A Return to the Shariah?

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A RETURN TO THE *SHARÎ`A*?

Egyptian Judges and the Reference to Islam,

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The present article seeks primarily to explain how in contemporary Egypt reference is made to the *sharî`a islâmiyya*, the Islamic law, taken here in a wider sense than its strictly legal one. Indeed the *sharî`a* is often referred to as the principle explaining the Islamic project. However few attempts have been made to analyze the content of this reference and its methods. Does it refer to a clearly identified legal model that would thus only need to be reinstated, or are we dealing with a purely ideological discourse that uses the Islamic idiom for strictly political ends? The situation is not clear-cut, and I will seek to show the complexity of the use of references to Islam in Egyptian legal practice.

I will do so in three steps. First, I will briefly survey the fields of Egyptian law where reference to religion is explicitly made. This will provide us with the main elements of the issue at hand and will put an end to speculation on the radically Islamic nature of Egyptian law. While doing so, I will also draw a basic typology of the judicial rulings referring to Islam. This will give us an initial insight into the ways legal practicians interpret texts, some of which refer to Islam. This first section will thereby allow us to gauge the scope of the legal provisions on which the Islamic discourse focuses and the ways by which the judges use or get round the breaches that are thus left open.

In the following section, I will sketch a typology of the perceptions of the *sharî`a* that the practicians of Egyptian law may hold. The aim is to look at how legal practicians use their readings to serve their ends. In examining what the legal actors think is or ought to be, I seek not to substantiate their discourse but rather to locate them in a power structure of which their

discourse is both a reflection and a determining factor. A series of interviews with lawyers, judges, and professors of law, *sharî`a*, and *fiqh* provides us with a body of perceptions of law and of the various legal repertoires that jurists use professionally and claim ideologically.

Finally, to conclude my overview, I will examine three recent cases in order to lay the foundations for my non-substantialist approach to Islam and to the normative discourse that claims to draw from it. There is the Abu Zayd case, in which a divorce was enforced on grounds of apostasy, a litigation on the wearing of the veil at school, and a case of trans-sexuality. In my view, these three cases reflect well the malleability of the reference to the *sharî`a* in Egypt, that is at least within the realm of law. The *sharî`a* stands out as a legal repertoire, that is a resource that practicians have at their disposal and that they use simultaneously or in conjunction with others, in a game whose nature seems primarily rhetorical or discursive. These available means of discourse and legal action are more or less used, according to the circumstances of time and place. It is this use that gives them a meaning, a content, and not their inscription on tables of the Law that are set for eternity. In this sense, the so-called return to the *sharî`a* should be viewed as the invention of a new *sharî`a* in the contemporary political, legal, and judicial setting.

The reference to Islam in law and in judicial practice

Whatever the importance given to Islamic law and to its norms in the construction of contemporary Egyptian statute law, the focus here will only be on what remains today as explicit reference to Islam. My goal indeed is not to trace the Islamic roots of the rules of Egyptian law, but only to locate the realms of this law where Islamic arguments still seem relevant. Three areas can be identified : criminal law, civil law, and constitutional law.

Islam in Egypt is the religion of the state (Const. art. 2) and its public management is the duty of the Shaykh al-Azhar, of the Mufti of the Republic, and of the Minister of Waqf, under the direct authority of the President of the Republic (LUIZARD : 1995, PARADELLE : 1995,

ZEGHAL : 1997). Regarding criminal matters, the sole explicit reference to Islam is the mandatory consulting of the Mufti of the Republic in cases where a death penalty is handed down by the Criminal Court (PARADELLE : 1995 ; 77).

The realm of civil law contains a number of more substantial references to Islam. First, as regards procedure, the question was recently raised if the *hisba*, that is the lawsuit to protect Islam that can be initiated by any Muslim, without his own interests having to be directly at stake, was still admissible in Egyptian law. Law number 3 of 1996 has confirmed the existence of this procedure while setting strict conditions for its use. Furthermore in civil law there are also a number of explicit provisions, the most important of which are found in the first article of the Civil Code of 1948 and stipulates the principle of the sole competence of the law for all the matters it regulates and, "in the absence of an applicable legal provision", the competence of the judge to give a ruling "according to custom and, in its absence, according to the principles of the *sharî`a*" (art. 1). Islamic law is thus ranked as the second subsidiary source to the law. Also, a realm is explicitly acknowledged for Islamic law and its principles in various sections of the Civil code, particularly as regards successions (art. 875) and wills (art. 915). As for personal status (marriage, divorce, separation, alimony, child custody, inheritance, etc), it is totally referred to the individuals' denomination, each of those acknowledged in Egypt having its own specific legal texts and competent judicial chambers for the various levels of jurisdiction. As regards Muslims, a series of texts have codified the Hanafite legal tradition[1]. Regarding family matters, these are chiefly law 25-1920 and decree 25-1929, both amended by law 100-1985 (EL-ALAMI : 1994 ; see below). In the same way, laws 77-1943, 71-1946, and 25-1944 came to regulate in detail the realm of succession. Let us note that understandably no reference to Islam is made within these texts which already only apply to Muslims, except for cases of inter-communal marriage where it is forbidden to a Muslim woman to marry a non-Muslim.

Certainly the Constitution takes up central stage with regard to the reference to Islam in Egypt. This is mainly due to its article 2, which states that "Islam is the religion of the state, Arabic is its official language, and the principles of the *sharî`a* are the main source of legislation". This article was amended in 1980 so that the principles of the *sharî`a* have moved from the status of being *a* main source of legislation to that of *the* main source of legislation. Furthermore, this provision was used as grounds for claims of unconstitutionality brought before the Supreme Constitutional Court of Egypt (*al-mahkama al-dustûriyya al-`ulyâ*).

