Toleration and exclusion: al-Shāfi‘ī and al-Ghazālī on the treatment of apostates

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An early theological dispute in Islam was the question of whether the grave sinner is an unbeliever and can therefore be killed. The question was related to the murder of the third caliph ʿUthmān ibn ʿAffān in 35/656. In the spring of that year, malcontents from Egypt, Basra and Kufa proceeded to the capital Medina to complain about various matters.1 Those who had a hand in the caliph’s killing during this revolt were sometimes later identified with the earliest Kharüjītes.2 Indeed, some Kharüjīte groups developed a theology that could perfectly justify the killing of ʿUthmān. All Kharüjītes shared the opinion that committing a grave sin leads to unbelief. The more radical groups held that if a believer becomes an unbeliever by committing a grave sin, he turns away from Islam and may be killed as an unbeliever.3 Of course, the less radical groups amongst the Kharüjītes did not accept this chain of argument and they rejected the murder of an unbeliever.4 But the moderates agreed that the status of a believer, which in those early days meant the membership of the community of Islam, was lost if a sin was committed or a key tenet on which the community agreed was denied. Membership of the community, according to Josef van Ess, is the oldest expression of Islamic soteriology.5

There has been strong opposition to the Kharüjītes from the very beginning. In legal and theological thought their antagonists first answered with the dogma of irjīḍ, the suspension of judgement on the grave sinner. When the first Muʿtazilites appeared we find a synthesis of these two theological positions, a dialectical progression. The Muʿtazīlī theory of al-manzilatayn l-manzilatayn rendered both previous positions, i.e. the Kharüjīte and the Murjiʿite, obsolete and simultaneously preserved them; they became ‘sublated’ (aufgehoben) as Hegel would have put it in his theory of dialectics. In religious and legal practice, however, the intermediate position proved to be nothing other than the irjīḍ, the suspension of judgement on the unbelief of a Muslim. The Kharüjī threat of a deadly persecution6 amongst the members of the community was thus permanently lifted.

Things are more complicated when it comes to the denial of a key tenet on which the community agrees. In recent years, accusations of blasphemy

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3 In effect the unbeliever (kāfīr) is in this case an apostate. The connection between unbelief and apostasy is nowhere mentioned. This, however, must have been the legal connection, if one is sought. On this position cf. al-Asīʿarī, Maqālāt al-Islāmīyya wa-khtilaṭ al-musalli; Die dogmatischen Lehren der Anhänger des Islam (ed. H. Ritter) (Beirut and Wiesbaden: Steiner Verlag, third edition, 1980) (Bibliotheca Islamica, 1), 86ff. On whether this was really the position of the radical Kharüjīte groups cf. Josef van Ess, Theologie und Gesellschaft im 2. und 3. Jahrhundert Hidschra. Eine Geschichte des religiösen Denkens im frühen Islam, 6 vols. (Berlin and New York: Walter de Gruyter, 1991–97), vol. 2, 613ff.

4 Cf. al-Asīʿarī, Maqālāt, i. 104ff. and van Ess, Theologie und Gesellschaft, vol. 2, 224ff.

5 van Ess, Theologie und Gesellschaft, vol. 1, 8.


(sabah) and apostasy (irridād) against members of the Muslim community have become more widespread. These allegations have become an effective political and legal weapon in the hands of some radical Muslim groups and individuals. Consequently, the application of these two legal institutions in Islamic law has changed considerably over the past dozen or so years. There have been several cases in Muslim countries where judgements of apostasy from Islam have been passed on writers and artists and the alleged perpetrator persecuted by state authorities or by self-appointed guardians of the Muslim faith. The most public cases of such accusations of apostasy in the 1990s were those of Faraj Fawdā and Nasr Hāmid Abū Zayd in Egypt, Asim Nesen in Turkey and Taslima Nasrin in Bangladesh. The renewed use of the judgement against apostates was clearly prompted, or at least encouraged, by al-Khomayni’s fatwā against Salman Rushdie in 1989.7 The Anglo-Indian writer, however, was not only accused of apostasy, but of the more serious offence of blasphemy (sabah).8

Whilst the renewed use of the charge of apostasy has been examined in a number of recent articles,9 there is little literature on the emergence and application of this legal institution in the early periods of Muslim history. The early literature on the development and application of the charge of apostasy is dominated by Ignaz Goldziher’s Vorlesungen über den Islam. Goldziher examined the culture of takfir (i.e. the accusation that someone is an unbeliever, kāfir) within the Ash’arite school of theology and he tried to determine the meaning and legal consequences of this accusation. He held that a Muslim unbeliever is ‘considered to be excommunicated’. If his unbelief (kāfir) is sufficiently established and he is caught, he should be asked to repent and be given the chance to return to the community of Islam. If he does not do so, he is put to death.10 For Goldziher there seemed to be little historical development within this verdict. Furthermore, he did not distinguish between the status of an unbelieving Muslim and that of a Muslim apostate, and thus he neglected the dynamics of this legal institution.

According to an established view, which is shared by European scholars and Muslim legal authorities alike,11 the law of apostasy has its origins in the

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7 In an almost identical judgement of 1983, the Mufti of Jerusalem Sa’d al-Din al-‘Alami delivered a verdict on the apostasy of the Syrian president Hafiz al-Asad, and just like al-Khomayni six years later, called on all Muslims to carry out the death penalty. (Reinhard Schulze, Geschichte der arabischen Welt im 20. Jahrhundert. (Munich: C. H. Beck, 1994), 328; al-Sharq al-‘Awdat, 27 June 1983, 1.)


first century of Muslim history. No judgement on apostates is mentioned in the Quran, but the legal basis for the death penalty is expounded in two prominent ahadith. The Muslim sources hand down the allegedly Prophets decision that (1) anybody who changes his or her religion shall be killed, and that (2) apostasy is one of the three offences deserving capital punishment. Two of these two most important sources for the judgement on apostates are supported by a small number of ahadith which confirm that following the death of Muhammad, the companions of the Prophet did apply the death penalty to those who broke away from Islam.

