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THE ISLAMIC LAW OF APOSTASY AND ITS MODERN APPLICABILITY

A CASE FROM THE SUDAN

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On 18 January, 1985, the Sudanese Muslim reformer, *Ustadh* (revered teacher) Mahmoud Muhammad Taha, was executed in Khartoum, Sudan. Specified at the criminal trial were charges of offenses against the state under the Sudan Penal Code, 1983, and the State Security Act, 1973. In separate actions, The Special Court of Appeal and former President Nimeiri confirmed conviction and sentence, however, not only for the secular charges specified at the criminal trial but also for the *Shari'a* religious offense of apostasy—the renunciation of Islam by a person known to have been a Muslim.

The entire episode brought to the surface questions about President Nimeiri's attempts to govern the Sudan by imposing traditional *Shari'a* religious law. In the case of the execution of *Ustadh* Mahmoud, this involved silencing an outspoken critic. But Nimeiri's introduction of the *Shari'a* into civil contexts seemed also generally aimed at other segments of the political opposition. Questions of the bizarre legal and judicial proceedings attending this complex episode also arise, and will be discussed in due course.

However legal chicanery and political motivation may have figured in *Ustadh* Mahmoud's execution, even larger issues are at stake. *Ustadh* Mahmoud's case has implications for universal human rights and civil liberties. The real importance of *Ustadh* Mahmoud's trial and execution is in the questions it raises about the place of the *Shari'a* in the modern world. Especially important is the relation between sincere Muslim belief and compliance with laws purporting to be derived from that belief. In the *Shari'a* principle of apostasy, the tension between faith and legalism is most obvious. The candid admission of this element of religious intolerance in *Shari'a* is an essential prerequisite for the success of any attempt to secure complete respect for freedom of religion. The author hopes to undertake the major task of contributing to the building of the theological, philosophical and legal case for religious freedom in Islam at a later stage. Meanwhile, this preliminary treatment of the issues may be useful as an early caution to those contemplating

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the enforcement of the totality of *Shari'a* law. They seem to have chosen this course of action out of religious conviction or political expediency without being aware of the full implications of such policy.

To understand the case of *Ustadh* Mahmoud, however, it is necessary to give a brief account of the legal and constitutional background and the process of Islamization undertaken by former President Nimeiri in 1983. The basic features of Sudan's constitutional and legal system prior to Nimeiri's Islamization was not unlike that of many other Muslim countries where similar Islamization is likely to take place. Current constitutional and legal safeguards in force in their own countries should not lead Muslims to believe that they are immune from facing the consequences of the *Shari'a* law of apostasy and other related concepts. What happened in the Sudan can happen in any other Muslim country today.

LEGAL AND CONSTITUTIONAL BACKGROUND

The Sudan was ruled by a Turco-Egyptian administration throughout most of the 19th century until it was liberated by the indigenous religio-nationalist movement of Muhammad Ahmad al-Madhi in 1884. Britain joined Egypt in the successful campaign to recover possession of the Sudan in 1898. As the dominant power, Britain was by far the stronger partner, and managed to rule the Sudan with very little Egyptian participation until the Sudanese took over after Independence in 1956.

During the Anglo-Egyptian Condominium, as the colonial partnership was called; and throughout the national rule since Independence, the Sudan has been administered under three concurrent systems of law, namely, the overall official system, herein termed the general territorial law, the customary laws of the various tribal groups, and Islamic *Shari'a* Law.[1]

Although the general territorial law has so far been more dominant, local customs, or what may be called customary laws, are the oldest and most widely practised of the three legal systems. The indigenous Sudanese tribes and peoples have been settling their disputes in accordance with their local customs for centuries before the advent of Islam and the rise of modern colonialism that brought the British to Egypt and the Sudan. Moreover, the manner in which Islam came into the country, with Muslim migrant tribes and *Sufi* (Muslim mystic) religious leaders, meant that the Sudanese knew and practised what may be described as popular Islam long before any official legal administration was attempted by the Turco-Egyptian administration during the 19th century.[2] Some principles of Islamic law itself were no doubt adapted and incorporated into the native customary law.[3]

The Anglo-Egyptian administration began to regulate the administration of customary law, in accordance with the colonial policy of decentralization, in

the early 1920s. A number of Ordinances, culminating in the Chief's Courts Ordinance and the Native Courts Ordinance of 1931 and 1932, respectively, attempted to regulate the jurisdiction, personnel and basic procedure of the customary law courts. These Ordinances were subsequently revised and consolidated into a single enactment: The People's Local Courts Act, 1977.

The general territorial law consists of a large body of legislation enacted by the various types of legislatures the country had over the past 80 years. The reception of principles of English common law began with the enactment of the Penal Code, the Code of Criminal Procedure and the Civil Justice Ordinance around the turn of the century. All three basic Codes, and subsequent enactments regulating the various spheres of Sudanese civil and commercial life, were based on English law as applied in other parts of the British Empire. Active adaptation and reception continued throughout the codominium through the judicial work of English lawyers appointed as judges and judicial officers.[4] When systematic legal training for Sudanese was undertaken on a regular basis in 1936, it was done by English lawyers using English textbooks and material.

Thus, when independence was achieved in 1956, the Sudan Judiciary was firmly established in the techniques and traditions of English common law. Although an increasingly poor replica,[5] the Sudanese legal profession continued its nominal adherence to the common law tradition up to 1983. This general territorial law, based on principles of English common law as adapted and sudanized through generations of revisions and re-enactments,[6] governed civil and criminal matters in the towns and more accessible countryside of northern and central Sudan. Over the rest of the country customary law prevailed.

Islamic *Shari'a* law, on the other hand, has been confined to the area of family law and inheritance for Muslims since the beginning of the Anglo-Egyptian administration.[7] Marriage, divorce, child custody and succession for Muslims remain under the jurisdiction of *Shari'a* courts.[8] Although the Judiciary was supposed to have been unified under the provisions of the 1973 Constitution and the Judiciary Acts since 1973,[9] the Civil and *Shari'a* Divisions of the Judiciary have remained divided by much more than formal administrative considerations. They belong to totally distinct and irreconcilable legal traditions, namely English common law and Islamic *Shari'a* law. Although applied to the same population, the two legal systems are a world apart in terms of substance, literature and techniques. The anomaly is often emphasized in the debate over radical legal reform in the Sudan.

All three legal systems, however, have always been implemented within the context of a secular constituional framework. The Anglo-Egyptian Condominium administration pursued secular colonial policies that maintained a very strict separation of religion and state.[10] In December 1955, the Sudanese

Parliament, set up under the Self-Government Statute of 1953, adopted that Statute as the country's first constitution. It was called the 'Transitional' Constitution because it was adopted hurriedly in order to achieve full independence, with a view of enacting the 'Permanent' Constitution at a later stage.[11] The Transitional Constitution provided for liberal parliamentary democratic government and guaranteed freedoms of thought, belief and expression, etc.

The Transitional Constitution was abolished by the coup d'état of 17 November, 1958, only to be re-enacted, with some slight amendments, on the overthrow of military rule in October 1964. Another *coup d'état*, on 25 May, 1969, abolished the Transitional Constitution once again. The May Regime, as the regime established by that coup came to be known, enacted its own constitution, called the 'Permanent' Constitution of 1973. This 1973 Constitution was also a secular document, providing for some of the democratic rights and freedoms, including religious freedom, within a one-party state. President Nimeiri ruled the Sudan under that constitution until his overthrow on 6 April, 1985. The major political parties,[12] in partnership with the Armed Forces this time, have now adopted another 'Transitional' constitution on 10 October, 1985, to be applied until another 'Permanent' constitution is drafted and enacted by the Constituent Assembly which was elected in April 1986.

Although both the 1956 and 1973 Constitutions established a secular state, and the legal system as a whole retained its essentially secular, common law orientation until 1983, the question of Islamization has always been a major issue in Sudanese political and constitutional debate since Independence. On the one hand, all the major, northern political parties at least paid lip-service to the policy of implementing Islamic Shari'a Law to replace the pre-existing 'colonial and alien laws'. The southern parties, on the other hand, represented their non-Muslim constituents' objection to the implementation of Shari'a.[13] The Muslim majority almost prevailed twice, once in 1958 and again in 1968, when draft 'Islamic' constitutions were about to be enacted, thereby making *Shari'a* not only the main source of legislation, but also the criterion by which the legality of all legislation and judicial practice was to be judged. Both attempts were aborted by *coup d'état*, and nothing concrete was done to enforce *Shari'a* outside the area of personal law for Muslims until the recent efforts of former President Nimeiri.

