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APOSTASY IN ISLAM

BY

RUDOLPH PETERS & GERT J. J. DE VRIES

In the first centuries of Islam, the Islamic legal scholars elaborated a complex set of rules pertaining to the legal status of those Moslems, who gave up their religion, the apostates. These rules belong to the sphere of penal as well as civil law.¹ This doctrine remained valid until, in the latter half of the 19th century, punishment for apostasy fell into desuetude, though it was almost nowhere expressly abolished. At the same time the principle of freedom of religion was gaining ground in the Moslem world. These two factors compelled Moslem

¹ For general literature on apostasy see:

Muhammad Abū Zahrah, *al-Uqūbah*. al-Qāhirah: Dār al-Fikr al-'Arabī, n.d., 695 p.; p. 192-208.

'Abd al-Qādir 'Awdah, *al-Tashrī' al-djīnā'i al-Islāmī muqāran^{an} bi-al-qānūn al-waḍ'i*. Bayrūt: Dār al-Kitāb al-'Arabī, n.d., 2 vols.; vol. 1 p. 534-8, vol. 2 p. 706-30.

Ahmad Fathi Bahnassi, *La responsabilité criminelle dans la doctrine et la jurisprudence musulmanes*. Tr. par Mohammed A. Ambar. Rev. par Ahmad Ahmad Moukhtar. [Caire:] Le Conseil Supérieur des Affaires Islamiques, 1969, 332 p.; p. 104-37.

Ömer Nasuhi Bilmen, *Hukukî İslamiyye ve İstilahatı Fikhiyye Kamusu*. İstanbul: İstanbul Üniversitesi Hukuk Fakültesi, 1949-52, 6 vols.; vol. 3 p. 474-502.

W. Heffening, *Murtadd*. In: EI¹, vol. 3 p. 795-7; SEI, p. 413-4. *Mawsū'at Djamāl 'Abd al-Nāsir fī al-fiqh al-Islāmī*. al-Qāhirah: al-Madjlis al-A'lā li-al-Shu'ūn al-Islāmiyyah, 1382; vol. 4 (1389) p. 252-73.

A. S. Rahman, *Punishment of Apostasy in Islam*. Lahore: Institute of Islamic Culture, 1972, 144 p.

F. H. Ruxton, *The Convert's Status in Maliki Law*. *Moslem World* 3 (1913) p. 37-40.

Eduard Sachau, *Muhammedanisches Recht nach Schafiiitischer Lehre*. Stuttgart & Berlin: W. Spemann, 1897, 879 + 27 p.; *passim*, see index.

Nu'mān 'Abd al-Rāziq al-Sāmarrā'i, *Ahkām al-murtadd fī al-sharī'ah al-Islāmiyyah*. Bayrūt: Dār al-'Arabīyyah, 1968, 291 p.

David Santillana, *Istituzioni di diritto musulmano malechita con riguardo anche al sistema sciafiita*. Roma: Istituto per l'Oriente, [1926, 1939], 2 vols.; vol. 1 p. 167-71.

Samuel M. Zwemer, *The Law of Apostasy*. *Moslem World* 14 (1924), p. 373-91.

Id., *The Law of Apostasy in Islam*. London: Marshall Bros., 1924, 164 p.

In India and Pakistan a few books dealing with the question of capital punishment for apostasy appeared in Urdu. These, however, we could not consult. Cf. Rahman, *Punishment*, p. 143-4.

thinkers to reconsider the doctrine of apostasy (or to reinterpret the principle of freedom of religion). However, in the sphere of civil law, the rules concerning the apostate are still being applied and seldom is the problem raised whether these rules are compatible with the constitutionally guaranteed freedom of religion. The first part of this article is an *exposé* of the classical prescriptions pertaining to apostasy, according to the four orthodox schools (*madhāhib*) and the Shi'ites. From this description we have excluded those subjects that touch upon the ritual (*'ibādāt*) or that are nowadays of small importance, in practice as well as in theory, like for instance the legal status of the apostate's slaves and his penal and civil responsibility for crimes and torts. In the second part we shall examine the situation of the apostate in modern Islam, both from the practical as from the theoretical point of view. This part contains sections on the definition of apostasy, the present-day legal status of the apostate, modern opinions on this topic and finally how the complex relationship between the doctrine of apostasy and the principle of freedom of religion is perceived in contemporary Islam.

I. The Classical Doctrine

I.1 The Legal Definitions of Apostasy and the Apostate²

Riddah or apostasy is defined as "turning away from Islam" (*al-rudjū' 'an dīn al-islām*) or "severing the ties with Islam" (*qaṭ'*

² Ibrāhīm al-Bādjūrī, *Hāshiyah 'alā sharh* Ibn Qāsim al-Ghazzī. al-Qāhirah: 'Isā al-Bābī al-Ḥalabī, 1340 H., 2 vols.; vol. 2 p. 263-5.

Muḥammad Ibn 'Arafah al-Ḍasūqī, *Hāshiyah 'alā al-sharh al-kabir*. al-Qāhirah: 'Isā al-Bābī al-Ḥalabī, n.d., 4 vols.; vol. 4 p. 301-3.

Aḥmad Ibn Maḥmūd al-Ḥamawī, *Ghamz 'uyūn al-baṣā'ir sharh al-ashbāh wa-al-nazā'ir li-Ibn Nudjaym*. Istanbul: Dār al-Ṭibā'ah al-'Āmirah, 1290 H., 2 vols.; vol. 1 p. 288-90.

Abū 'Alī Muḥammad Ibn Muḥammad al-Ḥattāb, *Mawāhib al-djalīl li-sharh mukhtaṣar Khalīl*. Ṭarābulus (Lībiyā): Maktabat al-Nadījāh, n.d., 6 vols. (repr. of the 1329 H. Cairo ed.); vol. 6 p. 279-80.

Nadīm al-Dīn Dja'far Ibn Muḥammad al-Hillī, *Sharā'i' al-Islām fī masā'il al-ḥalāl wa-al-ḥarām. Taḥqīq Muḥammad Taqī al-Hakīm*. al-Nadījaf: Maṭba'at al-Ādāb, 1389/1969, 4 vols.; vol. 4 p. 183.

Muḥammad Amīn Ibn 'Ābidīn, *Radd al-muḥtār 'alā al-durr al-mukhtār*. Bulāq: Dār al-Ṭibā'ah al-Amīriyyah, 1299 H., 6 vols.; vol. 3 p. 391-4.

Id., *Madjmū'at al-rasā'il*. Istanbul: Der Sa'ādet, 1325 H., 2 vols.; vol. 2 p. 284. Muwaffaq al-Dīn 'Abd Allāh Ibn Aḥmad Ibn Qudāmāh, *al-Muqni'*. 2nd impr. al-Qāhirah: al-Maṭba'ah al-Salafīyyah, 1382 H., 3 vols.; vol. 3 p. 514-6.

al-islām). By the *murtadd* or apostate is understood the Moslem by birth or by conversion, who renounces his religion, irrespective of whether or not he subsequently embraces another faith.³ Apostasy is materialized by "expressions of unbelief", specified as words implying unbelief, deeds implying unbelief or, according to Shafi'ite doctrine, the mere intention of unbelief. The apostatical words can be either explicit, *viz.* solemnly abjuring Islam, or implicit, *viz.* utterances incompatible with the theological consensus (*idjmā'*) or with the axiomatic articles of faith (*mā 'ulima min al-dīn ḍarūrat^{am}*).⁴ General rules providing criteria for the practical admissibility of these expressions have not been constructed, but examples of sayings and acts considered to imply unbelief and, therefore, constituting *riddah* are abundant.⁵ An extensive collection is given by the Hanafite scholar Shaykhzādeh in his book "*Madjma' al-anhur*" (1, p. 629-37). His classification is quoted below; the examples listed there are more an anthology.

(a) *Relating to Allah*: to deny Allah's divinity; to conceive of Allah as a woman or a child; to attribute partners to Allah; to hold Jesus for the son of Allah or to conceive of Allah as part of a trinity; to deny Allah's unity or one of his divine qualities. (b) *Relating to prophets and angels*: to deny the prophethood of Muḥammad; to assert that prophets are free of error; to consider oneself a prophet;

Abū 'Alī Muḥammad Ibn Yūsuf al-Mawwāq, *al-Tādj wa-al-iklil li-mukhtaṣar* Khalīl. Printed in the margin of Ḥaṭṭāb's commentary; vol. 6 p. 279-80.

Muḥyī al-Dīn Abū Zākariyā' Yahyā Ibn Sharaf al-Nawawī, *Mimhādij al-tālibin*. Ed. & tr. by L. W. C. van den Berg. Batavia: Imprimerie du Gouvernement, 1882-3, 3 vols.; vol. 3 p. 205.

'Abd al-Raḥmān Ibn Muḥammad Shaykhzādeh, *Madjma' al-anhur sharḥ multaḡā al-abhur*. Istanbul: Dār al-Tibā'ah al-'Āmirah, 1302 H., 2 vols.; vol. 1 p. 626, 629-37.

