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► To cite this version:

Baudouin Dupret. The Person and His Body: Medical Ethics and Egyptian Law. B. Dupret. Standing Trial: Law and the Person in the Modern Middle East, I.B. Tauris, pp.294-317, 2004. halshs-00179029

HAL Id: halshs-00179029

<https://shs.hal.science/halshs-00179029>

Submitted on 15 Oct 2007

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The Person and His Body Medical Ethics and Egyptian Law

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The judicial realm is a locus where debates on public morality and its definition evolve and are temporarily settled. The mere fact that issues pertaining to this field are brought before the courts points to a growing trend towards the “juridicisation” of privacy (or intimacy), otherwise known as the “publicising” of the private realm, that is, the intrusion of public and legal regulation in the realm supposedly kept for the individual. In this sense, the analysis of legal debates on morality allows one to analyse modes of construction of the public sphere by focusing on the place kept for the individual within this sphere and, inversely, on the place that the individual keeps for himself within it. Such an analysis brings to the light a number of tensions between the normativity of individual choice and that of public morality. This stands out clearly in the case of the field of medical ethics where all the stakes involved in the relationship are found between the individual and his body in the autonomy of individual will, in individual responsibility and in the freedom to dispose of oneself. A case in point is the dispute over the notion of “therapeutic purpose” that regularly arises on the Egyptian judicial scene.

I present my argument by using this dispute as a starting point. In the first part of this contribution, I attempt to outline the parameters of the legal and judicial debate in Egypt. Following a few comments on a number of axiomatic legal principles, their role and their transfer from one legal system to another, I examine the nature of existing legal provisions and those pertaining to jurisprudence by focusing on the example provided by the notion of “therapeutic purpose”. I then extend the discussion to include the main principles of medical ethics and, more particularly, the assumption of the autonomy of the patient’s will and its

legal corollary, the requirement of consent. This leads me to distinguish two types of constraints that may restrain the use of this autonomy of will: autonomous constraints, that is, those pertaining to the current legal order and heteronomous constraints, i.e. those stemming from an alien normative order.

In the second part of this work, following a comment on the paths followed simultaneously by individualisation and moral restraint, I seek to argue that the spread of the assertion of an autonomous “self” takes place together with the shrinking of the realm where autonomous “intimacy” is free from any legal intrusion. The paradox inherent to this growing assertion of a “pure self” and to the expansion of law into the realm of privacy is that it leads to the notion of an inalienable “inner-self” that is given no public voice. I show that privacy, when it is subjected to the legal system, becomes the object of a moral judgement in the eyes of a “virtual public opinion”. By way of conclusion, I comment on the role of morality in the shaping of public space.

The framework of the legal and judiciary debate

Introductory note

This contribution begins with several comments on the axiomatic principles of law and their possible transfer from one legal order to another. Whether regarding interpretative principles (e.g. the rationality of the ruler), legal standards (e.g. the good family man) or legal axioms (e.g. the personality of the criminal sanctions), one is constantly faced with fundamental elements on which rests the whole economy of a legal system and its judicial interpretation. For example, it is manifest that “the anthropology underlying the legal philosophy of the Enlightenment asserts the principle of the irreducible singularity of human

nature found mainly in the freedom allowing the individual to have control over and to be the primary agent of his own body's movements".¹ Hence the importance, with regard to medical matters, of the concepts of therapeutic purpose, consent, responsibility and aim. Thus, French law has a rule according to which "no harm can be made to the integrity of the human body unless it is a therapeutic necessity for the individual" and "the consent of the individual in question must be obtained beforehand except in the case when his state of health requires therapeutic treatment to which he is unable to consent".²

As seen further on in this discussion, quite similar axiomatic principles prevail in Egyptian law. This similarity is due to processes of legal transfers on a more or less significant scale. For example, it is well known that French law has had a great influence on the shaping of Egyptian law. In this particular case, one can really talk about the migration of concepts and legal principles. But, this migration should not be seen simply in terms of legal exogeneity or cultural assimilation for that would suppose conceiving of legal systems only in a very static and autarkical manner. It would also suppose being able to determine the tangible content of the notion of legal culture, a task which is very problematical. Finally, it would neglect the whole issue of why, from an endogenous perspective, have recourse to a foreign legal model.

