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## Public/Private and references to Islam

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► **To cite this version:**

Baudouin Dupret, Jean-Noël Ferrié. Public/Private and references to Islam. A. Salvatore and M. LeVine. Religion, Social Practice, and Contested Hegemonies: Reconstructing the Public Sphere in Muslim Majority Societies, Palgrave Macmillan, pp.135-153, 2005. halshs-00178901

**HAL Id: halshs-00178901**

**<https://shs.hal.science/halshs-00178901>**

Submitted on 12 Oct 2007

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“Public/Private and references to Islam: A Praxiological Perspective”, in A. Salvatore and M. LeVine (eds.), *Religion, Social Practice, and Contested Hegemonies: Reconstructing the Public Sphere in Muslim Majority Societies*, New York, Palgrave Macmillan, 2005.

## References to Islam and the Public/Private Distinction: A Praxiological Perspective<sup>1</sup>

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Is there any specific meaning to the notions of the “public” and “publicness” in the so-called Muslim societies? Is there anything that makes a situation characterized as public an “Islamic public”? And, prejudicially, what kind of approach can there be to the concept of public and its corollary, the public sphere? Our answer to these questions suggests a multiple shift in perspective. We claim that the distinction public/private and the very notion of a “public sphere” need fundamental reexamination. Consequently, we say that there is nothing that can be characterized as an “Islamic public sphere” outside what people actively claim to be such.

We shall first ground this praxiological critique by showing that “public” and “private” are contingent categorizations only. These are characterization procedures that are always particular, always contextualized and never open to generalizations from one interaction to another, even though people contextually and situationally give them some objective meaning. From a praxiological point of view, “public” is necessarily a redundant categorization simply because the analyst cannot take into consideration anything else but procedures and references that are shared and known as such. Second, we shall substantiate our analysis through the use of cases implicating moral characterizations during the course of daily exchanges. Indeed, morality is an activity that consists in normatively characterizing preferences in the thread of an interaction. As such, it is nothing but a public object, something that has no social reality outside its instantiation in public circumstances. Third, we shall also concentrate on cases in which the judicial institution is asked to adjudicate in issues of morality. The trial is, in this sense, a paradigmatic instance of the fixation of moral preferences. It is a mechanism that is oriented par excellence to the production of a decision. In other words, law is a non-moral mode of punctual reduction of moral indeterminacy. However, as far as the “public” is concerned, it does not correspond to some “public” intervention within a realm that is allegedly “private”, since it consists only in a formalized reference whose sharing is explicitly taken for known and known as constraining.

### **The Public, Islam, and Morality**

In the reexamination that follows, we adopt a praxiological conception of the public and the corollary notion of the public sphere, i.e. a conception that considers the public as a practical, situated, contextual, and local accomplishment. According to this conception, the “private” is a categorization that exists only in a predicative way, in the course of interactions that are sustained by shared procedures and references; therefore, necessarily and by definition, these interactions are public. In that sense, the “private” exists only publicly. Thus, the “public” and the “public sphere” cannot be placed as a counterpoint to activities that are

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<sup>1</sup> We wish to express our gratitude to Hussein Agrama who carefully read a first draft of the text and made invaluable comments and corrections. Our thanks go also to Armando Salvatore for his many useful suggestions.

confined to some kind of private realm or space, which is too often conflated with the space of the “domestic”. The ubiquity of the conflation between “the private” and “the domestic” in contemporary scholarship only highlights how it has focused on the definition of “the private” as a place (i.e., the domestic), rather than on the identification of mechanisms through which people interact and circumstantially ascribe to some types of relationships the characterization of “private.”<sup>2</sup> For example, the same person can expose his or her sexual life during a TV show, even though he or she will refuse to do it at the opportunity of an evening among friends. In a certain way, it echoes Eickelman & Salvatore (2002) for whom the public and the public sphere receive their meaning through members of society’s action. However, it diverges from this conception, for these authors seek to give the public sphere a specific *locus* which is external to the members’ explicit orientations,<sup>3</sup> whereas our conception is radically situational, contextual, and bound to people’s manifest action and understanding. It also echoes the position of Salvatore & LeVine [ch. 1, this volume] when they state that the vocabulary of social science theories can hardly capture the vocabulary used by the militants of Islamic movements, for it remains external to the specific context of the latter. However, it diverges from Salvatore & Levine’s position in the sense that it does not seek to substitute any alternative vocabulary to the defective one, but it merely keeps describing any actual situation in which people publicly characterize something as Islamic, or refrain from doing it.

