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## SEXUAL MORALITY AT THE EGYPTIAN BAR

### Female Circumcision, Sex Change Operations, and Motives for Suing

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#### 1. Introduction

Since the publication of Howard Becker's *Outsiders* (1963), marginality and deviance can no longer be considered as categories per se, but as the product of definitions and characteristics that individuals and institutions interactively ascribe to one another. Thus, normality and deviance do not correspond to any objective situation but to a point of view from which a particular behavior is evaluated. In this perspective, law and the judiciary play a major role. As I have argued elsewhere, it is the peculiar nature of the law to proceed by definitions, categorizations, typifications, and delimitations of an inner side (belonging, identity) and an outer side (exclusion, alterity) (Dupret, 2000a). This holds true particularly when questions dealing with morality are at stake. The treatment of sexual morality by Egyptian judges constitutes an excellent locus for the study of the production of a stance vis-à-vis sexuality that recognizes the existence of normality and deviance.

Modern societies--and Egyptian is no exception--have witnessed an expansion of discourse on morality, especially sexual morality. As Foucault observed: “The ‘putting into discourse of sex,’ far from undergoing a process of restriction, on the contrary has been subjected to a mechanism of increasing incitement” (Foucault, 1990: 12). This mechanism might be labeled as a process of “publicizing the private” (Ferrié, 1995:188; Dupret and Ferrié, 2000). This means that the possession of what is supposedly limited to the inner self or to the realm of intimacy can be

claimed only in public terms. In other words, any claim to the autonomy of the private must be made in public, thereby contributing to the emergence of a 'public culture of intimacy' and its ever growing regulation. It is also part of a process in which people, far from accommodating themselves to what is their natural lot in terms of sex, engage in "the desire to dominate the body's intricacies and functions; the endeavor to maximize its powers and resources." (Gauchet, 1985: 130) In this framework, law is constantly mobilized; it is situated at the center of this will to master the natural environment, hence, the clamor for the legalization of medical practices dealing with the human body: cosmetic surgery, sex change operations, and abortion. The legalization of abortion, for example, is a result of the demand for the recognition of the specific right to be the sole sovereign of one's body. Paradoxically, claims for the legalization of abortion are public procedures equivalent to the procedures that seek to prohibit it. At stake is not so much the definition of the limits of life or the definition of the rights of children, but the right to impose one's "will to moralize sexual relationships." (Ferrié, Boëtsch and Ouafik, 1994: 686)

Another preliminary remark: Although the burgeoning discourse on sexuality is a historical achievement, the public and social nature of sexuality is a sociological phenomenon. Far from being limited to the realm of the inner self, sexuality is necessarily constituted as something thoroughly public: it is publicly defined, publicly negotiated, and publicly displayed, i.e. it is a transparent phenomenon that is social and belongs to the public domain. (Watson, 1995: 211) From this perspective, law represents one of the procedural techniques used by social actors that assures the visibility and the mastery through knowledge of the public phenomenon that is sexuality. It also means that we cannot assume the existence of local boundaries of the moral; we can only describe the ways which social actors--both professionals and laymen-- produce morality and moral boundaries within the framework of tribunals.

There is no reason to doubt that Egypt participates in the legal tendency to over-codify the body, its uses, and its sexuality. It is often assumed that Islam and Islamic law play a major role in the way these are defined, as for instance in Vardit Rispler-Chaim's book on medical ethics (1993). Moreover, many scholars hold that 'Islam' must be understood from within the framework of its own cultural and linguistic categories, which produce a specific meaning, and that Islamic law can only be understood with reference to the technical categories produced by local Muslim scholars. Accordingly, sexual practices should be understood from the "seminal perspective of Islamic religion." (Chebel, 1988: 8) Hence, Islam is constituted as the standard against which sexual manners, which are shared "in all the countries of Islam for the last fifteen centuries" (Zeghidour, 1990: v) must be evaluated.

In my view there is no a priori reason to believe that the judicial treatment of sexuality in contemporary Egypt is directly linked to the historical and intellectual background of Islamic law and/or Muslim societies. Moreover, it is misleading to assume that there is a **biographical** connection between Islamic *fiqh* and modern Egyptian law. The evolution of Egyptian law, the adoption of a legal system fully belonging to the civil-law family, and the practical way in which Egyptian judges adjudicate, all suggest caution in assessing the relationship between *fiqh* and modern Egyptian law. Even when people refer to *fiqh*, it does not necessarily follow that their reasoning is influenced or motivated by the categories of *fiqh*. In other words, the invocation of "Islam" or "*sharî`a*" as a legal repertoire does not mean that we are dealing with Islamic law in its classical and technical sense. From a sociological perspective, Islam is what Muslims claim that Islam is and Islamic law is what Muslim people characterize as Islamic law. The fact that people utter the word "*fiqh*" or "*sharî`a*," or use a lexicon which I call the "Islamic repertoire" (Dupret, 2000a), does not mean that there is a necessary connection between present and past uses of the terms of this lexicon.<sup>1</sup>

This essay is part of a research project that examines the constitutive forms of judicial discourse on morality and the ways in which contemporary Egyptian judges rule on moral questions. It deals with Egyptian law, the living and continuously evolving law of a nation state, codified by its legislative and executive powers and administered by a unified judiciary. I make no attempt here to understand the historical development of Egyptian law and the manner in which it appropriated different juridical legacies.<sup>2</sup> My focus is on the ‘how’ of the judiciary’s ruling in questions of morality. Egyptian public discourse is filled with debates whose main objective is to define public morality. For present purposes, I shall limit the enquiry to the possible motives that lead people to mobilize the judiciary and ask it to respond to moral questions. I shall first examine the manner in which the question of public and sexual morality emerge in the legal and judicial arena and how these matters are treated. I shall then examine three Egyptian cases that, in one way or another, involve the definition of sexuality. From these cases I will attempt, finally, to deduce some of the motivations that impel actors to use the judiciary in moral matters.

## 2. The Legal and Judicial Treatment of Sexuality

According to François Ost and Michel van de Kerchove:

The relations between sex and law have sometimes been close, sometimes loose, but they never ended; society always gained its cohesion at the expense of certain forms of control or even repression of sexual activity. The French Council of State said that “the preservation of good manners is, after the preservation of life, what is most valuable to us” (Locre, 1827: 519) (Ost and van de Kerchove, 1981: 9).

