The rule of morally constrained law

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THE RULE OF A MORALLY CONSTRAINED LAW
Morality, Islam, law and the judge in present-day Egypt

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1. Introduction

In this contribution, I would like to address the question of the limitations which may be put to law in the current Egyptian judicial context by invoking the moral rule.

In the Western tradition of legal philosophy, the assertion of the social and non-metaphysical nature of norms allowed to view them as positive facts. Starting from such an assessment, moral norms and legal norms have been distinguished. This can be considered one of the fundamental principles on which modern law has been built. Austin, for instance, considers law as being distinct from other normative orders because it is established on a command expressed by a *de facto* legitimate authority having the power to sanction. Such a theory aims at substituting a principle of predictability and reappraisal for the hold of transcendence. Hence, Herbert Hart, the leading figure of what has been called "soft positivism", claims that there is no necessary reason to consider that legal rules are reflected in or respond to some moral requirements, even though it could have been actually the case.[1] It is the non-existence of any necessary relationship between law and morality that is at stake. On the other hand, Ronald Dworkin strongly criticizes Hart's conception[2] because of his failure to consider that law is more than a mere system of rules, but the combination of rules and principles. According to Dworkin, there are general, fundamental maxims of law that, even though they do not enjoy the status of a rule, are guiding the judge in his/her decision. However, principles are not univocal; hence they are open to an interpretation process in which their weight and appropriateness must be assessed in every situation.

Dworkin makes it possible to reintroduce morality as a major component of the legal phenomenon. However, such a perspective leaves one facing a fundamental question mark. In Dworkin's theory, the judge is acting as if there were a correct solution in which principles are framing rules, yet he gives no answer as to the ways in which such principles are constituted, mobilized and characterized. This is why we need a much more pragmatic approach to the question.

The sociological hypothesis according to which norms are assimilated and are expressed in automatic and unconscious conducts does not give any account of the way people perceive and interpret the world, recognize what is familiar and build what is acceptable.[3] On the contrary, pragmatic theory starts from the idea that norms, and moral norms in particular are a public phenomenon that has no meaning but in its public

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[1] Hart H.L.A., 1961, *The Concept of Law*. Oxford: Oxford University Press, p. 224.
[2] Dworkin R., 1985, *A Matter of Principle*. Oxford: Oxford University Press.
[3] Coulon A., 1994, "Harold Garfinkel, présentation". In K.M. Van Meter (ed.) 1994, *La Sociologie*. Paris: Larousse, p. 648.

construction and explanation. The meaning is something which is constructed *in situ* by people and is attributed so as to give its object the dimension of something which is typical, uniform and interchangeable.[4] Hence, moral order is what is taken for true and fair in a given context. It means that practice is making norms, not the reverse. Moral norms enjoy what one may call a status of inquestionnabilité because they are supposedly known and expected by the many actors of a given context. Because they express what everyone supposedly knows and contain "pious allusions to presumed, deep, pre-existing moral commonalties, (…) it catapults the normative version of reality into a state of public acceptance.[5] This is made possible through the action of institutional settings and languages such as law.

Law and morality are mutually related in a very intricate way. Not merging together, they can neither be considered as totally autonomous from one another. Hence, law must be formulated in the non-codified terms of what is morally acceptable. This is here that one can observe the emergence of notions such as public order or policy, custom, good moral character, inner nature of things, as well as all the legal standards, which are at play in the judge's work. One of the main assumptions of this paper is that Islamic normativity (Shari'a) constitutes one set of such moral notions and standards.

The main characteristic of invoking the moral order is that, while being postulated and not deduced, it gives the lion's share to the ascription of a norm to which it cannot be objected. This article aims at describing the ways through which restrictions are put to law in the name of morality in the Egyptian context. I will firstly describe how a new legal and judicial system was established through a process of codification and transfer of legal technology in which Shari'a fragmented into shrinking positive legal norms and inflating moral principles. Secondly, I will aim at showing how moral principles are invoked in order to restrictively constrain the implementation of the law and close its open texture. In general, it shows how morality, including Shari'a, becomes a major way for sharing in power and reshaping the public sphere. In conclusion, I will stress the fact that, though such a morality has a heteronomous legal nature, meaning that it is always outside itself that law finds the means for solving hard cases, however it is up to legal professional actors to interpret the content of these moral principles, with the consequence that they own the final word with regard to their definition and implementation.

It must be noted that this paper does not address the relationship between law and morality within the Islamic world as such, for several reasons. First of all, because I very much doubt the existence of anything such as an Islamic world. This paper adopts a position that is rather anti-culturalist and, accordingly, the Egyptian case is neither an exceptional nor a paradigmatic instance of an Islamic specific dealing with the rule of law and with the relationships between law and morality. As I put it, one cannot but

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[4] Watson R., 1998, "Ethnomethodology, Consciousness and Self". *Journal of Consciousness Studies*. Vol. 5 No 2: 202-223, p. 215.

