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Baudouin DUPRET AND JEAN-NOEL FERRIE

The Inner Self and Public Order

It is difficult to raise the issue of the trivialisation of a *cultural space* without, at least, an implicit criticism of the paradigms and classifications hitherto used in dealing with it. As far as Arab-Muslim societies are concerned, such criticism was uttered long ago and often repeated (e.g. Ferrié 1991 and 1996a). Nevertheless, one cannot but note the persistence of a certain approach, one that always refers knowledge of those societies to an area rather than to a number of disciplines. The idea of accumulating knowledge pertaining to a given place - even in the absence of any culturalist bias leading to describe it as a whole - only leads to a transfer of the object of knowledge from a description of underlying mechanisms to an explanation of facts, like in the case of a news commentator. In other words, we do not think that the job of the social scientist is to explain the strategic reasons that lead a group of lawyers to persecute a professor on an allegation of apostasy. His job is to understand, by way of referring to similar cases, some of the mechanisms at work in the structuring of the public domain; that is to say that our subject is the public sphere and not the accusation and persecution for apostasy.

Undoubtedly, this position does not exclude an interest in a given society rather than in another - be it only an emotional interest. It merely indicates a priority in the manner of formulating an issue: if one wishes to avoid the trap of "geographic" specialization, it is imperative to reestablish the priority of the relevant science over the *local* relevance, for there is no science of the local, nor can there be (Ferrié, 1995c). We would like here to stress the possibility of describing certain aspects of the present dynamics of Arab-Muslim societies without resorting to specific references, and, quite the opposite, by using problematics formulated in order to describe the structuring of the public space in 18th century Europe. We also hope to show, at the same time, first, that the use of a literature specialized in the "local" is unnecessary for understanding it, and, second, that the universality of the cognitive frameworks available to the researcher corresponds to a universality of the cognitive frameworks available to the protagonists. In other words, if the concepts used to describe a certain category of phenomena are relevant to the description of another, seemingly alien or opposed to the first, it only means that both categories belong to the same family. The present study illustrates this approach.

The case of Nasr Hamid Abu Zayd

An Egyptian and a Muslim, Nasr Hamid Abu Zayd, before "*the* case", worked as an assistant professor of Islamic studies and literature in the Arabic department of the Faculty of Literature at Cairo University. He is the author of several publications among which "Imam al-Shafi`i and the foundation of medieval ideology" (*al-imam al-Shâfi`î wa ta'sîs al-idyûlûjiyya al-wasatiyya*) and "The concept of text: a study in the sciences of the Koran" (*Mafhûm al-nass: dirâsa fi `ulûm al-Qur'ân*). In May 1992, he submitted an application for a promotion to full time professorship[1]. On the basis of one single unfavorable report (claiming the "obvious impiety" of Abu Zayd's writings), the Promotion Committee

1 For a more complete coverage of the case see Dupret 1996d.

decided that there was no ground for promotion and, on the 18th of March 1993, the Cairo University Council agreed to reject the request (CHRLA 1995).

Hitherto confined to the university walls, the case takes on a new aspect when, on the 16th of May 1993, a group of lawyers filed a lawsuit to the Personal Status division of the Giza Court of 1st instance, in which they filed a suit against Nasr Hamid Abu Zayd, requesting a verdict of nullification of his marriage with Ibtihal Yunis, his wife, an Egyptian and a Muslim, the motive being that the publications of the former "contain elements of impiety (*kufr*) thus excluding him from Islam", "allowing him to be considered an apostate (*murtadd*)", and "calling for the application, in his case, of the provisions (*ahkam*) related to apostasy (*ridda*)" and that, "among the unanimously recognized (*mujma` `alayhâ*) consequences (*athâr*) of apostasy in jurisprudence, is a judgment calling for the separation of the spouses" (extracts from the lawsuit, as quoted by the Giza court of 1st instance, January 27, 1994, judging the claim inadmissible).

The defense of Abu Zayd was organized, among other ways, around the idea of the lack of personal interest of the claimants. Here the argument of the *hisba*[2] comes in. That is how the claimants claim their right to file a case in all matters related to Islam, the argument being that the personal interest of any Muslim is thus involved. Technically speaking, the possibility of invoking the *hisba* depends on the competence of the tribunals. The court of 1st instance, keen on demonstrating the isolation of a precedent of the Court of Cassation, preferred to refer all conflicts dealing with personal status to the provisions of civil procedure. By rejecting the *hisba* argument, the court could thus reaffirm that a personal interest in the cause is necessary for making a lawsuit pertaining to civil matters admissible. The conclusion was drawn that "all things taken into account, the request submitted puts all the claims introduced under the heading of a *hisba* request, based on Islamic *shari`a* rules, and the claimants, when introducing it, cannot claim a direct and real interest as defined by the law" (Court of 1st instance, 27 January 1994, judgment on the admissibility of the lawsuit).

The group of lawyers, on the 10th of February 1994, appealed the decision. To begin with, the Court of Appeal declared invalid the interpretation of the first instance judge. In as much as no legal text deals with the specific question of the *hisba*, it is appropriate to refer to the main texts of the Abu-Hanifa school. The Court goes on to affirm the validity of this procedure for all matters pertaining to one of God's rights (*haqq Allâh*), or to the violation of a prescription established by the Law of God. In this respect "the Court indicates that what is meant by the rights of the All-Mighty and His sacrosanct due (*hurumâtihi*) is everything related to the general interest, to the Islamic community as a whole (*umma islâmiyya*), as well as everything pertaining to God and what relates to the general interest of Islamic society, so drawing a distinction between the latter and peoples' rights as related to individual rights in a limited and particular way (*`alâ sabîl al-tahdîd wa'l-ikhtisâs*). (...) The point here is to denounce a reprehensible act (*munkar*) which occurred, and to command a rightful act (*ma`rûf*) which may have long been neglected. Consequently when the claimants filed their case asking for the separation of the first defendant [Nasr Hamid Abu Zayd] from his wife, the second defendant, they were

2 A non Koranic term by which a certain literature (*fiqh and ahkâm sultâniyya/siyâsa shar`iyya*) designates the obligation of a Muslim to command what is rightful and prohibit what is reprehensible (*amr bi-l-ma`rûf wa nahî `an al-munkar*, Koran 111-104). Among others, see Cohen and Talbi E12: v° *hisba* and Dupret 1995c.

claiming for a recognition of the fact that the former had committed apostasy against Islam, while the latter remains a Muslim, thus justifying a *hisba* action, bearing in mind all the preceding arguments".