³ Malikiite doctrine attaches particular importance to the *murtadd's* profession of Islam prior to his apostasy. They define *riddah* as *kufr ba'd Islām taqarrar*: "unbelief (of the Moslem whose) Islam has been established beyond doubt". It is equally stated, that this Islam needs to be evident in both *qawl* and *'amal*; a person who embraced the faith by merely pronouncing the *shahādah* without conforming to religious orthopraxy (such as the daily *ṣalāh's*) would not be considered qualified to perform a legally valid act of apostasy.—Cf. Mawwāq in the margin of Ḥaṭṭāb: *Mawāhib al-djalīl*. VI, pp. 279-80.

⁴ Not all legal matters covered by *idjmā'* are considered "axiomatic articles of faith". Agreement may exist on, for instance, subordinate questions of the law of inheritance, while rules of such limited scope are not thought to belong to the unquestionable axioms of religion.

⁵ There exist several treatises exclusively dealing with words and acts constituting unbelief. For an enumeration of those works, see al-Sāmarrā'i, *op. cit.*, p. 116.

to assert that all animal species have their specific prophets; to declare that the Angel of Death Azrā'īl does not always correctly fulfil his task and occasionally picks the wrong people. (c) *Relating to the Koran, pious formulas (adhkār) and ritual prayer (ṣalāh)*: to repudiate some of the Scriptures; to add or to omit koranic verses; to assert the createdness of the Koran; to translate the Koran into for instance, the Persian language; to utter the “*bismillāh*”-formula while raising the wineglass or throwing the dice at backgammon. (d) *Relating to science ('ilm)*: to ridicule scholars; to address scholars in a derisive manner as by the diminutive *'uwaylim*; to reject the validity of the *Shari'ah*-courts; to prefer an ignorant ascetic (*zāhid djāhil*) to a sinful scholar (*'ālim fāsiq*). The more miscellaneous expressions of unbelief may be illustrated by the following examples: to pay respect to a non-moslem; to celebrate *Nawrūz* (the Iranian New Year); to assert one's belief in transmigration or in the uncreatedness of the world.⁶ A detailed discussion within the *madhāhib* on the question whether the practice of magic arts constitutes apostasy has not resulted in a *communis opinio*. The Moslem who states his intention to apostatize at a later point in time, is an apostate at the very moment of his announcement. Sayings not considered to reflect the speaker's inner conviction, such as words spoken in jest, may equally entail *riddah* (as stated in the Koran).⁷

Not only the act of apostasy is subject to certain conditions in order to be legally valid, but also with regard to the perpetrator (*murtadd*) specific qualifications have been laid down. He can perform a legally effective act of *riddah* only out of free will (*ikhtiyār*), at an adult age (*bulūgh*), being *compos mentis* (*'āqil*), and, as emphasized by the Malikite school, after his unambiguous and explicit adoption of Islam (cf. note 3).

⁶ Certain expressions may carry an ambivalent meaning. If their contents admit several interpretations, Ḥanafite theory acknowledges only that one, which does not constitute *riddah*. Cf. Shaykhzādeh: I, p. 626.

⁷ Cf. K 9:65-6 (...) *Qul a-bi-Allāh wa-ayātih wa-rasūlih kuntum tastahzi'ūn. (66) La ta'tadhirū qad kafartum ba'd imānikum (...)*.

I.2 *The Legal Consequences of Apostasy*

*Penal Law*⁸

The punishment laid down for apostasy is the death penalty.⁹ The opinion that this punishment constitutes a *ḥadd* or “restrictive ordinance” (the fixed punishment for crimes against religion which have been forbidden or sanctioned by punishment in the Koran) is contested by Hanafite and Shafīʿite lawyers. Hanafite theory excludes some categories from capital punishment; although qualified to perform a valid act of *riddah* they will not face its ultimate consequence: (a) *Women* are “kept in hostage” instead. They shall be beaten every three days in order to effect their return to Islam. To justify this exception Hanafīte scholars adduce a tradition according to which the prophet disapproved of the killing of females.¹⁰ It was also argued, that because of her physical disposition the female apostate could hardly be expected to pose a threat to the Islamic state (the *ratio*, according to the Hanafite school, for the execution of *murtadd*s). Finally, a woman’s submissiveness to her husband was considered to exclude a fully independent judgement on her part, and to render her thus not fully responsible. Shiʿite law equally forbids the execution of female apostates and imposes solitary confinement instead during which they shall be beaten at the hours of the *ṣalāh*. (b) *Hermaphrodites*.

⁸ Burhān al-Dīn ʿAlī Ibn Abī Bakr al-Marghināni, *Al-ḥidāya sharḥ bidāyat al-mubtadiʿ*. al-Qāhirah: Muṣṭafā al-Bābī al-Ḥalabī, n.d., 4 vols.; vol. 2 p. 165.

Bādjūrī: 2, p. 265-6. Dasūqī: 4, p. 304-6. Ibn Qudāmah: 3, p. 516; 519-21. Shaykh-zādah: 1, p. 263. Ibn ʿAbidīn: *Radd al-muḥtār* 3, p. 394ff.; 403; 412-3; 420. Id.: *Madjmūʿah* 1, p. 315 and 2, p. 284. Ḥilli 3, p. 183ff. Ḥaṭṭāb 6, p. 281. Mawwāq 6, p. 281-2. Ḥamawī 2, p. 289. Nawawī 3, p. 208.

⁹ The sentence is to be executed by the sword of the *Imām* or his lieutenant. Other ways of putting the apostate to death (such as burning, drowning, flaying, impaling or breaking the bones) are not admitted. The Mamlūk sultan Baybars is reputed to have introduced these disapprovable varieties; cf. Bādjūrī, *l.c.* Beating the apostate to death with clubs is recommended by the Shafīʿite scholar Ibn Suraydj: this prolonged manner of execution would leave the apostate more opportunity to revoke his *riddah*. Cf. al-Māwardī, *al-Aḥkām al-ṣultāniyyah wa-al-wilāyāt al-diniyyah*. 2nd impr. al-Qāhirah; Muṣṭafā al-Bābī al-Ḥalabī, 1386/1966, 264 p.; p. 56.

¹⁰ “When Rabāḥ ibn Rabīʿah once rode out with the Messenger of Allah, he and the companions of the Messenger of Allah passed by a woman who had been killed. The Messenger of Allah stopped and said: ‘She was not capable of fighting’. Then he looked at the face of the men and said to one of them: ‘Catch up with Khālīd ibn al-Walīd [and tell him] that he should not kill children, serfs and women’”. Cf. Abū Dāwūd: *djihād*, III; Ibn Mādjah: *djihād*, 30; Musnad Ibn Ḥanbal II, 110; III, 488; IV, 178.

(c) “*Discriminating minors*”, i.e. minors capable of exercising responsible judgement. Although entailing no death sentence, their acts of *riddah* are deemed legally valid by the Hanafites; according to the remaining schools, no minor is qualified to produce an acceptable apostasy, whether he be “discriminating” or not. (d) *Converts to Islam* when substantial doubts exist regarding the validity of their conversion (like those having adopted Islam under force,¹¹ in a state of drunkenness, as an infant independent of the parents, or when the conversion was testified by unreliable witnesses).

The Malikite school equally recognizes the requirement of *ḥusn al-islām*: prior to his apostasy the *murtadd* needs to have been “a good Moslem” (cf. note 3). The other schools, however, make no such distinctions. They advance another tradition (“If someone changes his religion, then kill him”¹² which they interpret as leaving no room for penal differentiation.¹³ The legal validity of *riddah* thus having been established, the sentence is not passed on the apostate immediately. He is invited to repent (*istatābah*) and reembrace his former faith. The orthodox schools acknowledge the possibility of revocation and repentance (*tawbah*). The Shi’ites only do so with regard to an apostate, born an unbeliever. With the exception of the Hanafites, all scholars even agree, that it is obligatory to exhort the apostate to repent during a certain period or a specific number of times.¹⁴

¹¹ Goldziher relates the case of Maymūnī (Maimonides) who during his residence in Spain was compelled to adopt the Islamic faith. When he afterwards assumed leadership of the Jewish community in Egypt, the zealous Moslem Abū al-‘Arab accused him of *riddah*. His adoption of Islam, however, was considered involuntary and Abū al-‘Arab’s charge was consequently invalidated. Goldziher also quotes the legal opinion delivered by the Muftī of Constantinople, acquitting the Maronite emir Yūnus of a similar charge on similar grounds. Cf. I, Goldziher: *Vorlesungen über den Islam*. Darmstadt, 1963, p. 310.