Subsequent contributions that followed in Goldziher’s footsteps represented the Muslim legal literature on the judgement of apostates in a way that did little to uncover a historical development in this element of Muslim jurisprudence. Although it is widely acknowledged that there was never a unanimous
consensus amongst Muslims on the criteria necessary to constitute apostasy, the procedure for dealing with apostates, once an agreement on the apostasy of a Muslim has been reached, seemed to be the same through all periods of Islamic history.

But authors such as Goldziher faced a problem when they tried to reconcile the observation that only a very small number of executions took place with the legal principle of capital punishment in all cases of apostasy. Goldziher therefore assumed that the death penalty was only theoretical and seldom enforced, while all other sanctions against apostates, such as the confiscation of their belongings, were real. However, a closer examination of the relevant literature on the subject shows that there were very significant differences in the application of the judgement on apostates during the first five centuries of Muslim history. A comparison between al-Shāī‘ī’s position and that of al-Ghazâlî illustrates that the judgement on apostates could in one case, as analysed by Goldziher, be used to persecute heterodoxy, while in another period this would have been impossible.

(1) al-Shāī‘ī (d. 204/820)

The most important element in the development of the law of apostasy is the istītāba, i.e. the invitation to repent and to return into the community of Muslims. The istītāba constitutes a right of the accused apostate, since he is given the chance to be reinstated to his previous status as a Muslim as if nothing had happened and with no punishment whatsoever. The istītāba, however, did not enjoy general acknowledgement amongst Muslim jurists. In the early period of Muslim jurisprudence its legitimacy was to some degree problematic. Since no judgement on apostates is mentioned in the Quran, the istītāba does not figure there. Within the hadīth corpus it can only be found in a small number of ahādīth which claim to witness the application of the judgement on apostates by the companions of the Prophet. It is not mentioned in any of the Prophetical ahādīth.

Nonetheless, the istītāba was generally accepted amongst the early Muslim jurists of Kufa by the time there was a critical approach to the sources of law


at the end of the second/eighth century. But in the process of this increasing hadith criticism, the most important support claimed for the istitāba, a comment by ‘Umar ibn al-Khattāb on the legal practice of two companions of the Prophet, was eliminated. Although the legal institution of the istitāba was at least theoretically weakened by the elimination of its most important pillar, it still had the approval of the doctors of law in Kufa and to some extent in Medina as well.

The early authors of fiqh in the second/eighth century, from both Medina and Kufa, devoted a significant portion of their comments on the law of apostasy to the question of whether apostates who conceal their breaking-away from Islam should be given the right to repent, or whether they forfeit this right by their clandestine action. All early jurists acknowledged that an apostate who refused to repent and return to Islam should be put to death. The debate centred on the legal rights of secret apostates. The early authors from Kufa as well as those from Medina used the word zindiq to describe a secret apostate. The meaning of this word changed considerably in later centuries, but in the early legal texts—at least up until al-Shāfi‘ī—zindiq is used in the sense of a suspected apostate who conceals his (supposed) apostasy behind a public profession of Islam.

The discussion amongst the early Muslim jurists of the second/eighth century on the legal rights of a zindiq can be followed in al-Shāfi‘ī’s Kitāb al-Umm, where he reports that among the jurists and scholars of his era the universal application of the istitāba was disputed. According to al-Shāfi‘ī, there were three positions among the Muslim jurists. The first group of scholars held that an apostate who was born a Muslim should be treated differently from a convert to Islam who later returned to his religion of birth. Only the latter should be given the right to repent, because a born Muslim—thus the line of argument within this group—who knows from the early days of his

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15 Two companions of Muhammad, Abū Mūsā ‘Abdollāh ibn Qays al-As‘āri (d. after 41/661) and Mu‘ādh ibn Jabal (d. 18/639) were sent to different regions of the Yemen in 10/631. They are said to have met one day, and Abū Mūsā presented Mu‘ādh with an apostate. The latter—according to one version of the story—insisted on the immediate execution (al-Bukhārī, Le recueil, vol. 3, 156, maghāzī 60) while according to another version both companions granted the right of istitāba and asked the accused three times to repent (Abū Dāwūd, al-Sunan, vol. 4, 526, hadīd 1). Mālik ibn Anas mentions a comment by ‘Umar ibn al-Khaṭṭāb on the former version of events: ‘Did you not jail him for three days and give him daily only a loaf of bread and call on him to repent? He would probably have repented and have returned to God’s command. O my God, I was not present, I did not order this and I am not pleased, since it was reported to me!’ (Mālik ibn Anas, al-Muwatta‘, 459, aṣdiya 18). ‘Umar in this hadith is presented as the responsible caliph, but since he came to power only after Mu‘ādh left the Yemen soon after 10/632 this hadith was probably rejected for chronological reasons by the increasingly critical hadith science. Abū Yūsuf does not quote it in a list of statements by companions of the Prophet on the necessity of the istitāba (Abū Yūsuf Ya‘qūb al-Anṣārī, Kitāb al-Khārajī, 1352 (1933–34), 180). Later Ibn Sa‘d (d. 230/845) in his Kitāb al-Fihrist attributes a similar comment to the Umayyad caliph ‘Umar II (Ibn Sa‘d, Biographien Muhammeds, seiner Gefährten und der späteren Träger des Islam, ed. E. Sachau et al., 9 vols. (Leiden: E. J. Brill, 1904–21), vol. 5, 258f.) and as a tradition on the companions of Muhammad it no longer appears.


youth that apostasy entails capital punishment should not be given the right
to return to Islam unharmed. These scholars regarded the breakaway of a
Muslim who was born as such as the most severe case of apostasy.