Having thus established the basis for annulling the judgment pronounced by the court of first instance and judging the appeal admissible, the Court dealt with the issue of proving apostasy. Recognizing the absence of any text in Egyptian law or in the regulations governing personal status tribunals that would authorize any tribunal to judge the quality of a citizen's Islam, and consequently his impiety or his apostasy, the Court affirmed that this absence did not affect the case when the apostasy left no room for doubt. Before evaluating Abu Zayd's according to this criterion, the Court operated a very important distinction "between apostasy - a material act with its own bases, conditions and criteria of occurrence - and conviction". By so doing, it gave apostasy a legal status by characterizing it as "a material act having an external existence".

At a later stage, the sentence of the Court of Appeal plunges into arguments totally unrelated to the legal rhetoric it had hitherto adopted. It then becomes a matter of proving the obvious impiety substantiating the apostasy of Abu Zayd's works. The judge then raises the question as to what defines apostasy in Hanifite law. As far as the Court is concerned, "there is consensus in declaring the impiety of any one who opposes the text of the Holy Book, diminishes the Koran in any way, denies it, falsifies it, claims it to be false on any given point, affirms what it denies or denies what it affirms, while having cognizance thereof or by casting doubt thereon. Knowledgeable men are unanimously agreed in calling such a person impious. The same applies to him who mocks the *shari`a* or any of its rules, who mocks the need to command what is rightful and prohibit what is reprehensible and who does not accept the prophets and the angels. Such a person is unanimously considered to be impious." The Court then sums up all its accusations and concludes with the obligation of separating an apostate from his Muslim wife. Since the Court did not command the execution of the judgment to be executed, no procedure for the actual separation of the Nasr Hamid Abu Zayd from his wife followed up.

The Nasr Hamid Abu Zayd case as a "cause"

Informed of the Islam (or lack of Islam) of an individual, the state was brought in on the grounds of the definition to be given to its own Islam and, without its being directly accused, a public order claim was established concerning a private matter. The judicial arena was thus turned into a tool which, if not necessarily aimed at contesting the existing political order, was, nevertheless, part of a project to reconstruct and reestablish a religious reference, so as to substantialize the Islamic juridical repertoire which may have appeared, so far, purely rhetorical. Thus, since it is not aimed at an individual, at his religion or at his "inner self" as such, the Abu Zayd case transcends the level of a civil litigation and attains the status of a public issue.

As such, it is very tempting to draw a parallel with the Calas affair, a case of apostasy that arose in 18th century France (Claverie 1994). As far as Voltaire was concerned - and he was the master mind behind it - there was no point in considering Calas important as a person, but rather, as an incarnation of the cause of humanity. From that perspective, Voltaire showed that he had no personal interest whatsoever and that his only concern

was to restore Reason. In order to do so, he picked up and reoriented the idea of "cause", or "good cause", that notion which, originally, had to do with cases in point where theological arguments could be resorted to in the area of politics (id.: 82). Voltaire transformed the cause into a mobilization of the general interest, over and above particular interests, to the benefit of "public good". In his public dramatization of the reasons behind his indignation as to Calas' fate and the modalities of his judgment, Voltaire invented the "affair" as a politico-judiciary genre; he also established the notion of "cause" when he used the affair in order to promote and illustrate the fact that what was at stake was of a more general nature.

In both cases, the judgment of Calas and that of Abu Zayd, at issue is an accusation of apostasy. But beyond that and essentially, it is an application of a procedure, with totally different modalities, using as a pretext a current issue projected into a public space to serve as a basis for affirming and defending a given notion of the general order of society. The Abu Zayd case can be qualified as an affair because he becomes part of a public presentation which largely transcends the simple litigation of personal status. He is made use of in order to support a cause, that of proclaiming the 'Islam' of the Egyptian state and its institutions and of defining that very 'Islam'. Moreover, in both cases, one can detect what Claverie calls "a general model of critical presentation" (*id.*: 85), i.e. the underlining of the fact that by using the different institutional resources available, while formally remaining within the limits of the sense and reference allowed by the authorities, it is possible for some protagonists to bend its substantive definition. Nowhere in the Abu Zayd affair is there any mention of what is 'Islam' for the Egyptian state and its institutions or any attempt at defining that very 'Islam'. Nowhere in the Abu Zayd affair is there any mention of the authorities in power. There is, however, a use of the judiciary as an institution, as well as of the positive and Islamic juridical references of Egyptian law, with the aim - stemming from a desire to share the institutional power - of adopting its modalities and of precisely defining its tenets.[3]

The parallel established between the Calas and Abu Zayd affairs should not lead one to forget a major difference which at the same time creates an opposition between them, and places them within the same perspective. As far as the Abu Zayd affair is concerned, one is confronted with an accusing indignation claiming to restore to judgment a criterion of order, of belief and of the argument of religious authority, precisely what Voltaire was opposed to in the Calas affair. As such, it appears to be more of a "counter-cause", i.e. a performance aimed at establishing an order defined by the extraneousness of a transcendental law the significance of which is considered as non debatable. There is no pretension of referring the repertories available to the protagonists to an autonomous referential provision: quite the opposite, the motive is that the repertories are being refurbished within a space they affirm to be subject to a closure defined by a heteronomous instance. Here the "counter-cause" works counter to the *Aufklärung*, as based on the repudiation of divine guarantee and, by extension, of authoritative arguments. This inversion does not contradict the reasons for the parallel, since we deem it impossible to correctly grasp what is at stake in the Abu Zayd affair outside the

3 Not that these postulates of power mean that those holding the power are attached to their essence. It is more a matter of a procedural attachment to postulates which, because they are identified with a group of protagonists, signify that once they are formally adopted, the way is open for their formulators to share the institutional power.

framework established by the *Aufklärung* (which is what we do explicitly, whereas the protagonists do it implicitly, as we explain in the last section of this article).

