

*Everyone has the right to freedom of thought, conscience and religion;
this right includes freedom to change his religion or belief,
and freedom, either alone or in community with others
and in public or private,
to manifest his religion or belief in teaching,
practice, worship and observance.*
Article 18 UN Universal Declaration of Human Rights

*“I can write all the books I want to,
even propagate what some folks call heresy,
but under no am I permitted to teach.
That’s considered much too dangerous.
What kind of freedom is it
that doesn’t allow me to transform my ideas into any sort of power?”*

- Nasr Abu Zayd, Voice of an Exile¹

I. Introduction

On Friday, April 2, 1993, from the pulpit of the Amr b. al-Ās Mosque in Old Cairo, Dr. Abd al-Sabur Shahin declared Dr. Nasr Abu Zayd to be an apostate. Abu Zayd had previously been denied a promotion to full professor at Cairo University – he believes it was because his writings went against a fundamentalist conception of the teaching of Islam. Shahin was not only a fervently traditionalist preacher, but also a faculty member of Cairo University who happened to be on the committee which denied Abu Zayd the promotion. Following Shahin’s declaration, a group of lawyers brought the matter to the Personal Affair Department of the Giza Court of the First Instance, stating that Abu Zayd’s Muslim wife, Dr. Ebtehal Younes, was not legally allowed to be married to a non-Muslim – a designation now thrust upon Abu Zayd. This designation, based on his written, scholarly work, brought about the official dissolution – despite appeals – of Nasr Abu Zayd’s marriage. Having lost his job and fearing for his safety, Dr. Younes and Abu

¹ Abu Zayd, Nasr and Nelson, Esther. Voice of an Exile: Reflections on Islam. (Westport, Conn: Praeger, 2004.) [e-book Greenwood Publishing Group. 2004 through EBSCO]

Zayd moved to the Netherlands where Abu Zayd continued to teach until his death in 2010.

While it is tempting to declare Shahin et al as exercising some form of identity politics or wielding “religion” as a weapon of “the state,” complications arising from the notion of apostasy thoroughly complicate these designations – where exactly does one category end and the other begin?

Just as this particular instance of alleged apostasy was addressed both in the courtroom and the mosque, so the category of turning from one’s faith can be analyzed through a legal/political as well as a social or theological lens. It is difficult, then, to decipher a clean entry point to the discussion of exactly what apostasy constitutes in Islam and which sources would provide a firmer grasp of the concept – or determine if it is helpful to distinguish between the legal/political and theological aspects of apostasy in the first place. By focusing on the Abu Zayd case, it is hoped that the tension between the religious and the political, the private and the public, and belief and law will be brought to light in order to more fully examine the problems involved with appeals to ‘religious’ sources in the operations of the state apparatus. To this end, the paper will begin by discussing apostasy – “turning away from or rejecting one’s religion”²– within the Qur’an and Hadith before turning specifically to the Abu Zayd case. The paper will then analyze the effect of the state apparatus – the episteme of modernity’s nation-state, to borrow Wael Hallaq’s application of Michel Foucault, – on the implementation of Shari’ah law in Abu Zayd’s trial. Throughout this analysis, the paper will argue that the line between the “religious” and the “political/legal,” especially with regard to the concept of apostasy in Islam, is quite blurred, rendering an analysis of apostasy as “a religious” or “a political” (or legal, or

² Hallaq, Wael. “Apostasy.” *Encyclopedia of the Qur’an*. General Editor: Jane Dammen McAuliffe, Georgetown University, Washington DC. Brill, 2011. Brill Online. EMORY UNIVERSITY. 01 December 2011. <http://brillonline.nl/subscriber/entry?entry=q3_SIM-00023>

social, etc.) category difficult at best. Further, following Hallaq, the paper will examine the idea that the distinction between these spheres of analysis may very well be an ideological construct within modernity's nation-state apparatus which seeks to challenge or eliminate alternate sources of power or authority.

II. Apostasy in the Qur'an, Hadith, and Islamic Jurisprudence

"In a culture whose lynchpin is religion, religious principles and religious morality, apostasy is in some way equivalent to high treason in the modern nation-state"

-Wael Hallaq, Shari'a: Theory, Practice, Transformations³

In Hallaq's encyclopedia entry regarding apostasy, he helpfully delineates between the related concepts of kufr, irtidād, and fisq. While irtidād "[bears] more directly than [kufr] upon notions of apostasy," the two terms are difficult to distinguish. Kufr most appropriately refers to 'disbelief', defined by Hallaq as "the act of failing to acknowledge, even of rejecting, God's benevolence, and together with this ingratitude and rejection comes, in a more developed sense of the term, the renunciation of God himself."⁴ Under this umbrella of disbelief is the bifurcated distinction between those who never recognized God's goodness (non-Muslims from birth) and those who professed faith in Islam before renouncing it. The latter of these concepts – even when not indicated by the use of "irtidād" (which implies a turning away from faith) – is apostasy. A further nuancing of the concept entails "a stage beyond that of kufr, when the person stubbornly persists not only in turning away from God but also in deliberately disobeying his (sic) commands."⁵ This is the concept of fisq. While apostasy (irtidād) is related to both the concept of unbelief (kufr) and that of persisting in unbelief (fisq), it carries the distinction of *the*

³ Hallaq, Wael. Shari'a: Theory, Practice, Transformations. Cambridge University Press, New York: 2009. Page 319

⁴ Ibid.

⁵ Ibid.

act of turning away from the faith. With this distinction in mind, this section will address the Qur'anic description of the act of turning away (rather than an analysis solely of the word "ridda") before contrasting the ambiguity of the Qur'anic punishment for apostasy with the explicit call for death of the apostate attributed as a saying of the prophet within two hadiths (collections of sayings of the prophet).