In a previous publication,³ I tried to show that the "instrumentalisation" of the Western legal model should not be confused with its "Egyptianisation", that is, with the idea of a re-injection in this model of the basic features of the local legal "culture". In other words, the fact that an Egyptian elite has recourse to the Western legal model does not mean that the model has been the object of a re-introduction of the characteristics particular to Egyptian "legal culture", but simply that it was used for a specific aim. One should not overestimate the

¹ Cayla, in Canto-Sperber, **1996**, v° Droit.

² Civil code, art. 16-3, L. n° 94-653, 29 July 1994, art. 3 : JO 30 July 1994.

adaptation to the Egyptian context of a legal code inspired by the West: indeed, there has been a transfer that is historically testifiable and empirically verifiable. However, this transfer took root and so one must now consider it as a fact. Generally speaking, this does not create a problem for anyone. Whatever its inspiration, Egyptian law is practised by Egyptian lawyers and by those who are subject to law and serves within the Egyptian judicial realm and with the support of Egyptian referential texts. If the issue of exogeneity is raised, it is neither for legal nor for judicial reasons, but rather for political ones.

The legal and case-law provisions: the case of “therapeutic purpose”

As a first example of Egyptian legal and case-law provisions in matters of medical ethics, I take the notion of “therapeutic purpose”.

Egyptian law defines a medical act (*‘amal tibbî*) as “any act necessary or desirable for use by a doctor of his right to practice medicine”. The following conditions must be filled for an act to be considered as medical: that the individual performing the act be fully authorised to treat patients (*tarkhîs qânûnî bi-muzâwalat al-‘ilâj*); obtaining, beforehand, the patient’s consent (*ridâ’ al-marîd*); that there be a therapeutic purpose (*qasd al-‘ilâj*). This third requirement is justified by the fact that the aim is to cure the patient on which rests the doctors’ right to practice medicine and surgery. Therapeutic purposes require good faith (*husn al-niyya*). Since integrity of the body (*salâmat al-jism*) is a public matter, the therapeutic purpose makes up an essential condition. When there is no such purpose, the doctor puts himself outside the realm of legality even though he may have acted with his patient’s consent (this point is important in order to understand one of the controversies that I will discuss further on in this chapter). The principle of therapeutic purpose is summarised in article 14 of decree number 224-1974 by the Ministry of Health which includes ethical rules and the

³ Dupret, 1997.

professional oath of medicine: “the doctor has to do everything possible for his patients, he must strive to reduce suffering and he must treat them in a sensitive and humane manner”.

If one compares this position of the Egyptian legal doctrine regarding the therapeutic purpose with article 16-3 of the French civil code, one can clearly see the close relationship between both. This is a first example of common legal roots or what we may call legal “kinship” that stems from transfer processes. In this respect, the ruling of the State Council that reflected the doctrine mentioned previously actually copies the corresponding French terminology. Moreover, this foreign origin does not seem to bother the actors involved in the definition of law or in a legal dispute. That may be possible because there is always the option of finding provisions holding a similar view on the notion of purpose in the tradition of *fiqh*.

But it is most probably the result of a total and non-conflictual integration of provisions and principles that are foreign in origin, but that are applied in the local way. Following Bernard Lepetit, according to whom the origin of history should be sought in the present, I would like to suggest the idea that if one is to look for the foundations of law, he or she should start the inquiry by focusing on current medical practice. This practice clearly puts, at the centre of its whole economy, the modern notion of the individual as conceived by Norbert Elias⁴ as “this ideal of the self that wants to exist on its own”. One must then draw the consequences. More particularly, one notes the heavier weight of notions such as “responsibility”. Therefore, criminal law links responsibility, on which the sanction is based, with the notion of intentionality or of predictability. In other words, criminal law makes the conscious and willing individual to be the basic unit of its economy.

⁴ Elias, 1991.