¹² *Man baddal dīnahu fa-‘qulūhu*. Cf. Bukhārī: *djihād*, 2; Muslim: *ḥudūd*, 1; Tirmidhī: *ḥudūd*, 25; Nasā’ī: *tahrim*, 14; Ibn Mādjah: *ḥudūd*, 2; *Musnad* Ibn Ḥanbal: I, 2, 7, 282, 283, 323 and V, 231. The following ḥadīth is equally invoked: *Lā yahill dam imri’ muslim illā bi-ihdā thalāth: kufr ba’d imān wa-zinā ba’d iḥṣān wa-qatl naḥs bi-ghayr naḥs*. Cf. Bukhārī: *diyāt*, 6; Muslim: *qasāmah*, 25, 26; Abū Dāwūd: *ḥudūd*, 1; Tirmidhī: *ḥudūd*, 15; Nasā’ī: *tahrim*, 5, 11, 14; Dārimī: *siyar*, 11; *Musnad* Ibn Ḥanbal: I, 61, 63, 65, 70, 123, 382, 428, 444, 465 and VI, 181**, 214. Finally, reference is made to the koranic *āyah* 9:5 (*fa-‘qulū al-mushrikīn*) and all other verses in which the killing of unbelievers is declared to be imperative.

¹³ In order to protect the *foetus*, however, certain precautions are made regarding female apostates. Malikite theory prescribes an adjournment of the execution to determine whether the *murtaddah* is pregnant. If so, she will be put to death only after delivery. Cf. Dasūqī, 4, p. 304.

¹⁴ Reference is made to K 16:125 (*Ud’u ilā rabbika*).

At the same time, some categories, like magicians (*suhḥār*), treacherous heretics (*zanādiq*) and recidivists are excluded from *istatābah*. The sincerity of their return to the faith cannot be established with reasonable certainty and their apostasy is considered legally irrevocable.

*Civil Law*¹⁵

The apostate remains legally entitled to his property. His rights to dispose of it, however, are in abeyance (*mawqūf*), pending his repentance. Upon returning to Islam he is fully reestablished in his rights. The legal effects of the apostate's acts are also suspended. If he fails to repent and dies as an unbeliever, his acts are legally void;¹⁶ if he readopts the faith, they are considered to have been legally valid from the beginning and without interruption. According to the Hanafites, the female apostate remains legally capable and in full possession of her rights to dispose of her property, this in accordance with their view that she is not to be put to death. Within the Hanafite school Muḥammad al-Shaybānī (d. 805) and Abū Yūsuf (d. 798) hold that this rule applies to the male apostate as well. They compare him with a criminal awaiting his execution, who does not lose his legal

¹⁵ Ibn 'Abidīn: *Radd al-muḥtār* II, 539-40 and III, 414-5, 417, 420. Mawwāq: VI, 282, 284; Nawawī: II, 209-10, 243, 349-50 and III, 209; Ibn Qudāmah: II, 450 and III, 68.522; Marghinānī: II, 165-6; Hillī: II, 294, 297-8 and IV, 11-2, 183-4; Dasūqī: II, 270 and IV, 486; Ḥaṭṭāb: VI, 282; Bādjūrī: II, 127-8. Secondary literature not mentioned in note 1:

'Umar 'Abdallah, *Aḥkām al-mawārith fī al-Sharī'ah al-Islāmiyyah*. 4th enl. and rev. impr. al-Qāhirah: Dār al-Ma'ārif, 1385/1966, 408 p.; p. 91-9.

Muḥammad Abū Zahrah, *al-Aḥwāl al-Shakḥsiyyah*. al-Qāhirah: Maṭba'at Mukhaymar, n.d. [ca. 1957], 543 p.; p. 296-7.

K. N. Ahmed, *The Muslim Law of Divorce*. Islamabad: The Islamic Research Institute, 1972, 1107 p.; p. 793-813.

Neil B. E. Baillie, *A Digest of Moohummudan Law*. 4th impr. Lahore: Premier Book House, 1965, 2 vols.; *passim*, consult indices to both vols.

'Abd al-Raḥmān al-Djazīrī, *Kitāb al-fiqh 'alā al-madhāhib al-arba'ah*. 5th impr. al-Qāhirah: al-Maktabah al-Tidjāriyyah al-Kubrā, n.d., 4 vols.; vol. 4, p. 223-37.

Aḥmad al-Ḥusarī, *al-Nikāḥ wa-al-qadāyā al-muta'alliqah bih*. al-Qāhirah: Maktabat al-Kulliyah al-Azhariyyah, 1387/1967, 538 p.; p. 455-64.

[Qadrī Pāshā], *al-Aḥkām al-shar'iyyah fī al-aḥwāl al-shakḥsiyyah 'alā madhhab al-Imām Abī Ḥanīfah al-Nu'mān*. al-Qāhirah: Maṭba'at al-Sa'ādah, 1327 H., 110 p.; artt. 303-9, 587.

Muḥammad Muṣṭafā Shalabī, *Aḥkām al-mawārith bayn al-fiqh wa-al-qānūn*. al-Iskandariyyah: al-Maktab al-Miṣrī al-ḥadīth, 1967, 443 p.; p. 92-9.

'Abd al-Raḥmān al-Ṣābūnī, *Madā hurriyyat al-zawdjayn fī al-ṭalāq*. 2nd enl. and rev. ed. [Bayrūt:] Dār al-Fikr, 1968, 2 vols.; vol. 2 p. 967-74.

¹⁶ Cf. K 2:217: *Wa-man yartadid minkum 'an dinih ja-yamut wa-huwa kāfir fa-ulā'ik ḥabīṭat a'māluhum fī al-dunyā wa-al-ākhirah*.

capacity either. The other schools compare him with a *ḥarbī* or enemy alien (a non-Moslem not belonging to one of the "tolerated" religions and not protected by treaty of armistice), who cannot legally hold property.

The apostate lacks the capacity to inherit, even from those whose co-religionist he has become. This demonstrates that the apostate's exclusion from the right to inherit goes beyond the rule that difference of religion forms a bar to inheritance. His own estate falls upon his death to the *Bayt al-Māl* or Public Treasury as it has become *fa'y*' (enemy property "returning" to the Islamic Treasury without warfare as distinct from *ghanimah* or booty taken from the enemy after a military victory). Hanafite legal theory regards the apostate's flight to the *Dār al-Ḥarb* (enemy territory) legally as his death and distinguishes, with regard to the male apostate, between property acquired before the act of apostasy and property acquired after it. The first part of his estate passes to his Moslem heirs, for the Hanafites regard as crucial for the application of the rules of inheritance not the actual moment of his decease, but the moment of the act that necessitated his execution. At that moment, the moment of the act of apostasy, he was technically still a Moslem. The other part becomes *fa'y*' and falls to the Public Treasury.¹⁷ The estate of the female apostate passes, according to Hanafite law, entirely to her Moslem heirs. The Shi'ites and the Hanafite scholars al-Shaybāni and Abū Yūsuf hold that all the apostate's property goes upon his death to his Moslem heirs according to the normal rules of succession.

Upon apostasy of one or both partners the marriage contract expires immediately and without need for judicial intervention. This dissolution is considered *faskh* or nullification, rather than *ṭalāq* or repudiation. If the apostate repents, a new marriage is to be contracted. However, Shafi'ite and Shi'ite legal theory consider the marriage contract in some cases to be in abeyance during the wife's waiting period (*'iddah*), so that, if the apostate repents during this

¹⁷ Hanafite doctrine makes an exception for the widow of the apostate. If he is executed during her waiting-period (*'iddah*), she remains an heir to his property. Hanafite lawyers claim a legal analogy between this situation and the repudiation pronounced by the husband on his deathbed, which is not considered to affect the wife's inheritance claims. A similar rule applies to the succession of the estate of a female Moslem who apostatizes on the deathbed. Cf. Ibn 'Ābidīn, *Radd al-muḥtār*, 3, 414-5.

period, the marriage remains valid. The Shafi'ites do so if the apostasy takes place after the consummation (*dukhūl*) of the marriage, the Shi'ites if the apostate was born an unbeliever. Only the Malikite and the Hanafite schools give provisions for the case of a woman apostatizing in order to free herself from the bonds of matrimony, a legal trick still resorted to in countries where there is hardly any social *stigma* and no penal consequence attached to apostasy, as e.g. in the former Dutch East Indies and British India.¹⁸ The Malikites hold that in this case marriage is not dissolved.

Actually, one can hardly see a point in her doing this, as she will be executed anyway. On the other hand, provisions of this kind do make sense in Hanafite legal theory, according to which the female apostate is not to be killed. The prevalent Hanafite opinion, first put forward by the scholars of Bukhārā, is that the former husband, upon repentance of the wife, can claim that the judge conclude a new marriage between them for a dower (*mahr*) of trifling value, the wife's consent not being required. Besides this prevailing view, there are, within the Hanafite school, two other opinions: the scholars of Balkh held that apostasy of the wife never dissolves marriage; the other opinion is that upon apostasy women become slaves. In present times one can hear voices advocating that the rule of the Balkh scholars should be applied in court.¹⁹ In former British India this rule has been introduced by statute, *viz.* section 4 of the Dissolution of Muslim Marriages Act, 1939.²⁰

II. *Apostasy in Modern Islam*

II.1 *Who is an Apostate?*

As we shall see below, the question whether one is an apostate or not still has very important legal effects. In most cases there is no problem: a Moslem who formally embraces another religion or

¹⁸ G. F. Pijper, *Echtscheiding en Apostasie*. In: G. F. Pijper, *Fragmenta Islamica. Studiën over het Islamisme en Nederlandsch-Indië*. Leiden: Brill, 1934, 195 p.; p. 79-94. A. A. A. Fyze, *Outlines of Muhammadan Law*. 3rd ed. London: Oxford University Press, 1964, 509 p.; p. 171.