The mechanism for the closure of the juridical field

We are now basing our analysis on the hypothesis of a closure of the juridical field and of the repertories of law in Egyptian society. By closure we mean that the protagonists can only get hold of a necessarily limited number of references and repertories, not because there are few, but because the conditions prevailing in the field in question make it impossible to resort to any unauthorized source. The closure is set up by the referential heteronomy and by the circumscription of the juridical field due to the monopolization of the political game. The protagonists 'wishing to share in the power' have to position themselves in a political area that is not theirs, while trying to draw advantages from it and to exploit some of its potentials by maximizing the opportunities it offers them. A closed field is a structure of possibilities with which the protagonists are playing, and of impossibilities which they cannot use (at least if they wish to continue to play within the common game). It is a kaleidoscopic game which, on the one hand, allows all possible combinations of references and repertories, permitting their reciprocal conversions by virtue of their inscription within a space defining structural homologies, while, on the other, refusing to admit any but the combinations based on the few homological elements which the structure authorizes.[4]

The key-agents (the "protagonists") of the law, whatever their political stance, operate in a sort of closed vase where the modalities of interpreting and using standard-setting references and repertories may vary, but not the references and repertories themselves. Contrary to classical sociology, that derives the plurality of values from the plurality of groups (Boltanski 1990: 81)[5] - which complicates the explanation of the agreement among groups with different values and renders insufficient the explanation based on a shared culture - it is more appropriate to insist on the idea of protagonists inserted in one space of references and acting simultaneously, alternatively or concurrently, on the ones available. Hence we see the interest of an approach via scale economies, advancing the postulate of the plurality of principles of equivalence attending the actions of every single individual. These principles of equivalence are, by their very nature, not related to different groups, but to different situations, consequently "a normal person should, in the course of one day, be capable of moving among situations related to principles of varying scale". Moreover, "varying scales being incompatible - since each of them is set in a situation wherein its validity is maintained as being universal - persons should be capable, in a given situation, of ignoring the principles on which they based their justifications in other situations they have gone through" (id: 82). This outline allows one to illustrate the synchronic use by the same persons of different repertories; it also allows one to explain how greatly different orientations can manage to rely on identical repertories (in the definition of which they do not take part).

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4 It is not, strictly speaking, a matter of closure in the sense meant by Alain Roussillon (Roussillon 1991: 123; 1992 : 81)

5 With regard to this trend in the anthrology of law and the nuances that can be brought to it, cf. Dupret 1996 a and b.

Similarly, when Paul Veyne deals with conduct without belief, he notes the plurality of attitudes which one single spectator could have when faced with the same work of art, or those of a participant in a ritual vis-à-vis that same ritual (Veyne 1988: 8). The same person, then, can believe in a number of different truths, enclosing in turn different truths and interests (Veyne 1988: 96). Going even further, Veyne points out that using the same thing or practicing the same procedure does not result in greater agreement on the substance of it or on the significance of the procedure, the recourse undertaken therein never being fully lived through (Veyne 1988: 19-20), its function not being to affirm the belief they contain (id: 14).

This argument of a double plurality of truths (the truths of one person, the truths of one object or of one procedure) can easily be translated into in the Egyptian juridical concept we are dealing with. This is shown, for example, in a study dealing with the position of two judges concerning legal sanctions (*hudûd*), one of them - `Abd al-Qadir `Uda (an Egyptian magistrate and one of the Muslim Brothers leaders, executed in 1954), arguing in favor of the application of *shari`a*, the other one - Muhammad Sa`id al-`Ashmawi (an Egyptian magistrate, recently author of several works on the relations between religion, politics and the law) affirms that such a claim makes no sense (at least no juridical sense) in so far as the *hudûd* are factually - at least presently - inapplicable (Ferrié et Radi 1995: 68). It is a fact that two persons may have totally divergent interpretations of the same object and of the same procedure (the *shari`a* and the means for applying legal sanctions), neither, however, contests their relevance or their legitimacy. `Ashmawi insists on the conditionality of *hudûd:*

"Such *hudûd* can only be applied in a society of believers (*mu'minîn*), a society of just and pious individuals, so that judgment pertaining to the *shari`a* may not be used for purposes that are not legitimately Islamic. He who wants to apply the *hudûd* must first prepare such a society by spreading the faith" (`Ashmawi, quoted in Ferrié et Radi 1995: 72).

But he never contests the legitimacy and relevance of *hudûd*, provided the conditions are satisfied:

"The legal sanction for illicit sexual relations (*hadd al-zinâ*) can only be applied if four witnesses are present throughout the entire intercourse and if a thread cannot be passed between the bodies" (ibid).

As for `Uda, he affirms that not to apply the *hudûd* is not to apply the *shari`a*. "Their application, for him, is a must because they are a Koranic precept as clear as explicit. Since the *hudûd* are stated in the Koran, `Uda demands their application, because a transcendental order is not open for discussion. In that sense, the laws applied instead of the *hudûd* are considered invalid" (`Uda 1985: 225 quoted by Ferrié et Radi 1995: 72-73). This brings to mind the positions adopted by judge `Abd al-Hamid Ghurab and his "Islamic judgments invalidating positive law" (Ghurab 1986, Dupret 1995 b).

"I consider primary *jihâd* the most noble and the best, even more, the most immortal and the most important in this time and age, it is the *jihâd* whose first and last objective is to establish God's legal sanctions (*hudûd Allah*), by means of the judiciary power, directly among the people" (Ghurab 1986).

Obviously, `Ashmawy does not aim to deny the veracity of the *hudûd*, but to re-describe their function within the Koranic provisions by presenting them as an ethical reference (which he does not question) rather than a juridical precept; and one that allows him to affirm that the *shari`a* is applied in Egypt, with the exception of *hudûd* which were not meant to be applied (Ferrié et Radi 1995: 72). Thus, he denies the purely juridical

aspect of *shari`a* and gives it an ethical status that is not devoid of a political dimension. If, on the contrary, `Uda (and his follower, Ghurab) considers that the application of *hudûd* determines the Islamic nature of Egyptian society and the status of *shari`a* therein, he too tends to remove the issue from its juridical context and to confer it a political status, which explains why he does not tackle the major legal point of the conditionality of legal sanctions.