Apostasy in the Qur'an

Hallaq notes that, in the Qur'an, "although apostates are usually assigned a place in hell, there is no mention of any specific corporeal punishment to which they are to be subjected in this world."⁶ Key texts which address the issue of apostasy are contained within Surahs Al-'Imran, An-Nisa, and An-Nahl (Chapters 3, 4, and 16). Each of these three sections addresses apostasy in specific and similar terms but each is equally vague about the punishment for the deed. Additionally, they each allude to courses of action to be taken after the act of apostasy for the accused and for the juror alike. In these sections, the definition of apostate is given as the following: "Any [who] turn back after this [binding covenant], they are perverted transgressors (3:81-82);" "Those who believe, then reject Faith, then believe (again) and (again) reject Faith, and go on increasing in Unbelief (4:137);" and "Anyone who, after accepting faith in God, utters Unbelief (16:106)." Surah 9 labels apostates as those who "violate their oaths after their covenant (9:12)." These definitions of apostate all entail the transgression of a covenant while the nature of the covenant made is left somewhat vague. Further ambiguity is added as these verses address the ramifications of denying their commitment to Islam.

With regard to the treatment of apostasy in these Surahs, Hallaq's statement is valid: all three explicitly mention the hereafter with little or no mention of the penalty in the here and now.

⁶ Ibid.

Of the apostate in Surah 3, the Qur'an states that in the "hereafter he will be in the ranks of those who have lost (all spiritual good) (3:85)." In Surah 4, the reader is told that "God will collect the hypocrites and those who defy faith – all in hell (4:140)." Surah 16 reads, once again that "without doubt, in the hereafter they will perish." In all three cases, this fate is described as a "grievous penalty" (16:104 ;4:138 ;3:91)(عَذَابٌ أَلِيمٌ). By emphasizing the hereafter, questions regarding whether or how the apostate should be punished in this world are left unanswered in these sections of the Qur'an. Surah 16, though, adds the stipulation that if the apostate utters unbelief under compulsion but his heart remains firm in faith, he does not fall into the category of apostate. In other words, one may outwardly proclaim falsehood against Islam (if coerced) while remaining inwardly true to Islam. Another important aspect with regard to the fate of the apostate is whether he or she repents. Surah 3 states:

Of such the reward is that on them (rests) the curse of God, of his angels, and of all mankind; In that will they dwell; nor will their penalty be lightened, nor respite be their (lot) – except for those that repent (even) after that, and make amends; for verily God is Oft-forgiving, most merciful (3:86-89).

However, the next verse states that "those who reject faith after they accept it, and then go on adding to their defiance of faith – never will their repentance be accepted (3:90)." This tension between an "Oft-forgiving, merciful" deity and one that would never accept the repentance of a persisting apostate seems to be the starting point in the jurist's search for clarity regarding the fate of the apostate.

Many have noted the inconsistency between the Qur'anic treatment of apostasy and its presentation in later juridic sources. The above Surahs all contain the ambiguity typical of the Qur'anic literature on the subject. However, they each add a further complication – perhaps one

that would justify or, at least, contextualize the attachment of capital punishment to the crime of abandoning one's religion. Surah 3 poses the question, "How shall God guide those who reject faith after they accepted it and bore witness that the Messenger was true and that Clear Signs had come unto them (3:86)?" Surah 4 states that "God will not forgive them nor guide them on the Way (4:137)," which is in agreement with Surah 16, "God will not guide them...God will not guide those who reject faith (16:104; 107)." If one believes that his/her society is being guided by God and that those who have rejected the faith are no longer guided by God, it follows that those who reject their faith should be viewed as enemies of the community. An enemy of the community of believers (the umma) may, in turn, be viewed as one deserving of capital punishment – a turn illustrated in prophetic hadith. This idea, of a religious offense being seen as excluding a former believer from a society, as will be shown, problematizes the line-drawing that was the original aim of this project.

Apostasy in the Sayings of the Prophet (hadith) and Islamic Jurisprudence (fiqh)

Reported sayings of the prophet were compiled in two manners: one type is arranged based on the companions of the prophet who transmitted the reports and the other is arranged according to subject matter. One of the more widely referenced and cited collections is Sahih al-Bukhari ("Authentic/true" sayings compiled by al-Bukhari). While schools of Islamic jurisprudence differ as to the authenticity of various sayings for many reasons, the sayings collected by al-Bukhari regarding apostasy seem to be widely held as accurate. The first report, as narrated by 'Abdullah, states:

God's Apostle said, "The blood of a Muslim who confesses that none has the right to be worshipped but God and that I am His Apostle, cannot be shed except in three cases: In Qisas for murder, a married person who commits illegal sexual intercourse and the one

who reverts from Islam (apostate) and leaves the Muslims.⁷

A second report, also recorded in *Sahih al-Bukhari*, as narrated by Ikrima:

Ali burnt some people and this news reached Ibn 'Abbas, who said, "Had I been in his place I would not have burnt them, as the Prophet said, 'Don't punish (anybody) with God's Punishment.' No doubt, I would have killed them, for the Prophet said, 'If somebody (a Muslim) discards his religion, kill him.'"⁸

Hallaq hypothesizes that this turn towards a more severe worldly punishment for apostasy reflects the growing political influence of the prophet. He states that “at the early stages, the prophet did not have the effective power to deal with apostates and thus the Qur’an adopted a considerably more lenient attitude. With the growing strength of the new religion that attitude changed into a confident and less compromising one.”⁹ He continues with a discussion of the “wars of apostasy” (*ḥurūb al-ridda*) which followed the death of the prophet. While scholars disagree over whether these conflicts were motivated by a desire to challenge the newly imposed religious hegemony or by a refusal to pay taxes to the new political order, Hallaq suggests that these conflicts “generated a new element in the attitude towards apostasy”¹⁰ – the element of putting the apostate to death. This theory is echoed by Declan O’Sullivan who states that, in the specific context of these battles, “it could have been justifiable...to prescribe such a death penalty as a deterrent to avoid the rise in numbers of quisling traitors from their community.”¹¹ Whether these sayings arose as reaction to/justification for the *ḥurūb al-ridda* or were, in fact, authentic sayings of the prophet, their tension with the ambiguous Qur’anic punishment was something with which jurists would need to come to terms.