[5] Moore S.F., 1993, "Introduction: Moralizing States and the Ethnography of the Present". In S.F. Moore (ed.), *Moralizing States and the Ethnography of the Present*. Arlington: American Anthropological Association, pp. 1-2.

note the persistence of a certain approach that refers knowledge of those societies in which Islam is present as a religion to an area rather than to a number of disciplines. This position 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. 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. We also hope to show that the universality of the cognitive frameworks available to the researcher corresponds to a universality of the cognitive frameworks available to the protagonists.[6]

A second reason is that one of the main contentions of this paper is that what is called Shari'a is morality and that the question of the application of the model of the rule of law in Egypt is difficult not because it is located in an Arab or an Islamic context, but because the Egyptian context witnesses a strain in the relationship between law and morality. Such a strain is not per se specific to Egypt. Because Egyptian law has been built along the lines of "modern law", in general, and of the Civil-law family, in particular, it reflects some of their specific tensions, among which the tension raising from the (denied but actual) relations existing between law and morality. This is why this paper addresses these relationships, in general and at a theoretical level, be they conceived by Western jurists and sociologists or not. In sum, if the Egyptian situation is an instance of anything, it is the one of an awkward relationship between law and morality, which is constraining the application of the rule of law. This is why the Egyptian case is worth being considered: not because it would reflect an Islamic conception of the rule of law, but because it (pathologically perhaps) reflects the fact that the notion of the rule of law is by large determined by a complex cluster of relations between the legal and the moral dimensions of the norm.

Before any attempt at describing the way morality is constraining law in the current Egyptian context, I will briefly describe some of the major changes the legal and judicial system experienced over the last two centuries, so as to relocate the formal separation of law and morality and the evolution of Shari'a (i.e. Islamic law) in their historical framework.

2. Legal transfers and the implosion of Shari'a in Egypt

If it is true, as Nathan Brown suggests, that contemporary Egyptian law cannot be considered a mere instrument of imperialist domination, and if it is true that the role of Egyptian elites must not be neglected in assessing the way a legal system has been crafted so as to allow the building of a state and later on its endeavors to free itself from

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[6] Dupret B. and J.N. Ferrié, 1997, "For intérieur et ordre public : ou comment la problématique de l'Aufklärung peut permettre de décrire un débat égytpien. In G. Boëtsch, B. Dupret et J.-N. Ferrié (eds.), *Droits et sociétés dans le monde arabe. Perspectives socio-anthropologiques*. Aix-en-Provence: Presses de l'Université d'Aix-Marseille (translated "The Inner Self and Public Order: About a recent Egyptian affair". In "Muslim Traditions and Modern Techniques of Power", Armando Salvatore ed., *Yearbook of the Sociology of Islam*, vol. 3, 2000).

imperial domination,[7] it remains nonetheless that the legal system as we can observe it now is mainly the product of a transfer whose effects must be assessed. First one has to briefly depict the main legal changes that occurred during the last two centuries. Then, one must raise three questions: why is it the case that it is to French law that the Egyptian elites turned? To what extent did the importing of French law carry into Egyptian law all the legal standards and postulates that were operating in the former? Did we observe any transformation in the so-called Islamic law during this period?

One can date from 1876 (creation of mixed courts with their own codes) and from 1883 (creation of national courts with their own codes) the exact time of Egypt's entry into the French legal family. Lord Cromer, the British Resident in Egypt, blamed these new codes for not being Egyptian enough. This was the result of a long process beginning at the turn of the eighteenth century.[8] The whole nineteenth century saw the many Ottoman governors, vice-roys and khedives striving to give the legal and judicial system a "modern" color, that is mainly a Western one.[9] In less than a century, the qadi's jurisdiction complemented by a system of law enforcement by the executive gradually evolved "into a much more complex and sophisticated type of justice administered by a fully-fledged judiciary",[10] before being replaced by a French-type court system. In the initial stage of the process, justice and administration were blending. The foundation of the major building stones of the administration was at stake, and it came out in the establishment of conciliar bodies. In a second step, the need for specialization began to be felt and specialized bodies were established in order to enforce the law. Meanwhile, "the procedure before the new councils developed from a purely bureaucratic handling of cases to a procedure resembling a trial".[11] We can observe the creation of many jurisdictions, like the High Court (majlis al-ahkam), and later on, due to the constraints of international trade and Western imperialism, special courts for merchants (majalis al-tujjar) using French law and lawyers. From the late 1870s onward, mixed courts (mahakim mukhtalita) and national courts (mahakim ahliyya) operated, together with religious courts (mahakim shar'iyya) for matters related to personal status. However, the latter were progressively stripped of their jurisdiction and were finally absorbed in 1956 by a unified system of national courts. Following the French dividing line between civil and administrative law, the Council of state (majlis al-dawla) was created in 1946. In 1969, the Supreme Court (al-mahkama al-'ulya) was established with jurisdiction on constitutional matters. It was replaced in 1979 by the Supreme Constitutional Court (al-

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[7] Brown N.J., 1995, "Law and Imperialism: Egypt in Comparative Perspective". *Law & Society Review*. 29/1: 103-125.

[8] Goldberg J., 1998, "Réception du droit français sous les Britanniques en Egypte: un paradoxe?". *Egypte-Monde arabe*. No 34: 67-79.

[9] Hill E., 1987, "Al-Sanhuri and Islamic Law". *Cairo Papers in Social Science*. 10/1; Reid D. 1981, *Lawyers and Politics in the Arab World*. Minneapolis-Chicago: Bibliotheca Islamica; Ziadeh F., 1968, *Lawyers, the Rule of Law and Liberalism in Modern Egypt*. Stanford: Hoover Institution; Botiveau B., 1989, "L'adaptation d'un modèle français d'enseignement du droit au Proche-Orient". Flory M. et Henry J.-R., *L'enseignement du droit musulman*. Marseille: Ed. du CNRS. : 229-252.

[10] Peters R., 1999, "Administrators and Magistrates: The Development of a Secular Justice in Egypt, 1842-1871". *Die Welt des Islams.*

[11] Peters R., 1999, *art.cit.*

mahkama al-dusturiyya al-'ulya).

