BASIC FREEDOMS IN A FRACTURED LEGAL CULTURE: EGYPT AND THE CASE OF NASR HAMID ABU ZAYD

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The modernization of law in the Arab world, which began in the nineteenth century, has created a dichotomy between the European-based laws in the constitutional, commercial and criminal law fields and the Islamic and other religious laws which continue to apply to matters of personal status and domestic relations. Certain individual rights and freedoms guaranteed by constitutions have been subverted by limitations on the freedom of belief, impediments to marriage, and lack of gender equality, in the religious laws. The detrimental impact of these fundamental contradictions in the same legal system are illustrated by the case in Egypt of Professor Nasr Hamid Abu Zayd, who was accused of heresy and ordered to separate from his wife on the grounds that Islamic rules of domestic relations do not permit a Muslim woman to be married to an apostate from Islam.

The confrontation between liberal and traditional values has been a common feature in evolving democracies. Societies that have achieved a liberal democratic existence tend to forget that the liberal view was born in conscious opposition to traditionalism;[1] while those that have yet to do so tend to overlook the fact that the logical outcome of the liberal

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1. W. Cole Durham, Jr., "The Relationship of Constitution and Tradition," *Southern California Law Review* 53, no. 2 (January 1980), p. 645.

state is secularism.[2] In Arab Muslim societies, where tradition is closely identified with religion, the constitutional declarations of basic freedoms, themselves a product of the modern liberal state, are more often than not frustrated, not so much by the actions of oppressive governments (although that cannot be completely dismissed), as by the contradictions in the legal culture between traditional religious values and the newly adopted attributes of the modern state.

Some of the blame lies with the Arab constitutions that endorse, if not create, these contradictions. On the one hand, there are the religiously oriented personal status laws that are not based on the constitution, but define and limit some of its provisions on basic freedoms. On the other, these freedoms are often qualified by the phrase "as defined by," or "in accordance with," the enabling law. The constitution may very well guarantee, for example, the equality of citizens and their freedom of belief, of expression, of association, and of literary and scientific creativity, as the Egyptian constitution does. But when it comes to the enabling laws, such as those regulating the press and political parties, one finds an inordinate number of restrictions on their freedom of expression, formation and activity. The religiously based laws of personal status and domestic relations also impose limits on the freedom of belief, marriage and equality between the sexes.

These conflicting norms in the same legal system, already made incongruent by the dichotomy between the secular and the religious, can have a significant impact on the lives of ordinary citizens. A case in point is that of Professor Nasr Hamid Abu Zayd. A distinguished scholar of Islamic studies and Arabic literature at Cairo University, he has been a proponent of the modern science of hermeneutics in the interpretation of the Quran.[3] Some of his colleagues with fundamentalist Muslim leanings had long claimed that his theories and writings were so out of line with accepted traditional Islamic views that they amounted to heresy. In 1993, an enterprising group of Islamist lawyers, with no connection to Abu Zayd, petitioned the Court of First Instance to divorce him from his wife, Ibtihal Yunis, an academician and a teacher, on grounds that a Muslim wife may not, under Islamic law (which is the law of domestic relations of Muslims in Egypt), remain married to an apostate from Islam.[4]

The Abu Zayds had no intention of getting divorced. They also believed that their freedoms of belief and expression were fully guaranteed by the Egyptian constitution. What then would a group of outsiders have to do with their marriage; and how could their marriage, unbeknownst to them, be suddenly invalidated because of what one of them had said or written?

This article will seek an answer to these questions, and in the process analyze the medieval Islamic notions of *hisba* (promoting the good and combating evil), *radda* (apostasy), and *nikah* (wedlock), which figured in the case, and how they could be used

2. Owen Chadwick, *The Secularization of the European Mind in the 19th Century* (Cambridge: Cambridge University Press, 1975), p. 27.

3. His latest major work is *Al-Nas, al-Sulta, al-Haqiqa: Al-Fikr al-Dini Bayn Iradat al-Ma'rifa wa Iradat al-Haymana* (The Text, the Authority, the Truth: Religious Thought Between the Desire for Knowledge and the Desire for Hegemony) (Beirut and Casablanca: Al-Markaz al-Thaqafi al-'Arabi, 1995).

4. See Muhammad al-Dijwi, *Al-Ahwal al-Shakhsiyya li al-Misriyyin al-Muslimin* (Personal Status of Egyptian Muslims) (Cairo: Dar al-Nashr li al-Jami'at al-Misriyya, 1969), pp. 33–34.

to compromise the modern constitutional concepts of freedom of belief and expression, as well as individual rights and the rule of law in a modern democratic state. This article will also examine how Egyptian courts dealt with this unprecedented case in which the petitioners, unable to deny Abu Zayd the right of freedom of thought and expression under the constitution, invoked the equally legitimate restrictions on his freedom of belief and of marriage under the personal status and domestic relations law.