Following his 'National reconciliation' with his political opponents in 1977, President Nimeiri set up a committee for the revision of Sudanese laws in order to bring them into conformity with *Shari'a* Law. The Committee produced seven draft bills purporting to bring Sudanese laws into conformity with *Shari'a* in matters such as prohibitions of alcohol, gambling and *riba* (usury) and the imposition of the *hadd* (prescribed penalty of amputation of the hand) for theft, and the voluntary regulation of *zakah* (religious tax on Muslims). The most significant draft bill, *'Usol alahkam al-qad'iah* (the Sources of Judicial

Decisions) purported to make Islamic *Shari'a* law applicable in all matters not provided for by specific and explicit Sudanese legislation. Moreover, the draft bill made *Shari'a* applicable to the interpretation and enforcement of existing legislation and created a presumption of compatibility and consistency of all existing and future legislation with the principles of *Shari'a* . Any piece of legislation was to be deemed invalid to the extent it was incompatible or inconsistent with *Shari'a* . It was presumably intended to introduce subsequent legislation to enact *Shari'a* principles in place of legislation found to be inconsistent with *Shari'a* .

President Nimeiri did not seem at first particularly keen to implement the program devised by the Committee for the Islamization of the Sudanese legal system. During the first five years of the Committee's existence, the Regime enacted only one of the seven draft bills,[14] and did not undertake the revisions and repeal of legislation deemed to be inconsistent with *Shari'a* law. He did, however, encourage the implementation of the so-called Islamic banking system by granting 'Feisal Islamic Bank' significant tax and other operational advantages over the first five years of its existence in the Sudan. Therefore, it came as a complete surprise, even to his own Islamic fundamentalist allies, when President Nimeiri suddenly declared his intention in August 1983 to transform the Sudan into an Islamic republic.[15]

THE PROCESS OF ISLAMIZATION

A committee of three lawyers was set up inside the Presidential Headquarters sometime in July–August 1983, and entrusted with the task of transforming the Sudanese legal system into 'an Islamic' one. By the first week of August, the committee started producing the draft bills which President Nimeiri enacted into Provisional Republican Orders having the force of law subject to confirmation by the People's Assembly under Article 106 of the 1973 Constitution. When the People's Assembly reconvened in November 1983, the President put before it the eight Provisional Republican Orders he had enacted over the previous two months. They included a full Penal Code, Code of Criminal Procedure, Civil Procedure Act and a Judiciary Act. The Assembly passed all eight Orders, without debate, in two morning sessions in its first week of business. Other Provisional orders followed in 1983 and early 1984, covering a wide range of legislative subjects, and were all approved by the Assembly without much debate.[16] The most significant enactments of that period include the Sources of Judicial Decisions Act, one of the bills drafted by Dr At-Turabi's Committee of 1977, *Zakah* and Taxation Act and the extensive Civil Transactions Act which purported to regulate every aspect of civil liability and commercial and property law.

When it became apparent to President Nimeiri that some aspects of the new legal order were inconsistent with the 1973 Constitution then in force, he

proposed to the People's Assembly in June 1984 amendments of the Constitution which were so extensive that they were in effect a fresh 'Islamic' constitution. During the debates over this 'new' constitution, it became clear that the Assembly was unlikely to pass it with the necessary two-thirds majority.[17] The President then decided to postpone 'debate' over the amendments, and they were never reintroduced. In that way, the 1973 Constitution remained intact until it was abolished by the April 1985 *coup d'état* which overthrew President Nimeiri and replaced him with a civilian–military coalition. The conflict between the Constitution and Nimeiri's 'Islamic' laws remained unresolved because the Supreme Court, established under the same 'Islamic' laws, rejected on procedural grounds the few constitutional challenges mounted against those laws.[18] These laws which remained in force after Nimeiri's overthrow, are also inconsistent with the 1985 Constitution. The transitional government of 1985–86 left the issue to be settled by the parliament to be elected in April 1986. Despite its apparent commitment to repeal these laws, the new government which took office by the end of April 1986 has not yet acted on the matter.

With the successful completion of the legislative task, the President and his staff turned to implementation. The Judiciary and other branches of government were obviously not doing enough to enforce the 'Islamic' laws. To rectify that state of affairs, the President decided to inject some 'Islamic' spirit and motivation into the judicial and executive organs by declaring a state of emergency on 29 April, 1984. Article 111 of the Constitution enabled the President to 'take the necessary measures . . . which may include the suspension of all or any of the freedoms and rights guaranteed by this Constitution', except the right to resort to the Courts. All measures taken by the President under the provisions of this Article 111 were to have the force of law.

The President issued the State of Emergency Regulations of 1984, under which he granted the Army and other security forces extensive powers of arrest and search and established the State of Emergency Courts and Prosecution machinery. This so-called 'prompt-justice' courts system dispensed with some of the basic requirements for judicial appointments and fair trial procedure guaranteed by the Constitution. These extraordinary measures were certainly effective in dramatically increasing the number of convictions under the 1983 'Islamic' Penal Code, which seemed to be the sole criterion employed by the Regime for judging the success of the 'Islamic Legislative Revolution' of 1983–84. Public floggings and amputations for alleged violations of the 'Islamic' Code were extensively publicized by the state-owned media.

Despite its success in raising the level of criminal law enforcement, the State of Emergency was too expensive to maintain for long. Beside the financial burden of maintaining the security forces in a state of full alert, the continuation of the State of Emergency contradicted the President's claims that the country was undergoing genuine voluntary and profound religious transformation. As

he still needed the 'Islamic' law enforcement advantages of the State of Emergency, the President sought to maintain the machinery he had devised for the enforcement of the criminal law after the abolition of the State of Emergency in September of 1984.

The primary tool for achieving that objective was the Judiciary Act of 1984 which repealed and replaced the 'Islamic' Judiciary Act of 1983.[19] The new Act increased the President's power to appoint and deploy judges and set up special courts and appoint special prosecutors to enforce the 'prompt' justice of the 'Islamic' Code. The Act provided for the establishment of 'special' criminal courts to be manned by judges who may be appointed by the President of the Republic personally, regardless of whether they satisfied normal requirements for judicial appointment.[20] A new post of State Minister for Criminal Affairs was established within the Attorney-General's Chambers to supervise and conduct prosecutions before the 'special' criminal courts. The Act also gave the President the power to appoint a specific judge or a special court to try a specific case or accused person, to appoint any person to any judicial office, including membership of the Court of Appeal and the Supreme Court, regardless of requirements and qualifications specified by the Act itself for appointment to each level of judicial office.[21]

Using his powers under this Act, and by means of issuing Presidential Decrees which were immune, by virtue of Articles 81 and 82 of the Constitution, from challenge before any authority on any grounds whatsoever,[22] the President established a special system of criminal courts, to be served by a special system of prosecution machinery. Cases before those courts were to be tried in accordance with special summary procedure. Appeals and revisions were to go before the special Court of Criminal Appeals, also set up by the President and manned by three judges who also had their own special criminal trial courts. As the three judges sat in the most crucial and active trial courts in the capital, Khartoum, they often sat on appeal or revision over cases they had tried themselves! One of these three judges was also a member of the Supreme Court which considered constitutional challenges to proceedings before the special criminal trial courts. In at least one major case, the same judge was sitting as a trial judge and on the Supreme Court Panel which considered a constitutional challenge to the legality of the trial proceedings.[23]

Such was the state of the administration of criminal justice when *Ustadh* Mahmoud Muhammad Taha was released from 19 months of political detention without charge or trial, on 19 December, 1984. In retrospect, it would almost seem like an elaborate scheme specifically designed to entrap and eliminate a single man. He was the only political prisoner to be executed through the system. The immediate collapse of this judicial system after Taha's execution seems to reflect its internal contradictions and inability to function as a real legal instrument. Who was this man, and why did he have to be killed in this way?

ALL IN THE CAUSE OF ISLAMIC REVIVAL

Ustadh Mahmoud was one of the founders, and the first leader of the Sudanese Republican Party in October 1945. The Party worked for the complete independence of the Sudan from Egyptian as well as British control, and the establishment of a Sudanese republic, hence the Party's name.[24]

Ustadh Mahmoud, an engineer by profession, was jailed twice by the British colonial administration in 1946 for his political activities. During his second term of imprisonment, which extended two years, he started to develop his conception of Islamic revival through the evolution of certain aspects of Islamic *Shari'a* law. He continued his endeavor, based on the personal worship practices of the Prophet,[25] after his release from prison in 1948 until he mastered the theory of the comprehensive and universal level of Islamic ideology which he continued to articulate and propagate from 1951 until his death in 1985.