With respect to the Islamic character of public situations, it fully endorses Salvatore & LeVine’s reminder of “the necessity of moving beyond a focus on ‘religion’ as a separate category, and thus on ‘Muslim’ public spheres.” [Salvatore & LeVine, this volume] However, it follows a praxiological way that concentrates on the performance of characterizing things as Islamic in the course of action. Among other things, it raises the question of how it is possible to suppose that the referring to an Islamic lexicon can determine interactions while this use is concomitant or posterior to them. For example: to answer *in sha ’a-llah* does not pre-characterize the nature of our relationship with a taxi driver as Islamic; rather, in this context, it allows him (at least at a first time) to ratify the direction that he is asked for. It is only if, later on, he ostensibly utters other formulations of the same type – *ma sha ’a-llah*, *subhan Allah*, *bismi-llah* – that we shall be able to infer that he wanted to set the seal of religion on this interaction. It clearly shows that the words that are used do not connote anything independent of the course of action. Whether a history of the use of these expressions and an etymology of the lexicon reveals its Islamic origin or not does not matter here, in the sense that most often people do not bear the entire weight of their history and tradition on their shoulders in the course of their daily, non-reflexive, and ante-predicative actions and interactions. We are not concerned with an archeology of language(s), because there is no way to show that its findings bear direct consequences on the practicalities of its actual uses.

We argue that an interactionist, contextual, contingent and minimalist conception of the public *must* be adopted if any plausible investigation of “publicness” is to be conducted. The public must be understood as a publication device, that is, either (1) “a set of practical operations that regulate, during the time of their unfolding, the problems posed by the organization of speech exchanges during conversation” [Relieu & Brock 1995: 77] or (2) the embedding and the coordination of action within an institutional frame that is explicitly recognized as such by interacting people, or (3) the nominalization [*ibid.*] that constitutes the

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<sup>2</sup> We must note here that what is “private” in some circumstances can be “public” in others, depending on the context of interaction.

<sup>3</sup> “Not limited to modern secular settings, the public sphere is the site where contests take place over the definition of the obligations, rights and especially notions of justice that members of society require for the common good to be realized.” [Salvatore & LeVine ch.1, this volume].

public as a collective entity to which people orient. These are the three possible ways to conceptualize anything like a “public” from within an ethnomethodological perspective. We must note that the third meaning does not correspond to a conceptual elaboration that the praxiological perspective builds on the notion of “public” but to an objectivezation that is produced by actors, both professionals and laypeople. From a praxiological point of view, the “public” is this and only this. This article aims at showing that all the attempts that seek to substantiate the “public” – outside (1) the collective character of a specific situation, (2) its embedding within an explicitly institutional context or (3) its being an actors oriented object – come under the theorizing endeavor proper to the social sciences professionals. In this article, we shall not try to systematically observe and describe “public” situations in these three senses. We will rather try to document this contention as against the prevalent abstract theorizations (or more precisely, the overt disposition toward abstract theorizing) concerning the “public” and the “public sphere”.

We also contend that morality is a phenomenon of order. This moral order is performed by operations of category ascription in which the idea of normality is central. Garfinkel, in his description of the case of Agnes, a transsexual, exhibits the practical conditions for displaying the category of “woman” allowing Agnes to exhibit the features making her a “natural, normal female” [Garfinkel 1984 [1967]: 185]. Hence, categories on which members of a population are distributed according to their sexual orientation are at the same time objective configurations produced by these members’ practices and schemes orienting these practices [Quéré 1994: 33]. In another study devoted to the analysis of a famous case of rape,<sup>4</sup> Matoesian shows how the mobilisation of a category (the one of “rapist” in this case) somehow naturalises the normative expectations which are linked to it (it is normal to be frightened by a rapist) and makes it possible to question the belonging to such a category (he cannot be a rapist since you weren’t frightened by the idea to meet him) [Matoesian 1997]. Normalcy here corresponds to these situations that share a family resemblance and from which one can expect the reproduction of their particular features. Thus normalcy constitutes the reference point of practical legal reasoning.

There is no way to give morality and the moral order any kind of meta-definition. Like religion, morality is what people orient to as such in a given context, i.e., what they contextually and situationally take as true and fair. It means that norms do not impose themselves because they belong to the nature of things, but on the contrary belong to normalcy because people collaboratively impose them as such. In other words, practice is making norms, not the reverse. Moral norms enjoy what one may call a status of “unquestionability” because they are supposedly known and expected by the many members of a given context, because they express what everyone supposedly knows and contain “pious allusions to presumed, deep, pre-existing moral commonalities” [Moore 1993: 1], which catapults the normative version of reality into a state of public acceptance. This is made possible through the action of institutional settings and languages such as law. Law is one major realm where the “normalisation process” takes place: this is where things of nature and the nature of things are made normal and consequently binding. There is a legal claim to morality, i.e. a tendency to make appear as a legally and institutionally sanctioned norm what was a supposedly socially sanctioned norm. Category ascription is here a circumstantial operation aiming at orienting the debate by labelling an object and thus ascribing it a cluster of rights and duties which do not belong to the category as such but to the relational configuration it sets up. For instance, characterising a female as an “Islamic woman” does not

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<sup>4</sup> I.e., the Kennedy Smith rape trial. See also Matoesian 2001.

refer her to a pre-established set of permanent rules (e.g. the eternal rules of female modesty in Islam) but puts her in a definite membership categorisation device (e.g. being an Islamic woman) implying that all her activities are evaluated according to the rights and duties (e.g. modesty) associated with this category. [cf. Dupret 2001].