THE RULINGS OF THE COURTS

On 27 January 1994, the Giza Court of First Instance dismissed the petition of the Islamist lawyers to divorce the Abu Zayds on the procedural grounds that the lawyers were not a party to the dispute and that, therefore, they had no legitimate cause of action.[5] The court refrained, however, from expressing an opinion on whether Abu Zayd did in fact commit apostasy and if doing so should invalidate his marriage.

On appeal by petitioners, the Cairo Appeals Court, Department of Personal Status, dismissed on 14 June 1995 the decision of the Giza Court. It stated that it found that Abu Zayd's writings amounted to heresy, and that since heresy was within the purview of the law of personal status it was subject to the *shari'a* (Islamic law) rules rather than those of the Civil Procedure Code. The petitioners, the Court of Appeals argued, therefore had the right to invoke the shari'a rule of hisba to petition the court.[6]

Hisba is one of those medieval concepts of Islamic law which, because of the overlapping spheres of the religious and the secular in Arab legal culture, reappear from time to time to claim a place in the emerging legal order. Broadly speaking, hisba is the obligation incumbent upon every Muslim to promote the good and combat evil. A Muslim could do this by warning, remonstrating, and, in the case of failure of public authority to act, by legally intervening and constraining.[7] This is as far as this concept was developed legally. In practice, however, the concept of hisba was associated primarily with the office of the *muhtasib*, whose task it was to supervise and control the market place, to check weights and measures and to combat dishonesty and immorality. The duties of the muhtasib are not to be confused with those of either the *shurti* (police) or the *qadi* (judge).

Historically, the office of the muhtasib is said to have had its origin in that of the *agronomos*, the Byzantine market inspector, an office which the Umayyads took over when they established their administration in Damascus in the seventh century AD.[8] The office of the muhtasib continued to exist in a number of Muslim countries, especially in those of North Africa, until relatively recent times, when its duties were coopted by the

5. Egyptian Code of Civil Procedure, Law No. 13 of 1968, Article 3, in *Al-Jarida al-Rasmiyya* (Cairo), no. 19, 9 May 1968.

6. Text in *Al-Muhamat* (Cairo), vol. 74 (January-April 1995), pp. 160–79.

7. Claude Cahen and M. Talbi, "Hisba," *Encyclopedia of Islam*, new ed., vol. 3 (Liden: E.J. Brill, 1971), pp. 485–89.

8. Noel J. Coulson, *A History of Islamic Law* (Edinburgh: Edinburgh University Press, 1964), pp. 27–28.

various administrative arms of the modern state. Today, traces of the institution can still be found in the morality police of Saudi Arabia.[9]

In dismissing the petition, the Giza Court of First Instance had relied on the rules of procedure applicable to civil courts, which deny persons without a cause of action, or who are not parties to the case, the right to petition the court.[10] Why then did the two courts differ on which procedural rule should apply?

When Egypt abolished the shari'a courts, as well as the Christian and Jewish millet tribunals, in 1956 and transferred their jurisdictions in matters of personal status and domestic relations to the civil courts,[11] it did not completely succeed in straddling the religious/secular divide of the legal system. The state required the civil courts to continue applying the same religious laws of personal status and domestic relations that the religious tribunals had applied in the past, with the confusing procedural proviso that "except in matters for which special rules have been provided in the shari'a court regulations or in other relevant laws, the rules of the Civil Procedure Code shall apply to procedures pertaining to matters of personal status and of waqf."[12]

The Cairo Appeals Court interpreted this to mean that in cases involving substantive matters of personal status and *waqf* (religious endowments), matters previously within the competence of the shari'a courts, the civil courts had to apply the Law of Procedure of Shari'a Courts,[13] and not the civil procedure rules. This was a derogation from the spirit of the 1955 law which sought to unify, at least procedurally, the administration of justice in the country. Article 280 of the Law of Procedure of Shari'a Courts, on the other hand, required the decisions of the courts to comply with the shari'a rules of personal status and domestic relations, and where these were deficient, with "the preponderant rulings of the Hanafite *madhhab*, or school of jurisprudence."[14] The exception was where the law provided for special rules, in which case the decision of the court had to comply with these special rules.

According to the Cairo Appeals Court, since there were no special rules governing apostasy in the statutory religious laws of personal status and domestic relations, nor in the positive constitutional, civil or criminal laws, the rulings of the Hanafite school of jurisprudence had to be applied. Hanafite *fiqh* (jurisprudence) recognizes every Muslim's obligation to resort to hisba where the rights of God are at stake.

9. Saudi Royal Decree M/37 of 26/10/1400 AH, "Nizam Hay'at al-Amr bi al-Ma'ruf wa al-Nahiy 'an al-Munkar" (The Organization for Enjoining the Good and Refraining from Evil). This body is responsible for the "morality" police, whose duties, according to article 9 of the decree, are to "guide, advise, and order people to abide by the religious duties provided in the Shari'a, and to refrain from committing any of the acts prohibited by Shari'a." Text in *Um al-Qura* (Riyadh), no. 2853, 23 January 1981.