Basic principles of medical ethics

“Different values (reliability, serving the patient whatever his origins may be, keeping the medical secret, discretion) and principles (“especially to not harm”, forbidding abortion and euthanasia: not destroy a human life) have shaped the medical profession. These values and principles have been expressed by corporate bodies (associations, academies) either in the nearly legal form of a professional code of ethics or through an ethical code (...)”.⁵

Law 415-1953 in Egypt pertaining to medical practice (*muzâwala mihnât al-tibb*) states, in its first article, that “medical practice and doing surgery are authorised to any Egyptian whose name is registered on the doctors’ cause-list at the Ministry of Health and on the register of the Doctors Syndicate”. This practice to perform a medical act is, thus, limited only to licensed doctors so far as the act in question is justified by its aim to serve the general interest. Under this condition, there is no limitation to the right of doctors to practice their profession which is organised by a law that authorises performing all types of surgical operations necessary to save a human life or to reduce the ill that threatens it, save for exceptional cases provided for by the law. But, the practice of this profession is closely linked to this end outside of which the fact of inflicting injury on someone else’s bodily integrity is sanctioned by the criminal code. To put it differently, saving a human life or reducing an illness threatening a life are included in the permissive clauses (Criminal Code, art. 7 and 60) that allow one to avoid the sanction normally provided for inflicting injury on someone else’s physical integrity (Criminal Code, art. 240). The principle is the same in France where “the doctor’s action is justified if he purposefully inflicts injury on the patient’s bodily integrity because law authorises it as long as he is pursuing a therapeutic aim”.⁶

⁵ Parizeau, in Canto-Sperber, **1996**, v° Bioéthique.

⁶ Penneau 1996, p. 3.

Thus, the basic principle is the right to body integrity (*haqq al-insân fî salâmat al-jism*). All parts of the body, whether they visible (*zâhira*) or hidden (*bâtina*), are concerned. Furthermore, it is the material nature of the prejudice (*jasâmat al-'udwân*) that is sanctioned and not the higher value of one organ compared to another (*qîmat al-'udû*). Three elements are taken into consideration: first, preserving the natural functioning of the organs (any act reducing the level of bodily, mental or psychological health of the victim constitutes an injury to body integrity); second, preserving the overall integrity of the organs of the body and, finally, relieving the body from physical and psychological suffering (any act exposing the victim to further suffering thus constitutes an injury to body integrity).

To sum up, obtaining legal authorisation to perform a medical act (*ibâha tibbiyya*) on the patient's body, which constitutes a departure from the right to body integrity, comes under three conditions: being legally authorised to treat patients, intervening with a therapeutic purpose and obtaining the patient's consent. The first two conditions have already been discussed. I now turn to the third condition.

Autonomy of the will and the patient's consent

The centring of medical ethics on the individual finds no better example than in the requirement of the patient's consent.⁷ This requirement is totally linked to the right to physical integrity and its corollary, the right of non-interference. If the principle is that of physical integrity, no harm can be done to the latter without the patient's consent which is the only factor legitimising his treatment. Of course, the question has been raised concerning the conditions for consent. A consensus was reached on the requirement to inform the patient. But, there are different views on the nature of this information and they are expressed by two main contending trends.

⁷ Botros, in Canto-Sperber, **1996**, v° Consentement.

The first, of a more traditionalist brand, seems to be promoting a kind of medical paternalism that would allow the doctor to conceal from the patient what he thinks should remain unknown to him. The other trend, rather anti-paternalistic, requires complete information for the patient. For the supporters of a moderate anti-paternalism, this information must respect the criterion of the cautious individual. But, for the advocates of a radical anti-paternalism who reject any claim to a therapeutic privilege, it is rather the notion of full information that prevails (criterion of “the consent that the patient would give were he fully informed of all the facts pertaining to his personal case”). All of these trends were reflected in the courts: for example, the ruling of 7 July 1964 of the Court of Appeal that defined consent to a medical act in French law,⁸ the different cases of British case-law reflecting the traditionalist point of view⁹ and the American case-law supporting the view of informed consent.¹⁰