According to this theory, Islam was originally offered in Mecca in eastern Arabia from around A.D. 610 to 622 in terms of freedom of choice (*ismah*) and personal responsibility for such choice. Numerous verses of the Qur'an at that stage emphasized this freedom and personal responsibility.[26] Equality of all human beings regardless of sex or religion would have followed if those texts were made the basis of the law, but that was not to be in the 7th century. When it was shown in practice that the Arabs were not mature enough to appreciate and live in accordance with those superior principles, and they conspired to kill the Prophet, the offer of freedom and responsibility was withdrawn. Compulsion (*ikrah*) and guardianship were imposed following the Prophet's migration to Medina, another town in eastern Arabia. Qur'anic verses establishing *jihad*, holy war to spread the faith, and discrimination against non-Muslims and women were revealed in this second stage.[27] The Prophet elaborated upon these principles and made them the basis of the law, *Shari'a*, of the new polity of Muslims. Muslim jurists undertook the processes of tabulation and rationalization of the *Shari'a* over the following three centuries. The earlier texts of the Meccan stage that were inconsistent with the Law as enacted in Medina were deemed to have been repealed or abrogated from the legal point of view. They remained part of the Qu'ran and traditions of the Prophet and as such were revered by all Muslims, but only as ethical standards that enjoy moral authority without being legally binding. This was assumed by all Muslim jurists and scholars to be the final state of affairs. *Ustadh* Mahmoud, however, thought otherwise. He argued that the repeal or abrogation of the earlier Meccan texts were merely a postponement until the appropriate circumstances for their enforcement arose. He maintained that the abrogation should be related to its rationale, namely the socioeconomic and political conditions prevailing in Arabia at the time. With the radical transformation of these conditions in Modern times, Islamic Law should

respond by enacting the verses of freedom of choice and personal responsibility in order to establish the principles of freedom and equality which should be the basis of the *Shari'a* of today. In other words, he advocated the development of a modern Islamic *Shari'a* law from the basic Islamic sources to meet the needs and aspirations of today.

The Republican Party was transformed in the early 1950s into an organization for the propagation of this new conception of Islam. The group was never really a political party in the usual sense of the term. The organization, for example, never contested any election or sought power through any other means. It concentrated, instead, on the re-education and enlightenment of the people through public lectures, debates, pamphlets, books, etc. The group maintained a strict policy of nonviolent, open and direct popular action.

Ustadh Mahmoud and his followers were opposed to the immediate implementation of traditional Islamic *Shari'a* law. They called, instead, for the radical revision of certain aspects of *Shari'a* law, and the re-education and remolding of individual Muslims in accordance with the moral values and ethics of Islam before any attempt at the implementation of Islamic *Shari'a* law. They proposed the establishment of a socialist,[28] democratic state, where complete equality between men and women, Muslims and non-Muslims would prevail. Their opposition to the immediate-implementation of the totality of traditional *Shari'a* incurred them the severe and often violent hostility of the 'Moslem Brothers' and other Islamic fundamentalist groups.[29]

In May 1983, the Republicans issued a pamphlet criticizing the Sudanese Chief of State Security, who also happened to be the First Vice-President of the Republic, for his failure to check the incitement to religious hatred and abetment of sectarian violence that was being conducted in some mosques and through the state-controlled media. The Vice-President retaliated by arresting and detaining *Ustadh* Mahmoud and about 50 of his followers, without charge or trial, for more than 18 months.[30] The detention of the Republican leadership continued from May–June 1983 to 19 December, 1984. While they were in detention, President Nimeiri introduced the so-called Islamic Laws of 1983–84.

The Republicans started their campaign against the 'Islamic Laws' in March 1984, while their leadership was still under political detention, by issuing a booklet and several pamphlets explaining how those laws not only violated the Sudanese Constitution and distorted fundamental Islamic principles but also contravened elementary principles of the very *Shari'a* law they purported to implement.[31] The Republicans also instituted three constitutional suits before the Supreme Court on the grounds that those laws discriminated against women and non-Muslims and violated specific provisions of the Sudan Constitution. The Supreme Court, which had been re-constituted under the same laws, dismissed the suits on the ground that the Republicans had no standing to bring them because they were not personally aggrieved by those

laws. On 25 December 1984, within one week of the release of *Ustadh* Mahmoud and his leading disciples, the Republicans issued a leaflet calling for the repeal of what they described as the 'September 1983 Laws', a peaceful settlement of the conflict in Southern Sudan,[32] and the provision of opportunities for popular enlightenment and public debate throughout the country in order to achieve proper Islamic revival.

During the last week of December 1984, members of the group were arrested and charged, this time with the minor offense of inciting disturbance of the peace, but the Minister for Criminal Affairs suddenly intervened and promoted the charges to the capital offenses of undermining the Constitution and waging war against the State, and two other offenses against the State. *Ustadh* Mahmoud was himself arrested on 5 January, 1985 and brought to trial with four of his disciples, who just happened to be arrested in the same district as himself, on 7 January.[33] All five of them were convicted and sentenced to death the next day, 8 January, after two brief sessions of under one hour each. The special Criminal Court of Appeal, also constituted under the 'September 1983 laws', confirmed the conviction and sentence on all five accused five days later. On 17 January, President Nimeiri gave his final approval for the immediate execution of *Ustadh* Mahmoud, and granted the other four a reprieve of three days to repent and recant or else be executed. They recanted and were spared.

Ustadh Mahmoud and his co-accused boycotted the Court on the ground that it was constituted under laws which, in their view, violated and distorted *Shari'a* and Islam itself, and were designed to terrorize and humiliate the people.[34] They also challenged the technical competence and moral integrity of the judges enforcing those laws because they allowed themselves to be manipulated by the executive branch of government in humiliating and oppressing its political opponents. The five accused considered the trial to be nothing but a political ploy and treated it as such.

In this way, *Ustadh* Mahmoud sought to revive Islam and interpret it in a more egalitarian and tolerant way than that he felt prevailed under traditional Islamic *Shari'a* law. His own death was the ultimate act in the advocacy of his vision and conception of what he used to call the Second Message of Islam. As indicated above, he believed that the repeal of certain restrictive and discriminatory aspects of traditional *Shari'a* and their replacement by alternative Islamic principles is more appropriate to the needs and capabilities of modern humanity. Such alternative principles, as he continued to explain and demonstrate for over 30 years, would be the Islamic *Shari'a* law of today because they are derived from the same basic Islamic sources in response to the challenges and problems of modern society.

Rather than advocate secularism, *Ustadh* Mahmoud suggested an Islamic way out of the problems raised by some aspects of traditional *Shari'a*, such as questions of the civil and political rights of all the subjects of an Islamic state,

including women and non-Muslims. He called for the establishment of a more just Islamic socialist economic order, where all citizens would have their basic needs satisfied as of right, and not by way of charity. He also strove to distinguish his conception of democracy and socialism from the prevailing notions of liberal democracy and Marxist socialism.[35]

A POLITICAL TRIAL

The whole episode was fraught with procedural and substantive errors which compromised the proper aims of a judicial system. On the face of it, the prosecution was itself unconstitutional on several counts in the light of the Permanent Constitution of the Republic of Sudan of 1973—the constitution in force at the time. It violated the freedoms of thought, belief and expression guaranteed by Articles 47 and 48 of the Constitution. Since—incredibly—no attempt was made at the trial to show how the accused's conduct constituted the offenses charged, one may be justified in concluding that the charges under the Penal Code and State Security Act were merely a pretext for bringing *Ustadh* Mahmoud to the court in order to try him for his political activities and his opposition to the implementation of *Shari'a*. Such opposition was deemed to amount to a repudiation of the faith, technically known as apostasy. The initial arrest and police interrogation of the accused were all done under the state security offenses and nothing was said of apostasy. But when Presidential sanction for the trial was obtained,[36] the State Minister for Criminal Affairs added Section 458(3) of the Penal Code and Section 3 of the Sources of Judicial Decisions Act. Both provisions were introduced for the first time in 1983 as part of 'the September 1983 law'. The combined effect of the two sections purports to authorize the courts to impose Islamic penal provisions, and *hadd* penalities in particular, regardless of the lack of legislative provisions penalizing the particular conduct under Sudanese law. These sections were later on utilized by the Court of Criminal Appeal in confirming the convictions and sentences for apostasy although the trial court made no mention of this charge, and despite the fact that the two sections clearly violated Article 70 of the Sudan Constitution of 1973.[36a]

The accused were charged with several offenses against the state, pleaded not guilty and then boycotted the Court for the reasons indicated above. The case for the prosecution consisted of a single witness, the police officer who interviewed the accused. This witness simply read out the statements made by the accused to the police admitting full responsibility for the leaflet. The leaflet itself was the only prosecution exhibit. Nothing was said or presented at the trial on the writings or views of the accused on the wider issues of Islamic law reform or Islamic revival. These writings and views were introduced by the Special Court of Appeal on its own motion and made the basis of conviction for apostasy as we shall see below.