Morality in general and criminal policy in particular are often described as serving the purpose of “achieving social good.” Such is the case in Egypt, where, according to the Preparatory

Memorandum to Law No. 14 of 1999 (which suppressed Article 291 of the Criminal Code), one of the main goals of the legislative process is the “public control and protection of women, who form half the society, the protection of their good reputation, and encouraging them to play a major role in the construction of society and civilization”. Sexuality constitutes the core of this social ordering. Thus, jurists recently debated the conditions in which a woman may legitimately have her virginity “restored”; or the abrogation of the provision of the Egyptian Criminal Code that forbids the sentencing of a man who abducts a woman and then marries her. In both cases, law contributed to the definition of female honor and sexual relationships. (Dupret, 2000b)

In Egypt, as in other civil-law countries, the preservation of good manners (*al-adâb*) stands at the forefront of the legal and judicial discourse. Associated with public policy (*al-nizâm al-`âmm*), good manners have the status of a legal standard, i.e. a notion of legal language whose content is indeterminate and variable, hence open to judicial interpretation. As Gérard Timsit has observed, law is at the same time word (“law is the act that bears its author’s will and intentions”), writing (“the text given to its addressees’ reading”) and silence (“the person to whom the norm is addressed utilizes the incompleteness and indeterminacies of the text so as to insert his/her own interpretation”). This interpretation belongs, for the most part, to the judge. When textual formality is loose, the judge is constrained only by a linguistic operation whose relevance and fairness are uncertain. The real constraint lies in his need to justify himself (or herself) in front of an audience, that is to make his (or her) interpretation congruent with the meaning that appears to be commonly shared: “he must refer to supposedly objective standards, like morality, public decency, and/or social consensus” (Ost and van de Kerchove, 1993: 381).

It is the judge’s task to make the morality that he tries to establish appear to be normal, indeed to be normality itself. Hence, the question of standards. We speak in terms of nature when the judge emphasizes the normality of the biological or transcendental order of things, and in terms

of commonality when he emphasizes the normality of the sociological order. In the case of conformity to the things of nature, the judge claims to model behavior on the ‘previously set’ rules of nature, whether immanent or transcendental. In the case of commonality, the judge claims to bow to ‘public opinion’, thereby forcing the rule to conform to the social will. In practice, the judge’s attitude will oscillate between the two ends of the spectrum, invoking now a principle of an external order, now that of an order internal to the society. It is always tempting for the judge to refer to an external principle, whether it be moral or religious. His arguments generally do not conceal specific religious or philosophical views--if he is indeed attempting to conceal such views. The advantage of a principle of an external order is that it is located outside what may be called into question, thus asserting its inviolability. In this situation, public disagreement is particularly difficult, which explains the existence of an apparent unanimity that is unable to find the means to protest--what Jean-Noël Ferrié calls “negative solidarity.” (Ferrié, 1997: 80-82)

Egyptian jurisprudence acknowledges the difference between law and morality. Among the legal textbooks used at the Faculty of law of Cairo University, Hasan Jami`i’s (Hassan Gemei) *Mabâdi’ al-qânûn* (The Principles of Law; 1996) and *Introduction to Law – Theory of Law – Theory of Right* (1997), define law as “the set of rules governing the behavior of individuals in society which people should obey, otherwise they will be subject to penalties imposed by a competent authority. Legal rules, Gemei argues, are not alone on the track that aims at regulating and stabilizing relations between members of a given society; they compete with other rules like courtesy, custom, tradition, morality and religion. As for moral 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.” They share with legal rules several characteristics: they change according to time and place, they help to organize society, and they are linked to penalties. However, they differ in four respects: [1] their scope: “Whereas morality includes

personal and social manners, law addresses the relationship between one person and another from the perspective of the ostensible aspect of behavior, without taking into consideration the intentions unassociated with physical action;” [2] the penalties imposed in each case: “Whereas the penalty for violating moral rules is mere moral penalty, ranging from remorse and denunciation to social disdain, the penalty for violating legal rules is physical incarceration, imprisonment, or hard labor, and [the penalty] is imposed by the public authority;” [3] their purposes: “Whereas morality rules seek to achieve perfection in man, legal rules seek to achieve stability and order in society;” [4] the form in which they appear: “legal rules most often appear in a clear and specific form, whereas moral rules are not so clear because they are related to internal feelings that may differ from one person to another.” (Gemei, 1997: 6-17)

Similarly, case law reveals the interwoven structure of law and morality. For instance, in a case concerning the privatization of public sector companies, the Supreme Constitutional Court (SCC) argued that constitutional principles must be interpreted in the light of their ultimate goal, which is the political and economic liberation of the motherland and its citizens. For the Court, “it is not permitted to interpret constitutional texts in a manner that considers them a definite and perpetual solution to economic issues whose nature has changed over time”; “the Constitution is a progressive document whose wide horizon does not impede evolution; its thread must be in harmony with the spirit of the time.” (S.C.C., 1 February 1997, Official Gazette No 7, 13 February 1997, 13-17; see Bälz, 1998a; Dupret, forthcoming)

In the realm of sexuality, the interwoven structure of law and morality has given rise to an extensive legal and scholastic casuistry, reflected in a twofold tendency aiming at the objectivization of the field.<sup>3</sup> There is, on the one hand, a tendency to over-codify, i.e. “to superimpose criteria borrowed from the most diverse semantic fields (legal, moral, aesthetic, hygienic, psychiatric, and anthropological codes)”; and, on the other hand, there is a tendency to

over-determine, i.e. “to accumulate multiple devaluating predicates (dangerous, immoral, obscene, vulgar, dirty, lascivious, confused, pernicious, unnatural, etc.)” (Ost and van de Kerchove, 1993: 381). This holds true in Egypt. Consider the language in which the Egyptian Court of Cassation (*mahkamat al-naqd*) refers to those parts of the body whose violation is condemned (*mi`yâr al-`awra*): “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. The 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” to be a violation of her/his modesty. (Hasan, n.d.)

### 3. Sex Change and Female Circumcision: Defining Gender and Controlling Sexuality before the Courts

We turn to three cases that involve the right to perform a sex change operation--what I call the definition of gender--and the right to perform circumcision on young females--what I call the control of sexuality (since, according to its advocates, this procedure is performed in order to control female sexual desire). Within the general framework of legal discourse on sexuality, with its aforementioned properties, these cases will serve as the basis for exploring the motives that lay behind a particular legal action.