A second group of scholars had different priorities. This group held that
an apostate who conceals his true religion is the most reprehensible of all.
Mālik ibn Anas (d. 179/796) was the most prominent advocate of this direction
of thought. He judged that *zandāqa* should not be asked to repent and should
not be given the right to return to their former status because they lacked
credibility in their public statements. The Mālik ibn Anas' position was suppos-
edly aimed at Arab Bedouins who still held to the polytheistic faith of their
ancestors. Al-Shāfi‘ī reports this viewpoint, which in his generation had its
followers amongst some scholars of Medina:

> Another scholar amongst them says: 'I call upon him who returns to a
religion to which he confesses publicly, like Judaism or Christianity to
repent. If he repents, I receive him (unharmed), if he does not repent, I kill
him. If he returns to a religion which is kept secret, like *zandaqa*, and (the
truth) comes out I kill him. And when he professes his return (to Islam)
publicly I do not accept it. And I judge all people equal, be they born
Muslims or not'.

The position of some scholars in the Hijāz ignored a serious legal problem,
which grew with the large number of conversions to Islam in Syria, Iraq and
Iran. The dating of conversion to Islam still poses a number of problems,
but it may be assumed that the mass conversions amongst the populace of
Iraq began roughly twenty years before al-Shāfi‘ī wrote this text soon after the
middle of the second/eighth century. Unlike the conversions of earlier periods,
the change of religion was no longer a choice made by individuals, since by
now entire village communities had to convert to Islam in order to change
their taxation status. It may be assumed that this process frequently led to
conflict since new Muslims were torn between allegiance to their traditional
religion and professing publicly to Islam. This conflict could not really be
reconciled and we must assume that many newly converted Muslims continued
to practise their pre-Islamic religions, albeit secretly. In fact, there is evidence
from this period which indicates that while professing Islam in public, people
continued to practise their pre-Islamic religions in secret. If all these cases of
secret apostasy were judged according to the quoted legal viewpoint, this would
have led to a wave of executions among the newly converted peasants.
Al-Shāfi‘ī rejected this position. In his opinion—which is the third in his list—
every apostate should be given the option of returning to the community of
Islam without harm:

> We agree with a number of scholars from Medina, from Mecca, from the
Eastern Countries and from other regions that nobody should be killed
who professes publicly his return (to Islam). (And we agree) that those
Muslims who were born as such should be treated equal with those who
were not born as Muslims and (those who) have a religion which they do

19 al-Shāfi‘ī, *Kiub al-Umun*, vol. 6, 156.
21 Richard W. Bulliet, *Conversion to Islam in the medieval period: an essay in quantitative
22 For the case of Zoroastrianism cf. Jamsheed Kairshasp Choksy, *Conflict and cooperation.
Zoroastrian subalterns and Muslim elites in medieval Iranian society*. (New York: Columbia
profess publicly or who have a religion which they keep secret. This is all (the same) unbelief.\footnote{23} According to al-Shāfī‘ī the only criterion for distinguishing between a Muslim and an apostate is the public profession of Islam by pronouncing the most basic Islamic creed. Whoever pronounces the shahāda and thereby confesses his belief in one single God and in Muhammad as His messenger was regarded by al-Shāfī‘ī as a Muslim. For al-Shāfī‘ī it mattered neither how often he broke away from Islam before he pronounced this sentence nor how often he had saved his own life by lip service:

The public proclamation of one’s faith (izhār al-imān) protects one’s life indiscriminately in both of the following cases: that someone (1) professes his faith publicly, who is (in fact) still an idolater, and (2) that someone professes publicly, then commits idolatry after he has professed publicly (his Islamic faith) and then again professes publicly his faith.

Whichever sort of unbelief it is, secret unbelief, or unbelief which is publicly professed (there is no difference).\footnote{24}

In this decision al-Shāfī‘ī follows in the footsteps of the legal scholars from Kufa. His justification for the universal application of the istitāba to all cases of apostasy is, however, considerably different from the one given by his predecessors. Most of the jurists in the two generations before al-Shāfī‘ī referred in their justification of the istitāba to ahādīth which describe the legal practice of the companions.\footnote{25} In contrast to the legal traditions of Medina and Kufa, al-Shāfī‘ī regarded the ahādīth about the actions of companions as only a very minor source of law\footnote{26} and he did not accept them as sufficient justification of the legal institution of the istitāba. Some earlier jurists did refer to the practice of the Prophet. Abū Yusuf Ya‘qūb (d. 182/798), for instance, justified the general application of the istitāba by referring to a number of ahādīth in which the Prophet himself urged his followers not to kill anybody who professed the shahāda.\footnote{27} But even this did not seem sufficient for al-Shāfī‘ī and he recognized that there is still the prominent and well-recorded hadīth in which the Muslim community is ordered to kill all apostates—without reference to any obstacles or hindrances. Within the collected corpus of the hadīth there are two contradictory strains which cannot be reconciled according to the pattern of a general rule and a special exception. Al-Shāfī‘ī recognized that the institution of the istitāba cannot be unambiguously deduced from the reported sayings of the Prophet.