¹⁹ Djaziri, *op. cit.* 4, p. 224.

²⁰ Fyze, *op. cit.*, p. 171; Mulla, *Principles of Mahomedan Law*. 16th ed. by M. Hidayatullah and R. K. P. Shankardass, Bombay: Tripathi Private Ltd, 1968, lxii + 392 p.; p. 344.

who explicitly renounces Islam is an apostate. In cases where this is not so obvious, the scholars still apply the criterion mentioned in I.1: one becomes an unbeliever by denying those religious tenets and prescriptions that one must necessarily know, or by committing acts of contempt for Allah, the Koran or Mohammed.²¹ It was the emergence of new sects like the *Aḥmadiyyah* and the *Bahā'iyah*, who considered themselves as Islamic or, at least, as an offspring of Islam, that gave rise to problems. At the same time the spreading political ideologies like socialism and communism raised the question whether adherents of these ideologies could still be considered as Moslems.

The *Aḥmadi*'s of the Qādiyānī-branch, who regard the founder of their sect, Mirza Ghulam Ahmad, as a prophet, are generally considered as unbelievers.²² Nevertheless in former British India a court decided in 1922 that a Moslem who became an *Aḥmadi* was not to

²¹ Cf. Muḥammad 'Abduh wa-Muḥammad Rashīd Riḍā, *Tafsir al-Manār*, vols. 1-8, 3rd impr.; vols. 9-11, 2nd impr.; vol. 12, 1st impr. al-Qāhirah: Dār al-Manār, 1367-72 H., 12 vols.; vol. 1 p. 140.

Muḥammad Rashīd Riḍā, *Takfīr muslim bi-mā lā yaṣiḥh 'indah min masā'il al-dīn. Madjallat al-Manār*, 19 (1916) p. 279 (also publ. in: Id., *Fatāwā. Djama'ahā wa-ḥaqqaḥā Ṣalāh al-Dīn al-Munadjjid wa-Yūsuf Q. Khūrī*. Bayrūt: Dār al-Kitāb al-Djadid, 1390/1970, 4 vols.; vol. 4 p. 1309. Maḥmūd Shaltūt, *al-Islām, 'Aqīdah wa-Sharī'ah*. al-Qāhirah: Dār al-Qalam, n.d., 574 p.; p. 292.

When 'Abd al-Ḥamid Bakhit, a history professor at al-Azhar-University who, in 1955, published a sensational article on dispensation for fasting during Ramadan, was summoned to the disciplinary council of al-Azhar, the text of the summons alluded to this classical formula where it said: "... on the ground of the article which he published in the newspaper al-Akḥbār ... under the title "Permissibility of breaking the fast during Ramaḍān and its conditions", and which contained opinions obviously contrary to those rules of fasting that almost necessarily must be known as belonging to the Islamic religion (... *al-mukhālafāt al-ṣariḥah li-aḥkām al-ṣawm allatī takād takān ma'lūmah min al-dīn al-Islāmī bi-al-ḥarārah*). Cf. *Madjallat al-Azhar* 1374 H., p. 1135. For the Bakhit-case see: J. Jomier & J. Corbon, *Le Ramadan au Caire, en 1956. Mélanges de l'Institut Dominicain des Études Orientales*, 3 (1956), p. 1-71; especially p. 46-48.

On January 7th 1970, after the appearance of Ṣādiq Djalāl al-'Azm's book "*Naqḍ al-fikr al-dīnī*" (Bayrūt: Dār al-Ṭalī'ah, 1969, 230 p.) the Lebanese *Dār al-Fatwā* issued a *fatwā* declaring al-'Azm a *murtadd*, on the ground that he questioned uncontestedly established Islamic doctrines (*musallamāt qaṭ'iyyāt al-thubūt fī al-Islām*). For the German translation of this *fatwā*, see: Stefan Wild, *Gott und Mensch in Libanon. Der Islam*, 48 (1972), p. 230-1.

²² Cf.: Ḥasanayn Muḥammad Makhlūf, *Fatāwā shar'iyyah wa-buḥūth Islāmiyyah*. 2nd impr. al-Qāhirah: Muṣtafā al-Bābī al-Ḥalabī. 1385-1965, 2 vols.; vol. 1 p. 86-96. This *fatwā* was issued in 1953 on the request of a group of Pakistanis and also published in Urdu.

F. M. Pareja a.o., *Islamologie*. Beyrouth: Imprimerie Catholique, 1957-63, 1148 p.; p. 670.

be considered an apostate.²³ Apparently this decision was prompted by a general principle of Anglo-Mohammedan law, *viz.* the elimination of religious discrimination where possible. When Pakistan came into being as an independent Islamic state, the position of the *Aḥmadīs* became a very serious political issue. The government was put under heavy political pressure to place the *Aḥmadiyyah* outside the boundaries of Islam. However, the government did not yield to this pressure and finally this movement failed.²⁴

As for the *Bahā'ī* faith, there is not the slightest doubt that this sect cannot be regarded as Islamic, as its founders are venerated as prophets and as their prescriptions concerning *e.g.* praying and fasting are totally different from those of the *Sharī'ah*. Many authoritative legal opinions (*fatwās*) confirm that Moslems, turning *Bahā'ī*, are apostates.²⁵ In Egypt, the highest administrative court (*Madjlis al-Dawlah*) decided accordingly, when a *Bahā'ī* employee of the Egyptian State Railroad Company applied for a marriage allowance.²⁶

Several Moslem scholars regard communists as unbelievers, as the tenets of Marxism are incompatible with Islam.²⁷ The *Fatwā* Committee of al-Azhar took a similar stand when asked for a *fatwā* by a man whose daughter was betrothed to a young man from a Moslem family, who was a known communist. The *Fatwā* Committee stated that a marriage concluded with him would be null and void, as he must be considered an apostate.²⁸

It is a moot point whether those who refuse to judge, or to be judged, according to the *Sharī'ah* are apostates. The Koran reads:

²³ Asaf A. A. Fyzee, *Cases in the Mohammadan Law of India and Pakistan*. Oxford: Clarendon Press, 1965, xxxvi + 573 p.; p. 57-67.

²⁴ Leonard Binder, *Religion and Politics in Pakistan*. Berkeley/Los Angeles: Univ. of California Press, 1961, 440 p.; p. 259-97 *et passim*.

²⁵ Cf. Muḥammad Rashīd Riḍā, *Du'āt al-Bahā'īyyah wa-Madjallat al-Bayān al-Miṣri*. *Madjallat al-Manār* 17 (1914), p. 178-80 (also published in his *Fatāwā*, vol. 4, p. 1245-7).

Makhlūf, *Fatāwā*, vol. 1, p. 84-5.

al-Bahā'īyyūn malāhidah murtaddūn. *Fatwā*. *Madjallat al-Azhar*, 1373 H., p. 1102. *Hal yadjūz zawādj al-muslimah bi-al-Bahā'ī?* *Fatwā*. *Madjallat al-Azhar*, 1373 H., p. 1193.

²⁶ *Mahkamāt al-qaḍā' al-idāri bi-Madjlis al-Dawlah, al-Dā'irah al-rābi'ah*, 11-6 '52. Integrally published in: 'Alī 'Alī Mansur, *al-Bahā'īyyah bayn al-Sharī'ah wa-al-qānūn*. 2nd impr. Bayrūt: al-Maktab al-Islami, 1391 H., 54 p.

²⁷ Cf. Makhlūf, *Fatāwā*, vol. 1, p. 81-3. Sāmarrā'ī, *Aḥkām*, p. 83-90.

²⁸ *al-Ahrām*, 9-8 '65, p. 1. According to Sāmarrā'ī, *Aḥkām*, p. 84, Iraqi 'ulamā' had previously issued a similar *fatwā*.