10. Egyptian Code of Civil Procedure, Law No. 13 of 1968, Article 3, in *Al-Jarida al-Rasmiyya*, no. 19 of 1968.

11. Law No. 462 of 1955, in *Al-Waqai' al-Misriyya*, no. 73 bis, 24 September 1995. For a historical background to the jurisdiction of religious tribunals in matters of personal status and domestic relations, see George N. Sfeir, "The Abolition of Confessional Jurisdiction in Egypt: The Non-Muslim Courts," *The Middle East Journal* 10, no. 3 (Summer 1956), p. 248.

12. Law No. 462 of 1955, Article 5. Quotation translated by author.

13. Decree Law No. 78 of 1931, in *Al-Waqai' al-Misriyya*, no. 53, 20 May 1931.

14. Ibid. Quotation translated by author.

Having distinguished between the rights of God, which it said represented "the interest of the entire Muslim Community,"[15] and between personal rights, which concern only specific individuals, the Cairo Appeals Court went on to uphold the Quranic obligation of hisba of every Muslim to enjoin the good and forbid the evil.[16] Consequently, the Cairo Court of Appeals argued, the lower court had erred in denying the petitioners the right to invoke hisba to bring about the divorce of Mrs. Abu Zayd from her husband, as being married to an apostate from Islam was a violation of the rights of God.

THE RIGHTS OF GOD AND THE RIGHTS OF MAN

What exactly are the rights of God? According to 'Abd al-Wahab Khallaf, the Egyptian authority on shari'a and fiqh, the rights of God relate to those legal precepts in Islam the purpose of which is to serve the public interest. In cases when public and private interests overlap, the former predominate.[17] Achievement of the common interest of the Islamic *umma* (community) includes meeting its *daruriyat* (necessities), satisfying its *hajiyat* (needs), and allowing its *tahsiniyat* (betterment).

The necessities are those five basic elements essential to preserving the good life: *din* (religion), *nafs* (soul of human being), *'aql* (mind), *'ird* (honor) and *mal* (property). The denial of those necessities is a transgression against the rights of God. For the defense of religion, the shari'a legitimizes *jihad* (holy war) and imposes punishment for apostasy; for the protection of the soul, the shari'a created the laws of marriage for the proper procreation and preservation of mankind; for the security of the mind, the shari'a prohibited wine and anything intoxicating; for safeguarding honor, the shari'a prescribed punishment for adultery; and for the proper maintenance of property, the shari'a prohibited theft, fraud and usury.[18]

From the perspective of the Islamic legal order, which continues to govern matters of personal status and domestic relations in Egypt, Abu Zayd's faith or lack thereof, as well as his wife's wish to remain or not to remain married to him, were not matters of personal rights but of the rights of God. The measure of these rights was not what the Abu Zayds perceived them to be, but rather what the public interest determined them to be.

CONSTITUTIONAL GUARANTEES OF BASIC FREEDOMS

How did the Abu Zayds' constitutional rights then figure in this case? As in most Arab constitutions, the Egyptian constitution is quite explicit on these rights. The state guarantees the freedom of belief in article 46 of the constitution, the freedom of opinion

15. "Mahkamat Isti'naf al-Qahira al-Da'ira (14) Ahwal Nafsiyya" (Decision of the Cairo Court of Appeals, Department 14, Domestic Relations), *Al-Muhamat* (Cairo) 74 (January-April 1995), pp. 160–79. Quotation translated by author.

16. "You are the best Community brought forth for mankind, enjoining that which is good and fair and prohibiting that which is evil and forbidden, for you believe in God. . ." *The Holy Quran*, vol. 1, in Arabic with English translations by Abdullah Yusuf Ali (New York: Hafner Publishing Company, 1946), p. 151. The above excerpt was translated from the Arabic by the author.

17. 'Abd al-Wahab Khallaf, *'Ilm al-Fiqh* (The Science of Jurisprudence) (Cairo: Matba'at al-Nasr, 1972), p. 210.

18. Ibid.

and its expression in article 47, personal freedom, including the inviolability of a citizen's private life in articles 41 and 45, and the freedom of scientific research, literary, artistic and academic activity in article 49. The constitution also guarantees freedom of the press and publication, of association, of movement and emigration, of private property, and of the home, among others, in accordance with the relevant laws.[19]

It is clear from these provisions that although the Egyptian constitution recognizes and guarantees all basic freedoms, these freedoms fall under two categories: those that are absolute and may not be diminished or encumbered by any enabling legislation, and those that are relative inasmuch as their enjoyment is subject to the limitations and restrictions of the enabling legislation.