As Bernard Botiveau says, "today the judicial system, in its general principles and in its outline holds many of the basic characteristics usually found when describing the judicial structure of a modern state" (BOTIVEAU : 1986) : separation of judiciary and administrative jurisdictional orders, of civil and criminal jurisdictions, independence of the judiciary, etc. The present system is unified and similar to the judicial structure of the countries with a French legal tradition. There is no longer any specifically Islamic jurisdiction, since the denominational courts were abolished and replaced in 1955 by specialized sections of state courts. Civil law is divided into summary courts (for minor issues) and plenary courts at the first instance level, courts of appeal, and the Court of Cassation. Administrative law is handled by the Council of State, an institution made up of three sections (judiciary, consultative, and legislative), the highest of which being the High Administrative Court (KOSHERI, RASHED and RIAD : 1994). Egypt also has a Supreme Constitutional Court that has been carrying out its duties since the promulgation of its organic law (law 48-1979) and the adoption of its internal regulation code (JACQUEMOND : 1988 and 1994). The Supreme Constitutional Court is competent regarding the interpretation of laws, controlling constitutionality, and conflict resolution concerning competence between jurisdictions. It can be referred to by any judge if the constitutionality of a law or of a statutory text is challenged.

Following this brief review of the sources of the law, of the role of the Islamic principle within it, and of judiciary competences, I will now focus on the Egyptian judges' attitude towards issues involving a reference to Islam. To this end, I will sketch a typology of the decisions referring to the Islamic legal repertoire.

The need to establish such a typology may take as its point of departure the decision by an Egyptian judge to sentence the enforcement of the *sharî`*a punishment against an individual apprehended in a state of intoxication in a public place.

"Whereas the court refers to the preceding rules (rules contained in the doctrines) to judge on the nullity of any law contrary to the regulations of Divine Law, at the head of which are the repressive provisions concerning the present case. They are all invalid by absolute nullity. They are deprived of the reference to legality (*shar`iyya*). Thus the *sharî`a* and its rules must be implemented, as a result of obedience to God and to His Envoy and by making possible the institution of His rules in the state" (District court of `Abidin, 8 March 1982, in Ghurab 1986).

Beyond its declamatory nature, this type of ruling challenging statute law is only one among several types of reference to the Islamic legal repertoire. The rulings can be divided into four categories. The first is made up of rulings defining the content of Islam as a recognized and eventually privileged religion, or of the *sharî`a* as a legislative reference. In the second category are found arguments utilizing Islam as a source of legitimation for rulings related first and foremost to the institutional form of the state or to a specific conception of public order. The third concerns the positive ratifying of rules of statute law whose wording is self-sufficient in itself and so does not explicitly justify the same kind of reference. Finally, fourth category, there were certain judiciary rulings that went as far as invalidating statute law in the name of the *sharî`a*. Statute law, then, does not seem overly disturbed by references made to Islam and to its normative provisions, as long as these references are not made in order to challenge its validity and/or to require its subordination to an order external to it.

The "objectivation" category deals with situations where reference is made to Islam as a religion of which free worship is claimed. Such is the case for the question of wearing the veil at school. In this case, it is the definition of the Islamic norm itself that is the object of the dispute brought before the courts, where reference is made to the provisions dealing with religion, freedom of conscience, and public worship in statute law. The judgments of the Supreme Constitutional Court, when it gives a decision on the nature of the *sharî`a* as a legislative reference, are also included in this category. In a judgment of 15 May 1993, the Court came to explicitly position itself in the realm of the *sharî`a* and of its interpretation. Differentiating between the absolute and the relative principles of the *sharî`a*, the Court stated that its control only extended to the absolute principles, without these being clearly identified .[2]

The second category, that of "instrumentalization", covers instances where reference to Islam is made in order to ground a ruling pertaining to a specific view of public order. In this case, the harm to Islam is instrumentalized by the judge or by the parties who, under this guise, seek a different objective. Here many reasons may be put forward. It can be argued that harm is made to Islam as the religion of the state and as a pillar of the institutions. For example, it is on this basis that, in another context, the Communist Party of Morocco (PCM) was banned.

"Whereas the request of the Prosecution (...) stems from the incompatibility of the principles of the PCM with Islam and the Islamic institutions;

"Whereas it was wrongful for the first judges to consider that it was an accusation of heresy reaching beyond the competence of the regular courts (...);

"Whereas HM King Mohammed V stated many times that any materialist ideology was contrary to the religious precepts of which he is the spiritual guardian (...);

"Whereas the sovereign has thus directly and unambiguously identified the doctrines inspired from Marxism-Leninism (...);

"For these reasons, the Court (...) declares the dissolution of the association, with all the legal consequences". (The Court of Appeal of Rabat, 3 February 1960, the Supreme Court, 28 May 1964)

Or it can be argued that harm to Islam as the religion of the majority also affects public order. It is following such logic that in Morocco as well as in Egypt the Baha'i sect was considered heretical. In the former country, during the Nador trial, the accusation of heresy led to the sentencing to death and the execution on 10 December 1962 of three members of this faith rooted in Islam (TOZY : 1989 ; 27).