“Those who do not judge according to what Allah has sent down, they are the unbelievers” (K 5:44). Nevertheless Muḥammad Rashīd Riḍa and Maḥmūd Shaltūt do not take this verse literally. In their opinion a judge or a lawgiver only becomes an apostate if, within the territory of Islam, he judges according to laws or enacts laws, that are contrary to an immutable (*qaṭʿī* and not *idjtihādī*) rule of the *Shariʿah*, and if he does so because he thinks the non-Islamic rule is better and more just than the Islamic rule.²⁹ A stricter doctrine is advocated by ʿAbd al-Qādir ʿAwdah, one of the leaders of the Society of Moslem Brethren.³⁰ The question whether those who refuse to be judged according to the *Shariʿah* should be regarded as apostates became a serious political issue in Tunisia. In 1923 the French had made it possible for Tunisians to obtain French nationality. This implied that the *naturalisé* would be judged by the French courts in Tunisia, according to French law. The nationalist movement in Tunisia launched a campaign against this naturalisation law in 1932 declaring that the *naturalisé* should be considered an apostate. In December 1932 the *muftī* of Bizerta issued a *fatwā* declaring that a *naturalisé*, being an apostate, could not be buried in a moslem cemetery. However, this view was not shared by the leading Tunisian *muftīs*. The Hanafite *muftī* issued a *fatwā* stating that naturalisation did not imply apostasy; the Malikite *muftī*, al-Ṭāhir Ibn ʿĀshūr, emphasized the possibility of repentance before a Moslem judge. Broadly speaking one can say that the ʿulamāʾ did not use their religious authority to condone this nationalisation law. Yet there was much unrest among the people and finally the authorities had to yield by opening special cemeteries for *naturalisés*. Though not as outspoken as in Tunisia, also in Algeria there was opposition against naturalisation on the same ground.³¹

²⁹ Maḥmūd Shaltūt, *al-Fatāwā, dirāsah li-mushkilāt al-muslim al-muʿāṣir fī ḥayātih al-yawmiyyah wa-al-ʿāmmah*, al-Qāhirah: Dār al-Shurūq, 1969, 403 p.; p. 37-9.

ʿAbduh & Riḍā, *Tafsīr al-Manār*, vol. 6, p. 405ff.

³⁰ ʿAwdah, *op. cit.*, vol. 2, p. 708-11.

³¹ Cf. Charles A. Micaud a.o., *Tunisia, the Politics of Modernization*, London: Pall Mall Press, 1964, 205 p.; p. 60-2. *Oriente Moderno* 13 (1933), p. 381-6.

ʿAllāl al-Fāsi, *al-Harakah al-istiqlāliyyah fī al-Maghrib al-ʿArabi*. al-Qāhirah: Ladjnat al-thaqāfah al-waṭaniyyah li-Ḥizb al-Istiqlāl, 1368/1948, 560 p.; p. 73.

Alī Merad, *Le réformisme musulman en Algérie de 1925 à 1940*. Paris/La Haye: Mouton, 1967, 472 p.; p. 406-8.

II.2 *The Penalty for Apostasy*

There is no evidence that apostates are still being put to death in Islamic countries. Though in Saudi Arabia the *Shari'ah* is officially still in force,³² no contemporary cases of executions of apostates have been reported, which may be due to the fact that apostasy does not occur. In the Ottoman Empire and Egypt, the last cases of capital punishment for apostasy date from the first half of the last century. Edward William Lane, who lived in Egypt, with intermissions, from 1825 to 1835, relates how a female apostate was strangled and then cast into the Nile.³³ In 1843 an Armenian youth, who had once accepted Islam, but later returned to his former belief, was beheaded in Istanbul. The Western powers, lead by Great Britain, seized the opportunity to launch a campaign against the Ottoman Empire in order to obtain complete freedom for Christian missionaries to work amongst the Moslems. This was successful and on March 21st 1844 Sultan Abdülmecid gave the British Envoy Stratford Canning (later Stratford de Redcliffe) a written pledge as follows: "The Sublime Porte engages to take effectual measures to prevent henceforward the persecution and putting to death of a Christian who is an apostate".³⁴

In this century some isolated instances have been recorded in Afghanistan. In 1903 and 1925, Moslems converted to *Aḥmadiyyah* were condemned to be stoned to death.³⁵ Recently a curious trial was held in Morocco. On December 14th 1962 the criminal court of Nador condemned some schoolteachers who had been converted to *Bahā'iyah*, to death on the accusation of rebellion, formation of criminal bands and disturbance of religious practices. Fortunately on December 13th 1963, this verdict was quashed by the Court of Appeal in Rabat with the argument that none of the charges brought

³² Subḥi Maḥmaṣānī, *al-Awdā' al-tashri'iyyah fi al-duwal al-'Arabīyyah*. 2nd enl. rev. ed. Bayrūt: Dār al-'Ilm li-al-Malāyīn, 1962, 541 p.; p. 364-5.

³³ Edward W. Lane, *Manners and Customs of the Modern Egyptians*. London: Alexander Gardner, 1895, 595 p.; p. 122.

³⁴ Stanley Lane-Poole, *The Life of the Rt. Hon. Stratford Canning*. London: Green & Co, 1888, 2 vols.; vol. 2, p. 89-98

³⁵ *Oriente Moderno* 5 (1925), p. 128. Pareja a.o., *Islamologie*, p. 670. Rahman, *Punishment*, p. 6, relates that this incident occasioned a discussion between two Indian vernacular daily newspaper about the question whether the apostate should be killed or not.

against them was conclusively proven so that it appeared that the only reason for their condemnation was their apostasy.³⁶

Though apostasy no longer falls under criminal law, the question whether the apostate should be put to death is still debated in Islamic circles. Modernists³⁷ hold that the apostate cannot be put to death on the mere ground of his apostasy. This should only be done if he is also a danger to the Islamic state. They adduce the following arguments: No verse in the Koran prescribes capital punishment for the apostate *qua* apostate; on the contrary, verses like K 2:218 and K 3:86-97 clearly envisage a natural death for the apostate. Moreover, K 4:89 and 90 (Bell's translation: ... If then they withdraw from you, and do not fight against you, but offer you peace, Allah hath not opened for you a way against them. ... If they do not withdraw from you, and offer you peace, and restrain their hands, take them and kill them wherever ye come upon them), verses that have not been abrogated by any other verse, offer proof that only the dangerous, aggressive apostate may be killed. A further argument is that capital punishment for apostasy is founded on two Traditions (see note 12) that are contrary to the explicit Koranic rulings of K 4:89 and 90. There exist a much debated controversy on the question whether a Tradition can abrogate a Koranic rule. Whether in this case these Traditions can abrogate the Koranic ruling is even more

³⁶ *Journal de Droit International* 93 (1966), p. 383.

³⁷ 'Abduh & Riḍā, *Tafsir al-Manār*, vol. 5, p. 327. Muḥammad Rashīd Riḍā, *al-Djawab 'an mas'alat hurriyyat al-dīn wa-qatl al-murtadd. Madjallat al-Manār* 23 (1922), p. 187-91 (also publ. in *Fatāwā*, vol. 4, p. 1539-43).

Id., *al-Idjtihād fī al-dīn wa-qatl al-murtadd. Madjallat al-Manār* 10 (1907), p. 288 (also publ. in *Fatāwā*, vol. 2, p. 576-7). Shaltūt, *al-Islām 'aqidah wa-shari'ah*, p. 292-3. Rahman, *Punishment, passim*. The *Aḥmadiyyah* hold similar views. Cf. Muḥammad Ali, *The Holy Qur'an. Arabic Text, Translation and Commentary*. 4th ed. Lahore: Aḥmadiyyah Anjuman Isha'at Islam, 1951, 1254 p.; p. 91-2. Id., *De Religie van den Islam*. Tr. fr. engl. by Soedewo. Batavia: Aḥmadijah Beweging Indonesia, 1938, 582 p.; p. 421-7.

'Uthmān Ṣāfi in his book "*Alā hāmish naqd al-fikr al-dīnī*" (Bayrūt, Dār al-Ṭalī'ah, 1970, 102 p.), the publication of which was occasioned by the appearance of Ṣādiq Djalāl al-'Azīm's book "*Naqd al-fikr al-dīnī*", concludes that in present-day society the apostate should not be punished. His arguments, however, do not touch on the Islamic doctrine of apostasy itself, but are derived from his views, revolutionary for Islamic circles, on the relationship between Islamic and secular laws. He believes in the supremacy of man-made law, *i.e.* law made by a constitutional legislator. As there is no Islamic country at the present time in which laws exist that regard apostasy as a penal offence, apostates cannot be punished. Even if there were such laws, Ṣāfi continues, many apostates could not be punished as the required criminal intention is often lacking.—Cf. Ṣāfi, *op. cit.*, p. 87-93.

doubtful, as they belong to the category of Traditions relying on only one authority (*khābar al-āḥād*) and were not widely known amongst the Companions of the Prophet. So, even if one accepts the authenticity of these Traditions, they cannot contradict the Koran. Therefore, they must be interpreted as referring only to the inimical and fighting apostates. If one rejects however the above mentioned Traditions as spurious, the fact that apostates were killed in the first period of Islam can be explained as a relic of the *Djāhiliyyah* when everybody who was not formally protected, could be killed, or as the application of martial law (*siyāsah 'urfiyyah 'askariyyah*), necessitated by rebellion and disturbances. Finally the argument is put forward that killing the apostate must be considered as compulsion in religion, which has been forbidden in K 2:256 (There is no compulsion in religion), though this verse was traditionally interpreted in a different way.³⁸

A very detailed plea against capital punishment of the apostate was put forward by 'Abd al-Muta'ālī al-Ṣa'īdī in his book entitled "*al-Hurriyyah al-dīniyyah fī al-Islām*" (Religious freedom in Islam).³⁹ In addition to the aforementioned arguments,⁴⁰ al-Ṣa'īdī refers to an isolated opinion of Ibrahim al-Nakha'ī (d. 95 or 96 H.) that the apostate should forever be asked to repent (*an yustatāb abad^m*), from which it can be inferred that he may not be killed.⁴¹ However, this should not mean, as some scholars say, that the apostate should

³⁸ According to some classical scholars this verse had been abrogated by later verses. Others held this rule only to be valid with regard to those from whom *djizyah* can be accepted. The current interpretation of this verse, however, was that it forbids compulsion to things that are wrong (*bāṭil*) but not compulsion to accept the truth. Cf. Abū Bakr Muḥammad Ibn 'Abd Allāh Ibn al-'Arabī, *Ahkām al-Qur'ān. Taḥqīq 'Alī Muḥammad al-Badāwī*. 2nd impr. al-Qāhīrah: 'Īsā al-Bābī al-Ḥalabī, 1387-8/1967-8, 4 vols.; vol. 1 p. 233.