Historically, most states have had to deal with the persistent challenge of how to regulate these constitutional rights and freedoms without emasculating them in practice. A reading of any constitution does not in itself provide a clear indication of the measure of freedom citizens enjoy at any particular time. This is especially true of Egypt and other Arab states, where the accumulation of limitations and restrictions by laws to define and regulate constitutional rights and freedoms has sapped these rights of much of their vitality.[20] The perennial conflict between the Egyptian journalists' syndicate and the government over the freedom of the press, for instance, resulted in 1995 in an amendment of the Penal Code which extended the punishments of up to one year in prison and a LE5,000 ($1,500) fine on editors and reporters who published false or biased rumors and unsubstantiated stories with the intent of maligning the institutions and leading members of the government.[21] The following year, responding to criticism from the press, the reference to institutions and leading members of the government was expunged from the amendment.[22]

This is not to say that even in liberal democratic states the freedoms of speech and of the press are absolute and uniform; the problem of balancing them against other legitimate interests of society also exists.[23] In democratic states, however, which are faced with a constitutional injunction against laws abridging the freedoms of speech and the press,[24] the decision is left to the courts. The problem, on the other hand, with allowing

19. The current Egyptian constitution was adopted in 1971 during President Jamal 'Abd al-Nasir's regime. In 1980, Egyptian President Anwar al-Sadat's regime introduced certain amendments, the most significant being, in Article 5, the right of having a multiplicity of political parties, and the change in the wording of Article 2 from Islamic law as *a* source of legislation to Islamic law as *the* source of legislation. For the text in English, see Albert T. Blaustein and Gisbert H. Flanz, eds., *Constitutions of the Countries of the World*, vol. 6 (New York: Oceana Publications, 1994); for the text in Arabic, see Yusuf Qurma Khuri, *Al-Dasatir fi al-'Alam al-'Arabi* (Constitutions in the Arab World) (Beirut: Dar al-Umara, 1989), pp. 591–601.

20. Walid Thabit Ghabriyal, "Himayat al-Hurriya fi Muwajahat al-Tashri': Dirasa fi Dusturiyat al-Tashri'at al-Muqayyida li al-Hurriyat" (Protecting Freedom Against Legislation: A Study of the Constitutionality of Legislation Restricting Freedoms), *Al-Muhamat* 70, (March-April, 1990), pp. 101, 108.

21. Law No. 93 of 1995, amending the 1937 Penal Code, in *Al-Jarida al-Rasmiyya*, no. 21 bis, 28 May 1995.

22. Law No. 95 of 1996, in *Al-Jarida al-Rasmiyya*, no. 25 bis, 30 June 1996.

23. See Sydney Kentridge, "Freedom of Speech: Is It the Primary Right?" *International and Comparative Law Quarterly* 45, (April 1996), p. 253.

24. In the United States, for example, the First Amendment to the Constitution states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press. . ." Text in Albert T. Blaustein and Gisbert H. Flanz, eds., *Constitutions of the Countries of the World*, vol. 22 (Dobbs Ferry, NY: Oceana Publications, Inc., 1996).

the legislature or the executive to set limits on the exercise of constitutional freedoms, is the absence of clear criteria for assessing when the ordering of rights and freedoms ends and their restriction begins. In their case, there are only the flawed political criteria of "public interest" or "national security," which are prone to be arbitrary.

THE ANTINOMY OF CIVIL RIGHTS AND RELIGIOUS DUTIES

Even where the constitutional rights of freedom of belief and of expression are not compromised by executive or legislative action, they may be contradicted by the religious laws of personal status and domestic relations, which owe their legitimacy to sacred texts that are viewed as being at least equal with, if not superior to, man-made constitutions.[25] The 1948 Egyptian Civil Code failed to accommodate the rules of personal status and domestic relations, at the same time that it incorporated some of the viable Islamic rules of contracts and obligations into what was essentially a secular European-type code. The author of the code, jurist 'Abd al-Razzaq al-Sanhuri, justified this failure by saying that trying to incorporate them would have saddled the drafting committee with obvious difficulties. Not only were these rules based on religious doctrine for Muslims and non-Muslims alike, he said, but there had been no previous attempt to unify, let alone secularize those rules, which would have created "insurmountable obstacles and confusion in the formulation of the code."[26]

Thus, left secure in their traditional shari'a moorings, the rules of personal status and domestic relations, which comprise a good part of private law[27] in Egypt and elsewhere in the Arab world, have maintained a form of autonomy within the emergent legal order and its constitutional controls. Furthermore, these rules are only partially codified; they continue to draw on sources going back to the ninth century opinions and commentaries of various schools of jurisprudence, with considerable room for diversity and dissension.

This dichotomy in the legal system has also encouraged the emergence of self-appointed guardians of public virtue and morality who take their cue from provisions in the Egyptian constitution which identify the state, as well as the source of its legislation, with Islam. The Council of Islamic Research of Al-Azhar University, for example, contrary to legal provisions defining its functions[28] and the objections of the courts, has

25. The more moderate Islamist thinking calls for a single constitutional-Islamic concept of legitimacy that would merge positive legitimacy (according to the constitution) with Islamic legitimacy (according to the shari'a), since the constitution provides that shari'a is the source of legislation. See Tawfiq al-Shawi, *Siyadat al-Shari'a al-Islamiyya fi Misr* (The Sovereignty of Islamic Law in Egypt) (Cairo: Al-Zahra' li al-I'lam al-'Arabi, 1987), p. 22.