The nineteenth century was also the time of a huge codification process. In Egypt, decrees and laws regulated criminal matters as early as 1829. They formed a collection called *Qanun al-Muntakhabat*, some of its articles clumsily translating the provisions of the French Criminal Code of 1810. In 1852, a new penal code was promulgated (al-Qanunnameh al-Sultani) which is in its first three chapters largely identical with the Ottoman Penal Code of 1851.[12] This Penal Code can be regarded as the codification of the discretionary power given by the Shari'a to the state to punish sinful and undesirable behavior which stops short of strict Islamic provisions and procedures (ta'zir). However, French law massively suffused Ottoman criminal law in the new Penal Code of 1858, while in Egypt it occurred through the promulgation of the mixed and national codes of 1876 and 1883. Other codifications followed the track of criminal legislation. In the Ottoman Empire, five main codes were adopted whose French origin is unmistakable: the Commercial Code of 1850 (amended in 1861), the Code of Maritime Trade of 1863, the Code of Commercial Procedure of 1863 and the Codes of Civil Procedure and of Penal Procedure of 1879.[13] Again, in Egypt, the new codes of 1876 and 1883, which were drafted by French and Italian lawyers, followed a French pattern. In civil matters, while in the Ottoman empire a Civil Code known as the *Mecelle* was promulgated between 1869 and 1882, which aimed at conciliating Islamic law and the Napoléon Code, Egypt directly imported French codes despite Qadri Pasha's attempt (in his book *Murshid al-Hayran*) to codify Islamic law in the image of the *Mecelle*. One had to wait for the new Civil Code drafted by the prominent lawyer 'Abd al-Razzaq al-Sanhuri and promulgated in 1948 to witness an attempt similar to that of the *Mecelle* to establish a civil law in the systematic form of the code but claiming its grounding on Islamic legal principles.

Chibli Mallat argues that the reception of such a civil law system was facilitated by two underlying currents: "first, the comparative ease to reach (nineteenth- and) twentieth-century standards by the short-cut of comprehensive codes in the French tradition, as opposed to the slow build-up of common law through court cases, made the passing of statutes easier and more palatable than the reliance on a troubled judiciary for the development of case law. Like Japan under the Meiji, there was a need for clear, simple and comprehensive Codes that would regulate the most current legal transactions, and only the Napoleonic Codes could offer the adequate and needed model. The second factor was the nineteenth-century codification of Islamic law in important parts of the Middle East under Ottoman rule"[14] and, one should add, the very same attempt (though its final shape is totally different) as that of Sanhuri in the 1940s. However, this explanation is not sufficient. Besides the utility of French law for resisting colonialism and for imposing a centralized control on the country, one must complement the explanation by showing how the process has been made easier by the

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12 Peters R., 1995, "Sharia and the State: Criminal Law in Nineteenth-Century Egypt". In C. van Dijk and A.H. de Groot (eds.), *State and Islam*. Leiden: CNWS.

13 Lafon J., 1997, "L'Empire ottoman et les codes occidentaux". *Droits*. No 26: 51-69.

14 Mallat C., 1997, "Islamic law, droit positif and codification : reflections on longue durée". *Plurality of Norms and State Power from 18th to 20th Century.* Vienna Workshop.

relationship between Egypt and a colonial power like France whose asymmetric nature led to the conclusion that adopting French law was a unilateral obligation. Moreover, as in Christianity[15] the whole process has been facilitated by the very similarity of civil law and Islamic law in both structure and language.[16] Finally, it must be stressed that it has only been made possible by a huge transformation of Shari'a, what Armando Salvatore calls the implosion of Shari'a,[17] which was in legal matters progressively confined to the role of a mere identity postulate of indigenous law, i.e. that legal postulate allowing a group to preserve in law what it considers to be its cultural identity.[18]

One will have to address that last issue, but the point is now to consider whether such a transfer of legal technology has led to the transfer of the many postulates and standards on which a legal system is grounded from the French system into the Egyptian one. No doubt law in Egypt is nowadays Egyptian law. Does it mean that what was formerly French law has been completely "indigenized", so that what one faces is the former local legal system in the dress of a French-style legal system?[19] One should probably answer that what is now Egyptian law cannot escape its formal structure, i.e. its civil-law structural organization. In other words, Egyptian law (legislation and case law) must still be carrying the complex set of postulates and standards that actively operate in any legal system of the same family. Among these fundamental principles, one can identify the following: worship of statute law, unity of the legislature whose intention can be deduced from texts and preliminary works, pyramidal shape of the system, rationality of the legislature who "never speaks to say nothing" and is totally coherent, doctrine of the clear meaning of legal language, syllogistic application of law to fact, values of security, stability and order, standards of public order or policy, good moral character, good family man (bon père de famille), etc.[20]

Coming back to Salvatore's concept of the implosion of Shari'a, one must stress the radical transformation Shari'a experienced throughout the last two centuries. Shari'a could be best translated as "Islamic normativeness".[21] It includes both moral and legal norms. According to Salvatore, this dual nature was put in the field of tension between the differentiation of an autonomous legal system in Egypt and the de-differentiating, normative discourse of Islamic reform (islah).[22] At the end of the nineteenth century,

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15 Legendre P., 1974, *L'amour du censeur. Essai sur l'ordre dogmatique*. Paris: Seuil.

16 Dupret B., 1997, " 'Vent d'est, vent d'ouest' : l'Occident du droit égyptien". *Egypte-Monde arabe*. 30-31: 93-112; Dupret B., 2000, *Au nom de quel droit. RŽpertoires juridiques et rŽfŽrence religieuse dans la sociŽtŽ Žgyptienne musulmane contemporaine.* Paris: Maison des sciences de l'homme.