As seen earlier, Egyptian law also imposes the condition of the patient’s consent (*ridâ’ al-marîd*). This consent must be obtained beforehand (*sâbiq li’l-‘amal al-tibbî*), freely given (*hurr*), conscious (*mutabassir*) and given by an individual who has legal authority (*sâdir min dhî ahliyya*). Moreover, and this shows the Egyptian law’s anti-paternalistic stance, consent must stem from conditions of full knowledge of the nature, type and dangers of the possible consequences of the medical act requiring such a consent, this being so that the patient be able to express his acceptance or refusal. In cases of incapacity (‘*adîm al-ahliyya*, that is, for children under seven years of age) or of reduced capacity (*nâqis al-ahliyya*, i.e. not yet of adult age), consent must be obtained from the individual who legally represents the patient.

⁸ **French Court of Cassation**, Cass. civ., 29 May 1951, D.1952.53; Cass.civ., 7 July 1964, D.1964.625.

⁹ *Bolam vs. Friern Hospital Management Committee* (1957) 2A11 FR 18; *Chatterton vs Gerson* (1981) 3WLR 1003; *Sidaway vs. Brd. of Governors of Bethlem Royal Hospital* (1985) 2WCR 480.

¹⁰ *Salgo vs. Leland Stanford Jr. University Board of Trustees* (1957); *Canterbury vs. Spence* (1972).

All of these provisions clearly highlight the primacy of the autonomy of will within the economy of the legal system. Not only is it the individual who is referred to by these rights, but an individual who “asserts himself by the capacity given to everyone to create on his own initiative a new state of affairs according to Kant’s definition of free-will”.¹¹ The idea is really that of the individual as a central unit capable of choice and action. In other words, the individual comes to be identified with the person, i.e. with the unit who holds the legal or theological responsibility. “As Locke had already said, the term “person” is one pertaining to the courts (forensic); this means that treating an individual as a person is to consider him responsible for his deeds before the courts, in the literal or metaphorical sense, of law or of morality - or even, for some, before the courts of divine judgment”.¹² Here lies the origin of the above-mentioned penal principle of “individuality of the sanctions”. By making the individual “*en-soi*” a subject of the law, the legal system ran into a paradoxical situation where the generalisation and abstraction of rights and duties take place at the same time as their personalisation.

The limits to the autonomous use of will

This marked “individualisation” of law-making draws criticism based on the autonomous normativity of the current system of positive law as well as on the heteronomous normativity of religion. Here, one enters into the vicious circle discussed by Norbert Elias¹³ that perpetually opposes the supporters of the individualist conception (individuals without a society) to those advocating a holistic view (a society without individuals). Both trends give a metaphysical dimension to their basic unit, the ineffable “self” of the inner-self and the “community” with higher interests.

¹¹ Bouretz, in Canto-Sperber, **1996**, v° Droits.

¹² Montefiore, in Canto-Sperber, **1996**, v° Identité morale

¹³ Elias, 1991.

- *The use of an autonomous limitation : a case of trans-sexuality*

In 1982, Sayyid ‘Abd Allah, a medical student from al-Azhar University, consulted a psychologist claiming to suffer from deep depression. The psychologist examined him and concluded that the young man’s sexual identity 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 by the dean of the Faculty of Medicine of al-Azhar University to allow Sayyid to write his examinations while also refusing to transfer her to the Faculty of Medicine for women. In order 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 had done 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 which ruled that they had made a serious professional mistake by failing to prove the existence of a pathology 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 arrived on 8 June 1988, concluding that if the doctor showed that it was the only cure for the ill, this treatment was authorised. However, this treatment cannot solely result from the individual desire to change sex, but must be the therapeutic result of a pathology decided by the proper authorities.¹⁴ This *fatwâ* is not clear on whether the “psychological hermaphroditism” from which Sayyid

¹⁴ Skovgaard-Petersen, 1997, pp. 319-334.

suffered was an admissible medical reason or not. Thus, everyone claimed that the text supported his own view on the matter.