³⁹ 'Abd al-Muta'ālī al-Ṣa'īdī, *al-Hurriyyah al-dīniyyah fī al-Islām*. 2nd impr. al-Qāhīrah: Dār al-Fikr al-'Arabī, n.d. (probably second half of the fifties), 179 p.

⁴⁰ Ṣa'īdī, *op. cit.*, p. 72, 149, 170-1.

⁴¹ Ṣa'īdī, *op. cit.*, p. 72, 148, 156. This opinion can be found in: Abū Muḥammad 'Alī Ibn Aḥmad Ibn Sa'īd Ibn Ḥazm, *al-Muḥallā. Taḥqīq Aḥmad Shākir*. Bayrūt: al-Maktab al-Tidjārī li-al-Ṭibā'ah wa-al-Nashr wa-al-Tawzī', n.d., 11 parts in 8 vols.; part 11 p. 189 and 191; and also in: 'Abd Allāh Ibn Aḥmad Ibn Muḥammad Ibn Qudāmah, *al-Mughnī sharḥ mukhtaṣar al-Khiraqī. Taḥqīq Tāhā Muḥammad al-Zaynī, Maḥmūd 'Abd al-Waḥḥāb Fāyid wa-'Abd al-Qādir Aḥmad 'Atā'*. al-Qāhīrah: Maktabat al-Qāhīrah, 1389/1969, 9 vols.; vol. 9 p. 6. Ṣa'īdī's conclusion that the apostate's life should be spared is, however, not consistent with al-Nakha'ī's opinion that the female apostate should be killed, mentioned in: Ibn Qudāmah, *al-Mughnī*, vol. 9 p. 3-4.

be kept in jail until he repents.⁴² According to al-Ṣaʿīdī there should not be any difference between an apostate and a born unbeliever (*kāfir aṣlī*). The Moslems have the obligation of inviting them to be converted. That is as far as they can go with regard to the apostate. For if the repentance of the apostate is caused by the fear of death or lifelong imprisonment, it is a form of compulsion, which is explicitly forbidden in the Koran.⁴³ Though al-Ṣaʿīdī goes a long way in offering scriptural evidence for his opinions, he states very clearly that his motives are upholding the principle of freedom of religion in Islam and reconciliation of Islam with the actual situation of the Moslems.⁴⁴ In order to attain these goals he claims the right to free interpretation of the sources (*iḍṭihād*) which in some cases may result in adopting a weak and isolated opinion, if this opinion is better suited to modern circumstances.⁴⁵

Contrary to these modernist ideas, there are still many Moslem scholars who adhere to the classical doctrine. However, *vis-à-vis* these views, these scholars were more or less compelled to defend their position and clarify their concepts. Only the very traditionalistic authors refused to do so, as—according to them—the *Shariʿah* is beyond defence or justification.⁴⁶ The commonest argument in support of the death penalty for the apostate is based on the principle that Islam is not only a religion, but also a social and political order. A person who disagrees with the basis of organized society has only two alternatives open to him: he may either go out of the boundaries of the society's operation or submit to deprivation of all rights as a citizen. As the latter state would be worse than death, it is better to kill him.⁴⁷

Generally the danger the apostate constitutes for Islamic society is emphasized. By abandoning Islam one rebels against the Islamic

⁴² Ṣaʿīdī, *op. cit.*, p. 167-9.

⁴³ Ṣaʿīdī, *op. cit.*, p. 158-60.

⁴⁴ Ṣaʿīdī, *op. cit.*, p. 73, 156, 160.

⁴⁵ Ṣaʿīdī, *op. cit.*, p. 88, 156.

⁴⁶ Cf.: ʿIsā Manūn, *Hurriyyat al-raʾy wa-ḥudūdihā fī al-maqtūʾ bih min al-Shariʿah. Madjallat al-Azhar* 1374 H., p. 1143-7. Id., *Hukm al-murtadd fī al-Shariʿah al-Islāmiyyah. Madjallat al-Azhar* 1375 H., p. 884-92. Both articles were also published in full in Ṣaʿīdī, *op. cit.*, p. 56-64 and 74-88, however, with the exclusion of the introduction to the first article. In this introduction the author stated that this article was prompted by the Bakhīt-case.

⁴⁷ Abū al-Aʿlā Mawdūdī, *Murtadd ki sazā islāmi qānūn men*. 4th ed. Lahore: Islamic publications, 1963; p. 45-8. Quoted from Rahman, *Punishment*, p. 120-1.

state and society. Therefore, it is highly probable that the apostate will attempt to destroy the structure of Islamic society and to change the contents of the Islamic religion. Moreover having lost his loyalty to Islam, he is prone to support foreign nations against the Islamic state.⁴⁸ Muḥammad Muḥiy al-Dīn al-Maṣīrī puts it as follows:

“Apostasy (constitutes) an offense against the social order of Moslem society, for the social order of every Moslem society is Islam. Apostasy means treason to Islam and rebellion against its principles. It causes scepticism as to its truth. No society can function properly if its social order is made object of scepticism and defamation, for that may lead in the end, to the destruction of this order”.⁴⁹

So the apostate must be put to death for the protection of the Islamic society. At the same time, these authors argue, this severe punishment will have a preventive effect by deterring others from committing such a serious error. Moreover, elimination of political dissenters, is a generally accepted principle, they say. In a communist state, a person becoming fascist or democrat will be punished just as in a democratic state a person turning communist or fascist will be punished, the reason being that they form a danger to the social order.⁵⁰

Comparing these fundamentalist opinions with those of Muḥammad Rashīd Riḍā and Maḥmud Shaltūt, one will notice that the main difference is to be found in the fact that according to the former opinions the apostate is automatically considered to be a dangerous enemy of the Islamic state, whereas the latter state that enmity is not implied in the mere condition of being an apostate, and must be proven separately. This can be illustrated by the words of Muḥammad al-Ghazālī, who can be regarded as a representative of the fundamentalist school of thought:

“Apostasy seldom is a matter that only concerns one’s inner self alone. If that would be the case, nobody would notice it. In most instances apostasy is a psychological pretext for rebellion against worship, traditions and laws, even against the

⁴⁸ Cf. ‘Awdah, *op. cit.*, p. 536; Bilmen, *op. cit.*, vol. 3 p. 483-5. Shawqī Abū Khalīl, *al-Islām fī qafaṣ al-ittihām*. [Bayrūt] Maṭba‘at al-Inshā’, 1971, 387 p.; p. 165-8.

Muḥammad Muḥiy al-Dīn al-Maṣīrī, *al-Nuḥum allati yaqūm ‘alayhā kiyān al-mudjtama’ al-Islāmī*. *Madjallat al-Azhar*, 1374, p. 859-68.

Muḥammad al-Ghazālī, *Huqūq al-Insān bayn ta’ālim al-Islām wa-i’lān al-Umma al-Muttaḥidah*. al-Qāhirah: al-Maktabah al-Tidjāriyyah, 1383/1963, 272 p.; p. 101-2.

⁴⁹ Maṣīrī, *op. cit.*, p. 861.

⁵⁰ See note 48.

foundations of the state itself and against its stand towards its external enemies. Therefore apostasy is often synonymous with the crime of high treason".⁵¹

Now that the state no longer punishes the apostate anymore, there are some Moslems who hold the view that the killing of an apostate has become a duty of individual Moslems. 'Abd al-Qādir 'Awdah even argued that a Moslem who kills an apostate can, according to Egyptian law, plead impunity, for art. 60 of the Egyptian Penal Code states that acts that are committed in good faith on the basis of a right laid down in the *Shari'ah* will not be punished and art. 9 of the same Code says that the Egyptian Penal Code does not infringe on any right recognized by the *Shari'ah*.⁵²

II.3 *The Legal Position of the Apostate*

In Ch. I.3 we gave an *exposé* of the legal position of the apostate according to the civil law of Islam. In this chapter we shall examine to what extent these rules are still being applied, taking Egypt as a typical example of an Islamic country where the *Shari'ah* and Western law coexist.⁵³ Only in those countries that were under direct colonial rule as India, Pakistan and Algeria is the situation different.⁵⁴

⁵¹ Ghazāli, *op. cit.*, p. 102.