The third category, that of "overvalidation", involves cases where reference is made to motivations which, in and of themselves, lie beyond the scope of the judiciary dispute. The judge grounds his ruling in general principles, such as that of religion and of the principles of law that stems from it in a state that makes Islam its religion. This in itself does not seem to be a particular problem. Resort to such principles serves to reinforce statute law. It is thus simply considered as a quasi-stylistic formula which faces no opposition. Bernard Botiveau refers to the resort to the *sharî`a* as a measure of ratification (BOTIVEAU : 1993 ; 225).

"The judge normally grounds his decisions in the 1985 law and in the provisions maintained from the 1929 law, more rarely in the 1920 law; equally, when in existence, in the running jurisprudence of the Court of Cassation. However, it happens frequently that he (the judge) also justifies his judgment either by a provision accepted by one of the Sunni schools of Islamic law, or by a ranking of the sources that is not always perceivable in the current debates on Islamization of law. In the former case, it confirms the current application of a rule justified by a number of precedents cumulated by an age-old tradition; by way of example, he quotes "the dominant view" ascribed to the Hanafite *fiqh* or an "established principle of *fiqh*" enjoying the consensus of all four Sunni schools, such as the mandatory providing for the wife. In the second case, the direct references to the *sharî`a* tend to legitimate the ruling by a

very powerful principle: for instance the necessity of a harmonious life must lead to the acceptance of separation; the importance of the *nafaqat al-mut`a* (Koran II,236), a special pension paid after a repudiation; or the *hadîth* legitimising in a general fashion divorce on the basis of injustice suffered (*Lâ darar wa lâ dirâr*: neither damage nor retaliation disproportionate to the damage). In a few cases, the judge will combine in a same judgment practically all the available sources, *sharî`a, sunna*, consensus of the *`ulamâ'*, jurisprudence of the old Islamic courts, and statute law; for instance in order to establish that the alimony should be calculated based on the income of the husband" (BOTIVEAU : 1993 ; 225).

Finally, in the case of the "invalidation" category, the question is very different since the situation comes down to using the *sharî`a* and the details of its normative formulation to invalidate statute law. Such is the case for a number of judgments passed by Judge Ghurab, in which he hands down a decision that he calls Islamic, in opposition to statute law which by the same token he declares illegitimate. Here is another excerpt from a ruling made by this judge.

"Thus, the existence of laws that are contradictory (with the *sharî`a*) has become impossible, with the implication that to apply the laws of the *sharî`a* is to implement the textual content of the Constitution itself and to purify the legislator from any form of profanation" (district court of `Abidin, 8 March 1982, in Ghurab 1986).

The established legal and judiciary system thus finds itself faced with an obviously unacceptable assertion, a situation which leads it to react accordingly (judicial admonition and administrative measure attaching the judge to a non-contentious administration). But let us note the fact that what sets Judge Ghurab's stance apart is his explicit invalidation of statute law while the fact of using Islamic principles to ground a legal ruling is not uncommon.

Perspectives on Islam in law

In this section, I will examine the perceptions that various types of legal practicians hold of Islam and of its role in Egyptian law .

Let us begin by underscoring the duality, indeed the plurality of repertoires to which these various actors refer explicitly (Islamic and statute law repertoires), even if it is only so as to challenge the relevance and/or the legitimacy of one of the two.

"In Egypt, we have a mixed legal system: statute law is applied and *sharî`a* is applied. The *sharî`a* is the basis on which statute law rests" (interview with MD, lawyer, October 1994).

This acknowledgment of a plurality of repertoires may seem trivial, but overvaluing the *sharî`a* may lead to a refusal to grant it a legal status that in a way it transcends.

"There is a huge difference between a legislative document and the *sharî`a*. The *sharî`a* is not a legislative document but a life program" (interview with NH, lawyer, January 1994).

The simultaneous presence of various legal realms each reflecting a certain level of internal coherence brings forth the question of the transfers and adaptations that can be made between them. In other words, to what extent can the perceptions of the different legal repertoires be used outside their own original setting? In the Egyptian legal context, it seems that the actors operate through a displayed command of the various repertoires whose numerous provisions would be easily transferable, as long as the predominance of the religious reference is expressly acknowledged.

"Positive laws do not run against Islam, no more than they are in line with it. They are the laws proper to a state that is called the Arab Republic of Egypt. That is what I want you to understand. They are neither against nor in favor of Islam. They are not related to Islam. (...) And so, in my work I deal with Egyptian law, I do not deal with a law that is against or in favor of Islam. I do not deal with this issue. For me, Islam doesn't and never will come down to laws" (interview with NH, lawyer, January 1994).

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, 90% of our problems would be solved" (interview with AW, lawyer and former magistrate, June 1994).

This notion of referent reflects the perception of a cultural normality, that of the authentic tradition that society supposedly considers as the sole legitimate one.

"Until the present, the *sharî`a* is better suited for our societies. Why? Because people easily understand it. Why? Because it is related to the Koran which hundreds of thousands of people have memorized in each country. (...) If I transform the humanly acceptable legal values into culturally acceptable ones, I guarantee them a better understanding, a better application, and that they will be considered as binding by the people. If people feel that it is their law and their religion, they will comply to it" (interview with AW, lawyer and former magistrate, June 1994).

Following the same logic, we find the construction of a cultural identity that can only come about through the construction of a cultural otherness. Law plays a major role here. It is in this sense that in any case I understand the discourses on the cultural integration of the legal heritage.

"We think that the *sharî`a* is one of the visible signs of the expression of our independence towards the Western project. (...) Such is the conflict today. It lies in the fact that it is our right, as a community that has a history and a heritage, to be governed and educated according to our history and our heritage" (interview with AW, lawyer and former magistrate, June 1994).