Consequently, al-Shāfī‘ī does not refer to any hadīth for his justification of the legal institution of the istitāba. Instead he draws entirely upon verses from the Quran. But since the judgement regarding apostates is itself not mentioned anywhere in the Quran, the problem arises of legitimizing the istitāba from quotations in which it is not mentioned. Al-Shāfī‘ī can only draw upon the

\footnote{23} al-Sha‘ī‘ī, Kitāb al-Unn, vol. 6, 156.
\footnote{24} Ibid., vol. 6, 145f.
\footnote{25} As mentioned, the istitāba itself does not appear in a hadīth of the sayings and actions of the Prophet, but only in those of his companions. Mālik ibn Anas derived the istitāba from the later rejected hadīth in which ‘Umar responds and protests against the immediate killing of an apostate by the companions Abū Mūsā and Mu‘ādh ibn Jabal. Other early authors referred to one of the two versions of the hadīth of Abū Mūsā and Mu‘ādh ibn Jabal, in which the two give the apostate a sufficient chance to repent.
\footnote{27} Abū Yusuf, Kitāb al-Kharaj, 180. In addition to this he quotes a number of traditions in which companions accept the necessity of the istitāba. He even provides a hadīth in which the Prophet legislates the istitāba. None of these reports is supported by a credible isnād and the Prophethetical hadīth is criticized by al-Sha‘ī‘ī in his Kitāb al-Unn, vol. 6, 160.
spirit of the Quran and he does so when he stresses that the Quran requires Muslims to fight their enemies, ‘until only God is worshipped’ or ‘until the unbelievers are converted, perform the salāt and pay the zakāt.’ Of course, these words in the Quran do not occur in the context of the law on apostates. They were intended to restrict the zeal of Muslim fighters who conquered a group of unbelievers who had never been Muslims. Of these people, all those who proclaimed their conversion publicly should remain unharmed. According to al-Shāfi’ī’s reading of the Quran, this was even the case if the newly converted people remained secret unbelievers. Such secret unbelief would indeed constitute a case of secret apostasy from Islam and al-Shāfi’ī therefore feels entitled to apply these passages from the Quran as guidance for the judgement of apostates. Within the Quran it is promised that these groups of people will suffer a ‘severe punishment’ in the next world, but in this world they stay unharmed. Consequently, al-Shāfi’ī argues that the Quran does not pass any judgement on apostates without giving them the chance to return to Islam.

On this point al-Shāfi’ī’s reasoning is somewhat unconvincing. How can the istīlāba be justified as a necessary institution for the Muslim community if the Quran does not pass any judgement on apostates that is to be executed by the Muslim community? Al-Shāfi’ī incorporates the absence of a quranic command to punish apostates into the decree—as it is expressed in the sayings of the Prophet—to penalize apostates with capital punishment. This method contradicts al-Shāfi’ī’s own principle that a legal judgement should be derived from one source of law only.

Al-Shāfi’ī’s justification of the application of istīlāba in the case of secret apostates is to some extent more convincing. In this case al-Shāfi’ī refers to the Quran as a source of law. He evokes the memory of the struggle between the Muslims and the ‘hypocrites’ (al-munāfiqūn) within the earliest Muslim community. In the first verse in Sura 63, the munāfiqūn, the hypocrites (among the inhabitants of Medina) are described as people who professed to accepting the Prophet in public, whilst really they were liars. The source of the knowledge of the munāfiqūn’s true belief is God himself. Al-Shāfi’ī notes that the pronouncement of punishment for the hypocrites refers only to the next life. In this life there is no punishment for the munāfiqūn. The hypocrites hid behind their oaths to elude any punishment in this world and the Prophet accepted this. Al-Shāfi’ī then argues that the munāfiqūn in the Quran give the example for the judgement on the zanāda as in his era:

God reports (...) on the munāfiqūn that they were believers and fell into unbelief after they had been believers. If they were questioned, they denied this and professed to be believers. They professed their belief and announced publicly their return (to Islam). Concerning the things that can only be dealt with between them and God, they stayed in unbelief. (...) God says (in the Quran), they are ‘on the deepest ground of hellfire, you do not find any helpers for them’.33 (...)

28 al-Shāfi’ī, Kitāb al- Năm, vol. 6, 145. Al-Shāfi’ī refers to the verses 2.193 and 9.5 in the Quran.
29 Al-Shāfi’ī refers to verses 2.217 and 39.65.
31 Quran, 63.1: ‘God witnesses that the hypocrites lie’.
32 Quran, 58.16.
33 Quran, 4.145.
According to al-Shāfi‘ī, this assessment is an evaluation of the Prophet’s motives behind his decision on the munāfiqūn. The Quran stresses in several passages that nobody can judge the true belief (‘the heart’) of a fellow-Muslim. Al-Shāfi‘ī follows this argument as it is expressed in the Quran and hints at the fact that this line of thinking is also contained in a Prophetical hadith. Here the Prophet is believed to have said that according to the divine law the life of everybody is safe who professes his membership of Islam, even if only to be spared from capital punishment.35 ‘Islam’ is understood by al-Shāfi‘ī as a place of refuge that protects one from the accusation of being an apostate. Al-Shāfi‘ī points out that God himself is the guardian and trustee (walī) of this asylum and he will judge in a later trial what remains secret in this life. God is the only one who can know and judge the true beliefs of those who use this place of refuge.