26. 'Abd al-Razzaq al-Sanhuri, *Al-Wasit fi Sharh al-Qanun al-Madani al-Jadid* (The Intermediate Explanation of the New Civil Code) (Cairo: Dar al-Nashr li al-Jami'at al-Misriyya, 1952), vol. 1, pp. 26–27. Quotation translated by author.

27. In countries following the civil law system, laws are divided into two categories: private and public. The former deals with individual relations, the latter with relations between individuals and the government (e.g., criminal law).

28. Law No. 103 of 1961 in *Al-Jarida al-Rasmiyya*, no. 152, 10 July 1961, describes the function of the Council of Research as limited to research and study of what is published about Islam at home and abroad in order to benefit from what is useful, and correct what is erroneous.

set itself up as the official religious censor to ban from book shops and fairs publications it considers critical of Islam.[29]

By his critique of religious thought, Abu Zayd entered into this confusing legal realm. While believing that he was simply exercising his constitutional right of "freedom of scientific, literary, artistic and academic creativity" under article 49 of the constitution, he was, unbeknownst to him, abandoning his Muslim faith and consequently violating the rules of personal status and domestic relations.[30] Ironically, about the same time that the Cairo Appeals Court was siding with his accusers and had decided to invalidate his marriage to his wife, Abu Zayd's major work,[31] published not in Cairo but in Beirut and Casablanca, lamented in its first pages that "the entire Arab heritage has been encapsulated solely in Islam, which has become such a symbol of identity that its abandonment would only spell *'adamiya* (nihilism) and the risk of *diya'* (perdition)."[32]

Lacking the competence to do so, Egyptian courts, and most Arab courts for that matter, have been unable to bring the religious laws of personal status and domestic relations into conformity with the provisions of their countries' constitutions. Even in defining apostasy, as we shall presently see, there has been no consensus among Islamic scholars.

WHAT EXACTLY IS APOSTASY?

The orthodox Muslim view maintains that a person who abandons Islam commits apostasy and must be put to death. According to this view, it is important "to safeguard the freedom of the faith from those who seek to undermine and corrupt the Muslim Community. . ., an action that is comparable to high treason in modern states."[33] The problem with this comparison is that it fails to take into account the restrictions placed on the concept of high treason in modern constitutions. In early American history, for example, treason was used by some states of the Union to suppress all sorts of persons and groups considered enemies of the state. Any act that displeased the authorities was dubbed treasonous and, therefore, punishable by death or banishment. This lasted until the Federal Constitution, adopted in 1788, defined treason only in "levying war against (the states)"

29. See 'Abdallah Khalil, *Al-Qawanin al-Muqayida li al-Huquq al-Madaniyya wa al-Siyasiyya fi al-Tashri' al-Misri* (Laws Restricting Civil and Political Rights in Egyptian Legislation) (Cairo: Al-Munazama al-Misriyya li Huquq al-Insan, 1993). The author cites, in pages 149–52, the authors and titles of no less than 12 books banned by the council in 1992 alone, the year the book was written. They include books authored by judge Muhammad Sa'id al-'Ashmawi, 'Adil Hammuda, Sana' al-Masri, Ibrahim 'Isa, and 'Abdallah Kamal. The last is a journalist with the magazine *Ruz al-Yusuf*, whose book *Al-Tahlil al-Nafsi li al-Anbiya'* (Psychoanalysis of the Prophets) (Cairo: Dar al-Khayal li al-Tiba'a wa al-Nashr, 1996) was removed from the market with the help of the Egyptian authorities, according to *Al-Hayat* (London), 13 July 1996.

30. It is a situation out of medieval Europe. When the division between ecclesiastical and secular jurisdictions took place, heresy was left to the former as a spiritual offense punishable by anathema, although in the twelfth/thirteenth century it became also a criminal offense punishable by death. See Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge: Harvard University Press, 1983), p. 186.

31. Abu Zayd, *Al-Nas, al-Sulta, al-Haqiqa: Al-Fikr al-Dini Bayn Iradat al Ma'rifa wa Iradat al-Haymana*.

32. Ibid., p. 13. Quotation translated by author.

33. Muhammad Abu Zahra, *Al-Jarima wa al-'Uquba fi al-Fiqh al-Islami* (Crime and Punishment in Islamic Jurisprudence) (Cairo: Dar al-Fikr al-'Arabi, 1966), vol. 2, pp. 192–204. Quotation translated by author.

and "giving aid and comfort to their enemies,"[34] and procedural safeguards were enacted for the trial of those accused of this or any other crime.[35]