On 12 June 1988, al-Azhar brought the matter before the courts, holding that the surgeon must 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. The latter concluded that, while from a strictly physical point of view, Sayyid was a man, psychologically, he was not so. Thus, ultimately the diagnosis of psychological hermaphroditism was relevant and surgery was, in fact, the proper treatment. According to the report, the surgeon had only followed the rules of his profession since he had consulted the proper specialists, had carried out the operation correctly and had not inflicted permanent physical disability on the patient.¹⁵ 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. Let us note that the case in question is not explicitly set in the realm of Islamic law even though what underlies the core of the dispute are diverging views on morals based on Islam.

- The use of a heteronomous limitation : a case of excision

In July 1996, excision was the object of a ruling by the Egyptian minister of Health (ruling 261-1996) claiming, in its first article, that “the excision of girls is forbidden whether it be in public or private hospitals or clinics, except in pathological cases declared such by the head of the Department of Gynaecology and Obstetrics and following the doctor’s suggestion”. In its second article, the ruling 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”.

¹⁵ Niyâba, 1991.

This ruling, which forbids the practice of excision in hospitals, is only one in a long series of unfruitful campaigns against this practice.

The new decree created quite a stir in a society where excision is still widely practised. A group of people led by Sheikh Yûsif al-Badrî petitioned the administrative court of Cairo, requesting that the ruling of the minister be suspended and quashed. To justify their request, they presented a number of arguments: the ruling's contravention of article 2 of the Constitution which makes the principles of Islamic *sharî'a* to be the main source of law; the consensus among Muslim legal scholars (*fuqahâ'*) on the legitimacy of excision as a prophetic tradition of which they only discuss the mandatory or recommended aspect and the impossibility for the government to modify a clause of the Qur'an or a rule deemed mandatory or recommended in Islamic law. In its ruling on 24 June 1996, the administrative court decided in favour of the claiming party, considering that the single fact of being a licensed doctor is enough to be allowed to practice medicine and surgery freely. The minister of Health appealed against the decision to the High administrative court that ruled on the matter on 28 December 1997.

This ruling touches upon three issues: the claimants' authority to act when their personal interest is not directly involved; the scope of the legislator's (here the minister) power to sanction customs justified by referring to *sharî'a* and the right to physical integrity and its legal limits.¹⁶ Regarding the first question, the Court considers that the personal interest of the claimant is presumed regarding administrative matters for anybody enjoying a legal status. As for the second issue, the Court distinguishes between a principle of absolute relation and interpretation and principles leaving room for reasoning and, thus, for the legislator's intervention. Since excision does not enjoy the consensus of the legal scholars, it cannot be an absolute rule and, from this point of view, the intervention of the legislator is

totally legitimate. As for the third question, the Court considers that Law 415-1954 does not authorise doctors and surgeons to perform excision insofar as a surgical operation is only authorised in case of illness and must be performed with the intention to cure. The Court adds that following the Islamic saying, “neither prejudice nor counter-prejudice”, excision is forbidden by *shari‘a* as well as by positive law.

Privacy in the eyes of its judges

Using the results of my study on medical law and ethics, in this chapter, I will analyse the relations between morality, public space and privacy. In a perspective drawing mainly from the works of Norbert Elias, I will seek to show how the strengthening of a discourse on the individual and on his rights and duties stems from a transformation of society and of human relations that constitute it towards the moral “euphemisation” of power struggles.

Introductory note: the individual and moral (self-)restraint

It is important to frame this study within the wider dynamics of space, social groups and also within the Egyptian state since the time of Mehmet ‘Ali. Indeed, it is impossible to understand the phenomenon of the centring of Egyptian law on the individual without taking note of the growing trend towards political and legal centralisation that shaped the country’s structuring process. I do not intend to give a historical account of this phenomenon, but simply to highlight the fact that the building of an army of conscripts as well as legal and judicial standardisation, to take only these two examples, are fully part of the phenomenon of monopolisation (synonymous with centralisation) that marks the rise of the modern state. On the scale of Egypt’s land and population, such a monopolisation process can only come with a

¹⁶ Bälz, 1998.

gradual differentiation of functions. Thus, arose specialised legal professions or, as K. Fahmy shows,¹⁷ the totally new field of legal medicine began to grow. But, the differentiation of functions brought with it an increasing level of interdependence. For a military analogy, let us recall that increasing the length of a chain of command leads to the increase in mutual dependence between the different links. For those who prefer an analogy with a fishing net, let us note that every mesh is influenced by both its neighbour and by the overall tension of the net. If even only one of them breaks, then, it is the overall equilibrium that is jeopardised.