However, the text of the Quran sets the munāfiqūn in a somewhat vague locus poenitentiae. Although the Quran does not impose capital punishment on the munāfiqūn and on apostates alike, there are a number of social sanctions which obstruct the life of the munāfiqūn amongst the earliest Muslims. In his equation of the quranic munāfiqūn with the zandaqa of the second/eighth centuries, al-Shāfi‘ī transfers these vague quranic sanctions to those who keep their apostasy secret. While his public profession to Islam secures the life of the assumed apostate, and while his blood in this case is protected, this is not the case for the freedom and the unharmed body of the zindiq. Al-Shāfi‘ī writes:

If one meets somebody who is still an idolater but has publicly professed Islam—whichever is the case—this does not hinder using force against him. One may oppress him, take his freedom away from him, imprison him and do similar things that do not shed his blood. His blood is granted by (the profession of) his faith. (...) We may not kill him (only) on the suspicion that he does not believe.37

Clandestine apostasy is not completely tolerated by al-Shāfi‘ī, but it is treated entirely differently from the case of a public break from Islam. If someone declares his deflection from ‘those whose blood is protected’, and returns to ‘those whose blood is allowed to be shed’, he should be harshly punished and treated far more rigorously than a secret idolator. He is like an enemy upon whom war must be waged. According to al-Shāfi‘ī such an apostate once knew the way to salvation but chose the path to doom.38

Al-Shāfi‘ī’s understanding of the law regarding secret apostates led the way to a further division between the status of a Muslim (muslim) and that of a believer (mu‘min) in Islamic theology. This distinction originally occurs in some late verses of the Quran.39 Al-Shāfi‘ī’s view transferred those who publicly

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34 al-Shāfi‘ī, Kitāb al-Umm, vol. 6, 146.
35 Arabic: lam yaslam illa mutā'awwadhum min al-qatl bi-l-islām; ibid., vol. 6, 146.
36 ibid., vol. 6, 146.
37 ibid., vol. 6, 147.
38 ibid., vol. 6, 145.
39 Most prominently in Quran, 49.14.
profess their allegiance to Islam into a legal body and guaranteed that within this community ‘the blood is protected’. This legal body is not identical with the community of believers. However, in his wording al-Shāfi’ī tried to evoke a close correspondence between the community of believers and the community of those whose blood is protected. He uses the phrase ‘those who are unbelievers having once believed’ (man kafara ba’da ‘īmānihi) to describe the legal case of apostasy. But from his statement of the law regarding apostates, it emerges that inner belief does not feature in al-Shafi’i’s legal assessment of apostasy. The difference between the legal body of those who profess Islam and the believers becomes clear in the case of the munāfiqūn. In the late Suras, especially in Sura 63, the munāfiqūn are enemies of the community of believers. In this Sura the status of the unbelieving hypocrites changes to that of rebels, and the Muslims are urged to fight against the munāfiqūn once they take part in any act of rebellion. In the legal thinking of al-Shāfi’ī the ‘hypocrites’ remain members of the protected legal body, because they profess Islam.

If they take part in a rebellion they should be considered Muslim rebels, but they cannot be judged as unbelievers. Al-Shāfi’ī openly acknowledges that it is the outward claim of Islamic faith which guarantees membership of the community of Muslims.

Al Shāfi’ī’s understanding of the law on secret apostates may be regarded as the ultimate conclusion to emerge from a legal consideration developed under Murji’ī influence within the tradition of Kufa, which later developed into the Hanafi madhhab. The jurists of Kufa recognized the connection between the widely acknowledged institution of the istīštāba and the toleration of secret apostasy. If all apostates are guaranteed the right to repent and return to Islam without punishment, then secret apostasy cannot be an offence punishable in this world. If the repentance of an accused apostate had to be accepted under any circumstances, then lip-service was sufficient to elude conviction. However, there is a significant difference between the legal reasoning of al-Shāfi’ī and the jurists from Kufa. The jurists from Kufa justified the universal application of the istīštāba with a number of companion-ahādīth. This legal method was rejected by al-Shāfi’ī.

As there was insufficient ground for the establishment of the istīštāba in the actions of the Prophet, al-Shāfi’ī referred to the Quran and incorporated the spirit of the revelation to the judgement on apostates.

Al-Shāfi’ī effectively distinguished between an apostate in the sense of the Shari’a and a Muslim unbeliever. If a Muslim secretly held a belief that diverged from Islam or if he performed the rites of another religion in secret, this made him—according to quranic principles—an unbeliever. But this unbelief was not a legal offence that was liable to capital punishment. The unbeliever would only become an apostate if he publicly announced his break from Islam and continued to do so, even after having his life threatened. This distinction is made in al-Shafi’i’s legal reasoning, but it is not expressed in terms of a clear distinction between an ‘unbeliever’ and an ‘apostate’ in the Arabic language. In his use of legal terms, al-Shafi’i does not distinguish between a murtadā and a kāfir and argues that one cannot separate the concept of apostasy from unbelief, since the legal term ‘apostasy’ (īrīdāḍ) cannot be

40 Al-Shafi’ī uses the term ‘public proclamation of faith’ (‘izhār al-īmān), he never uses ‘public proclamation of Islam.’ The word īslām as a description for the community of Muslims does not occur in his writings. Even the term ‘if he was born in Islam’ (idha wulīda ‘ālā īslām) is taken by al-Shafi’ī only from the writing of another author, and he subsequently denies that this criterion has any significance in the case of the judgement on apostates.

41 Al-Shafi’ī, Kiāb al-Umn, vol. 6, 149. If in the case of mental illness the accused is not capable of professing the shahāda, al-Shafi’ī advises expressing the words slowly in front of the accused, so that he might be able to repeat them.
understood without referring to the theological concept of unbelief. Al-Shāfi‘ī uses the word ‘unbelief’ with a rather different meaning from that which is known from later authors or from the Quran. ‘Unbelief’ in the writing of Al-Shāfi‘ī implies the public announcement of an inward defection from the Islamic faith. In contrast, the ‘apostasy’ of a Muslim necessarily entails the outright refusal of the accused to return to Islam. According to al-Shāfi‘ī, one may not speak of an ‘apostate’ unless the accused has failed to answer positively to attempts to return him to the community. Hence, the application of the legal term ‘apostasy’ is based on three necessary conditions: first, the apostate had to have once had faith according to al-Shāfi‘ī’s definition (meaning publicly professing to Islam); secondly there had to follow unbelief (meaning the public declaration of a breaking-away from Islam); and thirdly, there had to be the omission or failure to repent after the apostate was asked to do so. These three criteria constitute apostasy and all three are necessary to pass capital punishment on a Muslim, while the first two are sufficient to classify a Muslim as an unbeliever.