The onset of the modern state has rendered the orthodox Muslim view of apostasy untenable, suffering from a similar imprecision of definition of treason, easy to apply, but difficult to defend. In a review of religious sources, prompted by the Abu Zayd case, Muhammad 'Amara, an active Islamist theoretician, rejected the view that apostasy is one of the *hudud*, the specified crimes in the Quran the punishment for which is imperative, being the right of God. 'Amara also disagreed with the notion that either the Quran or the *hadith* (the sayings of the Prophet) provides for a worldly punishment for apostasy. Nevertheless, 'Amara would still deny an apostate the freedom to propagate his heresy for fear of undermining the values of Muslim society. "Guiding the perplexed, replacing their doubt with conviction, and instilling faith in the heart of heretics, is a battle of the mind for which scholars and intellectuals must bear responsibility and not the penal institutions of the state."[36]

It must be pointed out here that radda, which literally means going back, refers only to persons who leave Islam. Otherwise a person is free not to become a Muslim, a freedom which is for all practical purposes curtailed *ab initio* by the fact that the great majority of Muslims, like the great majority of Christians or members of any other religious group for that matter, are born into the faith and do not elect to join it.

THE WRITINGS OF ABU ZAYD THAT SWAYED THE COURT

To convince himself of Abu Zayd's heresy, the Cairo Appeals Court judge chose to read into the record and contest, as a prosecutor would, excerpts from several works by Abu Zayd in order to show that the respondent had "repudiated that which has been proven to be true by the Quranic text or the Prophetic sayings and accepted as such by Muslims at large."[37] The works he chose to read from included *Naqd al-Khitab al-Dini* (Critique of Religious Thought)[38] and *Al-Imam al-Shafi'i wa Ta'sis al-Idulujiyya al-Wasita* (Jurist Shafi'i and the Foundation of Median Ideology),[39] and two unpublished manuscripts, "Mafhum al-Nas: Dirasa fi 'Ilm al-Qur'an" (The Meaning of Text: A Study of the Science of the Quran), and "Ihdar al-Siyaq fi Ta'wilat al-Khitab al-Dini" (The Loss of Context in the Interpretations of Religious Thought). Here are some of the excerpts the judge chose to read into the record and include in his decision as evidence of Abu Zayd's apostasy:

> From the moment the text was revealed and read by the Prophet, it was transformed from being divine text and became human understanding because it had immediately changed from *tanzil*

34. Article 3, section 3, in Blaustein and Flanz, eds., *Constitutions of the Countries of the World*.
35. See Lawrence Meir Friedman, *A History of American Law* (New York: Simon and Schuster, 1973), p. 256.
36. Muhammad 'Amara, "Ru'ya Islamiyya fi Ma'ani al-Radda 'An al-Din wa 'Uqubatiha al-Shar'iyya" (An Islamic View of the Meaning of Apostasy and its Legal Punishment), *Al-Hayat*, 2 October 1996. Quotation translated by author.
37. "Mahkamat Isti'naf al-Qahira al-Da'ira (14) Ahwal Nafsiyya," *Al-Muhamat*, pp. 160–79. Quotation translated by author.
38. (Cairo: Sina Publishers, 1992).
39. (Cairo: Sina Publishers, 1991).

(revelation) to *ta'wil* (interpretation). The Prophet's comprehension of the text represents the initial stage in the text's interaction with the human mind, contrary to the claim of [the proponents of] religious thought that the Prophet's comprehension of the text corresponds to the text itself, a claim which leads to a form of *sharak* (polytheism), since it suggests conformity between the absolute and the relative, between the permanent and the changeable, a conformity between divine intention and the human understanding, which claim would mean attributing divine qualities to the Prophet and sanctifying him by concealing his human nature and consequently the fact that he was only a Prophet.[40]

Dismissing the realities of history, and of language, and opposing reason which revelation had set free, have only led to the falsification and the freezing of [the meaning of] the text and of reality. . .It [is not] strange for those who slavishly hold to the text to learn that the Christian citizen is a second class citizen whom Muslims must treat kindly which is the historic sense of *jizya*, the poll tax. Now that the principle of equality in rights and duties, irrespective of race, color, or creed, has become well established, holding on to the literal meaning of the text in this respect would only draw society backward to a stage which humanity has already passed in its long strife for a better world built on equality, justice, and freedom.[41]

Turning from the realm of creed and ideas to that of rules and legislation, the latter are an integral part of the construct of societal reality at any given historical and social period. It will therefore be inconclusive to try and explain the problem of the woman and her equality with the man outside the context of the entire text.[42] The clear manifestation of the text is the total liberation of the human being, man and woman, from the social and mental bondage, that is why reason was invoked as a counter to *jahiliyya* (ignorance), justice as a counter to *dhulm* (oppression), and freedom as a counter to *'ubudiyya* (slavery). It was not possible for these values to express themselves except through their hidden indicators, just as it was not so much the intention of the text to conflict head on with reality, it was [the intention] to begin to move gradually. We can see today how recognizing the value of *ijtihad* (deductive reasoning) in granting daughters the right to inherit has also focused attention on all the other issues pertaining to women in our society. It should be unacceptable that this reasoning stop [at the point] where revelation ceased; any claim that the text is good for all times and places would then loose all credibility.[43]