Hallaq further describes the reasoning behind, and application of, punishments for *ridda*

⁷ *Sahih Bukhari. Volume 9, Book 83, Number 17.* <http://www.cmje.org/religious-texts/hadith/bukhari/083-sbt.php>

⁸ *Sahih Bukhari. Volume 4, Book 52, Number 260.* <http://www.cmje.org/religious-texts/hadith/bukhari/052-sbt.php#004.052.260>

⁹ Hallaq *Apostasy*

¹⁰ *Ibid.*

¹¹ O’Sullivan, Declan. *The Interpretation of Qur’anic Text to Promote or Negate the Death Penalty for Apostates and Blasphemers.* *Journal of Qur’anic Studies* Vol 3 No. 2 pp 63-93. Edinburgh University Press on behalf of the Center for Islamic Studies at SOAS. JSTOR Accessed 12-01-11

within his description of “offenses”¹² in the second section of his expansive work on Shari’a law.

¹³ According to Hallaq, “offenses recognized by the Shari’a ranged from the moral to the pecuniary and homicidal,”¹⁴ with only some offenses receiving direct regulation within the Qur’an and Hadith. Such crimes (those whose description and punishment could be deduced from these sources) were classified as “huddud” – “literally, the limits prescribed by God, and technically, offenses whose punishments are fixed and are God’s right.”¹⁵ Hallaq’s discussion of apostasy within Islamic jurisprudence falls within a discussion of hudud offenses, though he notes that of the four Sunni schools of jurisprudence “only the Malikites categorize [apostasy] as hudud, but the rules governing [it] are similar in all schools.”¹⁶ For this reason Hallaq is less concerned with whether ridda is considered huddud than he is with the process by which a jurist determines (a) whether the accused has turned from the faith and (b) a suitable punishment based on a reading of the sources.

In order to be charged with apostasy, a compos mentis adult must have acted of his or her own free will and accord (recall the stipulation regarding coercion mentioned in Surah 16 discussed above). Acts constituting apostasy include:

- a. Denying the truth of the Qur’an
- b. Accusing the Prophet of Mendacity
- c. Cursing God, the Prophet Muhammad or any messenger whose prophethood is undoubted
- d. Abandoning prayer on principle or denying the validity of a legal matter subject to consensus
- e. Worshiping idols.¹⁷

Hallaq states that, in fiqh, “failing repentance [allowed for by some jurists], the apostate is

¹² A term juxtaposed with criminal or penal law – a distinction that will be elaborated upon in the final section of this paper

¹³ Hallaq, Shari’a Second section is an exposition of the practice of Islamic legal reasoning (usul al fiqh).

¹⁴ Hallaq, Wael. Shari’ah. Page 310

¹⁵ Hallaq, Wael. Shari’ah. Page 310

¹⁶ Ibid. 318

¹⁷ Ibid 319

killed...apostasy is also cause for dissolution of the apostate's marriage."¹⁸ While he had previously noted that "the severe sanctions applied to hudud offenses were intended to deter and were thus infrequently implemented in practice,"¹⁹ the case of Nasr Abu Zayd in the early 1990s illustrates that appeals to these offenses – and their corresponding severe sanctions – continue in contemporary discourse. Whereas the Qur'an seems to imply that the apostate's punishment will be realized in the hereafter, what is one to make of the hadith commanding the apostate's worldly execution? How does a community which bases its "legal" injunctions on "religious" sources grapple with the apostate's denial of the validity of those sources? How is this conflict exacerbated by the presence of "religiously" oriented laws within a "secular" nation-state? The complications arising from considering apostasy as *either* a religious *or* a political/legal category are aptly illustrated by the legal dissolution of Abu Zayd's marriage.

III. The Trial of Nasr Abu Hamid Zayd

"The ruling is a slap in the face of civil society in Egypt and to its development. It is another addition to the backward behavior in Egypt that is working to stop any real development and it strengthens the limitations on freedom of opinion and belief."

- Mohammad Moneib

Secretary General of the Egyptian Organization for Human Rights

In May of 1992 Nasr Abu Zayd was an Assistant Professor of Arabic Studies at Cairo University where his wife, Ebtehal Younis, was an Assistant Professor of French. He had just submitted his publications – "11 papers and two books"²⁰ – to the University Tenure and Promotion Committee in order to become a full professor in the department. In the coming months and years, not only would Abu Zayd be denied tenure, but – as noted at the beginning of

¹⁸ Ibid. 319

¹⁹ Ibid. 311

²⁰ Voice of an Exile Page 1

this paper – he would be declared an apostate from the pulpits of several mosques and his marriage would be declared invalid by the Egyptian courts. While Abu Zayd appealed to the notions of free speech and scholarship, his opponents appealed to the notion of hisba – “the duty of every Muslim to ‘promote good and forbid evil’”²¹ – and to the allegations that Abu Zayd’s writings qualified as turning from the faith and he was, by promoting these ideas, an apostate. After exploring the position of apostasy within Egyptian law, this section will outline the process of Abu Zayd’s trial, drawing particular attention to Abu Zayd’s thought, the reasoning of his accusers, as well as Abu Zayd’s speculation as to their motives. The section will conclude with an evaluation of the trial which ends up being emblematic of the type of thought with which Hallaq takes issue in his critique of the nation-state.

Principles of Shari’ah as *The* Source of Legislation

Article Two of Egypt’s 1971 constitution names the principles of Shari’ah as “a chief source” of legislation. In 1980, under Anwar Sadat, the phrasing was changed to state that the principles of Shari’ah are “*the* chief source” of legislation.²² In 1985, the Supreme Constitutional Court (SCC) issued an statement that this new phrasing did not allow the court overturn laws that were already in place, but rather afforded them the authority to hear Shari’a-related challenges to legislation put forth after the re-wording. This, for Lombardi and Brown, allowed the SCC to determine a methodology for determining what constitutes the principles of Shari’ah law in order to provide a basis for determining whether legislation conformed to them. This methodology,

²¹ Cahen, Cl.; Mantran, R.; Lambton, A.K.S.; Bazmee Ansari, A.S. “Hisba” Encyclopedia of Islam, Second Edition. Edited by P. Bearman; Th. Bianquis; C.E. Bosworth; E. van Donzel; and W.P. Heinrichs. Brill 2011. Brill Online. Emory University. 01 Dec 2011 <http://www.brillonline.nl/subscriber/entry?entry=Islam_COM-0293

²² Lombardi, Clark B.; Brown, Nathan J. “Do Constitutions requiring adherence to Shari’ah threaten human rights? How Egypt’s constitutional court reconciles Islamic Law with the Liberal rule of law.” American University International Law Review. Volume 21, Number 3 p.379-435. 2006. Page 390

according to Lombardi and Brown, is twofold.