17 Salvatore A., 1998, "La sharî'a moderne en quête de droit : raison transcendante, métanorme publique et système juridique". *Droit et Société*. 39: 293-316.

18 Chiba M., 1986, "The Identity Postulate of Indigenous Law and its Function in Legal Transplantation". In Sack P. and Minchin E. (eds.), *Legal Pluralism. Proceedings of the Camberra Law Workshop VII*. Camberra: Law Department, Research School of Social Sciences, Australian National University.

19 Botiveau B., 1993, *Loi islamique et droit dans les sociétés arabes. Mutations des systèmes juridiques du Moyen-Orient*. Paris: Karthala-IREMAM.

20 Dupret B., 1997, *art.cit.*

21 Johansen B., 1998, *Contingency in a Sacred Law. Legal and Ethical Norms in the Muslim Fiqh*. Leiden-Boston-Köln: Brill, p. 39.

22 Salvatore A., 1998, *art.cit.*

Egypt saw the concomitant rise of a public sphere, the furthering of the codification of law, and the emergence of a legal and constitutional movement. It is in such a context that Shari'a began its paradoxical experience of being both differentiated from law and judicial institutions and mobilized for legitimizing the normative and, in due course, the legal system. So, by implosion of Shari'a one means the transformation of its understanding from its positive, systemic and institutional efficiency of the epoch prior to modern state-building, to its supposedly authentic, normative and civilizing kernel.[23] According to Rudolph Peters, the adoption of French law precipitated Shari'a into its marginalization and then its quite complete neglect, while "with the better organization of the Egyptian state apparatus, Shari'a justice during the second half of the nineteenth century, (had become) better organized too by means of clearer legislation, the regulation of the function of the mufti, and the creation of procedures to watch over the qadi's decision".[24] To the contrary, one would rather consider that it is the transformation or the rise of the public sphere, carrying with itself the transformation or the rise of the state apparatus and the ways it legally regulates its relationship with its citizens, that led not to the neglect of Shari'a but to its implosion. In other words, Shari'a experienced an internal split that marginalized its positive legal dimension and inflated its metanormative moral dimension.

Considering on the one hand the many legal postulates and standards that are operating in the legal system, and on the other hand the implosion of Shari'a, one must now turn to Egyptian juristic and judicial practice so as to examine the relationship between law and morality, including Shari'a.

3. The empire of a morally constrained law

Egyptian jurisprudence acknowledges the difference between law and morality. As to the definition of law, it actually very much follows Austin's command theory. For instance, Hassan Gemei defines law as "the set of rules governing the behavior of individuals in the society which people should obey, otherwise they will face penalties to be imposed against them by a competent authority".[25] Legal rules, Gemei argues, are not alone on the track which aims at regulating and stabilizing the relations between the members of any given society; they run with other rules like the rules of courtesy, customs, traditions, morality and religious rules. As for morality rules, these are "principles and teachings considered by the majority of the people of the society as binding rules of behavior which aim at achieving high ideals".[26] They share in common with legal rules a number of characteristics: they change according to time and place, they aim at organizing the society, and they are of a binding nature associated with penalties. However, they differ in three aspects: their scope: "Whereas morality includes personal and social manners, law addresses the relationship between the person and the others from the perspective of the ostensible aspect of behavior without taking into

[23] Salvatore A., 1998, *art.cit.*

[24] Peters, 1995, *art.cit.*

[25] Gemei H., 1997, *Introduction to Law: Theory of Law, Theory of Right*. Cairo: Cairo University, p. 6.

[26] Gemei, 1997, *op.cit.*, p. 15.

consideration the intentions unassociated with physical action";[27] the kind of penalties imposed in each case: "Whereas the penalty of violating morality rules is mere moral penalty ranging from remorse, denunciation and disdain of the society, the penalty of violating legal rules is physical incarceration, imprisonment, hard labor etc., and is imposed by the public authority";[28] their purposes: "Whereas morality rules seek to achieve perfection to man, the legal rules seek to achieve stability and order in the society";[29] the form in which they appear: "legal rules most often appear in a clear and specific form, whereas morality rules are not so clear because they are related to internal feelings which may differ from one person to another".[30]

When turning to religious rules, Gemei stresses the fact that they have much in common with legal rules, but that the sphere of the former is much broader and that the penalty ensuing from the violation of the former is imposed in the Other World.[31] Obviously the difference he draws between morality rules and religious rules is very tenuous. However, Gemei adds, such a differentiation between legal rules and religious rules "cannot be accepted with regard to Islamic Shari'a",[32] because Islam is a comprehensive faith encompassing law. This means that the scope of Shari'a is broader than the scope of law: "Islamic Shari'a is the source of legislation from which the legal rules should be derived in Islamic states";[33] "Islamic Shari'a was ordained as a divine law to govern the conduct of the Islamic society, formulate the thought of Moslems, and regulate the human relations. Revealed by Allah, Shari'a guides the society to the highest ideals and seeks to achieve wisdom for which God has created man on earth".[34] Again, one should note that, despite his refusal to distinguish between law and Shari'a, Gemei argues along the same lines he had previously adopted when considering morality rules and religious rules, i.e. that law, though it is different from the latter because of its scope, the nature of its sanctions, and its purposes, does (or should) proceed from these higher and ideal principles. In other words, Gemei, as a very good representative of Egyptian jurisprudence, while claiming a special status for Shari'a, seems to fuel a twofold contention: that Islamic rules are today very close to morality rules; and that law is serving with its specific technical tools objectives which generally do not run against principles of morality and religion.