These three necessary criteria gained general acceptance within the Shāfi‘ī and Hanafi schools. Within these two legal traditions this reasoning led to a far less severe application of the judgement on apostates than was the case in the Mālikite school. The viewpoint within the Shāfi‘ī and Hanafi schools meant that in the eastern part of the Muslim empire between the second/eighth and the fourth/tenth centuries, the law on apostasy could not be used to persecute heterodoxies. This situation did not change until in the middle of the fifth/eleventh century.

The necessity of the ʾistītāba was generally accepted amongst the jurists of the Hanafi, Shāfi‘ī and even the Hanbalī schools until at least the beginning of the fifth/eleventh century. Up until then, it had, in theory at least, been impossible to pass the death penalty on a supposed Muslim apostate who was not willing to die for his conviction. Some sources lead one to conclude that there were trends in third/ninth century Hanbalī legal thought which were to change this situation. But since Hanbalism was only a minor madhhab, it depended on the general opinion within the Shāfi‘ī school and it was not able to change the universal application of ʾistītāba even within its own ranks. The

42 al-Shāfi‘ī, Kitāb al-Umm, vol. 6, 145.
45 Cf. the distinction made by the Hanbali Ibn al-Baṭṭa (d. 387/997) between the criteria for belief and those for membership of the Muslim community in Henri Laoust (ed.), La profession de foi d’Ibn Battūta. Traditionally et juriscoutute musulman d’école hanbalite mort en Irak à ’Ukhara en 387/997. (Damascus: Institut Français de Damas, 1958), Arabic text p. 50; French translation p. 82.
general acceptance of this legal situation is stressed by some attempts within the Hanbali madhhab to overrule the necessary application of the istītāba by using a legal trick. The Hanbali jurist al-Dārīmī (d. 280/894) from Herat, for instance, developed a method against the traditional antagonists of the Hanbalis, the so-called Jahmites, whose teachings (in particular those on the created nature of the Quran) were considered apostasy amongst the Hanbalis. Al-Dārīmī recommended that a Jahmite accused of apostasy should be asked to repent and then let go after he professed his allegiance to Islam. If he then continued to teach his apostasy, his repentance had proved to be invalid and he may be put to the sword without a further chance to repent. Whether this understanding of the istītāba found many followers may be doubted, since al-Shāfi‘ī pointed out that the repentance should be accepted in any case, no matter how often the accused had rejected Islam and afterwards returned to it.

Three centuries after al-Shāfi‘ī, al-Ghazālī put forward an argument which led to a very different criterion for the application of the law on apostates. Within the fifth/eleventh century there was a shift towards a more severe judgement. One of the first examples of this development was the ‘Qādirī creed’ (al-‘i‘tīqād al-qādirī), a public announcement of the articles of faith published by the caliph al-Qādir in the eventful year of 409/1018. This creed is influenced by Hanbali legal thought and it contains a passage in which the position that the Quran is created is considered to be unbelief. In his pronounced al-Qādir urges everybody who holds this opinion to repent publicly and to reject this view in their teachings. Those who do not repent are subsequently declared unbelievers, ‘whose blood may be shed’.

Once again the application of the istītāba in the case of secret apostates is crucial in this development. The first two authors to argue in favour of the renunciation of istītāba in certain cases of apostasy were the Shāfi‘ī jurist al-Māwārdī (d. 450/1060) and his Hanbali contemporary Abū Ya‘lā b. al-Farrā’ (d. 458/1066), both writing in the middle of the fifth/eleventh century. It seems to be the case that the two more tolerant schools of law, the Hanafis and the Shāfi‘īs, were increasingly influenced by attempts within the Hanbali school in Baghdad to use the judgement against apostates as a means to persecute heterodoxy. A second influence must be considered from the Mālikī tradition which never accepted the necessary application of the istītāba. Both al-Māwārdī and Abū Ya‘lā were influential figures at the court and the chancellery of the caliph al-Qā‘im, al-Qādir’s successor in Baghdad and their views reflect the legal thinking at court. This change in legal reasoning was probably influenced by the successful second and third wave of the Isma‘ili da‘wā in Iraq

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46 al-Dārīmī, al-Radd ‘alā l-jahmiyya, 102f.
47 Cf. Laoust, La profession de foi, XCVI.
50 al-Māwārdī in his al-‘Abkām al-sultāniyya, p. 55 quotes the example of Mālik ibn Anas as the most prominent argument in favour of the abandonment of the istītāba as a necessary presupposition in the judgement on apostates.
and Iran.\textsuperscript{51} Al-Ghazâli’s writings go far beyond these two authors and he may be regarded as the ultimate stage in this development towards the application of the law on apostates against state enemies. Al-Ghazâli limited the obligatory application of the istitâba to the case of ‘ordinary people’ and held that it was acceptable to kill propagandists and teachers of heterodoxy without granting them the right to repent. In al-Ghazâli’s thinking, a Muslim unbeliever and a Muslim apostate became one and the same thing.