The idea of a social "normality" of Islamic law leaves the question of the content of this “normality” shelved. We can quite easily talk of a standard with regard to the discourse of

legal practicians on the *sharî`a*. The position of these actors is indeed located at the junction between technical knowledge and the common sense of the *sharî`a*. This is due as much to a "latent legal knowledge" (FOBLETS : 1994 ; 109) and to a "loss of legal knowledge accurate enough to be explicitly argued" (id. ; 110) as to a manifest will to subsume the legal dimension of the *sharî`a* to its ethical and globalizing dimension.

"The rule on which there is general agreement is the right of the Creator to govern. As long as He is the One who creates, it is Him who knows all, whether it be past, present, or future. This right (*haqq*) is for the good of the governed (*mahkûm*), since the one who creates doesn't need anything from the creation, from His creation. As long as He governs (...), there will be impartiality and equity. It is a basic condition of equity. It is a basic rule on which the sacredness of the judge stands. Consequently, the judge must meet various well-known requirements, by virtue of the Constitution: he must be virtuous (*muhsin*) and, when examining a petition, he must not seek anything other than signs of truth (*haqq*). The law says that if the judge has a stake in a petition, he must put off the case and part with it" (interview with MN, lawyer, January 1994).

I could never emphasize enough all that this type of discourse conveys on the transformation of the Islamic legal repertoire, well beyond any idea of reproduction. We are dealing here with the notion of legal memory, with the cognitive process of the construction of tradition. In this matter as well as in others, the need is not so much to oppose a "true history" to a "biased history" as to measure the extent to which history, especially in the legal and political realm, is primarily a historiography. Creating a classical model doesn't provide meaning as a standard of the deviations and/or conformities of the present. However it allows the gauging of the actors' perceptions of such-or-such object at a certain point in time. In this sense, the classic referent, the reference to tradition, can only be analyzed within the framework of a process of

(re)construction. Any tradition is a construct, even if this seems unacceptable to its supporter who acts "as if" that was not the case.

Thus what we have before us is a staging of the self, whether collective or individual. 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. As the staging of oneself, but also as the staging of the society to which the jurist attributes a compound of idealized norms, the process is not so much a reflection of social expectations as the result of what he perceives as social expectations and, above all, of the position he is seeking within that setting. This is one of the angles from which to analyze the discourse on the lawyer's role in today's Egypt as well as in the Islamic state to come.

"From my point of view, the role of the lawyer in the old Islamic legal system was of course different. He was only the representative of the party, only the spokesman of the expressions and perspectives that he served to represent. Today the lawyer has become an expert to whom one refers for consulting on legal and particularly procedural matters, and then to express the interests of the individual he is representing and not his own point of view. (...) I think that, if there were a legal and judicial system based on Islam, the system of legal, commercial, and criminal procedures would not be eliminated. Thus, by their very nature, these systems require the presence of lawyers who can fill the function they are now filling.

The other part of the question is to know what the lawyer must do in the context of the present political system. He must comply to professional honesty and not defend injustice. (...) Second, it is imperative that the lawyers who live in a society like ours acquire a deep knowledge of the *sharî`a*. (...) Third, we must underscore the similarity of the function of lawyer and judge in bringing together the prevailing texts and the foundations of the *sharî`a*" (interview with AW, lawyer and former magistrate, June 1994).

However, it is above all the issue of the crossing into the political realm that remains essential for assessing the attitudes of the professionals of law we interviewed. The idea of solidarity without consensus (KERTZER : 1988 and the use that FERRIE : 1994 makes of it) 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 (at least, when this is a disputed matter). Up until now, the only explanation that to me seemed to shed light on the question is of a political nature, such as the stakes involved in holding power and the use of the *sharî`a* in this context.

"If (the constitutional text says that) the *sharî`a* is the main source, we thereby eliminate all of the laws contradicting the *sharî`a*. Such a step requires the introduction of many judicial petitions in numerous cases. I am personally convinced that this type of legal conflict means the downfall of the state, a downfall that the Supreme Constitutional Court cannot allow, no more than any individual with common sense. That is why we settled for the general orientation of the text, just as the judges did" (interview with NH, lawyer, January 1994).

"The criticism made to the Islamists is that they want to apply the *sharî`a* without consulting the people. We say that if we sought the people's opinion freely and democratically, they would choose the power of God rather than that of the people. That happened in the past in Algeria and in Sudan. This success in Algeria and in Sudan comforted the perspective of those who call for elections as a means to change the leadership. (...) If in Egypt the people were given the opportunity to choose their leaders, they would certainly choose the *sharî`a*" (interview with MN, lawyer, January 1994).

"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 *sharî`a* as a referential framework for the laws may favor the renewal of the rules pertaining

to daily transactions. This is one type of opposition. Another type, this one political, sets the organizations involved in violent activities against those calling for moderation. The question here is if it is possible to apply the *sharî`a* simply through spreading the word. Some think that society needs a violent movement. Of course, the moderates hold that renewal is possible, while the proponents of violence refuse it. It is the social conditions that are accountable for this" (interview with BI, magistrate, November 1993).

"In Egypt, the *sharî`a* can be applied within a day or overnight. (...) We promulgate the decrees for its implementation, the government agrees and the *sharî`a* is immediately applied, without any problem" (interview with MZ, Islamic scholar, January 1994).