There was no case presented for the defense because of the boycott, but it must be noted here that the accused pleaded not guilty and boycotted a trial on state security offenses and not a trial for apostasy. Although convicting all of the accused for the state security offenses he specifically named, the Trial Judge stated that the death sentence would not be carried out if the accused were to repent and recant at any time before execution. As the notion of stay of execution on the grounds of repentance and recanting of one's beliefs or views is completely alien to Sudanese criminal law, the Judge must have had the *Shari'a* offense of apostasy in mind although he refused to mention it, presumably because of the obvious constitutional objections.

Again, and although the Trial Judge failed to discuss any of the ingredients of the offenses against the state with which the accused were supposed to have been charged and convicted, he emphasized in his judgment those aspects of the leaflet that hinted at the accused's conception of Islamic revival and their belief in the need for Islamic law reform. The judge took judicial notice of those views and beliefs, i.e. assumed the correctness of his own statement of the position without adducing evidence in court on the matter, and ruled that the accused's views and beliefs would cause upheaval if allowed to be publically propagated. This is the rationale for punishing religious and ideological dissent in traditional Islamic *Shari'a*. In other words, he was in fact convicting the accused of apostasy while citing provisions of the Penal Code to make it appear as if the convictions were for regular offenses against the state. This clearly violates the requirements of a fair trial provided for under Article 64 of the Constitution.

The judgment of the special Court of Criminal Appeal was at least candid in openly raising the question of apostasy, although it dealt with it in an unsatisfactory manner. The Court of Appeal started by noting the problem raised by convicting the accused under the specific sections of the Penal Code, while allowing them time to repent and recant, thereby gaining stay of execution. The Court of Appeal then proceeded to 'rectify' the decision of the Trial Court by raising the two questions: is apostasy punishable under Sudanese law, and if yes, did the conduct of the accused amount to apostasy as defined in Islamic law sources? The Court answered both questions in the affirmative, and proceeded to confirm the conviction and sentence of all five accused for apostasy as well as the state security offenses with which they were originally charged. According to the Court of Appeal, *Ustadh* Mahmoud was to be executed immediately, without opportunity to repent and recant, because he had persisted in advocating his 'heretical' views for many years and refused to heed judicial and other pronouncements. He was, moreover, to be denied burial with Muslim rites, and his property was to be forfeited upon his death. The other four convicts were allowed one month to repent and recant and reembrace Islam or else be executed. All Republicans, i.e. the followers of

Ustadh, were declared by the Court of Appeal to be apostates, to be treated as such in all matters and transactions. Their books, pamphlets and other publications were to be confiscated and destroyed, and all future publications and circulation of such material was banned together with any other activities of the Republicans. This judgment of the special Court of Appeal was then submitted to the President of the Republic for final confirmation.

Since the accused were never formally charged with apostasy, they, naturally, offered no defense against it. Even the prosecution did not present any evidence in support of apostasy! It was the Court of Appeal which took it upon itself to specify and try apostasy for the first time at the confirmation of proceedings stage. In the absence of the accused, and without representation for either side, the Court of Appeal produced its own interpretation of the views and theories of the accused. In convicting *Ustadh* Mahmoud of apostasy the Court relied almost exclusively on two grounds: a ruling by a *Shari'a* Court in Khartoum on 18 November, 1968, and the extra-judicial announcements of foreign institutions declaring the apostasy of *Ustadh* Mahmoud.

As to the first ground, the decision of the *Shari'a* Court was completely null and void because that Court lacked jurisdiction over questions of apostasy as such.[37] The cause of action itself was unconstitutional in the light of the 1956 Constitution, as amended in 1964, which was in force in 1968. The defendant, *Ustadh* Mahmoud was therefore entitled to refuse to attend the 1968 trial, and he in fact simply disregarded its outcome. There was nothing the plaintiffs could do to compel his attendance or enforce the judgment of the Court. How could, therefore, the judgment of one court in a civil cause of action, rendered in the absence of the defendant and without any jurisdiction, be a basis for a criminal conviction by a different court 17 years later?

The Court of Appeal then proceeded to cite the opinions of two foreign institutions, namely the Muslim World League and the Egyptian Azhar University, to the effect that these institutions held *Ustadh* Mahmoud to be an apostate and advised the Sudanese authorities to treat him as such. It is obvious that such 'opinions' have no weight in a court of law, especially since they were not adduced in evidence by the prosecution in a way that enable the accused or their counsel to cross-examine the experts on their claims to have the competence to make that judgment, and the grounds on which it was based.

The unjudicial reasoning of the Court of Appeal is also reflected in the manner in which the Court dismissed legal objections to the imposition of the death sentence on *Ustadh* Mahmoud. Section 247 of the Code of Criminal Procedure, 1983, one of the 'Islamic' laws themselves, prohibits the imposition of the death penalty on any person over 70 years of age. *Ustadh* Mahmoud was 76 years old at the time. The Court of Appeal simply dismissed this provision as inapplicable to Islamic *hadd* offenses, i.e. offenses for which *Shari'a* sets a specific unalterable punishment, since no law may be interpreted in contravention of

Shari'a. There was, however, no legal basis for that claim in relation to the Code of Criminal Procedure 1983.[38]

Having dismissed Section 247 in this arbitrary way in relation to the so-called *hadd* offense of apostasy, the Court of Appeal immediately proceeded to confirm the conviction and sentence under the Penal Code and the State Security Act, expressly describing them as non-*hadd* offenses. Even if Section 247 of the Code of Criminal Procedure did not apply to apostasy, it surely applied to the ordinary criminal offenses under the Penal Code and the State Security Act. It would therefore seem that the Court of Appeal was keen to confirm the death sentence, irrespective of legal objections.

President Nimeiri cited religious and political reasons for confirming the convictions and sentences on all five accused. He ordered the immediate execution of *Ustadh* Mahmoud, and reduced the period allowed for recantation by the other four accused, from the one month allowed by the Court to three days only. The President simply quoted claim after claim of alleged heretical views and beliefs of the accused, without bothering to cite or adduce any specific reference to the sources of such allegations in the writings and utterances of the accused. He also cited evidence of the emerging opposition of the group headed by *Ustadh* Mahmoud, the Republicans, to his regime in support of the view that the group was really a political organization and not an intellectual group.

Although the President's speech made no explicit mention of apostasy, and confirmed the convictions under specific sections of the Penal Code and State Security Act, all his arguments and reasons related to apostasy rather than any other offense. *Ustadh* Mahmoud was thus executed for an offense for which no one could be legally tried under Sudanese law in force at the time—an offense of which he was not personally guilty in any case, since he was not an apostate but rather a non-violent Muslim scholar and reformer who happened to hold views on Islamic revival that were at variance with those held by the government of the day. In the absence of any other rational explanation, one is forced to conclude that *Ustadh* Mahmoud was sacrificed in the cause of maintaining President Nimeiri's personal drive for Islamization, whatever the real motives behind that drive may have been. *Ustadh* Mahmoud was killed in order to frighten others who might have been contemplating criticism or opposition to Nimeiri's policies in general, and his Islamization policy in particular.[38a]

TRADITIONAL ISLAMIC LAW OF APOSTASY

President Nimeiri's motives and methods are not in issue here—even though one can argue that he exploited various religious or philosophical precepts in a bid to perpetuate his stay in power. What is at issue is the fact that the traditional Islamic law of apostasy is not only liable to be abused, but that

it is also inherently in contradiction with more universally accepted standards of constitutional civil liberties and international human rights. The case of *Ustadh* Mahmoud in the Sudan cannot, unfortunately, be dismissed as an isolated and curious example of despotic and oppressive brutality. Notwithstanding President Nimeiri's manipulation of Sudanese law, it is in fact genuine traditional Islamic law of apostasy that confronts Muslims all over the world with very real and fundamental questions. Before reviewing some of the human rights and civil liberties implications of apostasy, and considering some possible answers, it may be necessary to point out the legal bases of the offense and its consequences under traditional Islamic law.

Islamic law has two primary sources, the Qur'an and *Sunna*, the traditions of the Prophet. The agreement of the learned as representing the body of believers (*Ijma'a*) and derivation of legal principles by analogy (*Qiyas*) are subsidiary sources, resorted to either to settle arguments on the interpretation of Qur'an and *Sunna*, or to provide for situations not covered by the two primary sources.