### **The praxiological conception of the “public” and the “private”**

Amongst the most influential discussions of the “public sphere” are the ones found in the works of Habermas [1989a] and Koselleck [1988]. According to these two scholars, the “public sphere” corresponds to the inflating and extraverting process of private spaces into a sphere of rational discussion of collective issues. Such a discussion concerns topics of general interest, serious and non-trivial, which implicates the existence of a “list” of commonly admitted themes belonging to the “public” and others belonging to the “private.” The list is not at stake in the discussion. The main consequence of this division is that the procedures that are recognized so as to evoke “public” problems are not deemed to be the same as those aiming at dealing with “private” problems. Henceforth, we observe a triple disqualification: not all conversational interactions belong to “communicative ethics” [Habermas 1986; 1989b]; not all places of interaction belong to the limited space within which discursive rationality can unfold; not all interacting people are endowed with the hermeneutic “sagacity” and “tact” allowing to get access to the elite of communicative action. [Cayla 1996]

Our contention is not only that “Habermasian categories as ‘public sphere’ and ‘civil society’ cannot be unproblematically applied in understanding a situation such as obtains in contemporary [Muslim societies]” [Messick, in this volume]; if it is true that “versions of such categories are in global circulation” [*ibid.*], one must stress that it is only in a locally and situationally achieved manner. In other words, people orient to it and give it an objective dimension in a contingent and contextually defined way, which cannot be captured in any kind of general theory of the public sphere and communicative action. Contrary to the Habermasian attitude, from our point of view, interactions are phenomena that are always public and publicly available. In that sense, interactions are trivial and transparent, whatever the occasion that gives rise to them. [Watson 1998] “Trivial”, because the hierarchy of the themes does not govern the intrinsically normative character of interactions; action and cognition are thoroughly moral phenomena. [Heritage 1984] “Transparent”, because the “private” that is suggested in the Habermasian distinction does simply not exist, insofar as the quest for any private instance floating in a vacuum, outside the public realm, is a quest for chimera and ignores the important fact that the procedures used to describe any such private instance must be totally embedded in language. [Watson 1998: 215] And “whatever the occasion that gives rise to them,” because interactions – however futile their object may be – are necessarily moral. In fact, interactions are based on the intersubjective sharing of types and categories and proceeds in that sense from an idea of what is “normal”. The relationship between the token and the type is interpreted in terms of congruity and incongruity, that is, in an evaluative perspective. [Heritage 1984]<sup>5</sup>

Let us tell an anecdote. During engagement or wedding parties, it is common practice, in small Moroccan Middle-Atlas cities, to ask female dancers who are also prostitutes (*shikha*) to come entertaining the guests. Although such parties express respect for a moral order that is grounded on the public and stable character of exclusive sexual relationships, these female dancers are nevertheless an indispensable feature of their success. How can it be that a part of

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<sup>5</sup> Ch.4: “The morality of cognition”. It must be noted here that the terms “moral” and “normative” have in this type of perspective a very close meaning.

these women's activities, which is known to everybody, does not impugn the morality of the participants? In one instance, the housewife, the bride's mother, could only gather five *shikhât*, whereas the minimal number of dancers whose participation is necessary to form a group is six. Therefore, she asked one of her friends, some respectable woman of the neighborhood, to come and participate as the sixth member of the group. Actually, this woman used to practice the profession of *shikha* before her marriage. This anecdote gives us the opportunity to relate a series of interactions that do not particularly contrast with normal, daily life: marriage, party, organization problems, neighbourhood relationships, all constitute a set of routine events.<sup>6</sup>

To begin with, we can observe that asking this neighbor to dance meant to make "public" her sexual (through the indirect reference to her former, non-exclusive sexual relationships) and biographic (through the "public" reference to her past) intimacy. However, the fact that it could be done without prejudice for her suggests *a contrario* that the practice of prostitution proceeds from a certain kind of normality. Moreover, the mere fact that she was invited as a dancer and that by so doing she did a favor directly excluded the reference to the double profession of the *shikhât*. Everybody knew that she had been a prostitute, but they equally knew that she was no more and that she will not be anymore; it is on the basis of this shared knowledge that people could see her dancing with the other *shikhât* in a way that did not harm her respectability. In that sense, it is the interaction that makes available the conditions of its intelligibility by the participants. The interaction is therefore transparent. Concerning the evaluative perspective, it is noticeable that the presence of the neighbor among the *shikhât* is interpreted with regard to a goal that makes it impossible to make any inference from what is known of her past activities on her present actions. It would be incongruous and incorrect. The moral evaluation is done with regard to a typified activity – to do a favor to a neighbor – and it would be incongruous to evoke something that would step aside from the normal features of this typification.

Through this anecdote, it becomes clear that the notions of public and private, the concept of the public sphere, and their relationship to an Islamic predicate are inappropriate. First, the idea of an ante-predicative separation between the "public" and the "private", i.e., a separation that has not been the topic of a judgment prior to the interaction, does not fit the situation: the sexual past of the neighbor is indirectly invoked in a "public" situation without being presently used to characterize her "private" life. Second, it is obvious that the reference to Islam – which is manifested through the "public" ritual of marriage – does not determine the interaction order.