#### 3.1. Sex Change and the Definition of Gender

##### 3.1.1. Case One: *al-Azhar University v. Sayyid/Sally*.<sup>4</sup>

In 1982, Sayyid `Abd Allah, a medical student at al-Azhar University who claimed to suffer from a severe depression, consulted a psychologist. After examining him, the psychologist concluded that the sexual identity of the young man was disturbed. After three years of treatment, she referred him to a surgeon so that he might undergo a sex change operation.

The operation, performed on 29 January 1988, had many administrative and legal consequences for the patient. First, the dean of al-Azhar University's Faculty of Medicine refused to allow Sayyid to write his examinations and he also refused to transfer her to the Faculty of Medicine for Women. In his effort to obtain such a transfer, Sayyid submitted a request for a name change to the Civil Status Administration Office. Al-Azhar University maintained that Sayyid, who in the meantime had changed his name to Sally, had committed a crime. According to the university, the surgeon who performed the operation had not changed his sex but had mutilated him for the purpose of allowing Sally to engage in legitimate homosexual relations. Meanwhile, the representative of the Giza Doctors Syndicate summoned the two doctors who had performed the operation before a medical board. The board ruled that the doctors had made a serious professional error by failing to establish the existence of a pathological condition prior to the surgery. 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. In a *fatwâ* issued on 8 June 1988, Tantawi concluded that if the doctor demonstrated that surgery was the only cure for the pathological condition, the treatment should be authorized. However, a sex change operation cannot be performed solely because of an individual's desire to change his/her sex. Tantawi is not clear as to whether or not the "psychological hermaphroditism" from which Sayyid suffered constituted an acceptable medical cause. Thus, each side claimed that the *fatwâ* supported its position.<sup>5</sup>

On 12 June 1988, al-Azhar brought the matter before the courts, claiming that the surgeon had to be punished for inflicting permanent injury upon his patient, in compliance with Article 240 of the Penal code. At this point, the Attorney General and his deputy public prosecutor decided to examine the case. They referred to a medical expert, who concluded that from a physical point of view, Sayyid had been born a male, but that from a psychological point of view, he was not a male. Thus the diagnosis of psychological hermaphroditism was relevant and surgery was the

proper treatment. According to the report, the surgeon had followed the rules of his profession, since he had consulted the competent specialists, had performed the operation correctly, and had not inflicted a permanent physical disability on the patient (Niyaba 1991).<sup>6</sup> The patient could thus be considered a woman.

The Doctors Syndicate rejected the expert's conclusions and organized a press conference in which it made the issue a question of public concern that required a moral and social choice. On this ground, the Syndicate decided to remove the surgeon from its membership list and to impose a fine on the anaesthesiologist for his participation in the surgery. On 29 December 1988, the Attorney General decided not to pursue the charge. The final report confirms that the operation was carried out according to the appropriate rules. One year later, the file was closed and, in November 1989, Sally received a certificate establishing her status as a female. In view of the continuing refusal of al-Azhar to admit her into the Faculty of Medicine for Women, she submitted another claim to the Council of State, which, one year later, nullified al-Azhar's decision and authorized Sally to register at whatever university she wished in order to complete her final exams.

The case did not end with this ruling. In September 1999, the Cairo Administrative Court issued another ruling which recognized that Sally had taken all the necessary legal measures to register at al-Azhar University. The court therefore ordered the university to admit her to the Faculty of Medicine for Women (al-Hayat, 30 September 1999; Court of Administrative Justice, case no 4019/50, 1<sup>st</sup> circuit, 28 September 1999). On November 14, 1999, al-Azhar filed an appeal against the administrative court decision, charging that Sally did not meet its moral and ethical standards<sup>7</sup> in view of the fact that "she performs as a belly dancer in night clubs and has been arrested several times on vice charges" (Middle East Times, 18-24 November 1999). The same Administrative Court issued a ruling, on June 20, 2000, suspending the implementation of

the September 1999 ruling, on the ground that new evidence had been produced (interviews with newspapers, including photographs of Sally dressed as a belly dancer) which contradicted the conduct required of a woman belonging to this Faculty. Accordingly, the Court transferred the case to the State Litigation Office for further inquiry (Court of Administrative Justice, case no 1487/54, 20 June 2000).

### 3.1.2. Case Two: `Ali v. Hasan/Jilan

On December 15, 1991, a man died leaving his wife and two male children, Hasan and his younger brother, `Ali. The estate of the deceased was divided among his heirs: 1/8 for his wife, and 7/16 for each of the two male children. At the end of 1995, Hasan let his hair grow long and manifested other signs of femininity. Subsequently, he underwent a sex change operation and took the name of Jilan. The surgery was performed after his father's death. His younger brother, `Ali, decided to file a claim before the Alexandria personal status court, contesting Hasan/Jilan's share in the inheritance. Indeed, as a direct male heir, Hasan was entitled to a share equal to that of "his" brother. However, as a direct female heir, Jilan was entitled to only half the share of "her" brother. In an effort to establish the respective shares of inheritance, the court decided to take into consideration the gender of the heirs on the day the father died. At that time, no sex change operation had been performed and Hasan was a legitimate male heir. For this reason, the court declared itself incompetent to examine `Ali's claim (Mahkamat al-Iskandariyya al-kulliyya, personal status circuit, case no. 255/1994, 28 May 1996).

Another claim of a similar nature was introduced before the Raml summary court with the same result (Mahkamat al-Raml al-juz'iyya, personal status circuit, case no. 935/1996, 25 February 1997). Both rulings were in conformity with the *fatwâ* issued in June 1996 by the new

Shaykh al-Azhar, Shaykh Sayyid Tantawi, in which he stated that “a transsexual or a man who has changed sex prior to the death of his parents inherits as a female” and that “if, at the time of the death, the man has still not changed his sex, he inherits as a male”.

### 3.2. Female Circumcision: The Control of Sexuality

#### 3.2.1. *Case Three: al-Badri et al v. Egyptian Ministry of Health*

In July 1996, the Egyptian Minister of Health issued a decree on the subject of female circumcision (Ministerial Decree No. 261 of 1996).<sup>8</sup> The first article of the decree states that “the clitoral excision of girls is forbidden, whether it be in public or private hospitals or clinics, except in cases declared to be pathological by the head of the department of gynaecology and obstetrics, pursuant to a doctor's recommendation”; the second article states that “the performance of such an operation by someone who is not a doctor is a crime punishable according to the rules and regulations”.