⁵² 'Awdah, *op. cit.*, vol. 1 p. 535-8.

⁵³ For the situation in Tunisia, see: Maurice Borrmans, *Religion et succession en Tunisie. Oriente Moderno*, 49 (1969), p. 204-12.

⁵⁴ In India and Pakistan the situation is as follows: According to section 4 of the Dissolution of Muslim Marriages Act of 1939, apostasy of the husband immediately dissolves the bond of marriage. Apostasy of the wife does not, unless she was not born a Moslem and returned to her former faith. The clause is probably meant to be a prevention of fraudulent apostasy on the part of the wife with the sole aim of obtaining a divorce. Therefore this principle is not operative if the wife was not born a Moslem in which case her sound intention is supposed. As for inheritance, by virtue of Act XXI of 1850 (Removal of Caste Disabilities Act) apostasy does not operate as a legal bar. Cf. Mulla, *op. cit.*, p. 55, 297-8 and Fyzee, *op. cit.*, p. 170-1, 387.

During colonial rule, the situation in Algeria was rather complicated (cf. André Bonnichon, *La conversion au Christianisme de l'Indigène Musulman Algérien et ses Effets Juridiques*. Thèse-Paris: Recueil Sirey, 1931, 152 p.; and G. H. Bousquet, *Précis de Droit Musulman, principalement Malékite et Algérien*. Alger: La Maison des Livres, 1950, 371 p.). Generally apostasy did not raise any legal problem as the majority of the apostates were naturalized and subject only to French law. As for the apostates who were not naturalized, the *Cour de Cassation* (30-6-1919, *Journal de Robe*, 1921, p. 39; quoted by Bonnichon, *op. cit.*, p. 126-8; cf. also Bousquet, *op. cit.*, p. 277) decided that, colonial public order forbade the exclusion of an unbeliever from the inheritance of a Moslem *propositus*. Practice with regard to the celebration of marriages of this

In Egypt the *Shari'ah* is applied in matters of personal statute. The non-Moslem communities, as far as family law *stricto sensu* is concerned, are governed by their own statute. Up till January 1st 1956, Islamic law was applied in the *Shari'ah* Courts (*maḥākim shar'iyyah*), the law of the other creeds in the denominational assemblies (*madjālis milliyyah*). After that date only the secular national courts became competent. An important fact is that, Egypt being an Islamic state, the *Shari'ah* occupies a higher order than the other religious laws. In cases where the litigants differ in religion, it is the *Shari'ah* that will be applied. Some parts of the *Shari'ah* are even regarded as affecting public order to the extent that they are also applied to non-Moslems. The rules relating to the apostate fall into this category, which explains why he is subject to Islamic law. Most cases of apostasy in Egypt concern non-Moslems who were converted to Islam for some practical reason (marriage or *fraus legis*) and later returned to their former belief.⁵⁵ Actually the frequency of these cases is sometimes put forward as an argument for reintroduction of the punishment of the apostate.⁵⁶

As early as 1929 the Egyptian government promised to introduce separate legislation regarding the legal position of the apostate. No such legislation has, however, yet appeared.⁵⁷ Therefore, in matters of personal statute, the classical rules of apostasy, according to the Hanafite school, are still being applied. Thus, in Egypt, the legal consequences of apostasy pertain to family law and the law of inheritance. The act of apostasy dissolves marriage. Even if both spouses

category of apostates varied. Generally the simple procedure of option of French law (*option de législation*) was followed (Bonnichon, *op. cit.*, p. 21-2). The question whether apostasy would affect the validity of a marriage concluded *more islamico*, has never been brought before an Algerian court. Bousquet (*op. cit.*, p. 131) holds that in that case the marriage would remain valid, as a contrary decision would be in conflict with colonial public order. Now, after the independence there is a general tendency towards a stricter application of the *Shari'ah* (cf. Maurice Borrmans, *Perspectives algériennes en matière de droit familial. Studia Islamica*, 37 (1973), p. 129-53). This may entail the application of the classical rules concerning apostasy in matters of personal statute.

⁵⁵ Jan Brugman, *De betekenis van het Mohammedaanse recht in het hedendaagse Egypte*. Den Haag: Ned. Boek- en Steendrukkerij v/h H. L. Smits, 1960, 215 p.; p. 185.

⁵⁶ Abū Zahrah, *al-'Uqūbah*, p. 205-8; Ghazālī, *op. cit.*, p. 101; Ṣābūnī, vol. 2, p. 990.

⁵⁷ J. N. D. Anderson, *Recent Developments in Shari'ah Law. Moslem World* 42 (1952), p. 125; 'Abd Allāh, *op. cit.*, p. 97; Brugman, *op. cit.*, p. 184; Shalabī, *op. cit.*, p. 99.

apostatize at the same time, and are converted to *e.g.* Christianity, or if the wife alone is converted to Christianity, the bond of matrimony is dissolved. In fact, unless he repents, the apostate can never marry again.⁵⁸ The apostate lacks the capacity to inherit, even from a coreligionist. If he himself dies, or leaves Islamic territory, the property acquired before his apostasy will be inherited by his Moslem heirs, whereas the property acquired thereafter, will fall to the Public Treasury.⁵⁹ That this may lead to strange consequences is demonstrated by a decision of the High *Shari'ah* Court (14-6 1943): The Ministry of Finance claimed the estate of a deceased Copt, pleading that he was an apostate. They alleged that he was the issue of a Coptic father and a Moslem mother, so that, in accordance with the rule that the child follows the "best of his parents", he was born a Moslem. As he lived as a Copt, he could only be an apostate. The verdict put the plaintiff in the right.⁶⁰ The Egyptian draft Law of Personal Statute, which has not yet been enforced, devotes one article to the position of the apostate as far as the law of inheritance is concerned. Art. 414 runs as follows :

- 1) The apostate lacks the capacity to inherit from whomsoever.
- 2) The apostate's property, be it acquired before or after his apostasy, falls upon his death to his Moslem heirs. If there are no Moslem heirs, his property falls to the Public Treasury.
- 3) If the apostate obtains the nationality of a non-Islamic state, he is considered as being dead. His property falls to his Moslem heirs.
- 4) If the apostate, after having obtained the nationality of a non-Islamic state, returns to Islam, he will have that part of his property that can still be found in the possession of his heirs or of the Public Treasury.⁶¹

It is noteworthy that section 2) does not conform to the prevailing Hanafite opinion followed in the Egyptian courts, but to the opinion of Abu Ḥanīfah's pupils Muḥammad al-Shaybānī and Abu Yūsuf. Section 4) represent the classical doctrine with one difference: according to the classical doctrine the judge had to decide on the question whether the apostate had really fled to the non-Islamic territory (*Dār al-Ḥarb*) or not, whereas now the criterion lies in naturalisation.

⁵⁸ Brugman, *op. cit.*, p. 185, 187; Sābūnī, *op. cit.*, p. 991-2.

⁵⁹ Anderson, *op. cit.*, p. 130-1; Brugman, *op. cit.*, p. 109, 185-6.

⁶⁰ Brugman, *op. cit.*, p. 186-7.

⁶¹ 'Abd Allāh, *op. cit.*, p. 87.

II.4 *Apostasy and the Principle of Freedom of Religion*

One of the values recently adopted in the Islamic world is the principle of freedom of religion. According to Art. 18 of the Universal Declaration of Human Rights, this freedom contains three elements: freedom to practise one's religion, freedom to express one's religious feelings and freedom to change one's religion. Modern Moslem authors emphasize the fact that religious liberty is already recognized in the Koran, viz. K 2:256: "There is no compulsion in religion".⁶² As one will readily notice, this principle is incompatible with the classical Islamic doctrine of apostasy, according to which a Moslem is not free to change his religion. Most Moslem authors are aware of this contradiction or, at least, conscious of the fact that in the West the doctrine of apostasy is generally considered to be opposed to the principle of religious liberty. Therefore they try to eliminate this contradiction. This can be done in two ways. One can limit the scope of the principle of freedom of religion, or one can change the legal theory of apostasy. The first method is used by those who are of the opinion that freedom of religion, as guaranteed by Islam, is embodied in the right of unbelievers to practise their religion freely without being forced to give it up or change it, excluding thereby, sometimes implicitly, the freedom for Moslems to change their religion.⁶³ Muḥammad Rashīd Riḍā excludes freedom to apostatize *expressis verbis* with the argument that apostasy infringes on the freedom of others and on the respect due to the religion of the State.⁶⁴ Muḥammad al-Ghazālī does the same, using the *reductio ad absurdum* as an argument:

"Must Islam allow rebellion against itself? No religion of a similar nature will readily answer in the affirmative. (...) Take for instance a man who wants to be an unbeliever and a communist. Communism means: there is no God, life is only matter. Besides this it has a special theory concerning the social foundations of the State. Can one demand from Islam that it stupidly recognizes the freedom to apostatize in this manner? Or take a man who wants to be an unbeliever and an existentialist.