The closure of the field of juridical references and repertories appears in the Abu Zayd affair in a very characteristic manner. The various protagonists are ensconced in a well-defined space, providing a limited number of combinations of the authorized references. The positive and Islamic repertories are matched in such a way as to give priority alternately to the one or to the other, without contesting the relevance nor the legitimacy of either. One quite easily meets the principle of the double plurality of truths. On the one hand, the plurality of the truths of one and the same protagonist. That is how the defense was able to plead, successively, the absence of interest of those who submitted the case (an argument pertaining to the positive juridical repertory, taken up by the court of first instance), and the absence of apostasy within the main defendant (an argument pertaining to the Islamic juridical repertory)[6], which, consequently, means that once the charge of apostasy has been established, it can be acknowledged. The Abu Zayd affair shows us that once the protagonists in the case have admitted the closed nature of the game of references and repertories, no one seeks to invalidate any of the latter nor the possibility of combining them; what they seek to invalidate are rather rival interpretations given of those references and repertories, as well as the modalities of combining them.

Before broaching the modalities of setting up a referential closure, we briefly wish to draw the attention to the games of multiple truths, according to which all the forms of referential circumscription cannot be considered equivalent on all respects, in terms of the very function of the basic reference for the closure. At first glance, it seems to be a game of appearance, hence of form. This being the case, appearance is the expression of a norm: it is "the will to submit things and persons to an order" (Ferrié 1995a: 182). That order, although imposed, is the bearer of vastly contrasting consequences according to whether it pertains to the space wherein one is standing or whether it is external to it. The order of justice, and particularly the justice of the inner self, offers the possibility of arguing with this same self and even of submitting it to critique, whereas the order of the Law is necessarily linked to a dispossession in favor of an outside instance which one is only enabled to interpret. Whatever the case, the foundation on which the order claims to rest only stems from a game of words. There is neither an essence of justice nor a superior instance of the Law, there is only a game of rhetoric or statements (for example: "justice is divine"), which claims validation on the basis of the mode "correctness - legitimacy" (Melkevik 1990 and Dupret 1996c). In all cases, the affirmation of the transcendence of the foundation does not mean that its transcendence is established: if, for example, I say "justice is divine", I do not establish the transcendence of justice since the authority which confers a status upon justice is not the supreme being postulated by my statement, but only a humble replacement (Ferrié 1995 a: 188). What is different when one refers to a heteronomous or to an autonomous authority, is the status given to the validation. In a way, the formulation of standard-setting statements based on a heteronomous authority

6 It is interesting to note that the use of successive arguments each laying a claim to truth (articulated around the figure of "failing which, because of not having obtained satisfaction as to the main") is characteristic of any defence system.

allows for the validation to stem from the very mentioning of the name of the authority as a guarantor of the substance of the norm, whereas the formulation of a standard-setting statement based on an autonomous authority presumes it by invoking the principle itself, without questioning the substance. In fact, in the latter case, it is not as much a question of a personalized authority as it is that of a universal principle which authorizes the validation. It is clear that, from one case to the other, what differs is the intrusion of the authority in the validation procedure. The first formula postulates the existence of authority roles attached to the certification of the statements (God, the interpreters of God's will, etc.), and those roles are spaces available to protagonists who are in a position to invest them. The second formula postulates instead an impersonal space of recognition which allows very little leeway for the interplay of authority and relations of power which are inseparable from it, because it does not involve the certification of the substance by a recognized instance.[7]

Closure and Power

At present, we would like to stress the fact that the closure of repertories stems from power relations assigning the roles and defining the repertories available to the protagonists. It is, undoubtedly, important to differentiate between power and politics, between the hierarchical structuring of a social space and the management of public affairs. The interest of such a differentiation lies in its capacity to explain that a situation of monopolizing the political game (the internal distribution of the directing functions within the ruling group, excluding all competing instances) does not prevent people who do not participate in the game to have practices aiming to stabilize, to bend or to circumvent the ideological definition of power and of the role they intend to play in it. However, adopting these practices imply the recognition of both the monopolization of the political game (there is no chance to present oneself as an alternative) and the closure of the elements allowing to define power. According to de Certeau, these practices mean that we are in a consumption space, in which we find ways to use the products which are imposed by a dominating order, “ways of using the constraining order of place or language” (Certeau 1990: 51). This space, defined by those who combine power and politics, provides them a place where strategies are adopted, while allowing others only to elaborate tactics.[8] The aim of tactics is to “maximize” possible profits in an area where the actor is not the master. That does not necessarily make him a liberal attempting to open areas of freedom by manipulating the products imposed by the dominating order: he also wishes to impose an order, i.e., to share in the faculty of standard-setting and commandment of others.[9]

7This distinction between a certifying authority and an assumption devoid of any personal engagement of an authority is well developed by Alain Cottereau, who scrutinizes models of certificates and invention certificates from before and after the French Revolution. He demonstrates how, departing from the practices prevailing during Ancien Regime, the revolutionary period inaugurated a certifying system based on the presumption that did not involve any interference from an authority for validating the content of the certified object (Cottereau, 1992).

8 For a reference to these two notions within the framework of the interplay of positive and Islamic juridical repertories in Egypt, cf. Dupret (1996 c).

9 In that sense, the explanation of "Islamism" in terms of opposition to state power is partial without being wrong.

One can establish a sort of glossary of the practices which, because they take place in a space they do not share in defining, can only be understood in their familiar context. This context allows for a certain number of "hits", of possibilities to be taken advantage of, "opportunities" situated where implicit principle (which, because undefined, allow margins of tolerance) and explicit rules (which, being defined, leave all what they do not cover open) can be manipulated. One is thus confronted with a sort of "sale" where, because of a monopoly of the political play, the actors tend to maximize their incorporation in the existing power structure by "snatching" the possibilities offered by a system which they did not participate in defining and which they try to become part of. Those actors make a choice among practices which are available in a limited number, and are restricted by possible forms of combining a few repertories which can be used. "One should assume that such ways of doing things match a finite number of procedures (there is a limit to invention and, like 'improvisations' on the piano or the guitar, this implies knowledge and application of codes) involving a logic of interaction having to do with types of circumstances" (Certeau 1980: 40). Resorting to a limited number of repertories takes on a new light once we place the tactics of using these repertories in their context. It will be said that the closures of repertories are imposed (in a way, from outside), as a result of power games and ideological sedimentation, depriving the protagonists of strategic control thereof, but also making it unimaginable for them not to be allowed to use multiple tactics in playing with them (all of which are "make-dos"). Let us add that, after Michel de Certeau, one could usefully refer to the theory of speech acts plotting along and trying to circumvent grammatical rules. In short, it will be said that the closing of the juridical field refers one to a structure of monopolization of the political game requiring all actors wishing to share in the power to place themselves in a political area which is not theirs, and to bend it in such a way as to allow them to benefit from it and exploit some of its potentials by maximizing the opportunities it offers.