This decree, which forbids the practice of female circumcision in hospitals, is only one in a long series of unsuccessful campaigns against this practice. The new decree created a stir in Egypt, where female circumcision is widely practiced. Although no individual was personally targeted, a group led by Shaykh Yusif al-Badri and Muhammad Fawzi, professor of gynaecology at `Ayn Shams University, petitioned the administrative court of Cairo requesting that the minister's decree be suspended and annulled. In support of their request, the group advanced three arguments: (1) the decree contravenes Article 2 of the Constitution which makes the principles of the Islamic *sharî`a* the main source of legislation; (2) the consensus among Muslim jurists (*fuqahâ`*) supports the legitimacy of female circumcision on the strength of a prophetic tradition; according to the jurists, the practice is either obligatory or recommended; and (3) the government

does not have the power to modify a clause of the Qur'ân or a prophetic sunna that is obligatory or recommended in Islamic law.

In its ruling of 24 June 1996, the administrative court held in favor of the petitioner. After discussing the question of female circumcision in Islamic law, relying *inter alia* on a *fatwâ* issued by Shaykh Gad al-Haqq `Ali Gad al-Haqq, the court annulled the decree on the ground that Article 1 of Law 415/1954 requires all surgeons in Egypt to be duly registered by the Ministry of Health in the roll of the Doctors Syndicate; any doctor who is so registered is authorized to practice medicine and to perform surgery without any restriction. Indeed, the court added, only a new law can limit the scope of an earlier law; since the Minister's decree did not qualify as a law, it did not have any legal force.

The Minister of Health appealed the decision to the Supreme Administrative Court, which ruled on the matter on 28 December 1997. As Kilian Bälz has explained, this ruling raised three issues: (1) a claimant's right to act when he has no personal interest in the matter; (2) the power of the legislature (here the minister) to sanction customs that are justified with reference to the *sharî'a*; and (3) the right to physical integrity and its legal limits. (Bälz, 1998b)

Regarding the first question, the Court reiterated that the plaintiff must have a personal interest in the case, but it specified that for every person who is endowed with a legal status is presumed to have such a personal interest in an administrative matter. In this case, the plaintiff's status as a Muslim Egyptian was deemed sufficient to establish his personal interest in all matters relating to his religious beliefs.

As for the second issue, the Court followed the distinction drawn by the SCC between principles of *sharî'a* whose origins and interpretation are fixed and absolute and principles that leave room for interpretation; the legislature may intervene only with regard to the latter. In the

absence of any fixed and absolute rule, the legislature legitimately may exercise its interpretive power (*ijtihad*) in accordance with the time and the place in which it finds itself. Thus, the question became: What is the nature of the rule that proscribes female circumcision? The prohibition of this practice is not the subject of consensus among Muslim jurists and the traditions on which it is grounded are weak. The rule proscribing female circumcision is therefore not an absolute rule, and the legislature is entitled to regulate the matter.

As for the third issue, the Supreme Administrative Court recalled that the principle of bodily integrity necessitates protecting the normal performance of bodily functions, protecting all the different parts of the body, not mutilating it, and avoiding any physical and psychological suffering. Only a justification such as an intention to cure may limit this right to bodily integrity. Such a justification was not present in the female circumcision case. The Court therefore ruled that Law No. 415 of 1954 does not authorize physicians and surgeons to perform female circumcision, insofar as a surgical operation may be authorized only in case of illness and must be performed with the intention to cure. Moreover, the Court noted that the Penal Code of 1937 stipulates that the provisions of the Code do not affect personal rights grounded in the *shari`a* (Article 7), that the provisions of the Code are not applicable to acts that have been committed bona fide in pursuance of a right recognized by the *shari`a*, and that they do not apply to female circumcision, which is neither *fard* nor *wajib* according to Islamic law (Article 60). To the contrary, the Court added, the Islamic maxim, “neither prejudice nor counter-prejudice” (*la darar wa la dirar*), indicates that female circumcision is forbidden by the *shari`a* as well as by positive law.<sup>9</sup>

#### 4. Motives for Filing a Claim

I shall now attempt to identify the different motives that may cause individuals to turn to the courts in issues relating to sexual morality.

#### 4.1. Direct Personal Interest

The requirement that the plaintiff have a direct personal interest in the lawsuit is a fundamental legal notion that explains the formal structure of judicial actions. Moreover, the judge's definition of this requirement may shed light on his own motivation in the exercise of his adjudicating function.

As a general matter, a personal and direct interest is required in order to file a claim before the courts. Article 3 of Law No. 13 of 1968 on civil and commercial procedures stipulates that “no request and no legal grounds will be accepted if, with regard to it, its author has no effective interest (*maslaha qâ`ima*) as defined by the law”. In administrative matters, Article 12 §1 of Law No. 47 of 1972, which regulates, *inter alia*, the procedure to be used by administrative courts, stipulates that “a request will be heard [only on the condition that the plaintiff has] a personal interest (*maslaha shakhsiyya*) to [file] it”.

The Abu Zayd affair<sup>10</sup> called into question the requirement that the plaintiff in a civil lawsuit must have a direct and personal interest to act in questions involving religion. Whereas the judge of the first degree upheld the strict definition established by jurisprudence and precedent, i.e. the interest must be direct since what is at stake in the trial is a personal matter, the appeals judge based his decision on an isolated precedent of the Court of Cassation and on the argument that the jurisdiction of the unified court system had succeeded that of the earlier multiple court system, which included *shari`a* courts. He therefore recognized the right of a specific individual to file a *hisba* claim, the plaintiff's interest being presumed by virtue of his being a Muslim with regard to all matters relating to Islam.<sup>11</sup> However, the possibility of this type of action was severely

limited by the promulgation of Law No. 3 of 1996, which amended the personal status law, and Law No. 81 of 1996, which amended the Code of civil and commercial procedure.<sup>12</sup>

As mentioned, the direct personal interest requirement is interpreted differently according to whether the claim is civil or administrative, with personal interest being interpreted more broadly in claims of the latter type. As the judge put it in the female circumcision case:

It is sufficient that this interest be potential (*âjil*). There is no doubt that the goal of the defendant, who professes Islam, namely, to identify the Legally correct provision with regard to the circumcision of females, on the basis of their faith, (...) constitutes a personal interest for them (Supreme Administrative Court, Case No. 5257, 42d Judicial Year, 28 December 1997).