At another level, one must observe that during the last three decades, Egypt witnessed an increasing trend to call for the application of Shari'a. One is not concerned with the historical details of such a claim, which stretches from the political arena up to the judiciary, but only with the question of knowing how to make sense of it in terms of relations between law and morality. In other words, one is interested in the ways professionals are conceiving the relationship between state law and Shari'a and in the

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[27] Gemei, 1997, *op.cit.*, p. 16.
[28] Gemei, 1997, *op.cit.*, p. 17.
[29] Gemei, 1997, *op.cit.*, p. 17.
[30] Gemei, 1997, *op.cit.*, p. 17.
[31] Gemei, 1997, *op.cit.*, p. 18.
[32] Gemei, 1997, *op.cit.*, p. 18.
[33] Gemei, 1997, *op.cit.*, p. 27.
[34] Gemei, 1997, *op.cit.*, p. 28.

answers courts give to cases in which somehow Shari'a principles are mobilized to ground judicial decisions because these representations and rulings reflect the constraining effect morality, including religious morality, is exerting on legal thought and practice.

Legal practicians hold different conceptions of Islam and of its role in Egyptian law. They generally stress the duality of the repertoires law is drawing upon in Egypt, though they underscore the embracing nature of Shari'a: "The Shari'a is the basis on which statute law rests".[35] To a certain extend, it means that Shari'a transcends law: "There is a huge difference between a legislative document and the Shari'a. The Shari'a is not a legislative document but a life program".[36] It can even mean that positive law and Shari'a do not relate to each other: "Positive laws do not run against Islam, no more than they are in line with it. (…). For me, Islam doesn't and never will come down to laws".[37] Thus, generally speaking, it is only the question of the referent that creates a problem, and not the content of provisions of which the actors acknowledge the very wide compatibility: "The interpretation of texts and their application should refer to Islam. If this referential framework were found today, ninety percent of our problems would be solved".[38] Such a notion of referent reflects the perception of a cultural normality, i.e. the authentic tradition that society supposedly considers as the sole legitimate one: "If people feel that it is their law and their religion, they will comply to it".[39] Obviously, the reference to tradition can only be analyzed within the framework of a process of (re) construction. In this process, the actors carry anticipations regarding what they believe to be socially acceptable and desirable. Their self-perception, which narrowly determines their behavior and the content of their actions, itself stems from perceptions and anticipated assessments of the social realm: they stage society to which they attribute a compound of idealized norms.

However, it is above all the issue of the crossing into the political realm that remains essential for assessing the attitude of the professionals of law one interviewed. The idea of solidarity without consensus[40] can surely be used in the case at hand here. It remains to be examined what, beyond the solidarity with regard to referring to the Islamic legal repertoire, explains the disagreement as to the implications of this reference, indeed as to its content. The only explanation that seems satisfactory is of a political nature, such as the stakes involved in holding power and the use of the Shari'a in this context. Just compare the following sentences: "I am personally convinced that this type of legal conflict (between Shari'a principles and positive law) means the downfall of the State, a downfall that the Supreme Constitutional Court cannot allow, no more than any individual with common sense";[41] "If in Egypt the people were given the opportunity to

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[35] Interview with MD, lawyer, October 1994.

[36] Interview with NH, lawyer, January 1994.

[37] Interview with NH, lawyer, January 1994.

[38] Interview with AW, lawyer and former magistrate, June 1994.

[39] Interview with AW, lawyer and former magistrate, June 1994.

[40] Kertzer D., 1988, *Rituals, Politics and Power*. New Haven: Yale University Press; Ferrié J.-N., 1996, "Les paradoxes de la réislamisation en Égypte". *Maghreb Machrek*. 151: 3-5.

[41] Interview with NH, lawyer, January 1994.

choose their leaders, they would certainly choose the Shari'a";[42] "Some people think that everything is constraining, even some customs. I don't think this movement, called 'salafite', can serve as a basis for modern society. But a trend taking the Shari'a as a referential framework for the laws may favor the renewal of the rules pertaining to daily transactions";[43] "In Egypt, the Shari'a can be applied within a day or overnight".[44] It is possible that one of the core elements of the issue lies here. Calling for the implementation of the Shari'a may indeed well reflect the wish to change what is socially accepted and desirable (or at least supposed as such) into a set of prescriptive and proscriptive rules. It is as if somehow there were a structural inversion: from a "cultural order" conveyed and manipulated by the norm, one would move to a "legal order" influencing culture and setting its legitimate norms. This transition probably takes place through a process that gives strength to the norm. However this is possible only if the initial normative repertoire can be given a regulatory nature. But this condition alone does not suffice. It must be combined with conditions of a more political nature driving some actors to wish to include these regulatory features into the normative repertoire.[45]

It is now worth considering cases in which morality, including but not exclusively religious morality, clearly plays an important role. There are many such cases in present-day Egypt. Some would even consider it a judicial pathology. Focusing on the judiciary, one will refer to three cases so as to illustrate the constraining impact of morality on the implementation of law. Each of these cases very much exemplifies one aspect of such a contingent relationship: the procedural constraints and the common-sense typifications operating in the legal characterization of facts; the articulation of morality, religion and politics; the power of the normalcy argument. Moreover, in all three cases, one will observe the very political dimension of the combination.

The first case is known as the case of the Maadi girl. In January 1985, five young men ravished under the menace of a knife a 17-year old girl together with her boyfriend, took them in a removed place where two of the assailants had sex with her before being compelled to move to another place. A sixth young man hosted them in the garage he was living in, where they all but the sixth had sex with her and robbed her and her boyfriend from their watch and jewelry. They released their victims in the neighborhood. The victims lodged a complaint against them with the police and they were soon arrested, still in possession of the knife and their small booty. The case received a huge coverage by the media and an expeditious trial followed which resulted in the death penalty for abduction, rape and robbery for the five main assailants and a 7-year prison punishment for active participation for the sixth one. The Mufti of the Republic confirmed the death penalties and the sentences were executed.