"The claim of the Islamic trend is the implementation of the *sharî`a*. (...) But it is possible that many people are calling for the application of the *sharî`a*. Any society has a particular ideology that reflects the whole of the beliefs (that prevail in it). We are an Islamic country and any leadership that would stray from this truth would be at fault. With regard to the *sharî`a*, I can tell you that a great number of rules are implemented, and at the same time others are suspended" (interview with MB, lawyer, November 1993 and January 1994).

It is possible that one of the core elements of the issue lies here. Calling for the implementation of the *sharî`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, we 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, and this depends on whether historically and ideologically it has already actually functioned in such a way and/or has been considered as such. This is most certainly the case with the *sharî`a*. 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.

We may also observe that, as it functions on the basis of social and cultural models, law operates through categorization, a fact that has an impact on the reality that a social group builds for itself as well as on its self-definition. This categorization comes about by establishing limits, borders, by what we may call a "liminarization process". In this sense, law plays a role in the assertion of identity, but this doesn't necessarily mean that this assertion cannot be conceived in terms other than interactionist and non-substantial ones. In the Egyptian setting, and for the people we interviewed, this is reflected in the statement that Islam is radically different from other legal cultures, or at least that Islam is distinguishable owing to the fact that it has a legal culture with particular basic principles.

"It is not possible that the Islamic community, which is made up of many hundreds of millions of members, suggest a civilizational project disconnected from Islamic law. It wouldn't be its project" (interview with AW, lawyer and former magistrate, June 1994).

The analysis of law, of its repertoires, and of the perceptions that the various actors hold of it allows us to underscore the extent to which the (particularly legal) norm makes up a central component of the assertion of collective identity.

"As a matter of principle, Islamic law constitutes one of the aspects of our faith and we feel towards it a need similar to thirst for water or hunger for food. It is the backbone of the Islamic civilizational system. If the backbone of this system snaps, it is the Islamic civilization that disappears and becomes an altered reflection of the Western, Buddhist, or other civilizations" (interview with AW, lawyer and former magistrate, June 1994).

In its process towards the coalescing of identity, law operates on the basis of the assertion of both historical continuities by means of reinterpretation of the existing rules, and cultural discontinuities through the creation of boundaries defining the common tie underlying

identity. The legal discourse and the emphasis put on either of the legal repertoires reflect the typifying role of the legal norm. Law thus serves to build a unity based "on a process of division and a practice of exclusion" (OST : 1997). As for the behavior of the actors, its aim is above all to create the impression of conformity to the rules of the group, "while in fact their action is contradictory to the rule or is not based on the principle of total obedience to the rule" (BOURDIEU : 1984 ; 239). Thus revealing that what counts above all is the public assertion of group belonging and not the adoption of practices that substantially speaking are proper to it.

The Judge, the State, and the *sharî`a*

In this third section, I will expose briefly three cases where an Egyptian magistrate was led to refer to the *sharî`a* and to claim to base his judgment on its provisions. These examples of reference to the Islamic legal repertoire will allow me to put forward my general approach to the reference to Islam in law.

The first case deals with the wearing of the veil at public school. As the natural tutor of his two daughters, a father petitioned the administrative court of Alexandria against the Minister of Education, requesting that the ruling be suspended and declared void that forbade his two girls entrance to secondary school. Indeed, when the time came to enroll his two girls in school, he was informed of their expulsion based on a departmental order that forbade access to school to pupils wearing the full veil (*niqâb*); this decree orders the compulsory wearing by pupils of a standard uniform complying with the features it defines. For the plaintiff, this was seen to contradict articles 2 (see above) and 41 (individual freedom is protected and it is forbidden to undermine it) of the Egyptian Constitution. The administrative court then referred the case to the Supreme Constitutional Court. In its judgment of 18 May 1996, the Court recalled its interpretation of article 2. For the Court, the logic behind wearing the uniform is to protect the sense of decency of the girl and the ways and customs of society. The

legislator can legitimately impose limits to the dressing mode without it running against the principle of protection of individual freedom, as long as he does so for the sake of preserving identity. Islam improved the condition of women, and this explains that it prompted her to secure her sense of decency. It ordered her to veil since this protects her against vulgarity. And so in matters of dress and according to the Law (of God), the woman cannot use her free will. On the contrary, her dressing style must reflect the responsibility that she takes upon herself in the world. But since the style of female dress is not discussed in absolute Koranic texts, there is room for interpretation and the intervention of the legislator, who must respect the mores as well as the requirements of life in modern society. According to the Court, by authorizing the veil as long as it is not imposed and as long as it does not limit the young girl's capacities to integrate, the departmental order does not run against article 2 of the Constitution. Furthermore, in distinguishing between freedom of thought and freedom of worship, the Court underlined that while the first cannot be restricted, the second can for the sake of higher interests, such as public order and morality. And education is part of those higher interests that the state must protect and that authorize regulating school dress. Thus the Court decided to turn down the petition, which meant that the young girls could not return to school wearing the full veil.