One of the main achievements of Elias, from whom I borrow this pattern of social evolution, is to have established a link between interdependence and self-restraint, to have shown the significance, in a dynamic process of relations constrained by a framework of complex interaction, of the trend towards the establishment of codes of behaviour, their rise as distinctive signs, their gradual spread and common use and, finally, their assimilation during the process of socialisation that all the individuals undergo in society. These codes of behaviour, these moral codes are, thus, the product of a growing self-restraint that, for its part, reflects a marked individuation. Individuality, interdependence and self-restraint are in a relationship of mutual conditionality rather than of apparent opposition: “the separation and differentiation of the psychological functions of a human being or what we understand by the term “individuality” can only take place when the individual grows up within a group of individuals, in a society”.¹⁸

Individualisation, the strong assertion of individual consciousness and the control of emotional reactions that stems from it, in short, all attitudes towards oneself and others that seem obvious and natural reflect “a very particular historical imprint of the individual”. The “individualised” individual, that of the hypertrophy of self-awareness, is the individual who,

¹⁷ Fahmy, 1998.

¹⁸ Elias, 1991, p. 59.

through the formation of society, is forced to adopt “a very high degree of reserve”, to control his instincts and to impose a moral code upon himself. “In a word, this self-awareness corresponds to a structure of interiority that appears during very particular phases of the process of civilisation. On one hand, it features a high degree of differentiation and a strong tension between the imperatives and prohibitions of society, assimilated and transformed into internal constraints, and, on the other hand, the instincts and leanings specific to the individual which are not surmounted but restrained”.¹⁹

Expansion of the self and contraction of intimacy

The realm of medical ethics fully reflects this paradoxical and simultaneous trend of the hypertrophy of the individual and contraction of his area of sole competence (his privacy). A brief overview of the development of Egyptian case-law will show that the legal restriction of the individual’s right to autonomous action takes place at the same time as the assertion of the individual enjoying an autonomous will.

As early as 1891, the medical profession in Egypt became legally codified; illegal medical practice was sanctioned and barbers and other non-licensed practitioners were barred from medical practice. As for the patient’s consent to performing a medical act on his body, in 1897, it was the object of a ruling by the Court of Appeal that found innocent an individual who was not a doctor but who had operated on someone, claiming to having done so with the latter’s consent, upon his request and with the intention of curing him.²⁰ In a second phase, while remaining mandatory by legal doctrine and case-law in order to perform a medical act, the patient’s consent lost its status as a clause, exempting from criminal responsibility the one who performs the act without being legally entitled to do so. Thus, the Court of Appeal sanctioned a barber who had operated on a customer for pilosity on his eyelid and injured him

¹⁹ Elias, 1991, p. 65.

because he was not allowed to perform such an operation and so was liable to unintentional injury.²¹ Later on, the Court of Appeal further refined its position by claiming that it is the will and knowledge of the person who performs the operation concerning the fact that this operation inflicts injury on the body integrity of the victim which makes up the condition of this injury.²²

Thus, on the one hand, there is the principle of autonomy of the individual, the meeting point of our judgements of responsibility. “The fact of linking responsibility, either to the voluntary and cognitive involvement of the agent or to his legal capacity to reach a certain level of caution and reflection in his social interactions derives from a fundamental choice regarding our system of responsibility in favour of the individual who has control of his choices, capable of behaving in compliance or at odds with a system of norms.”²³ On the other hand, the constant expansion of law into the realms (that seemed reserved) of the autonomy of the will, realms of the free will that law endeavours to restrain in order to ratify a claim for the moral regulation of individual behaviour “for the sake of ethical imperatives aiming to bend habits that are “bad” because they are “politically incorrect” (smoking, alcoholism, sexual harassment, etc.)”.²⁴