The court begins with “a direct textual analysis of the scriptural passages that seem to be on point” and proceeds to seek “confirmation of outward meaning through an inductive survey of classical juristic writing over the years.”²³ From this, the court determined two sets of goals that a law in question could be measured against to ensure that they fulfilled Article Two – “the first are goals that the Court believes specific types of law should promote²⁴...the second are goals that all laws must promote.” To determine the latter, “the Court seems to adopt the classical assumption that Shari’ah has a paramount concern with five human interests which overlap with, but do not mirror exactly the classical ‘necessaries.’”²⁵ As the SCC is an independent entity within the judicial branch, its rulings are interpreted at the lowest level by Courts of First Instance, whose rulings can then be appealed to in the Court of Appeals, with the final interpretation resting with the Court of Cassation.²⁶ Abu Zayd’s case, after moving from the university to the pulpit and then to the court, was first heard in the Personal Affair Department of the Giza Court of the First Instance.

Nasr Abu Zayd’s Application for Promotion

While the legal dissolution of Abu Zayd’s marriage was brought by a team of lawyers (led by Muhammad Samida ‘Abd al-Samad and Yussef al-Badri), his troubles began at Cairo University when he submitted his writings to the tenure and promotion committee. His

²³ Lombardi and Brown 419

²⁴ “custody laws are supposed to promote the well-being of the child; divorce laws protect the well-being of the wife; veiling laws are supposed to promote modesty, and so forth”

²⁵ Ibid. 421 – 5 necessities are listed in Lombardi and Brown’s translation of Case no. 8 of Judicial Year 17 as “religion, life, reason, honor/modesty, and worldly goods (p 448)” noting the discrepancy between this list and the classical list by stating that not all jurists view honor/modesty (‘ird) as a necessary and that the SCC “does not include ‘progeny’ in its list (p 422 footnote 122)

²⁶ Abdel Wahab, Mohamed S.E. “An Overview of the Egyptian Legal System and Legal Research.”

http://www.nyulawglobal.org/Globalex/Egypt1.htm#_6_The_Judicial

application was then delegated to a subcommittee of three people: Dr. Abd al-Sabur Shahin, professor in the College of Dar al-Ulum and a fundamentalist preacher in the Amr b. al-Ās Mosque in Old Cairo,²⁷ Dr. Mahmud Ali Makki, Professor of Andalusian Studies at Cairo University, and Dr. Awni Abd al-Ra'uf, Professor of linguistics at 'Ayn Shams University.²⁸ Their job was to examine the writings and submit a report to the full committee. While, according to Abu Zayd, this process typically takes three months, he was notified seven months later that his application was denied. He states that "the department report emphasized my use of *ijtihad*" and "took issue with...my contention that many different copies of the mushaf²⁹ ...circulated during the time of the prophet."³⁰ Shahin's report specifically "rebuked Abu Zayd for criticizing Shafi'i's preference for tradition over reason, for rationalizing Quraysh's domination over Islam, and for saying that Islamic history was a conspiracy hatched by the caliphs of Quraysh."³¹ He criticized Abu Zayd's comment that "it is high time[Arabs and Muslims] re-examined our conditions, and liberated ourselves, not only from the authority of the religious texts, but also from every power that impedes human progress."³² He continued, accusing Abu Zayd of ridiculing belief in the supernatural, being supportive of Rushdie's Satanic

²⁷ It is beyond the scope of the paper to go into full detail, but it should be noted that a few years after the Abu Zayd trial, one of the lawyers who brought Abu Zayd to court – Yusef al-Badri - accused Shahin (the member of Cairo University's tenure and promotions committee who was the lead opponent of Abu Zayd's promotion) of apostasy due to the contents Shahin's book, My Father, Adam. See: <http://weekly.ahram.org.eg/1999/413/eg2.htm> In his autobiography, Abu Zayd relates his feelings on the Badri v. Shahin feud in a conversation with a journalist:

"[Abu Zayd stated] 'I am not happy at all about this. What we are witnessing is a fire in our house, a fire in our culture. We cannot kill a man for a stupid book.

'Are you supporting Shahin?' the journalist asked.

'Yes, definitely I am,' I said, 'I will defend his right to write what he thinks.'

...

One of the journalists told me Shahin said, 'What do you want me to do? Should I go around saying 'Thank you, Abu Zayd, you are my hero'?' (Abu Zayd 15)"

²⁸ Abu Zayd Voice of an Exile 2

²⁹ Literally translated as 'book,' Abu Zayd's contention was that there were several written books containing the Qur'an in circulation during the time of the prophet – these, according to Abu Zayd, acted as aids to believers but were not necessarily viewed as holy until the 'Uthman standardized a written Qur'an

³⁰ Ibid

³¹ Page 179 Najjar, Fauzi M. *Islamic Fundamentalism and the Intellectuals: The Case of Nasr Hamid Abu Zayd*. British Journal of Middle Eastern Studies. Volume 27 No. 2 (November 2000) pp.177-200. Taylor and Francis Ltd. Accessed October 14 2011

³² Ibid.