We can now follow up with an Egyptian anecdote. In the district of Heliopolis, a police operation led to the arrest of several women accused of prostitution and/or procuring. Some men were also implicated. Although interactions are phenomenologically speaking always "public" – be it in front of a "limited" public – interacting people subjectively proceed, according to the circumstances, to characterizations of the situation in which they interact in terms of "public" and "private". During the operation, the policemen noted that a non-married

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<sup>6</sup> One may wonder why there is no direct reference made here to the work of scholars who anthropologically studied *shikhât*, like Kapchan [1996]. To put it briefly, it must be emphasized that the singular phenomenon we observed largely differs from the general picture overloaded with folklorism, symbolism and interpretivism with which she provides us. One of the main tenets of the praxiological perspective we advocate consists precisely in refraining from constructing grand schemes that eventually miss the phenomenological dimension of every singular situation.

couple was staying in a closed room. Thus, this situation, subjectively private, became immediately characterized “publicly”, compelling the couple to position itself in a configuration henceforward subjectively “public”. Therefore, the characterization depends on the accidental course of the interaction, in the sense that the policemen’s intrusion is external to the story that conducted this man and this woman in this room. However, even though there is nothing in this room but a man and a woman, the policemen’s intrusion retrospectively characterizes the relation constitutive of this couple as an intimate relation “publicly” blamable. From this point of view, there is nothing private or public outside the police operation. In other words, the police operation is a categorizing action that creates the distinction between the “public” and the “private” within the course of an action oriented to a practical goal: enforcing the “public” morality of “private” life. If the definition of the “public” and the “private” follows the hazards of interaction, it necessarily means that it is action that defines them and not that action is defined by them. With regard to the Islamic dimension of the situation, we must simply stress that these categorizations are not religiously indexed. It will perhaps be objected that the public morality that must be enforced is itself “Islamic”. To this objection, we answer that if it is action that defines categories and if action is oriented to a practical goal, one cannot insert in its constituent features anything but what does explicitly manifest itself, under pain of ascribing to interacting people mental operations that cannot be documented.

### **Moralizing preferences**

Morality is a public thing. It has no existence outside its public accomplishment. Indeed, it accompanies every activity and it consists of normatively characterizing preferences in the course of interaction. In one sense, morality is a special domain in scholarly philosophical investigation. In another, more common sense, it is an evaluative modality that takes place in the daily course of action. Any interaction involves operations of categorization and hierarchization, that is, operations that evaluate and express normatively a preference. This is what John Heritage calls the “morality of cognition”. Let us take his example of a greetings exchange. Mahmûd meets Ghassân in the doorway of a research institute where both work. Mahmûd looks away and does not greet Ghassân back. Many interpretations are open to Ghassân: “Mahmûd didn’t see me”; “Mahmûd didn’t hear me, he must be preoccupied”; “Mahmûd expresses his dissatisfaction by not greeting me back”; “Mahmûd is badly educated, he doesn’t answer to these who greet him”; “Mahmûd hasn’t to greet me back since he’s the director”, etc. These concrete cases, which are of a very trivial nature, simply illustrate that there is no interaction that is not the object of an evaluation. By “evaluation”, we mean a process that starts from the categorization and comes out with the ascription of a normative value to beings, things or situations. When telling himself that Mahmûd is the director and that it is well known that directors have not to greet their subordinates back, Ghassân categorizes the person of Mahmûd (as a “director”) and his conduct (that he does not greet) in a way that allows him to consider that Mahmûd is “arrogant” more than “rude”. Although it was possible to contemplate *a priori* a scope of rules that might be applied to this interaction, it was in no way possible to say which one had to be effectively applied outside its actual performance. From Mahmûd’s point of view, it is not even sure that the absence of reciprocity in the greetings proceeds from a feeling of superiority that is inherent to his directorial function. He might have wanted to just express to Ghassân the contempt with which he takes him as a colleague. Far from having to be necessarily considered as the many particular instances of a single rule, similar actions can be performed on the basis of different particular rules which are defined in a contingent and contextual way in the course of one same interaction. In other words, the rule is not teleological: it does not consider *ex ante* the

whole set of its instances; and the interaction is not retrospective: it does not look *ex post* to the rule it was deemed to follow.

Action cannot be referred to any moral theory that grounds and organizes the entirety of its possible forms on the basis of abstract rules. That is, there are no abstract rules sufficient to all possible instances of an action that would impose upon such an action a necessary coherence. This is why Mahmûd's conduct cannot be morally characterized as long as it is not documented in itself and in its own right. However, it can be said that an interaction can be referred to an open series of rules which are used to support its interpretation as well as they could be used to support its performance. The rule is a referring point that can be used *ex ante* and *ex post*. In this sense, assuming the existence of a rule allows one to consider as virtually intelligible – and therefore to a certain extent “normal” – conducts that cannot be said to be effectively grounded on a precise rule. [Heritage 1984: 99 sq.] It implies a rejection of the postulate of moral coherence: the different moments of an interaction are always morally characterized, but this is a characterization which does not take place, with a few exceptions, in a congruent and stable manner, i.e., through the reference to a system of moral obligations continuously determining the courses of action of one same interacting person. [Williams 1985; 1993] In this perspective, the impossibility to decide by reference to which rule the other interacting person acts implies not only that there is a rule which remains to be identified, but also that there can be a plurality of possible rules, divergence on the rule which has to be applied, and discontinuity of the rules of reference in the course of interactions. [Livet 1994] It means that the interaction imposes its dynamics on the moral deliberation and, symmetrically, that the latter determines the former.