The second case aroused quite a bit of interest. It is the trial of Nasr Hamid Abu Zayd, assistant professor of Islamic studies and literature at the University of Cairo, author of works of exegesis. In May 1992, Abu Zayd was refused the title of professor on the grounds that he had attacked Islam and apparently had said heretical things. On 16 May 1993, the case took a new twist as a group of lawyers petitioned the court of first instance requesting that a judgment be passed to separate him from his Muslim wife on the grounds that his publications apparently "included blasphemous elements that place him outside Islam" and since "among the consequences of apostasy which is unanimously admitted in jurisprudence, there is the

decision to separate the spouses"[3]. While Abu Zayd's defense was structured, among other things, on the absence of a personal interest for the plaintiffs, on the contrary the Court of Appeal of Cairo confirmed the validity of the *hisba* procedure (see above). Having founded the legality of the *hisba* procedure in Egyptian law, the Court then based its argument for Abu Zayd's alleged apostasy on showing that he had "refuted the Koranic verses that hold that the Holy Koran is the word of God (... and said) that it is a human writing and a human understanding of the revelation". For the Court, all of these claims make the one who holds them an apostate, and that is supported by the unanimous agreement among the Ulema and Imams. Consequently, the judge drew the conclusion that Abu Zayd must be separated from his wife; this judgment was confirmed by the Court of Cassation, but its enforcement was eventually suspended by the judge in charge of applying sentences.

The third case, dealing with the authorization for sex change operations, did not have significant legal repercussions, even though it was much covered by the media. Also, it does not explicitly concern the realm of Islamic law, even though what underlies the core of the dispute are diverging views on morals based on Islam. In 1982, a student in medicine from al-Azhar University, Sayyid `Abd Allah, consulted a psychologist claiming to suffer from deep depression. The psychologist examined him and concluded that the sexual identity of the young man was disturbed. After three years of treatment, she decided to refer him to a surgeon so that he undergo a sex change operation that eventually took place on 29 January 1988. This type of operation involved many consequences of an administrative and legal order. The first was the refusal of the dean of al-Azhar University's Faculty of medicine to allow Sayyid to write his examinations, while also refusing to transfer her to the Faculty of Medicine for Women. To obtain this transfer, Sayyid made a request for a name change at the Administration Office for civil status. The University of al-Azhar maintained that Sayyid, who in the meantime had changed his name to Sally, had committed a crime. Indeed, according to

the university, the doctor who made the operation had not changed his sex but had mutilated him, and this simply to allow Sally to have legitimate homosexual relations. Meanwhile, the representative of the Doctors' Syndicate of Giza summoned the two doctors who had performed the operation before a medical board that ruled that they had made a serious professional error by failing to prove the existence of a pathological problem before operating. On 14 May 1988, the Doctors' Syndicate sent a letter to the Mufti of the Republic, Sayyid Tantawi, asking him to issue a *fatwâ* on the matter. This one came on 8 June 1988, concluding that if the doctor showed that it was the only cure for the patient, this treatment was authorized. However, this treatment cannot result solely from the individual desire to change sex, but must be the therapeutic result of a pathological diagnosis decided by the proper authorities[4]. This *fatwâ* is not clear on whether the "psychological hermaphroditism" from which Sayyid suffered was an admissible medical reason or not. Thus everyone claimed that the text supported his own view. On 12 June 1988, al-Azhar brought the matter before the courts, holding that the surgeon had to be condemned in compliance with article 240 of the Penal code for having inflicted permanent injury to his patient. The Attorney General and his deputy public prosecutor then decided to examine the case. They referred it to a medical expert, who concluded that while from a strictly physical point of view Sayyid was a man, psychologically he was not so. Thus the diagnosis of psychological hermaphroditism was relevant and surgery was the proper treatment. According to the report, the surgeon had only followed the rules of his profession, since he had consulted the competent specialists, had carried out the operation correctly, and had not inflicted permanent physical disability to the patient (Niyaba 1991). The latter could thus be considered a woman. On 29 December 1988, the Attorney General decided not to follow up the charge. The final report confirms that the operation was carried out according to the rules.

These three cases allow me to conclude this paper by putting forward a model to interpret the recourse to the *sharî`a* within the Egyptian legal and judicial realm.

Because it deals with the idea of normality, law claims to be the technical transposition of a social and historical reality that is clearly perceivable. The term "norm" indeed has two meanings, one rather legal and the other statistical. Far from simply coexisting, they tend to become confused. If we say of one thing that it is normal because it is consistent with the most common type, there still remains, either implicitly or explicitly a reference to values, to an idea of what must be. "If the notion of normality is ambiguous, it is because it constantly adds normative content to description" (LOCHAK : 1993 ; 393). Theoretically speaking, normality is not part of the conceptual realm of law. This being the case, we cannot ignore the surreptitious reintroduction of the concept in jurisprudence. The normal then becomes a legal category, under the guise, among others, of the notion of standard (an explicit reference to an implicit idea of normality). And thus law "ratifies and spreads a certain idea of normality and partakes in the effective normalization of behavior" (*ibid.*). On the descriptive plane, law claims to account for the prevailing social norms and to make them legally binding, while on the normative plane law prescribes the social norms it intends to approve. This inevitably creates a feedback effect, the norms considered normal in law, and so thereby guaranteed, tending to determine in return social normality. We thus notice from the part of the legal practicians the systematic tendency towards "conforming" the normal to the legal, and conversely towards "making coincide" social normativity with legal normativity.

The task of conforming the normal to the legal and of the conjunction of social and legal normativity raises the question of the status of the legal norm claiming to reflect normality, that of nature as well as that of common sense. The rule imposing the veil is one of these. The court presents it as ethically, socially, and historically based. A rule does not exist on its own, and it is not followed simply because it is there. A rule exists as the inclusion of an

understanding that we feel in harmony with others. Legal formalization does not in itself determine the existence of the rule, no more than a map would determine the spatial layout that it sketches more or less accurately. A rule exists as a set of practices forming a background that is possibly but not necessarily represented and representable, and the regularity of which is the object of an incorporation: it is reproduced with no other justification than the simple feeling of doing so by conformity. The legal practicians claim to be acting according to rules that exist, but these do so first and foremost as available resources, as parts of normative repertoires and as traces of previous formalized practices. According to Bernard LEPETIT (1995), a rule is a form that exists due to previous practices, but that can serve for different practices.