The Qur'an deals with apostasy in several verses: e.g. chapter 4, verse 90; chapter 5, verse 59 and chapter 16, verse 108. None of these verses expressly provide for the penalty for apostasy in this life, but they all condemn the apostate in very harsh and unequivocal terms. The punishment of apostasy in *Shari'a* is based on *Sunna*. It is reported, for example, that the Prophet said: 'The blood of a fellow Muslim should never be shed except in three cases: That of the adulterer, the murderer and whoever foresakes the religion of Islam'.[39] It is also reported that the Prophet, peace be upon him, said: 'Whosoever changes his religion, kill him'.

On the bases of these *Sunna*, and standard commentaries on the Qur'an, traditional Islamic schools of jurisprudence are unanimous in holding that apostasy is punishable by death, although they differ on such questions as to whether to execute the sentence immediately or grant the apostate a reprieve of a few days in order to allow him time to reflect and reconsider his position in the hope that he may recant and re-embrace Islam, thereby saving his life as well as his soul.[40] There is also disagreement on whether a female apostate is to be killed or merely imprisoned until she returns to the faith. Her offense is not regarded by any school or jurist to be of less magnitude, the disagreement merely relates to whether the appropriate punishment is death or life imprisonment.

Other traditions cited in commentary and jurisprudence (*fiqh*) books in the context of apostasy may raise problems of interpretation as they tend to cover a more serious situation than mere passive apostasy. It is reported, for example, that a band of Arabs, from 'Ukl tribe came to the Prophet in Medina and announced their embrace of Islam. When they were later taken ill, they asked the Prophet for medicine, and he advised them to go outside the town to live

with the Muslim herdsmen, and drink the milk and urine of their camels. When they recovered, the eight Arabs apostasized, killed the herdsmen and drove off with the camels. The Prophet ordered their capture and slow death and dismemberment. This extremely harsh punishment may be explained by a number of factors peculiar to this specific case. The offense itself, to begin with, was not merely passive apostasy but also robbery and murder, the former warranting the penalty of death and dismemberment as a *hadd* offense, i.e. one for which specific penalty is specified, while the latter is punishable by the *qassas* penalty for murder, which is death. There were also considerations of state security to be taken into account in the light of prevailing nomadic customs and practices of 7th century Arabia.[41]

If apostasy as an offense punishable with death was based solely on this last cited tradition, it may be argued that the Prophet was penalizing those Arabs for the multiplicity of aggravated offenses they committed, and not merely for passive apostasy. The offense and its punishment are based on the much stronger and more explicit authority of the two *Sunna* cited above and the *ijma'* of all leading Muslim jurists and schools.

A number of other drastic civil law consequences follow upon a finding of apostasy.[42] The legal effects of all the acts of an apostate are suspended pending his repentance or death. His right to dispose of his property, for example, is immediately held to be in abeyance (*mawqof*) until he either repents or is executed, or dies if he had escaped punishment. If he repents and returns to Islam, on the one hand, all his property rights are restored, including the right to dispose of it in the usual ways. If he dies an apostate, on the other hand, his estate falls to the Public Treasury. An apostate also lacks the capacity to himself inherit from others. A marriage contract is immediately dissolved (*faskh*) upon the apostasy of either spouse.[43]

These are the basic generally agreed criminal and civil law consequences of apostasy under traditional Islamic *Shari'a* Law. How does that Law determine apostasy? What is the test for identifying an apostate who is to suffer those consequences?

An apostate, one who is held to have turned away from Islam (*murtadd*), is a Muslim by birth or conversion who has renounced Islam, regardless of whether or not he subsequently embraced another faith. He is held to have done so if he expressed unbelief by words or deeds, whether explicitly or by necessary implication.[44] The test commonly applied is whether he has repudiated what is 'necessarily' known to be part of the Islamic Religion, presumably as determined by the judge or court. It is only natural that jurists differ on whether or not certain instances or cases are covered by this test,[45] but the following examples are clearly beyond dispute. A person who is known to have been a Muslim and then converted to Christianity or any other religion, or simply declared himself to have become atheist or agnostic, is the most obvious

example. Even a Muslim who does not openly declare himself to have become an atheist, but is known to be a Marxist, for example, may be held an apostate because Marxism is believed by most Muslim jurists to be incompatible with Islam.[46] Other generally agreed examples include Muslims who join the Ahmadi sect or the *Baha'i* faith because of the belief of these groups that Muhammad, peace be upon him, is not the final Prophet.[47] Members of these two religious traditions are in fact persecuted, sometimes prosecuted, in Iran and Pakistan, for example, because of their religious beliefs. Very recent examples of specific cases of persons treated as apostates on such grounds are reported within the most developed Muslim countries.[48]

A controversial application of the principle of apostasy is to be found in the area of the duty to implement Islamic *Shari'a* law today. Some jurists and scholars argue that the literal meaning of some Qur'anic texts indicate that any Muslim who refuses to judge or be judged by *Shari'a* law is an apostate.[49] While not disputing the basic premise of this principle, some modern scholars, however, insist that such rejection of *Shari'a* must arise out of the belief that non-Islamic rules are better and more just than Islamic rules.[50] This has recently been a serious political issue in some Muslim countries,[51] and continues to be the almost irresistible argument of the fundamentalists who demand the immediate implementation of the totality of *Shari'a*. It places the burden on the secularists to argue against the implementation of *Shari'a* without falling into the trap of apostasy. A secularist would either have to admit the validity and justice of *Shari'a* and thereby abandon his opposition to its implementation, or reject it as inappropriate and unjust and accept the consequences of being declared an apostate.

APOSTASY AND RELIGIOUS FREEDOM TODAY

The inescapable conclusion of the above review of traditional Islamic *Shari'a* law of apostasy is that it is inconsistent with modern notions of religious freedom, an internationally acknowledged basic human right and generally accepted fundamental civil liberty guaranteed by most constitutions throughout the world.

Modern Muslim jurists and scholars have responded to this charge in a variety of ways. Some proponents of *Shari'a* simply claim that *Shari'a* is beyond defense or justification, it being an article of faith with 'good' Muslims that anything that is inconsistent with *Shari'a* is necessarily wrong and bad.[52] Others make an attempt to justify the law of apostasy on the ground that it amounts to high treason, and is therefore punished as such.[53] They maintain that Islam is not only a religion, but also a social and political order. An apostate repudiates the very basis of this society, and ceases to hold allegiance to it. As such, he is most probably going to engage in hostile subversive activities. According to this argument, an apostate is killed in order to protect

the Islamic polity, an extreme preventive measure. This line of reasoning may be acceptable to some Muslims but it can never be convincing to non-Muslims, or even Muslims who expect to have rational objective justification for such basic policy decisions.

Another equally unconvincing line of argument seeks to limit the scope of religious freedom by excluding the freedom to change one's religion or belief.[54] For one thing, this is an integral part of the freedom of thought, conscience and religion as defined by Article 18 of the Universal Declaration of Human Rights and Article 18 of the International Covenant on Civil and Political Rights.[55] That was only logical because the freedom to change religion or belief is essential to any notion of religious freedom. The Muslims themselves would demand this dimension of freedom for those wishing to convert to Islam, how can they argue for its denial to those wishing to repudiate their faith in Islam? It appears that it was this compelling logic which forced all the Muslim states who are members of the United Nations to accept such freedom in the recently adopted Declaration on the Elimination of Intolerance and Discrimination Based on Religion or Belief.[55a] It is true that they objected to identical language,[56] but the phrase they did accept amounts to the same thing. Article 1(1) states that the right to freedom of thought, conscience and religion 'include freedom to have a religion or whatever belief of his choice'. Other Articles of the same Declaration provided for more specific rights and freedoms in this regard, such as the guarantee against coercion which would impair the freedom to have a religion or belief of his choice, and protection against discrimination on grounds of religion or other beliefs.

A more plausible line of reasoning is taken by another group of modernist Muslim scholars who seek to change the traditional Islamic *Shari'a* law of apostasy. There are those, for example, who argue that apostasy should not be punished with death unless it was accompanied by a threat to the Islamic state.[57] According to the logic of this argument, the apostasy of the person should be an irrelevant consideration, the offense being treason or other appropriate offense against the state. Such offenses can be defined and enforced within the ordinary criminal law of the land, without making any reference to the religious beliefs of the accused person. When stated in these terms, we find that this argument lacks legal and theological foundation in *Shari'a* law which is primarily concerned with the question of religious belief, with the notion of treason or offense against the state coming as a much delayed attempt at rationalization.

Another difficulty with this approach is that it is limited to trying to restrict the imposition of the death penalty for passive apostasy, and has nothing to say in relation to the civil law consequences of apostasy indicated above. Moreover, since these arguments are limited to questioning the legal basis for imposing the death penalty for apostasy under *Shari'a*, and do not seek to establish a

positive right to change one's religion or faith, they admit that adverse consequences may follow upon apostasy. This is inconsistent with freedom of religion.