This case is interesting at many levels, among which two in particular: a very

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[42] Interview with MN, lawyer, January 1994.

[43] Interview with BI, magistrate, November 1993.

[44] Interview with MZ, ulema, January 1994)

[45] Dupret B., 2000, *op.cit.*; Dupret B., forthcoming a, "A Return to the Shari'a? Egyptian Judges and Referring to Islam". In F. Burgat (ed.), *Islam and Re-islamization.*

pragmatic level of morality construction in judicial settings and a more general level of political effects of non-political cases. At the pragmatic level, one should first notice the definitions which have been given by the Egyptian Court of cassation (mahkamat al-naqd) to the sexual parts of the body (mi'yar al-'awra), the trespassing of which is condemned: "the offender lays the (female) victim on the ground and breaks her hymen with his finger"; "the offender pinches a woman's bottom"; "the offender grasps the victim's breast"; "the offender pinches the (female) victim's thigh", etc. "According to such a criterion, courts do not consider the kissing of a girl on the cheeks or the kissing of a boy on the neck or his biting at the kiss's spot a trespassing of her/his modesty".[46] Then one should stress the very pre-organized pattern of the procedure followed by the magistrate. This procedural approach to the case, i.e. the way the magistrates are formulating the rules they are referring to, is what makes professionals different from lay people. In other words, their narrativization of the facts is constructed so as to make it relevant for all legal purposes, e.g. the legal characterization and the criminal conviction. Moreover, the way the prosecutor is constructing his tale is also organized in a kind of "hyper-accusation", an accusation which "anticipates the uses to which it will be put by the court".[47] Finally, one can observe the many strategies to assess or to escape the blame-implicative nature of the accusations: the general prosecutor is looking for the intentional nature of the offenders' crimes, while the offenders are looking for alternative descriptions of the facts dissociating them from potentially damaging implications of the magistrate's wording or for the underplaying of their active participation so as to make their agency disappear. For instance, they stressed either the collective nature of the crime or the semi-acceptance of the victims or the effect of circumstances. Offenders were not challenging the morality which was at stake, but on the contrary they were affirming their adherence to such a morality, although trying to give an alternative picture of their participation to the crime and of the moral implications it has on their own personal morality.[48]

At another level, one might underscore the fact that this case, while non-political at first glance, became political by trigger effect. It had a tremendous public coverage that unfolded at length (more than it debated) paradigmatic conceptions of female modesty, sexuality, sexual control and the repression of any trespassing to its boundaries. This is clearly showing how moral questions are (made) public. Sexual relations are totally emptied of any dimension of intimacy and feeling and are constituted into a public legal question revolving around their only licit definition: marriage, and counter-definition: rape and non-marital relationships. This public character of morality cases is itself easily made political. In this kind of situation, all public authorities make statements

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[46] Hasan N., s.d., "Law of the protection of decency" (in Arabic). *Majallat al-qânûn wa l-iqtisâd - huqûq al-insân*.

[47] Komter M., 1998, *Dilemmas in the Courtroom. A Study of Trials of Violent Crime in the Netherlands*. Mahwah, New Jersey: Lawrence Erlbaum Associates, p. 168.

[48].For lengthy excerpts and comments on the case, cf. Dupret, 1998, "La typification des atteinte aux bonnes moeurs: approche praxéologique d'une affaire égyptienne". *International Journal for the Semiotics of Law/Revue Internationale de Sémiotique Juridique*. Vol.XI no.33: 303-322; Dupret B., 1998, "Repères pour une praxéologie de l'activité juridique: le traitement judiciaire de la moralité à partir d'un exemple égyptien". *Egypte-Monde arabe*. n° 34: 115-139.

about the case. For instance, in another rape case, that of the "Ataba girl", President Mubarak assented to a proposal aiming at the amendment of the legal provision dealing with rape, with the consequence that the law was actually amended and that the sanction was strengthened. Commenting on the same case, an Islamic yearly publication explicitly related the decrease of societal security to an increasing focus on political security. Close to the trend of the Muslim Brotherhood, it also seized the opportunity to state that the new law was in contradiction with Islamic Shari'a, since "it has the major shortcoming of not dealing with the question of honor and not inflicting any punishment for the act of sexual intercourse with consent".[49]

The second case deals with female circumcision. In July 1996, the Egyptian Minister of Health promulgated decree 261/1996 forbidding the operation of female circumcision both in hospitals and public or private clinics, other than in cases of illness, and punishing non-physicians performing the operation. This decree was attacked in the Cairo Administrative Court by a group of people lead by a prominent Islamist figure, Shaykh Yusif al-Badri, claiming that the decree was void as it violated principles of Islamic law, which are according to Article 2 of the Constitution "the main source of legislation". They stated that female circumcision is a legitimate practice and that the ruler may not impose restrictions upon what Shari'a allows, makes compulsory or recommends. The Administrative Court ruled in favor of the plaintiffs, but the Minister of Health appealed to the Supreme Administrative Court that waved the previous judgment. First, the Court stated that in the case of challenging an administrative decree in the administrative courts, whoever holds a particular legal position has a personal interest in the action. It consequently meant that "whoever believes in Islam and who holds the opinion that the correct judgment (…) regarding female circumcision follows from his belief (…) has a personal interest in raising an action". Secondly, it argued along the lines of the Supreme Constitutional Court, claiming that in case there is no definite provision of Shari'a governing a particular matter, the legislature has the right to exercise independent reasoning consistent with the particular context of the case. Since there is no consensus among Islamic scholars regarding female circumcision, one cannot derive a clear and definite provision, meaning that the legislature must interpret general Islamic principles in the light of contemporary social conditions. Thirdly, the Supreme Administrative Court hold that any intrusion upon the right to bodily integrity requires a legitimizing reason which does not exist in the case of female circumcision, except in the very few cases in which it is medically justified.[50]