The three cases that I have briefly presented clearly show the existence of normative forms to which magistrates give a content when they give a ruling. The relationship between the forms and their "substantialization" may be compared to the shared images serving as a kind of paradigm (JACKSON : 1995 ; 152). These images, at once both descriptions of typical actions and tacit social judgments, are temporally and culturally contingent. Like the process of narrative typification, the process of substantialization, dealing with the use of normative forms available according to the needs and constraints of interaction, is a judgment of relative similarity. The normative form works like a shared image, or better yet, like a paradigmatic narrative typification. Through a judgment of relative similarity, the normative form serves as a criterion for the legal definition of events which, because of their context, the actors are compelled to evaluate analytically and normatively. It is the result of the legal definition of these events that makes up the content as such.

It appears then that the process of typification must above all be linked to the structure of judicial action. We thus come to inquire now about an "economy of typifications" determined for a large part by the realms of interaction, realms that work according to a functionally

identifiable mode and in a way specific to their use by the actors. Symbols and rhetorics thus become resources rather than sources (FERRIE : 1997), forms rather than contents, which the systematic study of identificatory mechanisms compels us to distinguish from the occurrences that actors seek to define (DUPRET : 1997).

Furthermore, what about the relations of law with history, a discipline of which law is presented as the heir? It does not suffice to recall the notoriously known fact that very often the content of the law outlives its spirit; still the analysis of the type of relations that bind them remains to be undertaken. A number of hypotheses regarding substantialization can be put forward (see DUPRET : 1997) that shed an initial light on these forms of law which are available to the legal practician in a particular social setting. As I previously mentioned, these means available for normative action appear as the traces and resources that historical and biographical memory make available to the actor.

The norm is created by way of sedimentation, but that of its form and not of its content. Sedimentation, in the sense that the process, central to the idea of "memory", consists in the subjective intervention aiming to (re)construct the original reference and the milestones linking to it. The norms, tied to a founding past, are constructed, deconstructed, and reconstructed. Any particular moment in time is "a layer of a constantly changing diachronical accumulation of sediments brought by generations of different people" (KRYGIER : 1986 ; 242). However, these layers only significantly affect the present if they interact and, rather than reproducing separate structures evolving concurrently, they partake in the formation of the "top layer", of the new normative sediment that is coming into being. Due to its compound nature, this "top layer" is both the result of a number of normative "possibilities" and the closing of the normative repertoires available at that given moment. Furthermore, this sedimentation is formal insofar as it is true that it is not the thing per se that is socially relevant but rather the perspectives used to assess this thing, these perspectives being closely

determined by the setting of interaction. In this regard, the notion of “traditioning context” seems particularly relevant (BOUJU : 1995 ; 106). The claim is that the authority of a norm declared constraining by a judge stems more from the setting of its statement, which in some way would make the conjunctural conditions transcendental, than from its part in a transfer process. The "traditioning" of a claim and, consequently, its normativity come about from the fact of having been "made" by the authorized person, at the proper time and place. We can say that the trial is the ritual moment par excellence where a referent is given a traditional symbolic value, thereby concealing from the actors the contingent nature of the process, and reasserting a view of the world, of its norms, and of its history "as they are" (KERTZER : 1988, CARZO : 1994 ; 37). Therefore, normative sedimentation is not an act of heritage but rather a complex process of appropriation and reinterpretation establishing new truths. Thus the norm has no existence in itself except when it is being used. It explicitly becomes a repertoire, that is a (rhetorical) resource available to the actors and shaped and modified through practice (LEPETIT : 1995 ; 297).

In the interpretations of the legal rules that the magistrate makes with regard to the *sharî`a,* the judge authoritatively gives a formal rule an exact and constraining meaning by conferring on it the status of a historically based and socially sanctioned religious requirement. And the judge would supposedly be the only individual able to conceive of this rule simultaneously as a norm to be imposed upon society and as a social normality to be given legal status. Various obligations whose normality are displayed are morally and legally sanctioned by a judge presenting his interpretative mode as the current and cultural reflection of a timeless will. In its quest for a morality in compliance with its perception of religious and social normality, law gives strength to purely formal prescriptions inherited from history. While claiming to reflect natural normativity, it actually created it. While claiming to return to the *sharî`a,* it actually reinvented it.

Bibliography

BALZ K. 1997, "Submitting Faith to Judicial Scrutiny Through the Family Trial : the "Abu Zayd Case"", Die Welt des Islams, vol. 37: 135-155

BOTIVEAU B. 1986, "L'exception et la règle. La justice vue par les magistrats (Annexe : L'organisation judiciaire de l'Égypte)", Bulletin du CEDEJ, 20: 81-113

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

BOUJU J. 1995, "Tradition et identité. La tradition dogon entre traditionalisme rural et néo-traditionalisme urbain", Enquête, 2: 95-117

BOURDIEU P. 1994, Raisons pratiques. Sur la théorie de l'action. Paris: Seuil

CARZO D. 1994, "Le droit comme fait social total". In Jackson B. S. (ed.), Legal Semiotics and the Sociology of Law. Oñati: Oñati International Institute for the Sociology of Law