The existence of power relations in a context of political monopoly generates practices that are as varied as the forces wishing to participate in the definition of power and in positioning themselves in relation to it. Here, one finds the plurality of truths as previously described (Veyne 1983:100), truths which all speak in the same form, with its own memory - derived from the duration of its acquisition and the collection of its particular knowledge - which the actors use when opportunity allows. What is important for the several actors is their will to become part of the instances of domination by way of participating in the definition of its standards (one can, at the same time, judge it to be the motive of this participation). One of the means utilized is precisely the appropriation of a pre-existing form of standard-setting, its substantiation and, hence the establishment of rules defining normality and deviation (Becker 1985). Once more, the will to share in the power and the difference in the capacity to do so explain the differences in the capacity to set the standards and have them applied. All this implies that action should have its initiators (having an interest in the action), the people it targets, its object and a context. From here derives Becker's notion of "entrepreneurs of morality." "First, someone must take the initiative of having the alleged guilty party punished; to have a standard applied requiring an enterprising spirit and an entrepreneur. Second, those who wish to see the standard applied must draw the attention of others to the felony; once it has been made public it can no longer be neglected. In other words, someone must "cry: wolf". Third, to do so one must find advantageous: personal interest alone leads to such an initiative. Lastly, the type of personal interest which leads one to seek to have standards respected varies according to the complexity of the situation" (id: 145-146).

It is the action of such entrepreneurs of the law which gives substance to certain juridical forms. There was mention elsewhere of this inversion allowing the passage from a "cultural order" interpreted and manipulated by standards, to a "juridical order" influencing culture and prescribing its legitimate standards (Dupret 1996c). The passage from the standard to the rule leads to substantialize what had, so far, more to do with common sense. It is out of question to speak of some founding past that issued all possible forms which history need only to abide by. It is rather a matter of repositioning of the creation and the re-utilization of forms within a logic and a sociology of action. That was the focus of the works of Boltanski and Thevenot (1991) on justification, i.e., the adaptation of actors to a present situation through the means made available by their memory: "it is at the very moment of putting to test that the legitimizing evocation takes place, the working of temporal outlines and convenient stories" (Lepetit 1995a: 280). In these constant recycling operations, in the present enactment of past forms, one witnesses many constructions not reproductions, even though the protagonists claim to be going back to a precedent. The different social spaces take shape in the midst of "a variety of inherited fragments" which develop by successive partial adaptations until the moment when, adaptation being no longer possible, there is nothing left but a "trace", i.e., a form which has been detached from its past by the social practice of a given moment. The decision could be to wipe out that trace or to re-charaterize it, yet both operations have their limitations that allow neither a total wiping out nor a free re-charaterization (id: 291-292).

The dimension of power inherent in the explanation of the closure of the juridical field allowed for an explanation of the fact that, within a space and context of political monopoly, the protagonists develop tactics allowing them to seize the opportunity of participation in the redefinition or the bending of power and, by so doing, to establish their role. These snatched opportunities often consist of an appropriation, by entrepreneurs, of forms, of repertories available to the memory; their re-utilization gives them meaning and juridical substance. The Abu-Zayd affair is paradigmatic, from this perspective. In an Egyptian political context, where the ways open to the opposition are narrow, not to say non-existent, there is a proliferation of small entrepreneurs of Islamic morality, as confirmed by the conclusion of the Court of Appeal:

"The Court exhorts the defendant to return to the way of God - Glory be to Him - and to return to the faith of Islam, the truth God has created as alight and straight path which can lead man towards happiness in this world and the next, through the practice of faith, belief in what God - Glory be to Him - has ordained and by rejecting all those impious writings, falsely accusing the verses of the All-Mighty and denying their rules. Others have followed that same path only to return to the way of God - Glory be to Him - May they serve as an example to him.

"May he heed the words of the God of Truth - blessed by the all-Mighty - : "O my servants - you who have trespassed to your own detriment, despair not of God's mercy. God forgives all sins. He is the one who forgives, He is the Compassionate. Return to your Lord in submission before you are punished, for then you cannot be saved. Follow the excellence which has been revealed unto you by your Lord before you are struck with punishment when you expect it not". (Verses 53-55 of the Surat The Groups) (Cairo Court of Appeal, Fourteenth Chamber of Personal Status Disputes, June 14, 1995)."

Having attempted to point out the modalities of setting up a closed space of standard-setting repertories and the possibilities of participation it provides, one can only note that the game of combinations of repertories is closed, for reasons which are, above all, political. To such a closure we owe the aporetic nature of the measures, pretending to be reform measures, which, in fact, only prolong what can be termed "variations on a theme." The purpose here is not to deny all immediate political virtues of such measures,

but rather to stress the fact that they do not allow a real transformation of the system, they only allow its perpetuation since they imply a different re-utilization of the same references. In this respect, we now wish, through the detour of a comparison with the *Aufklärung*, to show that the transformation is more due what Jon Elster calls the secondary effect of attitudes, opposed among themselves, and having different objectives.