This case raises important questions as to the relationship between morality and law and between morality and politics. Female circumcision is an archetype of what in Islamic Shari'a belongs to the realm of morality, i.e. to what is not compulsory but is,

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[49] s.e., 1993, *The Nation in One Year. An Arab Political and Economic Report* (in Arabic). Cairo: Markaz al-Dirâsât al-hadâriyya, 1993; Dupret B., 1994, "L'Annuaire de l'Umma et la question sécuritaire". *Egypte-Monde arabe*. No 17: 157-184.

[50] Bälz K., 1998, "Human Rights, The Rule of Law and the Construction of Tradition: The Egyptian Supreme Administrative Court and Female Circumcision". *Egypte-Monde arabe*. n° 34: 141-153; Dupret B., forthcoming c, "Justice and sexual morality: Female Circumcision and Sex Change Operations Before Egyptian Courts". *Islamic Law and Society*.

according to some traditions, allowed (mubah) or recommended (mandub). However, with the differentiation between law and morality, this is no longer a question of what Shari'a considers good, neutral or bad, but a question of what the state appropriates so as to extend its control over people. Hence, legal authorities began interfering in matters that were previously outside their scope of intervention, e.g. sexuality and sexual control. One could call this a phenomenon of legislating intimacy. The Egyptian legislature and judiciary promulgated laws and issued rulings forbidding any kind of trespassing of bodily integrity except for cases in which physicians perform an act aiming at curing people. Thus, differentiating between law and morality leads to the confinement of Shari'a to the sphere of morality and to the making of it one morality among others (even though perhaps the most important one). One can consider that in challenging the Egyptian government's attempt to ban female circumcision, the plaintiffs attempted to reintroduce religion as the main set of moral principles on which law must be grounded. There was no question of personal interest in this case, but a claim to define what principles are of paramount importance in the definition of law. Actually, the Court acknowledged the enframing of law in Islamic principles, though it gave a different reading of what these principles are and signify. However, it does not mean that law and religious law are once again melting into each other, but only that religion has been given the status of a moral reference, that is that the principles of Shari'a have been given the status of the main moral source of legislation through a legal and judicial process.

This case is also worth of interest for the light it sheds on the relationship between morality, law and politics. Filing an administrative claim against the decree of the Minister prohibiting female circumcision is a way to initiate a case based on a specific question which is casted in the public sphere so as to support the presentation and the defense of a peculiar conception of the general ordering of society. Female circumcision is raised to the status of a cause, i.e. the mobilization of general interest to the benefit of public good (at least a certain conception of the public good), above and outside the interests of any individual in particular.[51] The issue of female circumcision becomes the case of female circumcision through the public staging of the reasons for opposing the decree of the Minister. This case becomes a "cause" when it is used in order to promote a stake of a more general nature. The case, which has been made a public legal affair, comes to support the cause of claiming the Islamic nature of the Egyptian State, of its institutions, and of the definition of such an Islamic nature. This is what Claverie calls a model of "critical monstration",[52] that is the evidentiating of the fact that it is possible for certain actors to twist the substantial definition of the reference which is used and given by the authorities though using the many institutional resources they have at their disposal and formally remaining within this frame of reference. In this case of female circumcision, there is no question of power and powerful people, but law and the judicial arena are used with the aim to share in power through playing the game of its institutions and attempting to define the major principles on which it is built.

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[51] Claverie E., 1994, "Procès, Affaire, Cause. Voltaire et l'innovation critique". *Politix*. 26: 76-85, p. 82.
[52] Claverie, 1994, *art.cit.*, p. 85.

The third case relates to the privatization of the Egyptian public sector. It is by nature a political case, since it directly deals with the nature of the regime. In a context of economic reform, the Egyptian government promulgated many laws in the commercial and economic fields. However, constitutional principles stating the socialist nature of the Egyptian State have not been amended. The Egyptian Supreme Constitutional Court had to deal with the tensions arising from the transformation to a market economy under a "socialist" constitution. In a ruling rendered on 1 February 1997, it held that law 203/1991 relating to the privatization of public enterprises does not run against the Constitution. For the plaintiff, a former public sector employee, the privatization of public enterprises violated the economic principles that are enshrined in the Constitution. The Court argued that the latter does not provide for a specific economic system, meaning that the constitutional provisions must be interpreted in the light of the overarching goal of achieving development, i.e. economic growth, which depends on private investment. The only role for public investment is to pave the way for private investment, a goal that allows for the privatization of public sector enterprises. According to this argument, the Court dismissed the claim.[53]