DUPRET B. 1997, "La définition juridique des appartenances. La typification narrative de l'action identitaire devant les juridictions suprêmes d'Egypte et d'Israël", International Journal for the Semiotics of Law/Revue Internationale de Sémiotique Juridique, Vol.X, n°30: 261-291

DUPRET B. 1996, "A propos de l'affaire Abu Zayd, universitaire poursuivi pour apostasie; le procès : l'argumentation des tribunaux", Maghreb-Machrek, n°151: 18-22

DUPRET B. 1997, "A propos de la constitutionnalité de la *sharî`a*: Présentation et traduction de l'arrêt du 26 mars 1994 (14 Shawwâl 1414) de la Haute Cour Constitutionnelle (al-mahkama al-dustûriyya al-`ulyâ) égyptienne", Islamic Law and Society, Vol.4, n°1: 91-113

DUPRET B. et FERRIE J- N. 1987, "For intérieur et ordre public, ou comment la problématique de l'Aufklärung permet de décrire un débat égyptien". In Boëtsch G., Dupret B., et Ferrié J-N., Droits et Sociétés dans le monde arabe. Perspectives socio-anthropologiques. Aix-en-Provence: Presses Universitaires d'Aix-Marseille

EL ALAMI 1994, "Law n°100 of 1985 Amending Certain Provisions of Egypt's Personal Status Law", Islamic Law and Society, 1/1:116-136

FERRIE J- N. 1994, "Prier pour disposer de soi. Le sens et la fonction de la prière de demande dans l'Islam marocain actuel", Annuaire de l'Afrique du Nord, 33: 113-127

FERRIE J- N. 1997, "Les visions de l'Occident dans le monde arabe. Introduction", Egypte-Monde arabe, 30-31: 13-27

FOBLETS M.C. 1994, Les familles maghrébines et la justice en Belgique. Anthropologie juridique et immigration. Paris: Karthala

GHURAB M.`A. H. 1986, Islamic Judgments Invalidating Positive Laws (in Arabic). Cairo: Dar al-i`tisam

JACKSON B.S. 1995, Making Sense in Law. Linguistic, Psychological and Semiotic Perspectives. Liverpool: Deborah Charles Publications

JACQUEMOND R. 1988, "Égypte : la Haute Cour Constitutionnelle et le contrôle de constitutionnalité des lois (1979-1987)", Annuaire international de justice constitutionnelle, 4: 271-295

JACQUEMOND R. 1994, "Dix ans de justice constitutionnelle en Égypte (1979-1990)". In Politiques législatives : Égypte, Tunisie, Algérie, Maroc. Le Caire: Dossiers du CEDEJ

KERTZER D. I. 1988, Rituals, Politics and Power. New Haven: Yale University Press

KOSHERI, RASHED and RIAD, 1994, "Egypt", Yearbook of Islamic and Middle Eastern Law, n°1:125-141

KRYGIER M. 1986, "Law as Tradition", Law and Philosophy, 5: 237-262

LAGHMANI S. 1994, "Droit musulman et droit positif : le cas tunisien". In Politiques législatives : Égypte, Tunisie, Algérie, Maroc. Le Caire : Dossiers du CEDEJ

LEPETIT B. 1995, "Histoire des pratiques, pratique de l'histoire". In Lepetit B. (sous la dir.), Les formes de l'expérience. Une autre histoire sociale. Paris: Albin Michel

LEPETIT B. 1995, "Le présent de l'histoire". In Lepetit B. (sous la dir.), Les formes de l'expérience. Une autre histoire sociale. Paris: Albin Michel

LOCHAK D. 1993, "Normalité". In Arnaud A.J. et al. (sous la dir.), Dictionnaire encyclopédique de théorie et de sociologie du droit, 2e édition corrigée et augmentée. Paris: LGDJ

LUIZARD P- J. 1995, "Al-Azhar, institution sunnite réformée". In Roussillon A. (sous la dir.), La réforme sociale en Égypte. Le Caire: Dossiers du CEDEJ

NIYABA 1991, "Memorandum of the Prosecution in Case No 21 of the year 1988" (in Arabic), Majalla hay'a qadaya al-dawla, 35/4: 159-169

OST F. 1987, "Essai de définition et de caractérisation de la validité juridique". In Rigaux F. et Haarscher G. (sous la dir.), Droit et pouvoir. t. I - La validité. Bruxelles: Story-Scientia: 97-132

PARADELLE M. 1995, "Entre juge et muftî : la place du religieux dans l'organisation judiciaire égyptienne (A partir d'une lecture de l'article 381 du code de procédure pénale)", Droit et Cultures, 30 : 77-89

SKOVGAARD-PETERSEN J. 1997, Defining Islam for the Egyptian State. Muftîs and Fatwas of the Dâr al-Iftâ. Leiden, New York, Köln: Brill

TOZY M. 1989, "Islam et État au Maghreb", Maghreb Machrek, Monde arabe, 126: 25-46

ZEGHAL M. 1996, Gardiens de l'islam. Les oulémas d'Al-Azhar dans l'Égypte contemporaine. Paris: Presses de la FNSP

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[1]For Orthodox Copts, personal status regarding marriage and divorce is regulated by a decree of 1938.

[2]On the evolution of the High Constitutional Court's jurisprudence regarding article 2, see Dupret 1997.

[3]Court of first instance of Cairo, 27 January 1994 (See also Dupret 1996, Dupret and Ferrié 1997, Bälz 1997).

[4]For the details of this case and the text of the fatwa, see Skovgaard-Petersen 1997 : 319-334.