Outer self, inner self: law and public space

In a context of political monopolization it is appropriate to note that the heteronomous nature of the argumentative reference is not the reason establishing the closure, but only an element of reinforcement. That is what we strove to prove. Referring to an instance of validation extraneous to the social field only limits the number of combinations of possible references, whereas the repatriation of that instance allows their de-multiplication but, in both cases, it is the political determination of authorized references which restrain the play within a relatively limited range. In this sense, one must recognize the need not to confine the issue to the level of a passage from referential heteronomy to referential autonomy. In as much as they do not aim to break with the established power but rather to join it, the actors only introduce transformations which are marginal to a system they drive to its ends, and the potentials of which they maximize, yet one whose structure they do not, fundamentally, question. If we go back to the Calas affair, we note that Voltaire builds up a cause not as such in order to oppose the structure and the system of administering justice, as to stress the gap between the truth and the fantasies of the Toulouse magistrates. Voltaire wanted to exploit up to their utmost limits the possibilities offered to him by the available references, whilst relying only on the mobilization of authorized resources.

The transformation that takes place is only marginal. It is the result of action by individuals and their manipulation of systems they have to contend with. This does not, however, make it the direct and intentional result of that action. We would now like to underline the fact that an affair like Abu Zayd's is the bearer, or, at the least, the reflection of potential transformations of the Egyptian political and juridical system, without necessarily revealing the intentions of those who claim a certain type of change. Drawing a parallel with the European 17th and 18th centuries should facilitate the demonstration of this statement.

Sticking to the public figures of the French 16th century, Helene Merlin, after Reinhardt Koselleck, explains absolutism as a compromise political solution to religious wars. This solution gives the sovereign the monopoly of political decisions and absolves all subjects of any responsibility towards the state. What is demanded to the subjects is a passive and outer obedience - one that does not involve their conscience -in return for their freedom of opinion. “Man cuts himself in half: a private half and a public half; actions and acts are subjected, without exception, to the law of the State, conviction is free, in secret free.” (Koselleck 1979: 31). Later, in the 18th century, private conscience gets public, thus bracketing out the historical conditions which had necessitated this dichotomy (Merlin 1994: 51-52). Absolutism establishes itself as a system by the granting of areas of competence: on the one hand the public self of the state, the area of politics where the Prince holds the monopoly of power in the secrecy of his cabinet (the "Prince's cabinet"); on the other hand, the inner self, the private area of each and everyone (the "private cabinet"). They both blindly face one another, without any right to look at each other - that

is the very condition of their existence; in a way, they are totally privatized. They do, however, lose this quality when, in the form of literature, drama, pamphlets or treatises, they are put in common, produced on stage or submitted to theoretical elaboration. This "publicizing" of the private gives birth to the notion of public space.

What interests us, precisely, apart from noting that the public area is set up against a backdrop of absolutism, is the fact that the genesis of political transformations is not to be found in the voluntary action of actors determined to reach a goal they have deliberately chosen, but to be found in the multiplication of practices which, while respecting the apparent distribution of competencies, still submits them to debate, thus starting their transformation. That is how the 17th century appears first as the moment of setting up a system of distribution of competencies based on conditions (the private nature of these discretionary competence) which are forgotten as a result of indirect practices of publicizing, thus opening the way to a "publicizing of the private" or, more precisely, a "communalization of the private". One finds the idea of a system that is closed under the will of political power, yet, at the same moment, necessarily allowing some practices, which, though respectful of the framework, draw from it the authorized argumentative logics and drive them to their maximum potential, via, among other ways, the public formulation and formalization (legitimately or not) of a state of affairs that the power establishment does not seek to open to the debate.

We have already said that the closure instituted by the power is reinforced by its referring to a heteronomous argumentative repertory. While reiterating this proposition, one should add that this does not contradict the possibility of transformations indirectly induced by practices developed under cover of maintaining the heteronomous reference. Concerning the reinforcement of the closure entailed by the refusal of a heteronomous reference, it is to be noted that, even though the Enlightenment has replaced God by Reason, thus maintaining a form of reference to a founding principle, it significantly changed the modalities of this reference.

Seeing the truth no longer requires a process of interpretation (understanding the Law which is already there), but rather a discursive process (discovering the Law hidden behind false appearances and prejudices) (Ferrié 1995a). By conferring upon individual understanding the status of a judge of matters and, thus, repatriating the instance of judgment, making it autonomous, the *Aufklärung* unifies the plurality of references, thus establishing the epistemic weave of the varieties of human experience, hitherto falling within the competence of separate instances and, henceforth, establishing in the law the existence of the private instance. The judgment of authority is banished.[10] This being the case, one may think that the seeds of transformation were present in the very practices of reference to heteronomy. This is what Michel de Certeau explains brilliantly in his description of the "inversion of what is thinkable" during the 17th century. Mutations of practices may occur, but they do not stem from new theoretical formulations; quite the opposite, they anticipate the latter. Strangely enough, de Certeau talks of the permanence

10«Il est indéniable que le trait saillant de la modernité est la répudiation de la garantie divine et, par extension, des arguments d'autorité. A cette répudiation, est étroitement lié le statut apodictique de l'individu : il lui est reconnu de pouvoir énoncer dans un langage public des positions personnelles. Cette reconnaissance est possible parce que le retrait de Dieu contribue à déconstruire le préjugé métaphysique selon lequel certaines idées auraient une validité indépendante du processus de communication qui en fait des objets publics» (Ferrié 1995a: 189).

of practices within formal transformations, whereas it would be more appropriate to reverse the statement and to talk of a formal permanence hiding a mutation of practice.[11] What is important is to note that, under the cover of a system of reference to heteronomy, mobilities are developed; and that the practice and theory of an institutional form could entail the modification of the form they mean to respect; finally, one could witness the emergence of new systems capable of co-existing with the old. One can, thus, get rid of any simplifying dichotomy opposing progress and resistance (Certeau 1975: 153-154). By nature, systems can be transformed into objects that can be instrumentalized. This instrumentalization facilitates the revitalization of beliefs associated with these institutions, without directly requiring them.

This process is certainly intensified by the presence of several systems of affiliation and belief. An autonomous space is thus set up which adds to existing institutional legalities, a "legality of another type, with reference to autonomous ethics based on the social order and on conscience" (id: 155). Once more, one should stress the fact that this is not done against the heteronomous referential system, but starting within that system. Simply, "yesterday's" doctrine becomes a fact of "belief". It is a "conviction" (i.e., an opinion combined with a passion), or a "superstition", the object of an analysis hinged on autonomous criteria". (id:156). If we were to take the example of ecclesiastic institutions, we would note that their multiplication introduces an effect of distancing and of localization. In a certain way, the total becomes part of differentiated systems: "everything happens as if doctrinal elements, taken out of the orbit of an integrating system, followed differentiated social weights" which can still be designated by religious language (id: 161-162). The forms (institutional) can thus be used again, but "as a function of an order they no longer determine." (id: 165). What is important in this particular case, is to show that the utilization of a repertory, i.e., of a rhetorical resource, can perfectly be disconnected from all axioms of practices, it can also become only the formal cover of their transformation.