The judge's definition of personal interest reveals an ideological or political stance. Indeed, it is highly political to claim that the preservation of Islam is a general interest that can be pursued in administrative matters by anyone who professes the religion of the state. (Constitution, Art. 2) However, this is done under the cover of an irreproachable legal argument--the broad interpretation of the direct personal interest requirement in administrative matters--, which reproduces a long-standing jurisprudence of the Supreme Administrative Court, which itself is faithful to classical French-style administrative legal principles that can be found in textbooks.

Thus, three main ideal-types emerge: [1] A positivist attitude in which the judge claims to adhere to the established legal framework. This attitude is exemplified by case two, in which the judge decided to adopt a temporal criterion for establishing the relevant gender of Hasan/Jilan: the date of the distribution of the inheritance. Whatever the defendant's current gender may be, it is his/her legal quality (*sifa*) at the time of the legal fact (the father's death), involving legal consequences (the inheritance), that is relevant.

[2] A traditionalist attitude that exploits every opportunity left open by law and the legal system to propose a definition and interpretation of religion and its place in society and the political arena. This is what the judges of the court of appeal and the court of cassation did in the Abu Zayd case, when they accepted the plaintiffs' argument that a judge may divorce a man from his wife if his apostasy is established, on the ground that Egyptian personal status law forbids a Muslim woman to marry a non-Muslim man. As the appeals judge put it:

Since the plaintiffs, when they submitted their request for the separation of the first defendant from his wife (the second defendant), asked for the recognition of the fact that the former committed apostasy against Islam, whereas the latter is a Muslim, this request allows the claimants [to file] a *hisba* action, bearing in mind all of the above. They are entitled to introduce such action (Cairo Court of Appeal, Case No 591/1993, 14 June 1995).

[3] A liberal attitude according to which the judge adopts a reformist and humanist perspective that does not appear to be external or hostile to the recognition of Islamic normativity. In both the Sayyid/Sally case and the female circumcision case, the prosecutor and the judge acknowledged that they must abide by the provisions of Islam, but they challenged the definition and interpretation of those provisions. In the Sayyid/Sally case, the prosecutor stated that Islam permits a sex change for the purpose of curing a psychological disorder. In the female circumcision case, the judge asserted that weak or unsound Traditions had no binding legal force.

#### 4.2. Motives for Filing a Claim

In the three cases that we have examined, the litigants' motives are of different types: individualistic, political, ethical, or professional. I shall try to provide an explanation of the

mutual articulation of these motives and of the use of narrative strategies relating to sexual morality and religious orthodoxy.

A short remark must be made with regard to the distinction between individual action, action 'by many', and collective action. Whereas collective action is grounded in an evaluation of a common good, action 'by many' refers to the juxtaposition of individual wills, even though they can to a certain extent take each other into account (Livet and Thévenot, 1994: 154).

Accordingly, we suggest that the action contesting the transsexual brother's inheritance is radically individual or egoistic; that the actions taken by the Doctors Syndicate and al-Azhar University correspond to an action 'by many' carried out in order to sanction the surgeons; and that the action against the Minister's decree prohibiting female circumcision is collective. As we shall see below, each type of action has its own specific structure, logic and ordering of the arguments, although the lines that divide one from the other are blurred.

#### - The Egoistic motive

`Ali was clearly motivated by egoism when he sued his brother, Hasan, over the inheritance of their father's estate. As the daily newspaper al-Akhbar proclaimed on 10 May 1997, "The father died as a millionaire, leaving two sons, and the law calls for the division of his enormous wealth into two equal parts between the two." By resorting to the Egyptian law of inheritance, which is explicitly grounded in the Islamic legal tradition, `Ali sought to achieve two goals: to solve a family dispute of a moral nature and to benefit from a recalculation of the inheritance shares. The family dispute was settled by inflicting a material prejudice on Hasan/Jilan, with whom `Ali was in conflict (vindictive dimension); the same prejudice resulted in a personal pecuniary benefit for `Ali (venal dimension).

The Islamic repertoire was invoked for instrumental purposes, although one cannot deny the Islamic dimension of the moral dispute. In other words, our interpretation of `Ali's motive will vary according to whether we emphasize the vindictive dimension of the claim or its venal dimension. In its venal dimension, personal profit constitutes the only goal of the action in which the Islamic inheritance rules are invoked; in its vindictive dimension, there is also the intention to bring the adversary to account for his/her breach of moral principles that are related to religion, even if this action is not legally punishable. This is still an egoistic motive: the plaintiff sought neither publicity nor a social sanction--the case did not receive any publicity until after the ruling. Hence, we assume that `Ali's only goal was to retaliate against his sibling through the courts. It is in this sense that law is instrumentalized, i.e. put in the service of an objective that is not itself legal: `Ali did not file the case in order to repair a possible breach of the law, rather, he used the law as one mean--among others--to satisfy a personal interest.

Paradoxically, these vindictive and venal dimensions may be mutually exclusive. Thus, in the pursuit of his pecuniary interest, `Ali asked the judge to ratify the sex change, with all the legal consequences that this entailed in matters of succession. That is to say, he asked the judge to legitimize his sibling's sex change, despite his strong opposition to this procedure, on moral grounds. What was the alternative? `Ali might simply have ignored the sex change;<sup>13</sup> or he might have attempted to settle the matter in private, e.g. as a crime of honor. Had he chosen the latter course of action, however, he would have risked transforming himself into a person accused of a crime, thereby forfeiting the venal gain that he anticipated from the legal claim. In sum, the vindictive and venal dimensions of the egoistic action, although paradoxical, are closely linked, and the judicial arena seems to be the best area for their accommodation.

- The Ethical Motive

A strong ethical motive lies behind all actions relating to sex change operations and the control of sexuality. Between the egoistic motive (see above) and the political motive (see below), the desire to define the range of professionally and religiously acceptable practices is common to the three cases examined above.