THE PREMISE OF ABU ZAYD'S VIEWS

It is important to know the context in which these statements were made. Abu Zayd was undoubtedly critical of fundamentalist Islamic thought; but he was not about to deny his Muslim faith. What he was waging, he said in his latest major work, was an intellectual war against the "self-serving, preconceived ideological reading"[44] of the Quran by contemporary Islamists who were "guided literally by the heritage of the past, in order to give them the historical depth, and consequently the legitimacy they lacked."[45]

40. Abu Zayd, *Naqd al-Khitab al-Dini*, pp. 93–94. Quotation translated by author.
41. Ibid., p. 205. Quotation translated by author.
42. Abu Zayd, *Ihdar al-Siyaq fi Ta'wilat al-Khitab al-Dini*, p. 37. Quotation translated by author.
43. Abu Zayd, *Naqd al-Khitab al-Dini*, pp. 105, 222. Quotation translated by author.
44. Abu Zayd, *Al-Nas, al-Sulta, al-Haqiqa: Al-Fikr al-Dini Bayn Iradat al-Ma'rifa wa Iradat al-Haymana*, p. 133. Quotation translated by author.
45. Ibid.

He compared present day Islamist thought to the speculative theology of *kalam*, the medieval Islamic version of scholasticism. The Quranic text, Abu Zayd maintained, was taken literally by Islamists, whether it related to matters of faith, transactions, or crimes, and placed in the category of *al-thawabit* (the immutables), to be understood in exactly the same way that the venerable forebears understood it. "*La ijtihad fi majal al-'aqida*" (no reasoning is permitted in matters of doctrine) is the motto of Islamist thought, which remains oblivious to the fact that *al-'aqa'id* (doctrines) are *tasawurat* (imaginary ideas) susceptible to the level of consciousness and the degree of knowledge at a specific moment in history.[46]

Abu Zayd argued that Islamists failed to realize that even Quranic rulings and legislation that were clearly an integral part of the social construct at a given historical moment represented an advance on what preceded them, and any contemporary reading of these rulings should be guided by the same progressive approach sanctioned by the Quran. Removed from their socio-historical context, the interpretation of these legislative texts would, therefore, be only "a form of self-serving temperamental interpretation."[47] A return to the extraneous social context, which made necessary these rulings and legislation in the first place would "not only provide a sure guide for their proper understanding, but [would] also open the way for deductive reasoning in order to effect their evolution on the basis of meaningful interpretation. . .Such a reading of the text [might] after all lead us to drop many of the rulings as mere historical rulings which were intended to describe a specific incident rather than the enactment of a rule of law."[48]

Abu Zayd blamed this total reliance by Islamist thought on the religious text as the source of legitimacy to the exclusion of "human experience" and the "collective memory," for the endemic crisis in Arab consciousness between the relevance of the religious text and the reality of human experience. This is why, Abu Zayd maintained, all Arab problems, be they economic, social or political, tend to transform themselves into religious issues; and with the religious text open to conflicting interpretations, these issues are never really resolved.

> The Arab mind, it seems to me, is doomed to continually turn upon itself like a stone mill of texts, making noises without producing flour. At the close of the twentieth century, the Arabs are arguing over the same issues they argued over in the nineteenth century: bank interest and usury, shura and democracy, science and religion, whether arts are good or evil, should the woman go out to work or remain at home, to wear the veil or not to wear the veil, and so on and so forth.[49]

Abu Zayd then challenged what he described as the "modern approach" that certain

46. Ibid., pp. 132–34.
47. Ibid., pp. 135–39.
48. Ibid. In this, Abu Zayd reflects the historical view of all classical law as made up of ad hoc rulings. As Oswald Spengler has put it, "classical law is not deliberately invested with validity for the future, but more or less recreated again and again as empirical rulings ad hoc." Oswald Spengler, *The Decline of the West* (New York: Oxford University Press, 1991 ed.), p. 63.
49. Abu Zayd, *Al-Nas, al-Sulta, al-Haqiqa: Al-Fikr al-Dini Bayn Iradat al-Ma'rifa wa Iradat al-Haymana*, pp. 140–41. Quotation translated by author.

Islamists claimed to apply to the reading of the Quranic text, and attempted to demonstrate that this approach only deepened the crisis in the Arab consciousness. Despite its attempt to distinguish between *al-thabit* (the immutable) and *al-mutaghayir* (the changeable), *al-azali* (the eternal) and *al-zamani* (the temporal), this modern approach, he argued, had only succeeded in grounding more firmly the concept of "the comprehensiveness of the text." This approach did so,

> first, by reading into the text all the scientific and intellectual evolutions of the human consciousness; second, by creating in the mind of the reader the contentment that the Holy Book possesses all that which man has achieved or could possibly achieve, past, present, and future; third, by preempting all the achievements of the human mind in all the fields of knowledge and reducing them to a text which was formulated fifteen centuries ago. This can only embed in the collective consciousness or unconsciousness the authority of the past and its hegemony over the present.[50]