Verses, and of belief in the createdness of the Qur'an based on Abu Zayd's statement that "the moment it was revealed to Muhammad it acquired a human existence separate from its divine nature."³³ While Professor al-Shak'a echoed many of Shahin's critiques and accusations, Professor Makki provided a dissenting report to the committee, stating that:

Abu Zayd makes the distinction between religion and religious thought; the latter consists of human reasoning in understanding and interpreting the religious texts, and it is subject to the general linguistic and cultural rules to which it belongs. Hence, the Qur'an is a linguistic text, and its divine character does not preclude its being studied and analyzed. ...[Abu Zayd's work, the *Naqd al-Khitab al-Dini*] demonstrates an enlightened, progressive thought, based on a conscious and competent reading of the heritage relating the past to the present, and deriving from the heritage what liberates the mind and turns it into an active force in the nation's progress.³⁴

Despite Makki's defense, the tenure and promotions committee denied Abu Zayd's application by a vote of 7-6.

Responding to Shahin's critiques, Abu Zayd explains that "there were different mushafs [books] circulating during the prophet's time along with a variety of ways of reciting the text, not different Qur'ans."³⁵ Abu Zayd explains that the third Caliph, 'Uthman, was responsible for standardizing a written Qur'an but, before that time, multiple books circulated to aid the memory of believers with oral recitation remaining the primary mode of Qur'anic dissemination. He adds that "this was not new information for Shahin, a man who earned his PhD doing work in the history of the Qur'an. I quoted publicly from his work, showing where he himself makes mention of the variety of mushafs in circulation among families in the earliest Muslim communities."³⁶ With regard to the remaining accusations, Najjar outlines Abu Zayd's distinction between two modes of thought, "the first type standing for...the immutable and its

³³ Ibid. 180

³⁴ Ibid 181-182

³⁵ Abu Zayd Voice of an Exile Page 3

³⁶ Ibid.

assertion; the other stands for discovering and ascertaining the truth.”³⁷ Abu Zayd’s critique of political discourse hinges on this distinction – the political Islamists claiming the assertion of an immutable, eternal, religious truth and its application in the political realm – using “religious discourse to get hold of power.”³⁸

Abu Zayd, conversely, argued for reinterpretation of tradition and sources in light of changing social circumstances. Abu Zayd responds further, stating that, in the beginning of his *Critique of Islamic Discourse*, “I draw attention to the relationship between political Islamist discourse in Egypt and the socioeconomic scandal brought about by Islamic investment companies.”³⁹ Abu Zayd was referring to a late-80s scandal involving companies that were offering an Islamic alternative to Westernized banks after fatwas had been widely issued accusing the banks of usurious practice. When these banks crashed, many Egyptians lost great sums of money – Shahin was “the religious advisor to al-Rayyan Islamic Investment Company [and] stood accused of misappropriating the savings of the faithful.”⁴⁰ Abu Zayd believed that Shahin’s report was tainted by his personal reaction to Zayd’s critique and served as motivation for his continued accusations. In addition to a concern for the maintenance of belief within an Islamic society (or, perhaps, disguised as such a concern) Zayd posits that these charges reflected not even a political or religious qualm, but rather were the product of a personal vendetta.

Nasr Abu Zayd’s Trial

On April 2, 1993 Shahin preached a sermon declaring that Abu Zayd had turned from

³⁷ Najjar 184

³⁸ Abu Zayd page 11

³⁹ Ibid. Page 5

⁴⁰ Ibid

Islam – that he was an apostate. Abu Zayd states that, during the next Friday’s services, similar sermons were preached throughout Egypt – including from the pulpit of the Mosque that he was raised in. After these initial accusations, the status of Abu Zayd’s marriage was officially – legally – called into question. This petition charged him with “publishing a number of books and articles which, according to ‘reputable scholars,’ amounted to kufr...deifying reason, which is a danger to the creed...and [leading] the people to infidelity.”⁴¹ Nearly six months later, the court rejected the lawsuit. The ruling was based on “Article 3 of the Civil and Commercial Code of Procedure...which stipulates that no petition or litigation shall be heard unless the plaintiffs have a legal interest in it, recognized by the law.”⁴² Due to the fact that none of the lawyers could argue that they had a legal interest in the dissolution of Abu Zayd’s marriage to Dr. Younes, the case was thrown out. However, the group of lawyers successfully appealed the verdict, utilizing the principle of hisba (as mentioned above, “the duty of every Muslim to ‘promote good and forbid evil’”) to establish that they did, in fact, have a stake in the dissolution of this marriage.

Due to the fact that the Giza Court failed to address the issue of apostasy, once the group of lawyers established their legal interest in the case, the court was forced to rule on whether Abu Zayd had turned from the faith. Abu Zayd explains this functioning of hisba in his case, stating that it “allows any Muslim to sue before a court of law if he or she believes Islam is being harmed.”⁴³ Explaining the charges leveled against him in the appeals court, Abu Zayd states that:

the court accused me of denying ‘the existence of certain creatures such as angels and devils referred to in the Qur’an’...that I ‘described certain images in the Qur’an about heaven and hell as mythical,’ that I believed ‘the text of the Holy Qur’an [to be] human,’

⁴¹ Najjar 189

⁴² Ibid. 191

⁴³ Abu Zayd 7

and that I had ‘advocated the use of intellect to replace the concepts derived from the literal reading of the text of the Qur’an by modern, more human and progressive concepts, [particularly] the texts related to inheritance, women, the Christians and the Jews, and women slaves.’⁴⁴

On June 14th, 1995, the court ruled that Nasr Abu Zayd was an apostate and that his marriage was null and void. Furthermore, a fatwa was released shortly thereafter by Ayman al-Zawahiri calling for Abu Zayd’s death. The following year, in August of 1996, the Egyptian Supreme Court confirmed and upheld the appeals court’s decision, outlining 10 reasons for his conviction:

1. Describing certain things mentioned in the Qur’an such as the throne of God, angels, devils, jinn, paradise, and hell as myths of the past
2. Calling the Qur’an a cultural product, thereby denying its pre-existence in the preserved tablet
3. Calling the Qur’an a linguistic text (the implication is that the prophet lied about receiving revelations from God)
4. Calling the Qur’anic sciences ‘reactionary heritage,’ and saying that the shari’a is the cause of Muslims’ backwardness and decline
5. Saying that a belief in the supernatural reflects a mind submerged in myth
6. Calling Islam an Arabic religion, thus denying its universality
7. Asserting that the final version of the Qur’an was established in the Qurayshi idiom in order to assert the supremacy of the Quraysh tribe
8. Denying the authenticity of the Sunna
9. Calling for emancipation from the authority of religious texts
10. Contending that submitting to religious text is a form of slavery.