The modernist Muslim scholars who adopt this line of reasoning seem to feel the political need to operate within the framework of traditional *Shari'a* in the hope of gaining quicker and wider acceptance for their views. This position would drastically limit the scope of their endeavor because it implies submission to the strict canons of construction and derivation of legal rules (*'usol al fiqh*) applied by the jurists of traditional *Shari'a*. The most serious difficulty they face is the cardinal principle of *Shari'a* that there can be no exercise of rational juristic reasoning (*ijtihad*) in any matter covered by an explicit text of Qur'an or *Sunna*. In view of this principle, it may not even be possible to avoid the death penalty for passive apostasy because it is based on the very explicit *Sunna* quoted above.[58]

A NEW APPROACH

It is precisely in response to these difficulties and limitations of reform within the framework of traditional *Shari'a* that *Ustadh* Mahmoud Muhammad Taha strove to perfect his novel reform technique outlined above. As applied to the present problem, namely the inconsistency between *Shari'a* law of apostasy and the modern principle of freedom of religion and belief, the principle of Evolution of Islamic *Shari'a*, *tatwir at-tashri' al-Islami*, as he used to call his approach, may be summarized as follows.

As noted above, Islam was originally offered in Mecca, around A.D. 610 to 622, through the principle of freedom of choice and voluntary conversion (*ismah*). Qur'anic texts of this class are often cited as evidence of religious freedom and tolerance in *Shari'a* law.[59] This is misleading, however, because the legal principles of *Shari'a* were not based on this class of texts. Legally binding principles were in fact based on the repeal or abrogation (*naskh*), in legal terms, and the enactment of the texts of compulsion (*ikrah*) revealed subsequently in Medina following the Prophet's migration to that town around A.D. 622.[60] This basic shift, which was manifested in the principles of *Shari'a* providing for *jihad*, and discrimination against non-Muslims, is summarized in the *Sunna* in which the Prophet, outlined his future policy as follows: 'I have been instructed to fight people until they accept that there is no god except God, and that Muhammad is the Messenger of God [i.e. the Islamic affirmation of faith] and undertake the prayers and payment of *Zakah* [i.e. Islamic worship practices]. Once they do that, they become secure in life and property except for just cause [i.e. in accordance with due process of law], and I leave their sincerity to be judged by God'.

It is therefore clear that the legally binding principles of *Shari'a* were not based on the texts of freedom of choice, but rather on the texts of compulsion

and *jihad*. The former group of texts, which were in fact revealed earlier in Mecca, remained part of the Qur'an and Islamic traditions, albeit not part of the legally binding law.[61] *Ustadh* Mahmoud started with the premise that the repeal of those texts was actually a postponement and not final abrogation.[62] He then suggested that Muslims should now enact those texts and repeal, again in legal terms only, the texts of compulsion and *jihad*. It is important to note that he was only concerned with legal efficacy, and the repeal of texts in this sense does not tamper with the sanctity of the Qur'an or deny any of its texts.[63] *Ustadh* Mahmoud simply maintained that the Qur'an was designed to provide the Muslims with a comprehensive source of guidance and instruction. The Muslims should apply themselves to that source in order to derive their law, the modern *Shari'a*, in the same way the Muslims of 7th century Arabia and the Middle East applied themselves to that fundamental source and developed their law, which has been handed down to us as historical *Shari'a*.

This technique of shifting legal efficacy from one class of texts to another may also be employed in other areas of Islamic law, thereby evolving *Shari'a* in relation to the status and rights of women, and other questions of economic, social and political reform.[64] This approach involves the radical revision and reformulation of the techniques for deriving legal rules from basic Islamic sources (*'usol al-fiqh*). To remove all the criminal and civil law consequences of apostasy, for example, it is necessary to practise rational juristic reasoning (*ijtihad*) throughout a wide range of legal principles, including those derived from explicit Qur'an and *Sunna* texts. This is not possible within the framework of traditional *Shari'a* because the traditional rules for derivation of legal principles from basic sources (*'usol al-fiqh*) will not permit *ijtihad* in matters governed by explicit texts. It takes a juridical revolution to evolve *Shari'a* and not merely reform it, thereby removing all features of compulsion and infringements of religious freedom in the fullest and widest sense of this basic human right.

CONCLUSION

This preliminary study demonstrates that the *Shari'a* law of apostasy violates freedom of religion because it penalizes a Muslim who renounces his faith in Islam. According to the prevailing view, apostasy is punishable by death. Several negative civil law consequences also follow upon a finding of apostasy. It is true that some modern Muslim scholars have argued against the death penalty for apostasy, while others have tried to restrict the death penalty to apostasy when combined with active rebellion. With all due respect to the effort put into the argumentation of both positions, it is still inconsistent with religious freedom to maintain the negative civil law consequences of apostasy.

The only Muslim author who has argued convincingly for the abolition of *all* civil as well as criminal law consequences of apostasy, in my view, is the late

Sudanese reformer *Ustadh* Mahmoud Muhammad Taha. To establish complete freedom of religion within Islamic law, argued *Ustadh* Mahmoud, Muslims must be prepared to base this aspect of Islamic law on a group of texts of Qur'an and *Sunna* that has hitherto been deemed to have been repealed or abrogated by the operative texts that discriminate against non-Muslims and penalizes apostasy.

This technique is clearly revolutionary, but it seems to be the only way for removing all the legal basis for discrimination on grounds of religion or belief. Some Muslims may maintain that it is not necessary to abolish such discrimination because this is the proper and fair way to treat non-Muslims and apostates. Arguments based on the principle of freedom of religion are unlikely to influence this class of Muslims. For those Muslims who feel the need to abolish legal discrimination as bases for protecting freedom of religion and enhancing tolerance, the technique suggested by *Ustadh* Mahmoud deserves serious consideration.

NOTES

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I wish to dedicate this discussion to *Ustadh* Mahmoud Muhammad Taha, the Sudanese Muslim reformer whose execution is discussed in this article. His exceptional courage and superior moral stature, his vision and support, have helped many Muslims both to see certain problems and to speak clearly of them.

1 For a survey of the working of these three systems see C. Thompson, 'The Sources of Law in the New Nations of Africa: A Case Study of the Republic of the Sudan', *1966 Wisconsin Law Review* 1146.

2 Islamic Law was applied informally by the people as part of their customs long before the Turco-Egyptian administration introduced official courts in the 19th century.

3 Abu Rannat, 'The Relationship between Islamic Law and Customary Law in the Sudan', *Journal of African Law*, 1960, 9.

4 The process of reception and its circumstances are discussed in detail in Z. Mustafa, *The Common Law in the Sudan* (Clarendon Press, Oxford, 1971).

5 See id. chapter IX on the operational difficulties that seem to have led to this result.

6 Major revisions and re-enactments of the main codes and statutes were undertaken in 1925, 1941, 1955 and 1974.,

7 N. J. Anderson, *Islamic Law in Africa* (Her Majesty's Stationery Office, London, 1955), pp. 301–321.

8 For aspects of Islamic and non-Islamic personal law in the Sudan, see C. O. Farran, *Matrimonial Laws of the Sudan* (Butterworth, London 1963).

9 The Judiciary Act was amended several times, and re-enacted twice during the 1970s and early 1980s before the enactment of the so-called Islamic Judiciary Act of 1983.

10 It seems that the colonial administration was very sensitive to the dangers of religiopolitical movements such as that of al-Mahdi which ousted the previous Turco-Egyptian administration in 1884. The new administration was therefore careful to maintain a balance between respect for the religious feelings of the population and the exclusion of religion from legal and political processes.

11 M. 'Abd Al-Rahim, *Imperialism and Nationalism in the Sudan* (Oxford University Press, 1969), pp. 226–227.

12 The traditional political parties, such as the *Umma* (Mahdists) and Democratic Unionists, etc., were revived after the overthrow of President Nimeiri who had banned them for 16 years, since the *coup* of 1969.

13 Southern Sudan is predominantly non-Muslim in contrast to the predominantly Muslim northern part of the country.

14 The least controversial bill, the one providing for the regulation of the voluntary collection and distribution of *zakah*, Muslim religious alms, as a charity and not obligatory tax, was selected for enactment during that period.

15 President Nimeiri's regime was always under attack by Muslim fundamentalists who demanded the immediate and total implementation of Shari'a in the Sudan. The regime tried to accommodate and contain the fundamentalists under the 'National Reconciliation' policy adopted in 1977. As the pressure continued, President Nimeiri seemed to have decided to implement *Shari'a* on apparently his own initiative, thereby taking political credit for the move.