In the ethical motive, professional and religious dimensions coexist. In the female circumcision case, the plaintiff stressed that Islam recognizes female circumcision and that its forbidding is contrary to *sharî'a*:

This decree is grounded on a faulty basis and is contrary to the Constitution, since it violates the provisions of Islamic *sharî'a*, which are derived from many authentic Traditions (*ahâdîth sahîha*) from the Prophet--may God pray for him and bless him--that order the circumcision of females, explain the proper way to perform it, and the wisdom of its Legalization (*tashrî'*) (Supreme Administrative Court, Case No. 5257, 42d Judicial Year, 28 December 1997).

But the plaintiff also based his claim on a medical and moral argument:

The truth is that famous medical specialists have established that this operation is healthy and useful for females, and protects their health and their morality (Supreme Administrative Court, Case No. 5257, 42d Judicial Year, 28 December 1997).

A classical theory in political science posits the existence of a dynamic model of differentiation between and among religion, morality, custom and law (Dauchy, 1993: 383). According to this model, the emergence of bio-ethical law is the logical outcome of the distinction between law and morality, on the one hand, and religious morality and professional ethics, on the other. However, in the cases studied here, we witness not a distinction of these spheres but their confusion and conjunction. Al-Azhar University, which we might have

expected to propose a full-fledged Islamic legal argument, argued in the strict domain of medical ethics:

[The student registered on the rolls of the University] was male and only male. He had no internal or external female reproductive organ, but underwent surgery that led to the suppression of his male reproductive organs and to the creation of an artificial orifice slightly beyond (*khalf*) the external urinary orifice. The student in question became, as a consequence of this surgery, a male lacking his external reproductive organs, so that the diagnosis of the physician [...] establishing his psychological hermaphroditism totally contradicted the committee's report and the examination of the student. The surgery performed on the student was not related to any organic medical requirement; to the contrary, instead of this surgery, one should have focused on a psychological therapy and terminated the taking of female hormones. Al-Azhar's report concludes by claiming that this constitutes a serious professional mistake on the part of the physician [...] and that, because of his faulty intention, what he dared to undertake constituted battery leading to permanent incapacity (as quoted in Niyaba, 1991: 159).

By contrast, the General Prosecution, in its report with regard to the same case, did not hesitate to use an argument grounded in religious principles, although it might have limited itself to arguments of positive law:

It follows from the above that the authorization of a medical surgery, provided it is grounded in the completion of a social interest that [God's] Law allows so as to preserve Islam, requires that the patient agree to the performance of a medical surgery on his body and that the physician totally commit himself to the healing of his patient in pursuance of the fundamental principles of medicine (Dr `Usam Ahmad Muhammad, General Theory

of the Law of Bodily Integrity: Comparative Criminal Study, 970). (as quoted in Niyaba, 1991: 168)

Both al-Azhar University and the Doctors Syndicate sought to participate actively in the construction of a public morality, which the judiciary was asked to ratify. The judiciary, represented here by the Public Prosecution, found itself constrained by the framework of the debate: it could not contest the legal relevance of the Islamic repertoire or that of the positive repertoire. Rather, it could only demonstrate the convergence of these repertoires on the solution that it proposed. For both al-Azhar University and the Doctors Syndicate, what was at stake was not so much the preservation of Islam as the construction of a normative medical ethics (purportedly) based on religious principles. Using logic of a corporatist nature, these two actors did not seek to limit, on the ground of a religious obstacle, the development of professional monopolies, but rather to confer religious legitimacy upon their respective professions. More than anything, they attempted to constitute themselves as the sole holders of what Bourdieu has referred to as “the monopoly of the right to define the law” (*le monopole du droit de dire le droit*; Bourdieu, 1986) of their profession. This monopoly is acquired when actors impose restrictive public moral norms on society; and their effective capacity to do so determines the level of their participation in power (Dupret and Ferrié, 1997). The General Prosecution, on the other hand, was eager to secure its argument by anchoring it in Islamic principles, in an attempt to over-validate its admissibility. By so doing, it gave the legal norm an additional weight, making it appear to be socially, ethically, and religiously justified and hence legitimate.

#### - The Political Motive

This last remark leads to the question of the political motivation of a judicial action. Only a narrow gap separates ethical and political motives. For instance, in the al-Azhar University action against the physician who performed the sex change surgery, the fact that the Doctors Syndicate

was dominated by representatives of the Muslim Brotherhood suggests that there is a close connection between the two types of motive.

The main line of the argument, as I developed it with Jean-Noël Ferrié with regard to the Abu Zayd case (Dupret and Ferrié, 1997 and 2000), is the following. In suing Abu Zayd, the plaintiffs acted so as to turn the judicial arena into a tool which, if not aimed at contesting the existing political order, was, nevertheless, part of a project to reconstruct and reestablish a religious reference, so as to substantiate the Islamic juridical repertoire which, to that point, appeared to be purely rhetorical. Since it was not aimed at an individual, at his religion or at his “inner self”, the Abu Zayd case revealed a judicial strategy to transcend the level of a civil litigation and to attain the status of a public issue.

It is tempting to draw a parallel with the Calas affair, a case of apostasy that arose in eighteenth century France (Claverie 1994), in which Voltaire, the mastermind behind the affair, showed that he had no personal interest whatsoever in the case and that his only concern was to promote a “cause”, or a “good cause.”<sup>14</sup> He used this “cause” to mobilize the general interest over and above particular interests for the benefit of “public good”. Voltaire thus invented the “affair” as a politico-judiciary genre; and he established the notion of “cause” when he used the affair to demonstrate that what was at stake was something of a general nature.

The issue in both the Calas affair and the Abu Zayd affair (both of which involved charges of apostasy) is the application of a procedure, with totally different modalities, using as a pretext a current issue projected into a public space to serve as a basis for affirming and defending a given notion of the general order of society. The Abu Zayd case can be characterized as an “affair” because it became part of a public presentation that transcended the simple litigation of personal status claim. It was used in order to support a cause, that of proclaiming the ‘Islam’ of the Egyptian state and its institutions and of defining the nature of that ‘Islam’. Moreover, in both

cases, one can detect what Claverie calls “a general model of critical presentation,” (id.: 85) i.e. the underlining of the fact that by using the different institutional resources available, while remaining within the limits of the sense and reference allowed by the authorities, it is possible for some protagonists to bend the substantive definition of that Islam. Without contesting the authorities in power, the actors used the judiciary as an institution, together with the positive and Islamic juridical references of Egyptian law, with the aim--stemming from a desire to share institutional power--of adopting the modalities and of precisely defining the tenets of such power.