Abu Zayd's writings are not exactly new to Arab Muslim thought; they are in the tradition of such reformers as Rifa'a al-Tahtawi, Muhammad 'Abdu, Muhammad Rashid Rida, 'Ali 'Abd al-Raziq, Khalid Muhammad Khalid, and Muhammad Sa'id al-'Ashmawi. But what Abu Zayd did, which his predecessors had failed to do, was to cross beyond the sacral bounds in applying the modern principles of hermeneutics to the reading of the revealed text, thereby extricating himself from the debilitating duality in which Islamist reformers invariably found themselves in the end for fear of offending traditional values.[51]

A LAW TO RESTRAIN HISBA

The clamor in intellectual and legal circles against the kind of vindictive and chaotic litigation that took place in the Abu Zayd case, prompted the Egyptian legislature to enact a law restricting the resort to hisba. But as in all previous attempts at legal reform, by simply straddling the religious and the secular divide the legislation failed to deal effectively with the problem.

The Law on Ordering of Procedure for Initiating Hisba Cases in Matters of Personal Status[52] gives the public prosecutor alone the right to initiate hisba cases in domestic relations matters. It goes on to say that those wishing to resort to the courts on the basis of hisba must first inform the public prosecutor of their intention to do so, and provide him with the motive and the evidence in the case.[53] It is then up to the public prosecutor, after hearing the parties and conducting the requisite investigations, to decide whether to proceed with the case, or simply file the information away. If the prosecutor decides to

50. Ibid.

51. It is the medieval doctrine of the "double truth" all over again, to get out of the dilemma of how the independence of the religious consciousness from the scientific consciousness and vice-versa be protected and at the same time bound up into a unified consciousness of truth. See Leo Strauss, *Philosophy and Law: Essays Toward the Understanding of Maimonides and his Predecessors* (Berlin: Schoken Verlag, 1935).

52. Law No. 3 of 1996, in *Al-Jarida al-Rasmiyya*, no. 4 bis, 29 January 1996.

53. Ibid., Article 1.

proceed with the case, he himself would assume the role of plaintiff. His decision is final. If it came to court, the case could, however, proceed without the presence of the respondent.[54]

What the new law has actually done is to interpose the public prosecutor between husband and wife in what is essentially a civil proceeding over matrimonial relations, when the law already provides for either of them to initiate civil action against the other. Under Islamic law, which is the law applicable to domestic relations of Muslims in Egypt, the husband may divorce his wife by repudiation of the marriage, that is *talaq*. The wife may seek to dissolve the marriage by mutual consent and the payment of consideration, which is *khul'*, or by court order on grounds of harm or abuse by her husband, which is *tatliq*. With the husband traditionally empowered to repudiate the marriage at will, the Egyptian legislature granted the wife, in 1929, the right to sue for divorce on grounds of harm or abuse.[55] The courts have interpreted this right expansively to include both active and passive harm or abuse; instances of the latter have included desertion of the marriage bed, but not change of religion unless it became the cause for dissention between them.[56] Assessment of the extent of the harm done was left to the discretion of the judge.

By giving the public prosecutor such a decisive role in initiating the hisba case, the new law gave credence to the Islamic legal notion that the spouses' marital relations was a matter of public interest requiring the intervention of the state. Indeed the law's "Explanatory Memorandum"[57] underscored the shari'a injunction to enjoin the good and refrain from evil if Muslims were "to protect their legitimate interests, interests which concern the public good, the most eminent being those interests which are the right of God or in which the right of God predominates."[58] Contrary to the very purpose of the law, the Explanatory Memorandum justified hisba procedure as *fard kifaya* (an obligation of the community as a whole but sufficiently discharged by some), to be pursued by anyone on behalf of the entire Islamic community when the authorities failed to act!

In other words, the memorandum endorsed the continued application of hisba to domestic relations, which remain subject to Islamic law, but not to criminal cases or civil and commercial transactions, where the modern codes of criminal and civil procedure restrict the right to sue to the public prosecutor and to the party directly concerned. No attempt, however, was made by the Explanatory Memorandum to explain why positive legislation could effect change, not only in the procedural rules of Islamic criminal law, but also in the substantive *hudud* crimes proscribed by the Quran, but could not do away with such a procedural anomaly as hisba, without affecting the substantive shari'a rules of marriage and divorce.

54. Ibid., Articles 3, 4, 6.

55. Law No. 25 of 1929, Article 6, in *Al-Waqai' al-Misriyya*, no. 37, 25 March 1929.

56. See Ashraf Mustafa Kamal, *Qawanin al-Ahwal al-Shakhsiyya* (Laws of Personal Status) (Cairo: The Lawyers Association, 1990), p. 92, who cites the case of a husband who converts from Christianity to Islam.

57. Text in Egypt, The People's Assembly, *Nashrat Majlis al-Sha'b* (The People's Assembly Bulletin), 7th Legislative Session, issue no. 4, 9 February 1996.

58. Ibid. Quotation translated by author.