During the proceedings, Abu Zayd refused to defend himself, stating: “I refused to defend myself against charges of apostasy because I do not allow anyone, no matter whom, no matter what authority, to judge my faith.”⁴⁵

While Abu Zayd drew a distinction between religion and religious thought – between belief and scholarship – his opponents drew no such distinction. While Abu Zayd claims that his opponents were using political means to defend political interests, they appealed to the notion of

⁴⁴ Abu Zayd 8

⁴⁵ Abu Zayd 14

preserving cohesion within the Islamic community against the threat of harmful teachings. His accusers claimed to be concerned about his religious beliefs, though they were not content to limit the criticism of Abu Zayd's ideas to the university and the Mosque, but took their criticism to the courtroom. In a constitutional system where it is written that the principles of Shari'a are *the* source for legislation, the line between religious belief and political/legal issue – between private belief and public scholarship – blurs if not disappears. The Abu Zayd case and the category of apostasy illustrate the difficulty of adhering to the principle of religious freedom in a state that professes adherence to a particular religious structure. In a 1998 article in the Middle East Journal, George Sfeir aptly summarizes the proceedings, saying that “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.”⁴⁶ Sfeir's footnote to that comment, though, as well as portions of his analysis, speaks directly to Hallaq's critique of the episteme of the modern nation-state.

IV. Shari'a and the Nation-State

“Subversive discourses are at their most effective when they feed on the decaying organs of the entrenched power-discourses, those which partook in the very definition of the systemic rules.”

- Wael Hallaq, Shari'a Page 12

After commenting on Abu Zayd's stumbling into the “confusing legal realm” of religion-based laws within an otherwise secular constitution, Sfeir notes that “it is a situation out of medieval Europe.”⁴⁷ He then states that “lacking the competence to do so, Egyptian courts,

⁴⁶ Sfeir, George. *Basic Freedoms in a Fractured Legal Culture: Egypt and the Case of Nasr Hamid Abu Zayd*. Middle East Journal, Vol 52 No. 3 pp 402-414. Middle East Institute. JSTOR accessed 14/10/2011

⁴⁷ Sfeir 409 footnote 30

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."⁴⁸ It has hopefully been illustrated that Abu Zayd's case does, indeed, present a confusing legal situation, but would the remedy lie in conforming these "religious laws" to their "constitutional" counterpart, a remedy Sfeir suggests that medieval Europe successfully applied? The dynamics of the seemingly oppositional realms may cause a reorienting a few religious regulations in order to decrease their dissonance with the norms fixed within the nation-state's constitution to be a difficult enterprise(at best). In order to shed light on this problematic dynamic, it is helpful, to turn towards Wael Hallaq's theorization of the seeming incompatibility between the modern nation-state and the traditional practice of Shari'a. For Hallaq, the dissonance between religious laws and secular constitutions is a byproduct of the project of colonialization and the imposition of the modern nation-state.

The process of colonialization, for Hallaq, necessarily begins with the institutionalization of commercial codes in order to preserve material interest. He states that "some of the first Western legal insertions into the native legal structures were commercial codes that were instrumental in opening up colonized markets to economic exchange on European terms."⁴⁹ Proceeding to describe the subsequent course of action within the colonial enterprise, Hallaq states that "it soon became obvious that to install a long-term and efficient mechanism for the economic exploitation of the colonies, the nation-state system, with all its legal arsenal, had to be exported as an essential first act."⁵⁰ Hallaq bases his hypothesis on an extended citation of Bernard Cohn's Colonialism and its Forms of Knowledge: The British in India wherein Cohn

⁴⁸ Sfeir 409

⁴⁹ Ibid. 358

⁵⁰ Ibid. 359

states that the Europeans took control through a “gradual extension of ‘officializing’ procedures.”

From the idea of gradual European encroachment, Hallaq proceeds to put forth a seven-point “conceptual analysis of the disharmony between Islamic law and the nation-state” in order to elucidate the “analytical difference between the pre-existing *system* (largely defined by Shari’a) and that *system* which came to replace it (the modern nation-state).”⁵¹ While it is beyond the scope of the present paper to reproduce Hallaq’s meticulous analysis of the history, evolution, and application of Shari’a law, his methodical differentiation of the nation-state and Shari’a law not only parses the tension between the categories of legal and religious in the Abu Zayd case, but allows us to posit that the question of whether his accusers were acting out of religious or political motives is a problematic entry point to the conversation. Perhaps it is most helpful to follow Hallaq and ask what factors made it possible for the Abu Zayd case to be brought to court in the first place. Hallaq’s approach to Shar’iah and the modern nation-state as ‘epistemes’ will, hopefully, shed light on the ambiguity which has met the question this project sought to explore: whether apostasy would be most appropriately understood as a political/legal or religious category. After examining Hallaq’s appropriation of Foucault’s concept of the episteme, this section will address Hallaq’s seven-fold comparison of Shari’a with the modern nation-state.

The Epistemes of the Shar’ia and the Nation-State

Hallaq begins his study by noting that even the field within which his work is situated (the academic study of Islamic Law) was, itself, “born...out of the violent, yet powerfully

⁵¹ Hallaq 360 emphasis Hallaq’s

homogenizing ventures of 19th Century Europe.”⁵² An analysis of the discourses of power that provided the context for the field’s emergence, though, is complicated within “the laboratory of colonialism” which Hallaq differentiates from Foucault’s field of power relations. He notes that Foucault’s

field was applicable to a span of about four centuries that witnessed the *systemic* evolution...of surveillance, discipline and punishment, but less so the all-too-quick downfall of the systems from which these new forms emerged...in the systemic structures he called ‘episteme,’ there were – *comparatively speaking* – no genuinely foreign or violently crude impositions, and no qualitatively different and culturally and systematically alien will-to-power...Europe, in other words, emerged from itself.⁵³