A political motive also lay behind the administrative lawsuit against the Minister's decree prohibiting the performance of female circumcision by medical doctors. Here too the plaintiffs projected a specific question into the public arena in order to promote the affirmation of a specific conception of the general ordering of society. The case was highly publicized. According to those who opposed the Minister's decree, what was at stake was respect for the Egyptian Constitution, which states that Islamic Law is “the main source of legislation” (Article 2). Female circumcision was identified as a “cause,” i.e. an issue that could be used to mobilize public interest, above and beyond particular interests, for the benefit of “public good,” or at least for the benefit of a certain conception of public good: defending Islam and preserving physical and moral health. It was in the public staging of the opposition to the ministerial decree that the question of female circumcision became the “female circumcision case”; the use of this case to promote and to illustrate an interest of a more general nature served as the basis for the notion of a “cause.” The issue of female circumcision--the object of a public staging that largely by-passed a simple administrative dispute--supports a “cause”, i.e. the proclamation and the definition of the Islamic nature of the Egyptian state and its institutions: “Doctors claim,” the weekly newspaper *al-Liwâ` al-islâmî* proclaimed on 16 October 1997, “the unconstitutionality of the Minister's decision on the ground that it contradicts the Islamic *sharî`a*.” In their use of the institutional resources at their disposal, some actors sought to amend the substantive definition of Islam in the

Egyptian context, while remaining within the framework of meaning and references authorized by the ruling power. The legitimacy of the ruling power was never explicitly mentioned. To the contrary, the most aggressive attacks against the Minister's decision came mainly from the religious pro-governmental press. For instance, on 16 October 1997, al-Liwâ` al-islâmî also announced that "Islamic scholars confirm that female circumcision is part of the Noble Sunna and is honorable for women, and that failure to perform the procedure exposes girls to danger." In sum, we observe that some social actors made use of the judiciary and of the positive and Islamic references of Egyptian law in order to impose a constraining definition of Islam and of morality, thereby allowing supporters of this definition to share in power by utilizing the state institutions and attempting to define the major principles on which the state is built.

## Conclusion

In this essay, I have tried to show how Egyptian judges deal with specific cases relating to the definition of sexual morality and to give examples of some aspects of the complex relationship between law and morality. In the course of this exercise, I have documented some features of the reference to Islam and to Islamic law within the Egyptian judicial setting.

The relationship between law and morality has been debated at length in the West. Many legal philosophers assert that norms are social and non-metaphysical phenomena; this allows them to view norms as positive facts. Starting from such an assessment, legal philosophers distinguish between moral norms and legal norms. This distinction is one of the fundamental principles on which modern law has been built. Hart (1961: 224) claimed that there is no necessary reason to consider legal rules as a reflection of, or response to, moral requirements, although they may be so in certain cases. According to Dworkin (1985), on the other hand, general, fundamental maxims of law do exist, and, even though they do not enjoy the status of rules, they guide the

judge in his decision. Dworkin thereby reintroduces morality as a major component of the legal phenomenon. However, this does not explain how such principles are constituted, mobilized and characterized. By examining actual cases in which legal rules and moral principles are mingled within the judge's work, I have attempted to shed light on these practical processes.

The relationship between law and morality is complex. These spheres are neither identical nor autonomous. The law must be formulated in the non-codified terms of what is morally acceptable. It is here that one can observe the emergence of notions such as public order or policy, customs, good moral character, inner nature of things, as well as all the legal standards that are used in adjudication. One of the main conclusions of this essay is that *sharî'a*, i.e. Islamic normativity, constitutes one set of such moral notions and standards.<sup>15</sup> Pace Dworkin, who argues that the judge deduces and discovers these standards, I maintain that standards are necessarily postulated and ascribed. Paradoxically, this means that although Islamic normativity has a heteronomous nature (i.e. it is always outside itself that law finds the means for solving questions of morality), it is up to professional legal actors to interpret the content of these moral principles, with the consequence that they have the final word with regard to their definition and implementation.

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## Notes

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<sup>1</sup> Accordingly, it makes no sociological sense to say that some countries, in their endeavor to implement Islamic law, departed from *sharî'a* to the point of distorting it. (Layish and Shaham, “*tashrî'*”, EI2) This may constitute a theological **debate** within the Muslim community, but it creates severe sociological confusions, since it assumes that: (1) scholars must evaluate present more or less deviant practices according to the yardstick of paradigmatic orthodox rules; (2) scholars are entitled to **ironize** the many ways people deceive themselves when adhering to such or such a conception of Islamic law; (3) scholars occupy a position that makes it possible for them to know what people do better than those people who are engaged in daily practices; (4) past categories are necessary relevant for present purposes; (5) people are deviant without knowing that they are deviant and without the legislature knowing that it promulgates deviant laws; etc. However, all this is redundant, since it only shows that legal interpretations and practices do not remain constant throughout history. Yet, it avoids the fundamental question: how do people engaged in the practice of law produce an understanding of rules, principles and settings that makes it possible for them to act in an ordered and intelligible practical frame.

<sup>2</sup> I propose the following brief sketch of the legal history of Egypt in the last two centuries: Egypt's entry into the civil-law family can be dated to 1876 (creation of mixed courts with their own codes) and to 1883 (creation of national courts with their own codes). This was the culmination of a long process that began at the turn of the eighteenth century. (Goldberg, 1998) The nineteenth century witnessed many Ottoman governors, viceroys and khedives striving to

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give the legal and judicial system a “modern” color, that is mainly a Western one. (Hill, 1987; Reid, 1981; Botiveau, 1989; Brown, 1997) In less than a century, the *qâdî*’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” (Peters, 1999), before being replaced by a French-type court system. In the initial stage of the process, justice and administration were mixed. 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.” (*ibid.*) We can observe the creation of many jurisdictions, like the High Court (*majlis al-ahkâm*), and later on, due to the **constraints** of international trade and Western imperialism, special courts for merchants (*majâlis al-tujjâr*) using French law and lawyers. From the late 1870s onward, mixed courts (*mahâkim mukhtalita*) and national courts (*mahâkim ahliyya*) operated, together with religious courts (*mahâkim 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 distinction between civil and administrative law, the Council of state (*majlis al-dawla*) was created in 1946. In 1969, the Supreme Court (*al-mahkama al-`ulyâ*) was established with jurisdiction on constitutional matters. It was replaced in 1979 by the Supreme Constitutional Court (*al-mahkama al-dustûriyya al-`ulyâ*).