⁶² See note 38.

⁶³ Cf.: Ali Abdel Wahid Wafī, *Human rights in Islam. Islamic Quarterly* 11 (1967), p. 64-75; p. 64-5. Sayyid Quṭb, *Fi zilāl al-Qur'ān*. 5th enl. & rev. impr. Bayrūt: Dār Ihyā' al-Turāth al-'Arabī, 1386/1967, 30 parts in 8 vols.; vol. 1 part 3 p. 34-6. This opinion was already common in the Ottoman Empire in the latter half of the 19th century. Cf. Zwemer, *The law of Apostasy in Islam*, p. 45.

⁶⁴ 'Abduh & Riḍā, *Tafsīr al-Manār*, vol. 11 p. 139-40.

Existentialism is a philosophy that sets human behaviour free from any restriction and rejects what we call worship, virtue and tradition. It turns the world into an unbridled anarchy. Can one demand from a religion, whose message is a creed and a law, that it allows these evils in the name of freedom?"

He then continues to demonstrate that conversion to Christianity or Judaism can neither be tolerated, as these religions have, since Mohammed's life-time, always harboured inimical feelings towards Islam.⁶⁵ 'Abd al-Muta'ālī al-Ṣa'īdī and S. A. Rahman, whom we met before, follow the other method of escaping from the contradiction. They state unequivocally that capital punishment for the apostate is not compatible with freedom of religion and conclude that this rule must therefore be abolished.⁶⁶ However, they are white crows amongst the '*ulamā*'. Most authors evade the problem by declaring that the reason why an apostate is to be punished, is not the abandonment of his religion, but his rebelliousness against Islamic social and political order. Modernists like Muḥammad Rashīd Riḍā and Maḥmūd Shaltūt hold, as we have seen, that an apostate should be killed only if he constitutes a danger to the Islamic society, whereas fundamentalists are of the opinion that an apostate is per se a danger to the Islamic community.

It is noteworthy that the discussion about freedom of religion and the doctrine of apostasy concentrates on the question whether the apostate deserves the death penalty, though in practice this is no longer being applied. However, nowadays there is still a conflict between the legal situation of the apostate in the sphere of civil law and the principle of freedom of religion.⁶⁷ This problem has as far as we know not been dealt with by contemporary '*ulamā*', but by practical lawyers, since most constitutions in the Islamic world guarantee freedom of religion. Taking again Egypt as an example, we see that this problem was first raised in 1943 during the preparation of the Law of Inheritance (*Qānūn al-Mawārith*). Article 6 section 2 of the draft law excluded, in accordance with the rules of the *Shari'ah*, the apostate from the right to inherit. In the final text this article had been left out as many members of the Legislative Committee considered it to run counter to the principle of freedom of religion

⁶⁵ Ghazālī, *op. cit.*, p. 99-101.

⁶⁶ Sa'īdī, *op. cit.*, p. 73, 156, 160. Rahman, *Punishment*, p. 136-7.

⁶⁷ Brugman, *op. cit.*, p. 187.

as recognized in the Article 12 of the Egyptian Constitution of 1923, which read: "Freedom of conviction is absolute". However, as the Egyptian *Shari'ah* courts must apply the rules of the *Shari'ah* according to the prevailing Hanafite opinion in cases where there is no statute law, in fact nothing changed.⁶⁸ The interpretation put forward by those members of the Legislative Committee has never found general acceptance. On several occasions it has even officially been rejected. On an international scale this occurred during United Nations debates concerning freedom of religion. The Egyptian delegates repeatedly expressed their country's opposition to the principle of freedom to change one's religion, as this would promote the machinations of Christian missionaries.⁶⁹ Professing this view, they implied that according to the official interpretation, Art. 12 of the Egyptian Constitution does not guarantee the freedom to change one's religion. In 1952 this exegesis of Art. 12 was "canonized" by the highest Egyptian administrative court, the *Madjlis al-Dawlah*, when it gave a decision in the afore-mentioned case of the *Bahā'i*, employed by the Egyptian State Railway Company, who after his marriage (contracted outside Egypt, according to *Bahā'i* formalities) claimed his marriage allowance, which had always been refused till then on the ground that, as an apostate, he could not legally be married. One of the arguments put forward by the claimant was that the rule that apostates could not legally be married had been invalidated by Art. 12 of the Constitution. The court rejected this plea. In the first place, they argued, the claimant's plea cannot find any support in the history of the drafting of this article. The first draft of this article, as originally prepared by the British Foreign Secretary, Lord Curzon, reads: "Freedom of religious conviction is absolute" (*Ḥurriyat al-i'tiqād al-dīnī muṭlaqah*). During the debates in the Legislative Committee it appeared that many members thought this formulation too wide, especially as it would protect apostates. Therefore it was decided to delete the word "religious" (*dīnī*). The difference between "conviction" (*i'tiqād*) and "religion" (*dīn*), was characterized by one of the committee-members as follows:

"Moslem are divided in 73 sects, each of which has its own conviction. Nevertheless they share one religion".

⁶⁸ 'Abd Allāh, *op. cit.*, p. 97-8; Shalabi, *op. cit.*, p. 99.

⁶⁹ Brugman, *op. cit.*, p. 183-4.

From these events the court inferred that:

“The text of Article 12 protects the Moslem who changes his *madhhab*, e.g. from *Shāfi’i* to *Ḥanafī*, or the Moslem who leaves the *Shi’ah* to become a *Sunni*, or a *Khāridjī*, or a *Mu’tazilī*. Equally the text protects the Christian who leaves Catholicism to become a Protestant. However, it does not relieve a Moslem who apostatizes, of the responsibility for his apostasy, be it in the sphere of civil law, or outside it”.

A second refutation of the claimant’s plea, the court argued, can be found in Article 149 of the Constitution, which establishes that Islam is the official State religion. This implies, according to the interpretation of the court, that Islamic law has complete supremacy in Egypt, abrogating all that runs counter to it as being unconstitutional.⁷⁰ As the wording of this Article has not been changed in later Constitutions,⁷¹ it appears that this interpretation still holds.

Conclusions

The rules concerning apostasy originated in a society that was entirely dominated by one religion. Its political structure and laws were, at least in theory, exclusively based on the Koran and Tradition. In this ambiance it was natural that giving up one’s religion also meant being disloyal to the state and the society. Therefore the apostate was considered to be a danger that should be eliminated. The increasing political and economic impact of the Western Powers on the Islamic world put an end to this. It was the outcome of two different processes. In the first place, the death penalty for apostasy was abolished in those Islamic countries that were under colonial rule or where Western Powers could exert enough pressure to attain this, as in the Ottoman Empire. The motives for this attitude may be found partly in a certain amount of idealism, partly in the then widespread opinion that converted natives were easier to rule. Yet the Western Powers were generally careful enough to put the Christian mission under certain restrictive measures so as not to stir up religious feelings. As for the Ottoman Empire, the Western Powers were

⁷⁰ Maṣṣūr, *op. cit.*, p. 45-50.

⁷¹ Art. 4 of the Constitutional Proclamation of Febr. 10th 1953; Art. 43 of the Constitution of Jan. 10th 1956; Art. 34 of the Constitution of March 25th 1964. The texts of these constitutions were published in: J.E. Godchot, *Les constitutions du Proche et du Moyen Orient*. Paris: Sirey, 1957, 442 p. (p. 50 and 77); and in: *Oriente Moderno*, 1964, p. 685-95.

recognized as the protectors of the Christian minorities. A growth of the Christian population, it was thought, would lead to greater influence of the Western Powers on the Ottoman Empire. The second process was the gradual adoption of liberal values by the growing Moslem bourgeoisie. Of these values the principle of freedom of religion and that of separation of Church and State were important in this connection.

However, the second principle has not been enforced in its entirety in any Islamic country, with the exception of Turkey. The Islamic character of those states did not disappear completely. Officially the supremacy of the Islamic law was never challenged and parts of it remained in force. Therefore many still regarded apostasy as having political implications.

As capital punishment for apostasy fell into desuetude by the introduction of Western inspired penal codes and by the spreading of the principle of freedom of religion, among the upper *strata* of Moslem society, Moslem thinkers were induced to reconsider the doctrine of apostasy. Some of them concluded that Islam does not require the execution of the apostate. However, a large majority of the Moslem, still regard the apostate as a traitor, who should be killed, or, in the best case, be treated as a social outcast. Conversions of Moslems to *e.g.* Christianity still cause a great deal of commotion.⁷² These views, expressed by fundamentalist authors, are still very strong. This may explain why the legal discrimination of the apostate, which some authors expressly consider as a form of punishment,⁷³ has been maintained in most countries.

⁷² Cf.: Brugman, *op. cit.*, p. 185.

⁷³ Cf.: Abu Zahrah, *al-'Uqūbah*, p. 197 (*lā taqtasir 'uqūbat al-murtadd 'alā qatlih faqat*). 'Awdah, *op. cit.*, vol. 2 p. 728 where he calls this legal discrimination '*Uqūbah taba'iyah*.