We now come back to an anecdote, the story of Hasan and the twin sisters. Hasan is married to Hayât, his first cousin. He also has sustained adulterous relationships, and Hayât is aware of it without knowing with whom. One day, she is informed by a phone call that her husband uses their former flat to meet his mistress Na'îma. She directly heads to this place and on the doorstep she hears a monologue that sounds like a phone conversation and a series of sounds suggesting some sexual activity. Hayât starts hitting the door while shouting her husband to come out. She insults him and threatens to call the police. Worried by the fuss, the doorkeeper comes and tries to calm Hayât down by telling her that the neighbors might alert the police. Hayât stops crying and just keeps on knocking on the door, asking her husband to open, which he eventually does. Hayât enters and realizes that there are two women, twin sisters who are the nieces of one of Hasan's friends. She insults them and everybody comes back home. At home, Hayât calls her mother and sisters, packs her bags and goes to her father's house. Later on, after many episodes, the two spouses are reconciled. Various interpretations combined with new details circulate in the family. The twins' aunt is said to be responsible for the phone call that alarmed Hayât so as to avenge herself upon Hasan's brother who used to be, briefly, her lover. Whether Hasan was the lover of the twins or of Na'îma only remains uncertain. A couple of months later, the twin sisters appeared in a commercial ad for some olive oil. Each time she watched it Hayât and Hasan's daughter would say: “these are dad's girl friends”.

It must be stressed, to begin with, that adulterous relationships are criminally prosecuted in Morocco. In other words, Hasan risks questioning by the police if they are asked to examine the case. It seems that this is precisely the outcome which Hayât was looking for. However, the fear arising through the doorkeeper's intervention to see the police effectively intervening induces a substantial change in her attitude. The direct fear of a precise sanction is not equivalent to the direct threat of some virtual sanction. Here, action transforms itself directly and quickly according to some incidental interventions. That is to say, Hasan risks the



police's intervention insofar as this intervention remains potential. This is what the doorkeeper's interference makes clear: it compels Hayât to adapt her conduct with regard to its possible consequences. One could imagine, at first, that the idea of a sanction was linked to the gravity of the accusation itself, i.e., that Hayât was activating a legal categorization and was seeking by so doing to prosecute Hasan criminally. However, she stepped from one repertoire to another at the time when the sanction became effectively more precise. One can therefore state that the hazards of interaction designated the normative repertoire that was used to characterize actions. In this sense, interactional contingencies index morality. [Garfinkel 1967] We are in a situation of "moral luck." [Williams 1981] It is meant by moral luck that the moral characterization of an action does not depend on what this action is in any substantial and absolute manner, but on what this action becomes according to circumstances.

When asked about the morality of this story, Sâra, Hayât's sister (and Hasan's first cousin) firmly opposed her husband, 'Umar, who was suggesting that Hasan was the lover of the two sisters. 'Umar's suggestion was grounded on the fact that the reaction to the twins' appearance on the TV screen was about "dad's girl friends". There was no distinction between Na'îma and her twin sister Sharîfa. Although Sâra did not express any trenchant judgment concerning Hasan's infidelities, which were considered as a blamable though rather common behavior, she felt that the mere idea that Hasan might be this "man-who-sleeps-with-two-sisters-who-sleep-with-the-same-man" was unbearable. The double incongruity, i.e., a man sleeping with two women and two sisters sharing the same lover – founded the moral condemnation of this attitude and took the form of denying the possibility of such an action. Sâra was scandalized by the mere possibility of such a suspicion. In a euphemistic way, she shifted the blame from Hasan to 'Umar.

This story of blame, which arose from the incongruity of the ascription of an incongruous sexual behavior to somebody, suggests a hierarchy in blame allocation: the blame for blamable though banal conduct and the blame for blamable though non-banal conducts. A "man-who-sleeps-with-a-woman-who-is-not-his-wife" belongs to the former category, whereas a "man-who-sleeps-with-two-sisters-who-sleep-with-the-same-man" belongs to the latter. According to the category, the blame turns on different objects: on the one hand, on marital infidelity; on the other, on sexual aberrations. It can also be said that, in the first case, the moral indexation is founded on an institutional membership categorization device (to be husband and wife), whereas in the second case the moral indexation is founded on a natural membership categorization device (to be a man and a woman). The blame that is attached to the breach to the duties specific to the institutional device implicate some reference to the notions of engagement, intention and reciprocity, whereas the blame proceeding from the natural device implicates the existence of a matter of fact independent of any engagement and intention. In other words, the natural device is grounded on the idea of stain, [Douglas 2002] that is, an evil independent of the intention to harm others. [Williams 1993: ch.3] The institutional device is, on its side, grounded on the idea of impersonal (i.e., not related to any specific person) and reciprocal obligation. Without entering into too much detail, it must be stressed that these devices are never free of any reciprocal influence. For instance, it is hard to understand why marital fidelity constitutes an obligation if any idea of stain is excluded. The story of Hasan and the twin sisters shows us how much normative positions and references oscillate in the course of interaction and according to categorization devices that are distinct but operate simultaneously. In that sense the dramatic enfolding of any interaction takes its coherence from successive, indexical and reflexive adjustments. [Ferrié, 1998; Dupret, 2001]