16 Although Article 106 of the 1973 Constitution clearly provided for legislation by Provisional Republican Orders as exceptional procedure to be used 'at any time when the People's Assembly is not in session or in cases of importance and urgency . . . ', President Nimeiri used this method to pass all the so-called Islamic Laws of 1983–84, even when the Assembly was in session and quite available. Extensive and highly technical legislation, such as the *Zakah* and Taxation Act and the Civil Transactions Act, were all enacted by Provisional Orders and subsequently confirmed by the Assembly with very little debate. The apparent effect of enactment as a Provisional Order is to make it extremely difficult for the Assembly to reject the bill as that would amount to direct confrontation with the President of the Republic. It must be noted in this connection that Article 108 of the same Constitution authorized the President to dissolve the Assembly if he 'considers that the public interest and the circumstances necessitate new elections . . . ' The President did in fact utilize this power more than once. The only People's Assembly that refused to confirm the President's Provisional Orders was dissolved soon after it took that decision in 1979.

17 It seems that the Assembly felt that the amendments were too drastic, transforming the nature of the Regime itself, and maybe costing the Members of the Assembly their political base. Many Members knew that they would not be re-elected if Sudan was transformed into an 'Islamic Republic.' Another factor that may have contributed to the defeat of the constitutional amendments was the position taken by the Members from Southern Sudan. These non-Muslim Members of the People's Assembly walked out in protest when the Provisional Orders enacting the so-called 'Islamic' Laws were being confirmed by the Assembly in November 1983. They changed their tactics in confronting the proposed amendments of the Constitution by staying and forcefully arguing against their adoption.

18 Three constitutional suits brought by several Republicans, followers of *Ustadh* Mahmoud, were all dismissed by the Supreme Court on the ground that the applicants had no 'standing' to bring the suits, i.e. they were not personally aggrieved by the legislation which they challenged as unconstitutional. The Court neither defined 'standing' nor attempted to show how the principle applied to the plaintiffs.

19 In accordance with the policy of total Islamization, the Government adopted the Islamic *Hijri* calendar to replace the Western Gregorian calendar previously used. The second Judiciary Act was therefore called the Judiciary Act 1405 Hjri, i.e. 1984.

20 Section 16(1) of the Judiciary Act 1984 authorized the President of the Republic to establish 'special' criminal courts for the national capital, while Section 16(2) authorized the Chief Justice to do the same in the provinces. Section 17 to 19 specified the 'special' procedural rules applicable to the 'special' criminal courts. Section 29(b), as explained in the following footnote, provided for the President of the Republic's power to appoint *any* person to *any* judicial position, regardless of qualifications and other requirements.

21 According to Section 29(b) of the Judiciary Act of 1984, the President of the Republic may, on the recommendation of the High Judiciary Council, appoint *any* person to *any* judicial position irrespective of the conditions set out in Sections 23 to 26 for appointment to various ranks of judicial office. The requirement of recommendation by the High Judiciary Council provided no real safeguard because the President of the Republic was not only the President of the High Judiciary Council, but he also appointed and dismissed the other members of the Council at will.

22 These two articles were amended in 1975 in order to confer on Presidential Orders and Decrees such immunity.

23 This case involved the trial of an Indian merchant named Lalitt, who was resident and doing business in the Sudan, for certain business practices, some of which were not penalized by Sudanese law in force at the time. The constitutional challenge raised by defense counsel was dismissed by a Panel of the Supreme Court of which the trial judge, al-Makashfi Taha al-Kabashi, was a member.

24 In the 1940s, some of the Sudanese nationalists were working for the evacuation of British forces and administrators so that the Sudan may unite with Egypt. Others were seeking independence with very close ties with Britain. The Republican Party was formed to oppose both strategies and demand immediate total independence.

25 *Ustadh* Mahmoud insisted that his ideas were based on deep religious insights acquired during his profound spiritual experience, and not as a result of purely rational intellectual endeavor. This is important for the religious authenticity of his views in accordance with the mystic approach he had subscribed to throughout his adult life.

26 See, for example, the Qur'an chapter 16, verse 125; chapter 18, verse 29; chapter 49, verse 13 and chapter 2, verse 228.

27 See, for example, the Qur'an chapter 9, verses 5 and 29; and chapter 4, verse 34.

28 Although he supported socialist economic development, *Ustadh* Mahmoud was strongly anti-Marxist. He objected to Marxism's atheism, and accused it of failing to achieve socialism.

29 The Muslim Brothers' fundamentalist movement originated in Egypt around 1928. It spread into Sudan in the late 1940s and early 1950s when it was being persecuted in Egypt. Although there are other fundamentalist groups in Sudan, the Muslims Brothers are by far the strongest and best organized group. On the Muslim Brothers generally see, for example, R. Mitchell, *The Society of the Muslim Brothers* (Oxford University Press, 1969).

30 Five Republicans, including four women, were released after nine months. A group of Republican students were also arrested and released after six months of detention. Detention orders were issued and periodically renewed under Section 22 of the State Security Act 1973 (as amended in 1975). Section 22 authorized detention without trial only for one who 'is about to commit or is likely to commit any of the offenses under this (State Security) Act', i.e. specified offenses against the state. The Republicans were neither 'about to commit' nor 'likely to commit' such offenses as they were actively supporting the Regime at the time. In the pamphlet which constituted the immediate cause of their detention, the Republicans declared their support for the Regime and argued that their criticism of the First Vice-President's failure to curb fundamentalism and religious fanaticism was intended to prevent a take-over of power by those forces. The Republicans were denied access to the courts to pursue their complaints of illegal arrest by being physically prevented from appearing before the court as required by Sudanese Code of Criminal Procedure, Section 156.

31 The pamphlet argued that the laws violated the general precepts of Islam as a religion as well as violating the specific provisions of *Shari'a* as a law. To illustrate the second point, they cited the omission of the requirement that theft must be from a securely enclosed place in order to warrant the penalty of amputation. The omission of this requirement under Section 320 of the 'Islamic' Penal Code greatly increased the incidence of amputation by allowing it to be enforced to a much wider class of offenses than originally intended by *Shari'a*.

32 Civil war had resumed in 1982 in Southern Sudan, following President Nimeiri's violation of the Addis Ababa Agreement of 1972, which ended the first civil war. By first redividing the Southern Region and then subsequently unilaterally imposing Islamic *Shari'a* law, President Nimeiri acted against the letter as well as the spirit of that Agreement.

33 *Ustadh* Mahmoud was arrested and tried in Omdurman, across the White Nile from Khartoum. Other Republicans were arrested and charged with the same combination of offenses in other parts of the Capital, Khartoum, and in other towns of northern, eastern and central Sudan. All charges against the other Republicans were subsequently dropped following the execution of *Ustadh* Mahmoud. Over three hundred Republicans who were detained without charge around the same time were also released over the two weeks following the execution.

34 Each of the accused made a short statement explaining his reasons for refusing to 'co-operate' with the Court, and then remained silent for the duration of the trial, refusing to answer questions or present any defense.

35 *Ustadh* Mahmoud was critical of injustices of the capitalist liberal tradition as well as the atheism and oppression of totalitarian Marxist-Leninism. He published about 30 books and many newspaper and magazine articles. He also lectured and debated in many Sudanese towns and cities for over 20 years. His followers, the Republicans, also published hundreds of pamphlets, booklets and articles and

traveled all over the Sudan distributing their literature, holding debates and giving public lectures on their methodology for Islamic Law reform.

36 The specific sanction of the President of the Republic is required for prosecutions of certain offenses against the state under Section 147 of the Code of Criminal Procudure 1983.

36a Article to guarantee against the imposition of criminal punishment in the absense of pre-existing penal provisions in Sudanese law.

37 The jurisdiction of *Shari'a* Courts was then determined by the Sudan Mohammedan Law Courts (Amendment) Act 1961, which limited such jurisdiction to 'questions regarding marriage, divorce, guardianship of minors or family relationships provided that the marriage to which the question related was concluded in accordance to Mohammedan Law . . . ', *wakfs*, gifts and succession amongst Moslems or parties who submitted to the jurisdiction of the Court. The *Shari'a* Court had no jurisdiction over apostasy as such. See C. O. Farran, *Matrimonial Laws of the Sudan*, pp. 230–234.

38 The Code makes no exceptions of *hadd* or any other offenses. There was also no provision anywhere to the effect that *Shari'a* principles are superior to other legislation or raising a presumption of consistency with *Shari'a*.

