial. The attorney general who had required—as had the the mufti, the highest Egyptian expert in religious law and ethics—that the Cairo Court of Appeal hear Abu Zayd's defense is severely rebuked by the court: the judges advise the prosecutor that he misunderstands his task. The only task of the prosecutor and the judges, says the court, is to read Abu Zayd's publications and to decide whether they constitute the crime of apostasy. No discussion with the defendant is necessary for this purpose (Cairo Court of Appeal, 1995: 6; Court of Cassation, 1996: 26-27, 33-34, see also 26-27).

The courts, for this reason, accuse Abu Zayd's books. They pick isolated quotations from his books and compare them with the text of the Koran or with reports from the prophet's normative practice. Wherever they find contradictions between Abu Zayd's sentences and the revealed texts (including the consensus of the *fiqh* scholars), they find proof of apostasy. The approach is reminiscent of the book inquisition of the early modern period in Europe (Crispo, 1987: 184-186).

Abu Zayd mentions the metaphorical and mythical language in the Koran. He discusses Koranic verses that speak about God as sitting on a throne (7:54), as being a king (20:114) commanding his soldiers (37:173) or that refer to devils, jinn, and magic practices. He insists that a twentieth-century Muslim should interpret the verses that speak of God as sitting on a throne or being a king commanding his soldiers as metaphorical speech related to the cultural habits and current forms of speech of the Arabs at the time the Koran was first revealed. He argues that every new generation through its reading of the Koranic text accedes to new dimensions of the revelation that correspond to the new generation's historical experience. He follows the logic of this argument when he insists that the norms contained in the Koran should be interpreted as an indication of the direction in which God wanted the Muslims to move rather than the final word of God on the

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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

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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, 22). It is difficult to imagine that Egypt's highest court really considers the acceptance of the institution of slavery as a criterion for membership in the Muslim community. The courts' approach to the interpretation of the revelation is all the more remarkable as Muslim scholars, during the twentieth century, have produced an important body of texts dedicated to the analysis of the purposes and aims of Islamic legal and ethical normativity (*maqasid al-shari'a*) in which the reflection on the teleological character of the legal and religious heritage of Islam serves to adapt its forms so that they may become effective under new social and cultural conditions.

VII

The Court of Cassation insists that Islam has an objective and essential meaning (*mafhum mawdu'i*) that never changes and that it is apostasy to deny this fact (Court of Cassation, 1996: 21). The court declares that the Islamic normativity does not change and does not have to be adapted to changing historical circumstances (21) and that it is apostasy to say that it does. It is, therefore, the court's task to defend the objective, essential, and unchanging meaning of Islam against all efforts to reinterpret that religion in the light of new theories. The role of the court as the defender of an objective transhistorical truth of Islam entitles it to separate the intellectuals' publications and public performances from the same intellectual's religious self-perception. The second is without interest to the court. It pertains to the private sphere and is of no concern to the public. The intellectuals' publications and public performances, on the other hand, are objective entities, separated from their authors and as such concern the public and

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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-

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nal forum and does not—not even for Muslims, let alone for non-Muslims—serve as the legal basis for a public debate between different interpretations of the relationship between religion, the state, society, and culture. The constitutional right to the freedom of cult and religion is banned from the public sphere and its content largely voided.

The courts accepted the *hisba* testimony as an indispensable part of their control of the public sphere. Groups of militant antisecularists, encouraged by the court's apostasy judgments, filed apostasy cases against Egyptian intellectuals. One well-known militant Muslim polemicist boasted in an interview with the *Musawwar,* an important periodical published in Cairo, that he personally filed 40 *hisba* cases against prominent Muslim writers. Estimates of the *hisba* trials pending before Egyptian courts in 1996 oscillated between 40 and 80, with the number constantly growing. It seemed at that moment that the courts' dogmatic view of Islam, in combination with the politico-religious militants' filing of *hisba* cases, would leave little room for a public debate on Islam in which new theories and interpretations would find their place.

But things worked out differently. In January 1996 parliament, reacting to the protestations of well-known lawyers and intellectuals and an important part of the press, passed a law that forbade individuals to bring *hisba* cases directly to the courts. They now have to bring them to the attorney who decides whether they are worth the court's consideration or not. More important, the parliament passed, in May 1996, a second law that prohibits the filing of cases unless an individual has a direct personal interest in the case. This law effectively closed the door to further *hisba* trials and thus reduced the role of the courts as censors of public thought. The deputies identified the motivations that incited them to bring about this legislation. Through this new law, the say, they want to "combat intellectual terrorism (*al-irhab al-fikri*) and protect intellectuals from attempts to inflict moral and psychological harm upon them [. . . by] extremists who consider it their privi-

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lege to be the sole Muslims and whoever opposed them to be unbelievers (*kuffar*)" (Baelz, 1997: 150).

These laws came too late to help Abu Zayd. The Court of Cassation decided to disregard them. But in September 1996, a Cairo court decided to stay the execution of the Cairo Court of Appeal's judgment against Abu Zayd on the grounds that none of the lawyers who had filed the *hisba* case against Abu Zayd had a direct and personal interest in its execution.

The public debate has, to a certain degree, been liberated from judicial censorship by the two laws of 1996. The lawyers, intellectuals, journalists, and parliamentary deputies who engaged in this struggle and who brought about the changes in the legal situation that make it now difficult to resort to the apostasy trials as a tool for the control of public debates are mostly Muslims. There is no reason to assume that they did not see these laws as conforming to Islam. Which is to say the public debate in Egypt on the interpretation of Islam is not closed. An important part of the country's Muslim elites sees Islam in harmony with public conflicts of opinion and with democratic freedoms; with the freedom of religion also in the public sphere and with a debate about different forms of religious discourse. Any judgment on the present development that does not take these forces into consideration will be misleading. The situation is complex, full of conflicts, and uncertain. Simplistic judgments that create one picture of an intolerant Islam will not help to understand why Muslim thinkers and reformers, even though persecuted, find such a wide audience in the Near East.

Let me add that the judgments on which I based my argument are not typical of all court reasoning in Egypt or the Arab world. The Egyptian Constitutional Court, active since 1979, has developed a much more refined interpretation of Islamic normativity (Johansen, 2004). Tunisian courts, during the last two years, have developed a concept of privacy that embodies the individual's right not to disclose her or his religious affiliation in public. The

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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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