This case clearly deals with principles of morality. It reflects the quest for answers to the following questions: Does privatization constitute a good and fair way to conduct economic policies? To what extent are liberal principles desirable? What is the "good" one should tend towards? This is built in legal terms. It could be considered a test case of what Dworkin describes as law as integrity. However, one is mainly interested in the way the Supreme Constitutional Court is interpreting principles and provisions so as to make moral what otherwise would have been considered as totally unfair. It shows how far interpretation can go in order to twist a textual frame and adapt it to new moral and political constraints. Hence, it stresses the major role judges (of the S.C.C. in this case) play in the process of giving moral principles a legal existence through official interpretation. This is done through the use of legal standards. The S.C.C. argued in the case that constitutional principles must be interpreted in the light of their ultimate goal, which is the political and economic liberation of the motherland and of its citizens. In other terms, the state must fulfill its duties in defense, security, justice, health, education, environment, but must be freed from all the excedential duties. Thus, there is no strict definition of the constitutional notion of socialist gains: the Constitution is a progressist document that must be interpreted in an evolutive way. For the Court, "it is not permitted to interpret constitutional texts in a way that considers them a definite and perpetual solution to economic issues whose nature has been changed by time"; "the Constitution is a progressist document whose wide horizon does not impede evolution; its thread must necessarily be in harmony with the spirit of the time". This is what one formerly called the normalcy argument. It conflates the statistical and ethical meanings of the norm so as to add normative weight to the description of allegedly statistical

[53] Bälz K., 1998, "Marktwirtschaft unter einer sozialistischen Verfassung? Verfassungsrechtliche Aspekte der Privatisierung von Staatsunternehmen in Ägypten (VerfGH, Urteil 7/16 vom 1.2.1997)". *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*. 58(3): 703-711; Dupret B., forthcoming b, "L'interprétation libérale d'une Constitution socialiste: La Haute Cour constitutionnelle égyptienne et la privatisation du secteur public". In D. El-Khawaga and E. Kienle (eds), *Political Structures and Logics of Actions in the Face of Economic Liberalization*.

facts. When referring to the spirit of the time, the judge claims that the constitutional text is in compliance with what he assumes to be the economic and political normalcy of Egyptian society. The acceptance of these principles (for instance, the new goals society wants to reach) is assumed to be widely shared because, it is argued, they are objectively grounded: the complementary role of the private sector, its efficiency and its dynamism are presented by the S.C.C. judge as belonging to the realm of what is not really questionable. To the contrary, they belong to normalcy, meaning that they are morally desirable and hence legally enforceable.

Conclusion

Moral principles are largely at work in law. This obviously holds true in the Egyptian context. The question is to know on which basis they operate. Positivist theory has firmly established the autonomous nature of law, i.e. its determination by human actors. It means that its original source, be it divine or man-made, does not really matter. However, this theory was wrong when limiting law, in the proper sense, to the primary (substantial) and secondary rules (procedural) which can be identified in a legal system. It missed the important dimension of the principles the legislature and the judges are referring to and by so doing are integrating into the empire of law. On the other hand, Dworkin's theory is also arguing along a line that is questionable. Whereas he is speaking of moral principles considered by the judge as embedded from the beginning in a coherent legal system, one could instead make the following statement: it is the lawyer's work that makes these principles legal. According to such a statement, the gaze must be oriented to the practical doings of lawyers performing their professional activities. It is through such an activity that very general and fuzzy principles are substantiated. In other words, a close look at law in action allows us to understand how the lawyer manages moral constraints, not by acknowledging the different nature of morality, but by making some of its principles legal rules. For instance, moral conceptions of the sexual parts of the body become legal definitions through the work of the Court of cassation's judge. Or, in the female circumcision case, the judge of the Council of State does not deny Shari'a a legal status, but he decides to sort out the many principles of Shari'a and to select which among these principles can be considered as law. Finally, the S.C.C. judge makes the liberal conception of development and economic growth a compelling legal rule allowing for the privatization of the public sector. The best way for achieving this "legalization" of moral principles is for the judge to cast their normal nature, so as to make it possible to proceed from the allegedly statistical dimension to the authoritatively imposed constraining dimension of the norm.

The rule of law is a principle that is enshrined in the text of the Egyptian constitution. Article 64 provides that "the sovereignty of the law (siyadat al-qanun) is at the root of the power of the state". Indeed, the state abiding by the principles of the rule of law is one of the major claims of the political opposition in Egypt. At the same time, the legislature of this country is producing a huge amount of legislation, while its courts are swamped with civil and criminal disputes, meaning that people are somehow convinced that these courts are applying the provisions of Egyptian law. This probably reveals the paradoxical nature of the rule of law, whose respect can be considered a major protection for the individuals against the arbitrariness of the state though its

implementation can be used as a major tool to build "a stronger, more effective, more centralized and more intrusive state".[54] This phenomenon holds true when looking at the relationship between law and morality. On the one hand, resorting to moral principles allows individuals to challenge state authority, though on the other hand it also enables the state judiciary to construct a legal and officially sanctioned interpretation of the same principles.

In other words, morality is constraining the law, but lawyers are making morality legal. By so doing, they transform the nature of morality whose allegedly heteronomous status actually becomes a very positive and legal one. In that sense, the rule of law is strengthened, the people and the state having to abide by rules which are legally and judicially defined. However, this is a rule of lawyers' law and it raises the issue of the latter's power to exercise such a legislative function while having no democratic legitimacy. This is the classical problem of government by judges (gouvernement des juges). However, in the Egyptian political context the problem is much wider, no institution being really entitled to claim democratic legitimacy. In other words, focusing on the government by judges results in completely dodging the issue of the political debate, of its legislative outcome, and of the exercise of power. In the Egyptian context in which politically sensitive questions are monopolized by the executive power, creating a dichotomy which is not leaning on the opposition between law and morality but on the opposition between regular law and exceptional law, this is no longer the mere question of the rule of a morally constrained law. One should also extend it to the question of the rule of a hierarchical law in which cases are treated differently according to their political nature. From the rule of law, one is shifting to the law of the ruler.

[54] Brown, 1997, *op.cit.*, p. 237.