We have attempted to make two points. First, the fact that the emergence of a public space, against a backdrop of absolutism, stems from a distribution of specific competencies which, even though they took shape within an authorized framework, are stretched to the utmost and end up in a transformation of the balance of the starting point. Then, being that the fact, the cover of formal continuity and heteronomous reference could hide a transformation of practices bringing on a transformation of form. It is now a matter of showing how the Abu Zayd affair may be understood within this perspective.

In the attempt to obtain a judiciary divorce because of the apostasy of one of the spouses, the group of lawyers who submitted the petition, obviously tried to seize one of the judicial means that were at their disposal to defend a cause, the definition of Islamic orthodoxy. The cause appears here as a means of action in the public sphere tending to confer upon an issue pertaining to the "private" sphere of individuals a dimension attending what is "common" to the members of a group. Thus, the course is governed by the bias by which public action intervenes in order to preserve public order. This latter notion is generally understood as the set of fundamental standards and values of a society, which it is forbidden to go against. (Carty, Carzo and Jori 1993). Without proceeding with

[11] In other words, whereas de Certeau argues that the words can change but not their meaning, we would argue that, although the words may be the same, their meaning is deeply modified.

the identification of these standards and values,[12] one simply notes that they refer to a concept of intimacy or of the publicly accepted private, to a definition of public morality.[13] In this sense, the *hisba* does effectively constitute public action, aiming at the preservation of the fundamental standards and values of Islam. When the claimants declare that their aim is not to obtain the divorce of the Abu-Zayd spouses, but, by proving his atheism, to deprive him of his teaching, they clearly claim to confer upon a matter of personal status the quality of a matter pertaining to the interests of the community as a whole. All the technical issues of interest in the cause manifests the problematic of what, in the matter of private order, are of a nature to concern society or not.

"To reject what is proper offends every Muslim, and the extension of reprehensible acts within society intensifies the offense. There was, consequently, a direct interest involved in introducing a lawsuit of *hisba*. The lawsuit of *hisba* extends from the Islamic regime to administrative justice in France or even to other matters, particularly where it concerns a lawsuit requesting to annul wrongful administrative decisions. Egyptian jurisprudence started following that path according to what is known in this respect. Since the claimants, when they submitted their request for the separation of the first defendant from his wife, the second defendant, they asked for the recognition of the fact that the former committed apostasy against Islam, whereas the latter is a Muslim, this request allows the claimants a *hisba* action, bearing in mind all the above. They are entitled to introduce such action. If the judgment which is being appealed against contradicts this point of view, it must necessarily be annulled". (Cairo Court of Appeal, Fourteenth Chamber of Personal Status disputes, June 14, 1995).

The lawsuit of *hisba* submitted as an action of public order establishes the principle of the existence of a distinction between the private and the common and, hence, the private and the public. To claim a limitation of what pertains to an individual's inner self - his freedom of conscience - assumes a recognition of the existence of that inner self. As noted by Jon Elster, "by desiring the inexistence of an object, one gives it an existence" (Elster 1986: 25)[14].

By attaching the right to freely expressing one's beliefs, i.e. by turning apostasy into a juridical concept, they give a basis to the right of freedom of expression of beliefs. Even if that right were to be denied, it would still exist. The existence within someone's mind, even if only an existence which is denied, is enough - though it also a condition - for the survival of a doctrine or an idea (ibid.). In the case at hand, there is no denial of the right to freedom of belief, there is only an attempt to give a restrictive definition of its space of jurisdiction. The space of jurisdiction (the *forum*) of freedom of belief is thus defined in a limiting manner. The field of competence of this tribunal of the conscience constituted by the inner self is only the intimacy of one's conviction: any publicizing would be a manifestation of an excess of authority. The differentiation of inner and outer selves is akin to the differentiation between the private cabinet and that of the Prince. The distinction between belief and apostasy stems from a limiting definition of that which is intimate, and the enclosure of its status within the secret of the conscience. One is, however, allowed to think that there is also a setting up of an interplay of competencies the frontiers of which are porous and at whose margins a public and juridical culture is

12On the notion of legal standard, cf. Orianne, 1993 and Dupret 1995b.

13The latter has a strong influence on, among other things, the implementation of sexual codes of conduct (Carty, Carzo and Jori 1993).

14Jon Elster adds that, as such, this is not paradoxical, since the created existence of something is different in mode from its denied existence (Elster 1986: 25) [does not this contradict the point made in the text by invoking Elster?].

developing, one whose intimacy is allowed to express itself publicly and to claim a legal expression for its stances:

"The investigation of the occurrence of apostasy is, consequently, part of matters of priority pertaining to the competence of the mentioned courts who cannot be set aside in the petition for separation. This matter of priority does not exceed their field of competence. The court does indicate that there is a distinction between apostasy - a material act with its own foundations (*arkân*), conditions (*sharâ'it*) and criteria of prevention (*intiqâ' mawâni`ihi*) - and belief (*i`tiqâd).* Apostasy necessarily pertains to material acts with an external existence. Such facts must, necessarily, manifest themselves without ambiguity (*labs*), without divergence about the fact that he lied to God - glory be to Him -, or lied to His Messenger - may the peace and blessings of Allah be upon Him - to the extent where he rejects (*yajhad*) what made him enter the faith of Islam. If it is heard saying that he committed no impiety by a precise act, or if the proof thereof is weak, one cannot draw a conclusion as to his impiety and this cannot lead to a declaration that he is impious because impiety is a very serious matter. One is not authorized to declare a Muslim as being impious as long as there is a report excluding his excommunication (*`adam takfîrihi*). As for conviction, it is what a man keeps confidentially within him (*yusirru*), that which he firmly believes within his heart and which he intends. This is obviously different from apostasy which constitutes a crime (*jarîma*) endowed with its own material foundation and which is submitted to justice so that it may conclude as to its occurrence. This falls within the purview of what justice is competent to examine or of what has to be judged and what is relevant to it. Conviction is, on the contrary, what falls within the purview of the human soul and what is enclosed in a man's inner self. It is a matter to which justice has no access. People must not enquire about it. It has to do with the relation between man and his Creator. Apostasy is an exit, to the highest degree, from the Islamic regime, by obvious material acts. In positive law, this comes close to dissidence (*khurûj*) from the state and its regime or high treason (*khiyâna `uzmâ*). The judge and the mufti are the ones to decide in matters pertaining to apostasy" (Cairo Court of Appeal, Fourteenth Chamber of Personal Status Disputes, June 14, 1995).