The situation described above is one where categorization devices sustain "thick" ethical concepts. [Williams 1985] For instance, the standardized relational pair [Sacks 1972; 1992;

Watson 1994] husband/wife sustains the concept of infidelity. The identification of this concept operates through some “documentary method of interpretation,” [Garfinkel 1967: ch.3]<sup>7</sup> that is, the mundane method through which the interacting people are referring to an underlying and supposed scheme of interpretation. It means that the various ways to consider fidelity, reciprocal engagement, sexuality, parental responsibilities, etc. refer to the underlying scheme of a normal couple’s life. Ethical principles slip into the life of people. The taking of an overhanging position claiming the possibility to identify these principles ante-predicatively would contradict their phenomenologically contingent character.

### **The judicial stop to moral indeterminacy**

Phenomenologically speaking, normative indexation can appear as an endless process. Considering that moral judgments function by inductive inferences, they are necessarily dependent of circumstances, interacting people and conventional adjustments. In this configuration, inferences are always revisable and nothing implicates any stable agreement between interacting people who each can enter in a relatively autonomous way in revision procedures, which are partly intelligible by others but whose consequences are not necessarily shared. [Livet & Thévenot 1994] Contrary to this, legal characterization stops the revision process through a broad restriction of indeterminacy. Indeed, it is constrained at three levels: formal, procedural and institutional.

By formal level, we mean that characterization must be performed according to a legal taxonomy. In other words, legal actors must produce legally relevant statements, that is, statements that are recognizable by, and intelligible for, other effective or potential legal actors. It operates a sorting between possible characterizations and implicates a substantial impoverishment of the situation’s features. It cannot be denied that law is endowed with an open texture that authorizes and even requires interpretation, but it does not mean that interpretation operates in an arbitrary manner: the interpretive field is necessarily constrained by the choice of the definition’s wording and its ordering. [Hart 1961] For instance, in Egypt, law No. 10 of the year 1961 represses “prostitution” (*da’âra*). However, it does not give any definition of prostitution, which at least opens the field of interpretation. The Court of Cassation, in its ruling of 2 March 1988, stipulates that “prostitution” means the committing of an indecent action (*fahshâ*) with somebody else without distinction, independently of any repetitive character of this action. Such definition allows much but not all. Indeed, the term “indecent action” cannot be applied but to actions of a sexual nature. It is the constraint induced by the selection of the words that comes here to the surface. The selection of one term instead of another brings out the activity that is commonly designated by a language “family”, that of sexually immoral actions whose signification is understood by “everybody”.

By procedural level, we mean that characterization can only be embedded in a judicial sequence partly predefined and that the compliance to this constraint is sanctioned. The Public Prosecutor to whom a prostitution case is referred must treat it with regard to, and in accordance with, the law of 1961. Moreover, he must necessarily frame his actions within the trial sequence, which means that he must lean on former procedural actions (police reports) and anticipate forthcoming procedural actions (the reading of his work by the judge who will issue the ruling). This procedural dimension involves a set of standard mentions testifying to the validity of the measures taken in the course of investigation, prosecution and judgment. It takes place in a sequence whose ordering is not free (investigation, searching authorization,

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<sup>7</sup> The title of the chapter is “Common sense knowledge of social structures: the documentary method of interpretation in lay and professional fact finding”.

searching, arrest, police record, routing to the Public Prosecution, etc.) At every step of this sequence, it must be mentioned that all procedural requirements were formerly followed and that the professional is now, in one's turn, satisfying to these requirements which are specific to the current step and will be necessary to ground the validity of the following step (for instance, the policeman, in his report, must mention that the searching was done pursuant to a warrant in proper form and he must state the identity of every person he examines so that no procedural flaw can be opposed later on in the trial).

By institutional, we mean that the participants in the trial occupy positions specified by the judicial frame and that these positions restrictively limit their capacities of action. All the parties do not have the same status and are not endowed with the same rights and duties. They are therefore engaged in asymmetrical relationships. If there is a system of speech turns allotted to the many participants, this system is partly determined by some pre-allocation of these turns (one asks and the other answers), by the initiative of and the control on the content of exchanges (one chooses the topic, the other cannot deny its relevance), by the uneven distribution of legal knowledge and the capacity of one of the participants to orient to a precise goal which the other can guess and whose damageable content can be anticipated and sometimes averted but which he cannot decide. Although the accused person is never deemed to contribute to his/her own incrimination, the institutional organization of turns and exchanges puts him/her in the obligation to collaborate and this confronts him/her to a series of dilemma whose solution can never be totally propitious to his/her interests. [Komter 1988] This is how suspects, in a police investigation, are led to answer to facts which were already characterized in a former record by the policemen. Their alternative is between showing their willingness to cooperate to some extent – but this cooperation, even though it allows them to amend the presentation of some facts according to their own interests, presupposes their consent to the general economy of the legal narrative – or refusing any kind of cooperation (their right to keep silent) – but this attitude, even though it protects against auto-incrimination, makes him/her lose any control on the characterization of the facts and is often interpreted as some implicit confession of guilt. [Komter 2001]