In one of his earliest works al-Ghazâli deals with the case of the secret apostate. This book, the \textit{Shifâ` al-ghalîl fi bayân al-shubab wa-l-mukhlîl} (‘The healing of passions through resolving of doubts and illusion’) was written when al-Ghazâli was still in Nishapur under the influence of his teacher al-Juwaynî (d. 478/1085).\textsuperscript{52} The book expounds strategies to solve a number of legal problems that arose in the Shâﬁ‘i fiqh of that period. One of the major problems the book examines is the intentional exploitation of procedural law in favour of the defendant. Al-Ghazâli illustrates this problem with a number of legal examples, one of which is the intentional exploitation of the istitâba in cases of apostasy. It was mentioned earlier that according to Shâﬁ‘i law, an accused apostate could not be sentenced as long as he was willing to profess the shahâda. This resulted in the sincerity of this profession being called into question. Al-Shâﬁ‘i’s argument led to the conclusion that in fiqh any sceptical doubts about the sincerity of the public profession should be dismissed. This requirement was no longer considered valid at the end of the fifth/eleventh century. Al-Shâﬁ‘i’s application of the principle of charity in the case of apostasy was for al-Ghazâli an exploitation of legal procedures. He discusses it under the heading of ‘the repentance of the secret apostate’ (tawba al-zindiq). Al-Ghazâli follows a general trend amongst his contemporaries and does not accept the universal obligation to grant the right of the istitâba:

The meaning of ‘repentance’ of an apostate is his abandoning of his inner religion. The secret apostate (zindiq) does not give up his inner confessions when he professes the words of the shahâda. He may be killed for his unbelief because we are convinced that he stays an unbeliever who sticks to his unbelief.\textsuperscript{53}

Al-Ghazâli suspects that a secret apostate (zindiq) who had lied previously about his true religion, holds that a lie in religious matters is allowed.\textsuperscript{54} He refers to the taqiyya as an element of Shi’i creeds. The taqiyya in fact made it possible for Shiites to deny their Shii allegiances in a situation of religious persecution. The early Hanafi and Shâﬁ‘i jurists took note of the taqiyya (literally: ‘caution’) without objecting to this practice.\textsuperscript{55} Al-Ghazâli differs from this opinion and he justifies his decision that a secret apostate may be

killed immediately with a reference to the lack of veracity of the public profession of a Shii. This decision opens the gate to sentencing apostates not only in the case of openly professed apostasy, but also in cases of supposed inward heterodoxies. While before the fifth/eleventh century apostasy was the outward profession of a break-away from Islam, it was now a supposedly heretical conviction or a heretical religious tenet. Unbelief, i.e. a heterodox conviction, could now be identified with apostasy and charged as such.

In several of his later writings al-Ghazâlî points out that capital punishment may be applied even in the case of a proven inward conviction which is considered unbelief.\textsuperscript{56} This opinion can be found in his early legal work:

> The death penalty in the case of unbelief (\textit{kufr}) is justifiable, because we believe in this case that he remains refractory in his unbelief.\textsuperscript{57}

This deviation from the principles of Islamic law established in the second/eighth century is even more astonishing, since al-Ghazâlî acknowledges that the Prophet and his companions did not judge this way. According to al-Ghazâlî the Prophet Muhammad understood the confession to Islam to be only outward. This becomes clear in the case of the \textit{muna}\\textit{fiqin}. Al-Ghazâlî writes that the Prophet declined to judge the \textit{muna}\\textit{fiqin} according to their inward confession and accepted them as members of the Muslim community. The same was true, al-Ghazâlî points out, in the early days of Islam. After the companions of the Prophet had conquered foreign countries, they did not judge according to the inward confession.\textsuperscript{58} The inner faith of the outwardly converted was not an issue in the early days of Islam.\textsuperscript{59} On the basis of the judgement of the Prophet and his companions, al-Ghazâlî accepts that the legal obligation to apply \textit{istiâba} can only be dismissed if it is well established that \textit{zandaqa} and apostasy are the case. If there are doubts about the unbelief of the accused, they should be given the right to repent and to return to Islam. In the case of the ‘ordinary people’ (\textit{'umum al-nâs}) such doubts are always justifiable and these people should therefore not be killed without being given the opportunity to repent.\textsuperscript{60}

This point is made clear in a later work of al-Ghazâlî, the so-called \textit{Streitschrift} against the Bâтинis, \textit{Fadâ'ı\'h al-bâtiniyya wa fadâ'ı\'l al-mustazhiriyya}. The book was written during the year 487/1095 and it is a work directed against the quite successful \textit{da'wâ} of the newly emerged Nizarî Ismaili movement. It was ordered by the caliphal court of al-Mustazhir (reigned 487–510/1095–1118).\textsuperscript{61} Here al-Ghazâlî reiterates his judgement that not only


\textsuperscript{57} al-Ghazâlî, \textit{Shî\'a al-ghâlî}, 222.

\textsuperscript{58} Cf. al-Ghazâlî, \textit{Shî\'a al-ghâlî}, 223: ‘After the flag of the Muslims had flown over a place in the countries of the unbelievers, its inhabitants converted to Islam because they stood in the shade of the swords and had been defeated by the Muslims and conquered.’ Cf. al-Ghazâlî’s commentary on the application of the \textit{hadith} according to which Muhammad was urged to fight against the unbelievers until they confessed the \textit{shahâda} in his \textit{al-Iqtisâd fi l-\textit{isti\'aqâd}}, 251.

\textsuperscript{59} Cf. al-Ghazâlî, \textit{Faysal al-ta\'fiqa}, 203.