It should be possible, at the end of the road, to come back to what one of us said about inner places and public culture (Ferrié, 1995 b) and to align it with what one pretended to draw from the Abu Zayd affair. It is to be noted that this affair reflects the explicit will of some protagonists to participate in the project of confining "inner spaces"[15] outside public culture[16].

The inner places do exist - it is not to be doubted - and they are many, as many as the frameworks of reference to which they correspond. Yet, in this context, we witness a process of strict definition of competencies: judgments of the inner self do not obtain any recognition of legal status; even more, their externalization is subjected to legal sanction. At the same time, these internal places which are denied public expression "do constitute a "public virtuality", i.e. a representation of the self exposed to a third party, a space where one can legitimately appear in a certain light to others" (id. : 193). One can even affirm their public existence, simply by virtue of the fact that their existence is denied (or, more exactly, reduced). This existence cannot, however, become publicly and legally concretized : it is neutralized, "disactivated". In that sense, the confinement of inner spaces to the inner self aims to "disactivate the potentials of contestation attached to an increasing number of behaviors" (ibid.). The intention of excluding the inner spaces from public culture, due to their subversive character for a monolithic definition of power, entails an increased intervention in people's life. This intervention, which presupposes the existence of spheres of intimacy proper to the individual and to the state, excluding one another, aims at

15«Par «lieux intérieurs», nous n'entendons pas un espace obligatoirement secret où s'accomplissent des actions innommables mais, dans la plupart des cas, un espace de communication intersubjectif où les pratiques individuelles ont la possibilité de devenir des récits pour autrui, à l'intérieur d'une socialité contrôlée» (Ferrié 1995b: 192). [should we keep this in the French original?]

16 It is not the misconduct which matters, but its disclosure. In the case of Abu Zayd it is not his alleged disbelief that is important but its being made public.

redefining the fields of competence. We are, therefore witnessing an attempt to expand what is public which, under the cover of a restrictive definition of intimacy, takes the form of the non-recognition of the latter. One can imagine that the non-recognition of intimacy by the law becomes a stance determined by the structures of power and destined to become part thereof. Determined in the sense that discourses and practices of non-recognition seem to hide "euphemized and (fictionally) depoliticized relations of power" (id. :200). Destined to become part thereof in so far as they reaffirm and stabilize a political domination, while pretending to participate in the definition[17] and bending of its ideological content.

The Judge's Paradox

In conclusion, we wish to point out the paradox represented by this non-recognition, as formulated by the judge. By carrying out a distinction between the inner self which only concerns the individual's relation to the divinity, and public order which, consequently, concerns all the acts liable to be known to others, the judge implements a dichotomy the origin of which would be difficult for him to find in the Islamic juridical traditions. This dichotomy, as we said, refers to the separation operated by the discrimination, following the religions wars, of the impenetrable but neutralized inner self, and the outer self where one could judge all of a man's behavior (Koselleck, 1979). This distinction aims to impose the preservation of a referential monism in a situation of a *de facto* referential pluralism. One could, justifiably, consider such a pretension as illustrating the will to see the religious reference regulate people's life and, from this angle, to interpret the judge's position as being "pre-modern".

This is, however, impossible, for the judge operates a typically modern distinction between religion, which he defines as the intimate relation with the Creator, pertaining to the inner self, and the law of the state, thus differentiating an individual subject of God from another one, subject of the state; he declares the first subject to be a private man, as the "Moderns" had always wanted it to be (e.g. Latour, 1991); the second subject he considers to be a public man. By so doing he, involuntarily, displaces the issue of apostasy from the domain of a religious economy of meaning to the domain of the law, i.e. to a site where the constitutive constraints of the social link as a latitude for the individual are clearly defined. This displacement situates the issue of apostasy within a, henceforth, secular logic, whatever the reference to the religious idiom.[18]

This makes it incumbent on us to consider, of course, that the judge adopts the epistemic standpoint of modernity - even in the sense of placing the relation with the divinity within the inner self - and affirms implicitly, *a contrario*, that the social world pertains to a separate jurisdiction which, while having to respect referential heteronomy, is not within the purview of the divine but within that of the positive provisions contained in the laws of the state and applied by magistrates. Thus what separates the judge who

17 All the strong a definition since it bears the seal of incontestability: usage of the heteronomous reference in the argumentative process works particularly well, because referring to an external instance of validation allows to escape the duty to demonstrate.

18 It is also shown that the establishment of religious references within a system not resting on religious sense do not subject them to the religious order, but rather undermines the pretension of religious instances to a referential heteronomy.

condemned Nasr Hamid Abu Zayd from the liberals who would consider that an academic cannot be sued for his ideas has nothing to do with ontology: they inhabit worlds that are similarly structured and contains the same beings. The only difference between the two worlds is the concept of the limits of the territory ceded to individual jurisdiction. As far as the judge is concerned, this territory is a misery not to be mixed up with conscience; by a rather remarkable paradox, it is also the territory left entirely to God. Just like in the troubled era wherein it was established, the distinction between "inner self" and "outer self" is not used in order to place religion at the center of the public sphere, but, for sure, to keep it out of it;[19] what it tries to establish, in fact, is the sole domination of the authorities in power by excluding from public space any system of reference other than the one authorizing such a domination.

19 For the reference to God institutes a principle of justice allowing the consideration of other principles, while separating them from all claims to standard-setting.

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