Here follows the police record in an Egyptian case of prostitution:

Information came to the police station that suffices to state that the called Fawqiyya Mahmûd Ghunaym, living at No. 4 al-Sa'âda str., Roxy, behind the Helio Lido club, district of the Misr al-Gadîda police station, runs her lodging for purposes of prostitution, procuring and exploitation of depraved women whom she finds for prostitution purposes in return of some pecuniary advantage. The investigation we conducted and the secret surveillance conducted under the direction of the police station's chief, in his capacity, confirmed that the called Fawqiyya Mahmûd Ghunaym, living at No. 4 al-Sa'âda str., Roxy, behind the Helio Lido club, district of the Misr al-Gadîda police station, ground floor, runs her lodging for purposes of prostitution, procuring and exploitation of depraved women, among whom her relative, for prostitution purposes, and that some male and female taxi drivers assist her in this matter, among whom this who is called Ahmad, who drives a Peugeot cab, who worked to decoy men looking for sexual pleasure to the abovementioned, like the called Fâtîm and the called Amîna, so that they assisted the abovementioned to supply the depraved women while she herself undertook to present them to the men looking for sexual pleasure, among whom Arabs and Arab Orientals, in return of some pecuniary advantage which they gave to her. One has observed, during this surveillance, frequent visits of men and women to the lodging of the abovementioned so as to commit adultery inside the lodging of the abovementioned or, with regard to men looking for sexual pleasure, to get the company of women whom the abovementioned made work and exploited for prostitution purposes.

Also consider the following excerpt of the examination conducted by the police in the same case:

Question of the police officer: Since when do you practice prostitution

Answer of the accused: For three years

Q: Did you get used to practice prostitution with men without retribution<sup>8</sup>

A: Yes

Q: How many times did you practice prostitution

A: More than once but I don't do it a lot and I do it monthly once or twice because I don't like doing like that

Q: When was the last time when you practiced adultery

A: Some two weeks ago or a little bit less

Q: Did you commit adultery today

A: Yes

Q: Who did push you into doing these things

A: This whom I told you about before who is called Fatna who has a known name and she kept on calling me at the doctor where I work and asking me to come and sleep with this who was with her and these are Egyptian and she settles up with me and then I leave

Q: Did the abovementioned undertake to facilitate and exploit your prostitution

A: Yes

Q: When is the last time when the abovementioned undertook to exploit your prostitution

A: About one month ago

Q: What financial advantage did get the abovementioned in return of this

A: She sat with the client and it was her who gave me the money and I don't know how much she took from the client

Q: How did you know about the presence of the called Ja'far in Cairo at the domicile whose searching was authorized

A: It is Fawqiyya who came to my home yesterday and told me that Ja'far was with her in the flat and asked me and she told me to stay with her because he desired me hard and she told me this time or I understood that she didn't want to let me speak with Ja'far about the question of his marrying me because she wasn't in the mood to do that

Q: Did the abovementioned get from you a financial advantage from all this

A: I'm like her I take from the one who sleeps with me and she naturally she takes a part of this

Q: Are there other women who use to frequent the lodging whose searching was authorized at the home of the called Fatna and her friend Amâl so as to commit adultery inside

A: There are other girls than me who go there and I know it but they don't leave more than one man in the flat because this who's called Fawqiyya she's scared and she prefers to go out and to leave the flat because she's scared

Q: Did you already get arrested before

A: No

Q: You're accused of exposing yourself to prostitution with men without distinction in return of retribution

A: I do it actually and our Lord will punish this who's the cause of this

Q: Do you have something else to say

A: No

Through the reading of this record, it appears that the incriminating party orients the exchanges toward the legal specification of facts: place, circumstances, concerned people, and especially toward the examined person's confession of the incrimination. There is no "normative overload" insofar as the incriminating party seeks only to get a clear, coherent and facts-centered narrative and refrains from evaluating facts from a moral point of view. Thus, the accused person is not even asked about her feelings when doing what she did. It is up to her to use her own answering turns, which follow precise questioning turns, to add a few words stating her moral position. To the question, "How many times did you practice prostitution", she answers, "More than once", and specifies, "but I don't do it a lot", which aims not at giving a periodicity, but at indicating the limited character of her punishable practice. Then, she adds a precision on the periodicity: "I do it monthly once or twice", which serves as a preface to the expression of a moral positioning that was not elicited by her interlocutor: "because I don't like doing like that." The same technique is used after the formulation of the blame by the incriminating party. The accused person takes advantage of

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<sup>8</sup> The meaning of this sentence is contradictory. It can be attributed to some mistake in the transcription process.