38a Following the overthrow of former President Nimeiri in April 1985, the daughter of *Ustadh* Mahmoud and one of his co-accused instituted a constitutional suit before the Supreme Court (S.C./Const. S./2/1406, i.e. 1986) to have the judgment against *Ustadh* Mahmoud and his co-accused set aside as null and void. The petition, dated 25 February, 1986, cited a wide range of constitutional and procedural objections. On 17 April, the Attorney General, acting as counsel for the Government, directly admitted the case for the applicants and stated before the Supreme Court that he had nothing to say in defense of that trial which was totally illegal. The Supreme Court, however, asked for a more detailed itemized response to the applicants' petition. As of the date of the publication of this article, the Supreme Court has not yet ruled on the substantive issues. In view of the direct and complete admission by the Government's attorney it is difficult to see how the Supreme Court can avoid giving judgment for the applicants. Nevertheless, as this Article demonstrates, one should not readily expect rational legality to prevail in a Muslim country when principles of *Shari'a* are being challenged. Moreover, even if the Supreme Court should nullify this particular trial and exonerate *Ustadh* Mahmoud, the problems with the *Shari'a* law of apostasy discussed in this article shall remain unless and until they are treated authoritatively by the Muslims themselves acting from within the religious tradition.

39 According to some sources, the *Sunna* adds, ' . . . foresakes (or abandons) his religion and separate himself from the community'. This element of rejection of the community is seized upon by those who argue that mere passive apostasy, without threatening the Islamic state, is not punishable by death. The first *Sunna*, and the numerous sources that report this second *Sunna* without the additional factor seem to reduce the credibility of this restrictive interpretation.

40 Ibn Rushd Al Qartabi, *2 Badyet-Al-Mujtahid*, 383. See Peters and Devries, 'Apostasy in Islam', *XVII Die Welt des Islams*, 1 at 5 *et seq.* (1976–77).

41 This incident is usually cited by treatises on the meaning of the Qur'an as an illustration of the capital offense provided for under chapter 5, verse 33 (i.e. *fasad fi al-ard*).

42 Procedural requirements for a fair trail of the issue can easily be added in the modern context although they may not have been a part of the traditional literature on the subject.

43 Peters and Devries, *supra* note 40, at 7–9, and sources they cited in their footnote 15 on page 7.

44 Id. at 2–4.

45 See Nu'man 'Abd Al-Razid Al-Samarr'i, *Ahkam Al-Murtad Fi Al-Shari'a Al-Islamyya*, 116 (1968).

46 Peters and Devries, *supra* note 40, report at page 11 an authoritative legal opinion (*fatwa*) by a committee of al-Azhar (Islamic University in Cairo, Egypt) to the effect that a marriage concluded with a known communist man from a Muslim family would be null and void, as he must be considered an apostate.

47 Id. at 10–11, and authoritative legal opinions from various Muslim countries cited there.

48 *Human Rights Internet Reporter*, 10, 3 & 4 (January–April 1985), quoted on page 406 a statement of the American Coptic Association, Christians of Egypt, U.S.A. (29 March, 1985) reporting the decision of an Egyptian Administrative Court which ruled that the *Baha'i* marriage is invalid, even if both parties are *Baha'is*.

49 Qur'an chapter 5, verse 44.

50 See Mahmoud Shaltut, *Al-Fatawa, Dirasah Li-Mushkilat Al-Muslim Al-Mu'Asir Fi Hayatih Al-Yawmiyah Wa-Al-Ammah*, 37–9 (1969) 6 Mohamed 'Abduh and Mohamed Rashid Ridda, *Tafsir Al-Manar*, 405 *et seq.*

51 Peters and DeVries, *supra* note 40, at 12 quoted an example from Tunisia in the 1930s when Tunisians who adopted French Nationality, and as such became subject to French law, were regarded as apostates by other Tunisians who demanded that such apostates should not be buried in Muslim cemeteries.

52 'Abd Al-Mota'al Al-Saidi, *Al-Hurriyyah Al-Diniyyah Fi Al-Islam* (Religious Freedom in Islam) (undated) 56–64 and 74–88.

53 There are several versions of this argument. See. for example, 'Abd Al-Qadir 'Awdah, *1 At-Tashri Aj-Jina'y Al-Islami* (Islamic Criminal Legislation) 536; and Mohamed Al-Ghazali, *Hoqoq Al-Insan Bayn Ta'Alim Al-Islam Wa-I'Lan Al-Omam Al-Mottahidah* (Human Rights between Islamic Principles and the United Nations' Declaration) 102–103 (1963).

54 For examples of this reasoning, see Samuel Zwemer, *The Law Of Apostasy In Islam* (Marshall, London, 1924) 45: and Wafi, 'Human Rights in Islam', 11 *Islamic Quarterly* 64–65 (1967).

55 All Muslim countries have by now adopted the United Nation's (U.N.) Universal Declaration of Human Rights, 1948. Even Saudi Arabia which abstained when the U.N. voted on the Declaration in December 1948, has now adopted the Declaration through subsequent conduct in the U.N. In any case, religious freedom may now be regarded as part of customary international law, and as such, binding on all states regardless of treaty obligation. Several Muslim countries, moreover, are parties to the International Covenant on Civil and Political Rights of 1966, a legally binding treaty which guarantees religious freedom.

55a This Declaration was adopted by the General Assembly of the U.N. on 18 January, 1982. U.N. GAOR Supp. (No. 51), U.N. Doc. A/RES/36/55 (1982).

56 Muslim states always had difficulty with the inclusion of the right to change one's religion, even at the time when the Universal Declaration of Human Rights was adopted in 1948. See Nehemiah Robinson, *The Universal Declaration of Human*

Rights (Institute of Jewish Affairs, New York, 1958), 128–129. The fact that they have always had to concede and support the international instruments on this point demonstrates the untenability of the Islamic traditional law of apostasy.

57 5 Mohamed 'Abduh and Mohamed Rahid Ridda, *Tafsir Al-Manar*, 327; Mahmoud Shaltut, *Al-Islam 'Aqidah Wa Shari'a* 292–293; and Al-Saidi, *supra* note 52. See also Mohamed S. El-Awa, *Punishment in Islam* (American Trust Publications, Indianapolis, 1982) pp. 49 *et seq.*

58 The argument advanced by some jurists and scholars that these *Sunna* cannot abrogate Qur'anic rule against the death penalty for passive apostasy summarized by Peters and Devries, *supra* note 40 at 14–15, is based on the false assumption that there is such a Qur'anic rule against the death penalty. The verses used in this argument (i.e. Qur'an chapter 4, verses 89–90 and chapter 2, verse 256) have already been rules by Muslim jurisprudence to have been repealed or abrogated (by Qur'an chapter 9, verse 5 and 29).

59 See, for example, Qur'an Chapter 16, verse 125 and chapter 18, verse 29.

60 Qur'an, chapter 9, verse 5, was in fact made the bases of legally binding principles, thereby abrogating, from the legal point of view, all the verses of *ismah*, i.e. freedom of choice. The concept of *jihad*, holy war to propagate the faith, and the status of non-Muslims, based on the Qur'an chapter 9, verses 5 and 29, many *Sunna*, and the practice of the Prophet as well as the practice of leading companions of the Prophet, are all inconsistent with freedom of religion.

61 Muslim jurists set out the so-called *'ayat wa-'ahadith al-'ahkam*, i.e. the verses and *Sunna* of legal binding rules, in a class of their own. The rest of the Qur'an and *Sunna* and other traditions are revered, and may be even observed in practice, but only as moral and ethical standards and not as legally binding rules. In relation to religious freedom, for example, it is generally regarded as advisable to practise persuasion and peaceful means, but if they fail, then resort must be had to compulsion and *jihad*.

62 The meaning of Qur'an chapter 2, verse 106, may be translated as follows: 'Whenever We (God) abrogate any verse or postpone it, We replace it with a better verse or a similar one, do you not know that God is able to do everything?' *Ustadh* Mahmoud cites this verse in support of his argument that abrogation is merely enactment of the more appropriate verse of the Qur'an and the postponement of the inappropriate one until its time comes.

63 It is an article of faith for a Muslim to affirm that the whole of the Qur'an is the literal and final revelation of God. Debate as to the meaning of the Qur'an and the legal implications of its verses is legitimate *ijtihad*, i.e. exercise of rational legalistic reasoning, open to all Moslems. Some Muslim jurists argue that only a few highly qualified individuals may practise *ijtihad*. This may be true, but who is qualified to certify others as competent *mujtahds*, i.e. competent to practise this function? The competence to practise *ijtihad* is clearly related to the quality of the end result, both of which, it is submitted, will have to be judged by Moslems at large and should not be allowed to be monopolized by any institution or group of people.

64 For a brief discussion of these wider implications of the work of *Ustadh* Mahmoud, see El Naiem, 'A Modern Approach to Human Rights in Islam: Foundations and Implications for Africa', in *Human Rights And Development in Africa*, 75 (C. Welch and R. Meltzer, eds, 1984).

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