Therefore, while Foucault’s analyses of power relations (particularly the concept of ‘episteme’) prove to be a useful starting point for Hallaq’s work, the Shari’a is unable to be systematically subjected to “Foucault’s theoretical and critical apparatus.” For Hallaq, the episteme of the modern nation-state emerged gradually within the European context, whereas its spread to other parts of the world is seen as a colonialist project. In other words, rather than examine the *evolution* of systems of surveillance, discipline and punishment, Hallaq will focus on their imposition on already existing systems of power. His argument, then, will center on the idea that “one of the strategies of colonialist power was the production, in the midst of undeniable diversity, of a considerably linear body of knowledge that invented two interrelated realities...the field of ‘Islamic legal studies’....[and] the effects of power-processes as they unfolded in the native legal cultures of the colonies.”⁵⁴

Hallaq, then, uses Shari’a to move from a description of the ‘origins and evolution’ of

⁵² Hallaq 6

⁵³ Hallaq 9

⁵⁴ Hallaq 10-11

Islamic law to a post-colonial analysis of the effects of the nation-state on Shari'a – describing both as 'epistemes.' The concept 'episteme,' in this work, stems from a methodological problematic when presenting a history of Islamic law: "how can one write any macro-history – without which, arguably, scholarship would remain both atomized and fragmentary – in a manner that avoids the pitfalls associated with generalization?"⁵⁵ There is a similar difficulty in turning towards the idea of micro-history - the necessary marginalization of those particulars not emphasized by the historian (an arbitrary choosing of a 'this' over a 'that,' if you will). In order to avoid these pitfalls, Hallaq describes Shari'a as an episteme: "a notion referring to systems of knowledge and practice that share in common a particular structure of concepts which qualitatively distinguish them from other systems of the same species."⁵⁶ Describing the Shari'ah as an episteme also serves the purpose of rendering a comparison between Shari'a law and the nation-state as systems of social order.

By addressing Shari'a as an episteme, Hallaq is able to analyze the "structures of authority and discursive and cultural practices [within Shari'a] that did not change over time and space"⁵⁷ while allowing for discrepancies at the micro-level of individual communities. In this matter, the complex set of phenomena that can be grouped under the analytical category of Shari'a are able to be analyzed without succumbing to either over-generalization or arbitrary choice of micro-historical examples. While Hallaq describes these historically constant structures and practices of Shari'a law, he states that he is only able to do so "until they met their structural death in the nineteenth and early twentieth centuries"⁵⁸ This death – "the collapse of

⁵⁵ Hallaq 14

⁵⁶ Hallaq 15

⁵⁷ Ibid.

⁵⁸ Hallaq 15-16

the organic features that made Shari'a ...possible...and reproductive...those features that allow us to speak of Shari'a as an episteme"⁵⁹ – was a product of the “dramatic transformation in the episteme and structure of the law...brought about by the introduction into Muslim legal landscape of the modern project of the state.”⁶⁰ The common structures and practices that can be traced as “Shari'a” up through the medieval period, for Hallaq, were killed by the introduction of the violent imposition of the incompatible episteme of the modern nation-state.

The Colonial Project and Shari'a

The first feature of the two epistemes compared by Hallaq is their existence as “machines of governance.” While the nation-state and Islamic law operate in vastly different ways, they both “are designed to organize society and to resolve disputes that threaten to disrupt their respective orders.” Relatedly, “both are legally productive mechanisms...lawgivers,” Hallaq’s second mode of comparison.⁶¹ Thirdly, “both systems claim ultimate legal sovereignty.”⁶² In these first three similarities one can see the incompatibility of two systems which exist in differing power discourses. Their differences are exacerbated in the analysis of Hallaq’s fourth hypothesis – that “Islamic Law and the nation-state operated in two opposing directions, the latter compelling and pushing toward an exclusive and ultimate center, the former demonstrably centrifugal.” By this, Hallaq means that the nation-state’s legal apparatus is blatantly hierarchical while the structure of Islamic law operates “horizontally” – meaning that the “referential authorities of the qadi (judges) are other qadis and muftis (scholars).”⁶³ In stark

⁵⁹ Ibid. 16-17 n.33

⁶⁰ Ibid. 21

⁶¹ Ibid. 361

⁶² Ibid. 362

⁶³ Ibid

contrast to the nation-state, Hallaq claims Islamic law to be “a personal form of justice, not corporate” justice that rarely answers to an external governmental apparatus.⁶⁴ The final three discrepancies between the two systems form the crux of Hallaq’s critique.

The fifth difference is in the nation-state’s encouragement of economic and political domination and the simultaneous concealment of that encouragement. “The modern state represents itself, and is represented in discourse about it, as an abstract legal entity, this being a fundamental feature of its ideological make-up.”⁶⁵ On the other hand,

the Shari’a, by the constitution of its fiqh...neither promoted economic classes nor encouraged capitalistic or class dominance...lacking this agenda and serving no class in particular, [it] did not develop the need to hide itself behind an impenetrable ideology.⁶⁶

This difference – the accusation that the nation-state structure favors some classes or groups – seems to be at the heart of Abu Zayd’s contention that his opponents were more concerned with political than religious motives. Further, the maintenance of the political ruling class is also central to Hallaq’s discussion of the political turn in the Muslim attitude towards apostasy mentioned above. It was not until the early Muslim community attained significant political power, according to Hallaq, that the discussion of apostasy evolved from the vague, other-worldly punishment of the Qur’an to the mandated death penalty in the Hadith. As stated previously, this penalty was meant more as a deterrent, but illustrates the difficulty in categorizing an act of apostasy. It would seem that as the political stakes were raised and the religious establishment became more closely intertwined with political establishment, the more severely this “religious” act would be dealt with.

⁶⁴ Ibid. 363

⁶⁵ Ibid.