\textsuperscript{60} al-Ghazâlî, \textit{Shî\'a al-ghâlî}, 221.

apostasy, but unbelief itself is a legal offence.\(^{62}\) The Muslim judge considering the case does not have the option of leaving a Muslim unbeliever unharmed, of making him a slave or accepting the jizya from him. A Muslim unbeliever must be considered an apostate, and the judge is obliged to purify the surface of the earth from his presence.\(^{63}\) Whether the unbelief remains secret or is made public in an open rebellion against the caliph makes no difference in the legal application of the judgement on apostates. If the unbelief of a Muslim is sufficiently established, every means to kill the unbeliever is permitted, even his assassination (ightiyāl). In the case of secret apostates there is no obligation to ask the accused to repent.\(^{64}\) However, al-Ghazālī accepts the qur'ānic principle that the heart is a place where only God can make out the true faith of a Muslim.\(^{65}\) If the accused is ‘someone from the mass of the people, who does not know things’\(^{66}\) he should be granted the right to repent. Since it is known how easily ordinary people change their minds, they should be shown the sword, and if they return to the truth, this should be accepted, and they should be trusted.\(^{67}\) But in the case of a dā'ī or anyone who spreads unbelief amongst the believers, there should be no forgiveness. According to al-Ghazālī, these people know that their teachings are not true and that their opinions are unbelief. The missionaries of the heretical movements only spread these heresies to gain political power and worldly possessions. In these cases it lies within the powers of the judge to grant the right of repentance or not.\(^{68}\)

According to al-Ghazālī, Islamic law cannot remain on the same level as it was in the times of the Prophets and his companions. It must not shy away from the threat posed to the Islamic community by the activities of secret apostates. Even in his statements in the Shifā‘ al-ghalīl, which were written before 481/1088, al-Ghazālī had the Ismaili danger in mind. In this early book, the change in Islamic law is openly justified by the interest of the state:

The consideration in all these cases should be led by an increase of the ruler’s benefit.\(^{69}\)

Al-Ghazālī recognized that the Islamic law and its judgements on apostates provide a forceful weapon against the Ismaili heterodoxy which threatened the Seljuk state. His understanding of this law must be regarded as a political interpretation of the judgement on apostates. This is true not only for the legal regulations on how to carry out the judgement (the furū′), but also for the criteria for apostasy. In both of his Streitschriften—against the peripatetic philosophy (the Tahāfut al-falāsifā) and the Ismailis (the Fadā‘īh al-bātīnīyya)—al-Ghazālī presents a catalogue of criteria for membership of the community

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63 al-Ghazālī, Fadā‘īh al-bātīnīyya, 156; cf. idem., al-Ightiād fi l-tiqād, 247f.

64 al-Ghazālī, Fadā‘īh al-bātīnīyya, 156, 160.


66 Arabic: min junūb Su‘ūdī wa-fuḥūlīhim; al-Ghazālī, Fadā‘īh al-bātīnīyya, 162.

67 ibid., 160.

68 ibid., 163. There is an interesting record of a case from this period in which a judge does not grant this right, while the accused Ismaili claims it. Cf. the trial on an apostate dā‘ī from Khuzestan in Sha‘bān 490/July 1097 led by the prominent Baghdadi Hanbali jurist Ibn ‘Aql, reported in Ibn al-Jawzī, al-Muntazam fi l-ta‘rikh al-ruṣūd wa-l-mulūk, vol. 9, p. 103.

69 al-Ghazālī, Shifā‘ al-ghalīl, 225.
of Islam. \(^{70}\) The arguments in both of these works are brought together in his *Faysal al-tafriqa* which he wrote towards the end of his life. Here he lays down that the apostasy of a Muslim depends on an epistemological argument. Deviation from any article of faith that is grounded on revelation is only allowed if one is able to advance a convincing argument that what is written in the revelation cannot be true in its wording. Using a number of sceptical objections, al-Ghazālí establishes in his *Tahāfut al-falāsifa* that there is no convincing argument that can contradict the wording of the Quran in the passages concerning three important fundamental elements of the Muslim creed (*usūl al-'aqā'id al-muhimmā*). \(^{71}\) These three elements are: belief in eschatology as it is laid down in the Quran; \(^{72}\) belief in God’s creation of the world in time; and belief in God’s omniscience. According to al-Ghazālí there cannot be a convincing argument founded on reason to contradict these articles of faith, and since there is no other way than revelation to knowledge of these three questions, every Muslim must follow the wording of it concerning these three questions. Whosoever deviates from these three dogmas of Islam is considered an unbeliever and subsequently an apostate, and may be put to death. \(^{73}\)

Two of the three fundamental articles of faith which al-Ghazālí establishes have an important political significance. Al-Ghazālí regards God’s omniscience and the resurrection of the body in the afterlife as a necessary precondition for the enforcement of religious law amongst ordinary people. If doubts about God’s knowledge of man’s actions and his ability to impose bodily pain in the afterlife spread amongst the Muslims, the religious law may be disrespected. In his *al-Iqtisād fi l-i'tiqād* al-Ghazālí makes clear the connection that he sees between these two articles of faith and the obeying of the law. Here he repeats his condemnation of the *falāsifa*’s three propositions, and he continues:

> Whoever claims this, annihilates the achievement of the religious laws, he sets limits to the possibility of receiving guidance from the light of the Quran and he hinders the forming of one’s own moral conduct according to the sayings of the Prophets. \(^{74}\)

Al-Ghazālí’s legal consideration to renounce the *istitāba* is an important prerequisite for his judgement on the apostasy of the peripatetic philosophers and the Ismailis. As long as every accused apostate was given the right to repent and return to Islam, it was not necessary to distinguish between a tolerated deviation from some minor articles of faith and apostasy. The accused could always deny what was considered apostatic deviation and pronounce what was asked from him, then return to his heterodox teaching, and then, when he was again accused, pronounce what was asked from him, and so on.

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\(^{71}\) al-Ghazālí, *Faysal al-tafriqa*, 191.

\(^{72}\) i.e. predictions of a bodily resurrection in the next life, cf. *Quran*, 6.22–4, 19.66–72, 23.99–118, etc.

\(^{73}\) al-Ghazālí, *Faysal al-tafriqa*, 197.

\(^{74}\) al-Ghazālí, *al-Iqtisād fi l-i’tiqād*, 250.