this formulation and uses it as if it introduced a speech turn and even though it did not address any invitation to her in order to introduce a formulation that is designed to excuse her from at least part of the blame: “I do it actually and our Lord will punish this who’s the cause of this.” This formulation takes place without regard to any procedural order, since it designates an anonymous or even virtual responsible entity and a divine intervening entity, who are not relevant in the legal ascription of blame. Neither does this formulation conform with the institutional order, since the accused person’s speech turn does not follow a question but precedes it and since the incriminating party does not nod approval to this statement and asks immediately after the question that might have directly followed the completion of the accusation formulation. This bracketing of a statement that is not really processed as a statement (despite its being consigned in the record) suggests the incongruity and uselessness of this type of exit from the procedural (where only facts that can be legally characterized are processed) and institutional (where the accused person is not supposed to intervene outside the incriminating party’s invitation) orders.<sup>9</sup>

The accused person gives a moral response to a legal accusation that makes her bear the responsibility for a misdemeanor which she patently perceives as a moral blame, even though there is nothing of this kind clearly manifested in the incriminating party’s formulations. There is place for neither moral order nor divine order in the characterization enterprise conducted by the police officer. It occurs only and at best in an interstitial manner, in a totally asymmetrical relationship, without having been elicited and without any consequence on the outcome of the ongoing procedure. However, the accused person, despite that it is never asked to her, has set her heart on the expression of her possessing a moral identity in front of an accuser who, in the routine accomplishment of his work, takes no further interest in this moral dimension. It can be inferred from all this that legal normativity can function independent of moral normativity, even though, from a commonsense point of view here expressed by the accused party,<sup>10</sup> the two go hand in hand.

#### **IV. Conclusion**

According to Salvatore & LeVine [this volume], there are long term traditions of practice and thought that do not basically or necessarily care about drawing a boundary between the private and the public. In that sense, a proper genealogical investigation would reveal how much this boundary is external to this or that tradition, appeared in specific historical circumstances, and takes a quasi-metaphysical dimension when referred to by scholars as an invariant. In this chapter, we showed, although in a very different way, that the drawing of this boundary has a totally contingent character and is situationally achieved. It does not mean that such a boundary, whatever the shape it takes, must be drawn. It only shows that, in just the contexts we described, the participants to these interactions oriented to sexual morality, religion and law in a way and with a lexicon that punctually and situationally pointed to the boundaries they drew between public and private situations or that specifically did not make any kind of distinction. This is what a praxiological inquiry can achieve, whereas a

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<sup>9</sup> In that sense, we consider that the statement of N. Calder [1996: 995-6, quoted by Messick, this volume], according to whom, whereas *fiqh* does not dominate society as it once did, the inspirational power of *shari’a*, although devoid of detail or specificity, has increased, although right in its general formulation, misses the phenomenological specificity of the reference to Islamic legal and moral principles in every singular, specific, contextual, local and situated situation.

<sup>10</sup> Nothing allows us to say that the accusing party does not subscribe, independent of his professional activity, to this commonsense point of view.

genealogical analysis misses the phenomenon of what people actually do when practicing dancing, marrying, chatting in a wedding party, shouting their anger, menacing to call the police, prostituting themselves, writing reports, interrogating, and answering questions in always specific contexts.

In the different cases we described, the reference to Islam is embedded in courses of action that are not determined by Islam. The meaning is fourfold: 1) The reference to religion has no signification other than what is given to it by interacting people in the course of interaction when they orient to it; in other words, religion is nothing but what people do and say when referring to something they designate as such; 2) Even when people turn to a lexical repertoire of a religious nature, it must be said that its use is embedded in sequences of action that are not logically oriented to a religious performance; 3) It is not the religious reference that modalizes the context but the context that modalizes the religious reference; 4) There can be something called a public sphere and it can even be characterized as Islamic, but all this has no meaning outside what people identify as such in a course of action; the reference to Islam is dependent on what they orient to (and what they orient to can have nothing to do with Islam), and both the signification and the range of this reference are strictly limited to the contingencies of the context in which it is embedded. There are only punctual and contingent uses of a lexical repertoire of a religious nature whose signification is irremediably bound to the context of its use. There can be Muslim publics in various contexts, but the meaning of the reference to Islam has a locally achieved and constrained character, i.e. it is not defined *a priori* by the recourse to a supposedly Islamic lexicon or attitude, but through the explicit orientation of the people participating to the situation toward Islam as the referring point around which organizing their interactions in public.

With regard to normative orders, one must observe that the reference to Islam does not impose, because of its mere mobilization, a kind of hierarchy among the many normative orders to which people refer themselves. In other words, the preference orders are not antepredicatively determined and the revision of preferences is indexically referred to the context in which it is embedded. In that sense, we partly oppose the working hypothesis of this volume, according to which the Islamic character of determined discourses is constructed according to contexts linking social practice to hegemonic contests. This is certainly the case in certain contexts, but it cannot be generalized so as to become the underlying interpretive scheme. The preference orders are dependent on the courses of action, that is, they are in a situation of equivalence outside these courses of action – insofar as such a generalization is possible. It is only their use that puts a distinction between them; it is only their use that determines the potential revisions of their hierarchy. This claim is consistent with Wittgenstein's position according to which symbols have no intrinsic meaning. And, according to Williams, there is no essential hierarchy of axiological norms, but only situations in which some of these norms are luckier than others.

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