The nineteenth century was marked by the process of codification. In Egypt, decrees and laws regulated criminal matters as early as 1829. Some of the articles of the collection known as

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*Qânûn al-Muntakhabât* clumsily translated the provisions of the French Criminal Code of 1810. In 1852, a new penal code was promulgated (*al-Qânûnnâmeḥ al-Sultânî*), the first three chapters of which are largely identical to the Ottoman Penal Code of 1851 (Peters, 1995). This Penal Code can be regarded as a codification of the state's discretionary power, according to the *sharî'a*, to punish sinful and undesirable behaviors in a manner that stops short of strict Islamic provisions and procedures (*ta'zîr*). However, French law entered Ottoman criminal law on a large scale in the new Penal Code of 1858; in Egypt it entered through the promulgation of the mixed and national codes of 1876 and 1883. Other codifications followed the model of criminal legislation. In the Ottoman Empire, the French origin of the five main codes 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. (Lafon, 1997) Again, in Egypt, the new codes of 1876 and 1883, drafted by French and Italian lawyers, followed a French pattern. In civil matters, Egypt directly imported French codes despite Qadri Pasha's attempt (in his *Murshid al-Hayrân*) to codify Islamic law in the image of the *Mecelle* (in the Ottoman empire the *Mecelle*, promulgated between 1869 and 1882, aimed at reconciling Islamic law and the Napoléon Code). One had to wait for the new Civil Code drafted by `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. Of course, new laws have been drafted continuously and judicial institutions have produced an impressive amount of case law. In this two-century process, what was originally imported law undoubtedly became Egyptian law, that is, a national law whose formal structure identifies it, from a technical perspective, as a member of the civil-law family.

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<sup>3</sup> I use the word “objectivization” to refer to the process whereby judges make visible and intelligible the definition they give to concepts and categories for practical legal purposes (and not as the actualization of historical forms and referents).

<sup>4</sup> This case has been well presented by Skovgaard-Petersen (1997: 319-334), from whom I borrow the main lines of the summary, to which I have added developments that occurred in the 1990s. On a similar case before the Tunis Court of Appeal, cf. Redissi and Ben Abid, 1995.

<sup>5</sup> This does not constitute the only *fatwâ* on the topic. On 27 June 1981, Gad al-Haqq `Ali Gad al-Haqq, then Mufti of the Republic, issued a *fatwâ* at the request of the Malaysian Center for Islamic Research. He concluded: “The performance of a surgical operation that seeks to externalize (*ibrâz*) the organs of masculinity or femininity that are hidden is authorized; moreover, it is deemed compulsory as a medical treatment when urged by a medical expert. Such a procedure is not authorized when it follows nothing more than a desire to change the gender of the human being from female to male or from male to female.” (Gad al-Haqq, 1995: 378)

<sup>6</sup> Focusing on the *fatwâ* itself, Skovgaard-Petersen does not pay much attention to this document.

<sup>7</sup> According to the court, al-Azhar held that belly dancing “is contrary to the provisions of Islamic *sharî`a*” and “contradicts the conduct which must be adopted by someone who belongs to one of the faculties for women depending on al-Azhar University, which is singular in that it strictly imposes a specific conduct which may not be trespassed.” (Court of Administrative Justice, case no 1487/54, 20 June 2000)

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<sup>8</sup> Female circumcision is a very widespread practice in Egypt. However, no reliable figures exist. Boyle and Preves identify Egypt as one of the fourteen countries in the world in which a majority of women are circumcised, giving the extreme rate of 97%. (Boyle & Preves, 2000: 716-7)

<sup>9</sup> The Court says: “The majority of physicians whose opinion is trusted and whose science is recognized consider [female circumcision] as belonging to practices which severely prejudice women and whose performance is not authorized without therapeutic necessity. It is established in the *fiqh* and in the *sharî’a* that there can be ‘neither prejudice nor counter-prejudice’.” To my mind, this means that although female sexuality is sometimes regarded as a social harm (a prejudice), any attempt to limit this harm by mutilating female genitals (a counter-prejudice) constitutes a greater harm.

<sup>10</sup> This is the famous case of a professor of literature at Cairo University whose marriage was dissolved because of his alleged heretical writings. When his apostasy was established on the basis of his writings, Nasr Hamid Abu Zayd lost his status as a Muslim, making his marriage with a Muslim woman null and void. (see Dupret, 2000b)

<sup>11</sup> *Hisba* is a non-Qur’anic term that refers to the duty of each Muslim “to order the good and to prohibit the evil” (*al-amr bi-l-ma’rûf wa’l-nahî ‘an al-munkar*: Qur’an III, 104 et passim); and also to the special office assigned to the *muhtasib*, who was in charge of controlling markets and maintaining public order. In Egyptian law, the term *hisba* refers to the right of any Muslim to sue when the general interests of Islam are at stake, even though he/she has no personal and direct interest in the case. (see Thielman, 1998)

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<sup>12</sup> Both laws require that any *hisba* claim be submitted to the General Prosecution, which latter is free to prosecute or not.

<sup>13</sup> This is what al-Azhar did in its conflict with Sayyid/Sally, when it argued that “Sally” was not a female but a mutilated male.

<sup>14</sup> This notion originally had to do with cases in which theological arguments could be invoked in the sphere of politics (Claverie, 1994: 82).

<sup>15</sup> Article 2 of the Egyptian constitution stipulates that “the principles of Islamic *sharî`a* are the main source of legislation”. As such, it clearly indicates that Islamic *sharî`a* is not Egyptian law. In other words, the provisions of Islamic *sharî`a* are not directly applicable in Egyptian law. In any case, there must be a law, promulgated by the Parliament, whose conformity with Article 2 can eventually be reviewed by the Supreme Constitutional Court. In the course of such a constitutional review the SCC made its famous distinction between absolute (*ahkâm qat`iyya al-thubût wa al-dalâla*) and relative (*ahkâm zanniyya*) principles of *sharî`a*, which are respectively excluded from, or open to, the interpretation of the legislature. To date, no law has been found unconstitutional with regard to any absolute principle of Islamic *sharî`a*. (see Dupret, 1997; 2000; Bernard-Maugiron, 1998; Bernard-Maugiron and Dupret, 1999)