⁶⁶ Ibid 364

Hallaq's sixth category is the direction of governance, stemming from "the central fact that Islamic law is a grass-roots system that takes form and operates within the social universe; it travels upward with diminishing velocity to affect, in varying degrees and forms, the modus operandi of the 'state.'"⁶⁷ The issues dealt with in Shari'a arise from the everyday experiences of those within a particular jurisdiction. This is quite different from the nation-state, where the law does not arise from every day experience, but

is superimposed from a central height in a downwards direction, first originating in the mighty powers of the state apparatus and thereafter deployed – in a highly structured by deliberately descending movement – to the individuals constituting the social order, those individuals who are harnessed as national citizens.⁶⁸

The notion of citizenship is Hallaq's final comparison – he states that "aside from the higher transcendental aims, Islamic law had little interest in the social order other than resolving disputes in a manner least disruptive to the social order."⁶⁹

While maintaining social harmony was the goal of Shari'a, the nation-state was concerned with crafting a homogenous citizenry through a developed use of "systemic surveillance, disciplining, and punishment."⁷⁰ Within the nation-state system, obedience to the law is foundational to the functioning of the state, whereas in Islamic law, the courts serve to address issues as they arise, not to intimidate those within its jurisdiction into docile obedience. In summation, "unlike the punitive nature of the state, which created the citizen by subduing him along with society at large, Islamic law mediated conflicts and arbitrated disputes in a constant effort to mend ruptures in the social fabric."⁷¹ In order to further demonstrate the irreconcilable

⁶⁷ Hallaq 364

⁶⁸ Ibid.

⁶⁹ Ibid 365-66

⁷⁰ Ibid 365

⁷¹ Ibid. 366

differences between the traditional implementation of Shari'a, Hallaq completes his discussion by pointing out that the ijthadic pluralism – the myriad opinions and rulings falling under the rubric of Shari'a law – of Islamic law is completely antithetical to the strict codification typical of nation-state's legal system. This created a different function in the office of qadi, mufti, and mujtahid as “public intellectuals” who discern and articulat the law based on the sources of legal reasoning while “the modern lawyer-judge is the representative and agent of the nation-state, an extension of its agency, and one who studies and applies the code as a technocrat.”⁷² These differences necessarily problematize not only the categorization of apostasy, but call into question the possibility of Shari'a existing within the framework of the nation-state's legal system.

V. Concluding Thoughts and Further Questions

This project began as an inquiry into the politics of apostasy – turning from one's faith. Should this act be categorized as a religious act – defined as giving up a personal, private commitment? Or, is this act best categorized as a social/political act, publicly renouncing the authority of one's community leaders? Perhaps some hybrid of the two categories? A different category altogether? Through an examination of the Qur'an and Hadith, a shift was observed from the Qur'anic imposition of otherworldly repercussions for apostasy to capital punishment for the apostate. It was hypothesized that this turn had to do with the early “wars of apostasy” in Islam, but there seemed to be a lack of consensus as to whether this was a political or a religious conflict. In a second attempt to categorize ridda, the trial of Nasr Abu Zayd was examined within the complicated context of early 1990s Egypt. While examining Abu Zayd's tenure

⁷² Ibid. 369

denial as well as the subsequent dissolution of his marriage, it became more difficult to draw a line between the religious and political aspects of the case. Were Abu Zayd's accusers seeking to maintain the purity of a religious community or were they upset about his critique of contemporary religious discourse or of his critique of their political and economic activities? The fact that the legal system, appealing to religious sources, made a ruling regarding the faith of an Egyptian citizen succeeded in further complicating the effort to categorize apostasy. Finally, the Abu Zayd case was set in the larger theoretical framework of the contesting epistemes of Islamic law and the nation-state provided by Wael Hallaq.

Hallaq concluded his work by pointing out that the goals and *modus operandi* of Shari'a are at such odds with the modern episteme of the nation-state that any appeal to Shari'a should not even be considered as an appeal to the traditional conception of Islamic law. The traditional conception of Islamic law was

not only a judicial system and a legal doctrine whose function was to regulate social relations and resolve and mediate disputes, but also a discursive practice that structurally and organically tied itself to the world around it in ways that were vertical and horizontal, structural and linear, economic and social, moral and ethical, intellectual and spiritual, epistemic and cultural, and textual and poetic, among much else.⁷³

How, then, to discuss the multifaceted phenomenon of Islamic law after its displacement by the episteme of the modern nation-state? Contemporary appeals to Shari'a, for Hallaq, no longer refer to the system above, but Islamic law has, rather, "become a marker of modern identity, engulfed by modern notions of culture and politics (but, ironically, much less by law)."⁷⁴ Within the Egyptian context, Hallaq situated recent calls for a return to Shari'a within the complicated relationship between al-Azhar, the Muslim Brotherhood, and the State apparatus, concluding that

⁷³ Hallaq 543-544

⁷⁴ Hallaq 550

“thus far, in the Egyptian experiment, at least, a definition of Shari’a that can garner popular and majoritarian legitimacy continues to be elusive.”⁷⁵ Perhaps, then, the notion of Islamic law as a religious or political or legal system was too simplistic a notion to begin with, or perhaps a dissection of it as such has much to do with the structures of thought imposed by the modern nation-state.

In Abu Zayd’s case, the lawyers’ appeal to state power in the name of the *hisba* command (promoting good and forbidding evil in order to maintain socio-religious unity) highlights the tension between the two epistemes – can one claim that an appeal to the state is a religious act? Or that a secular state/legal system has cordoned off a section for religious law? How is one to think of the judge – as an arbiter of religious orthodoxy or enforcer of state mandates? This analysis of *ridda* ends, then, by questioning first whether attempting to categorize apostasy as *either* political *or* religious is a helpful enterprise and, second, whether this bifurcated categorization is, itself, a product of the categories imposed by modernity’s nation-state. Further, the study draws attention to and has important implications for the way one thinks about the concept of “freedom of religion” and article 18 of the International Declaration of Human Rights cited at the beginning of the paper. If the principles of a religious tradition are seen as ‘a’ or ‘the’ source of legislation within a nation-state, where do these principles end and the “freedom to change one’s religion” begin? Finally, could this declaration be read as another example of the incompatibility of the modern nation-state and Islamic law, and thereby as an extension of state power and removal of competing claims to social power and legal authority?

⁷⁵ Hallaq 482