One is witnessing here what J.-N. Ferrié calls the “publicising of the private [realm]”. In a symmetrical fashion, one can also speak of a “contraction of privacy”. If one takes privacy or intimacy in the sense of sexuality, one can observe, for example, that “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.”²⁵ The publicising (in French, *publication*) of the private comes down to the fact that the possession of what supposedly

²⁰ **Court of Appeal**, 2 April 1897.

²¹ **Court of Appeal**, 4 January 1937.

²² **Court of Cassation**, 28 March 1983, *Majmu‘a al-qawa‘id al-qanuniyya*, C4, n 188, p. 184.

²³ Neuberg, in Canto-Sperber, 1996, v° Responsabilité.

²⁴ Cayla, in Canto-Sperber, v° Droit.

belongs exclusively to the domain of the inner-self or of privacy can only be claimed in public terms.

In other words, claiming the right to the autonomy of the private presupposes the establishment of a “public culture of private life” and, thus, also its constantly heavier regulation. On the subject of sexuality, I follow Foucault who argues that one must then consider it like something that “one had to speak of (which) as a thing to be not simply condemned or tolerated but managed, inserted into systems of utility, regulated for the greater good of all, made to function according to an optimum. Sex was not something that one simply judged; it was a thing that one administered. It was in the nature of a public potential, it called for management procedures, it had to be taken charge of by analytical discourses.”²⁶ Hence, the growing intrusion of the will to regulate that law, more than any other institution, has shown. Thus, law finds itself at the heart of the growing will to individually master the natural environment. It represents a favoured tool for the open and never-ending task particular to modernity: “the refusal to make do with what nature has given us in terms of strength, sex or face, the concern for mastering its mystery and functions and the effort to maximise its powers and resources. Understand, control, increase. Beauty, performances or pleasures, a mobilisation aiming to fit more appropriately and more intensely into the given thing par excellence that is one’s own body.”²⁷

This publicising of the private gives meaning to a number of claims regarding the legalisation of medical practices involving the body: plastic surgery, sex change operations, abortion. As Ferrié, Boëtsch and Ouafik note, the legalisation of abortion, for example, is the product of a claim for the acknowledgement of the individual right to have control over one’s

²⁵ Foucault, 1990, p. 12.

²⁶ Foucault, 1990, pp. 34-35.

²⁷ Gauchet, 1985, p. 130.

own body²⁸ As such, it is a public procedure in the same way as the procedure which it aims to forbid it. In this case, the whole initiative seeks not so much to determine the boundaries of life or the rights of the unborn child - otherwise, a fundamental problem - as to impose its “will to moralise sexual relations”.²⁹

What comes out of this discussion is the close relationship between the relations of the individual, his privacy and the publicising of the latter. If one agrees with Isaac Joseph³⁰ that a public space is an “area of knowledge”, then one’s privacy, at least, in its modern guise, can also be considered as such. Everything is set up so as to make it into an object that is both visible and made visible as well as an object of knowledge. It must then be treated as such, that is, not to consider it as a private, internal and inaccessible phenomenon, but rather as a transparent and social one that is part of the public realm.³¹ Then, law is no longer to be seen as a tool to straighten private behaviours which become public interest because they are deviant nor is it to be considered as a means to publicly sanction public will as the sum of individual wills. Rather, it constitutes one of the procedural means available to the actors to ensure the visibility and mastery through knowledge of the public phenomenon of privacy. In this sense, contraction of privacy does not mean that the boundary between the public and the private is moving at the expense of the second, but rather that the legal autonomy of the intimate is gradually being chipped away.

Restrained individuality: the inner-self and public muteness

While the requirement of consent for performing a medical act reflects the strengthening of the process of centring on the individual, the fact that it is only a necessary but not a sufficient condition to perform this act shows the constraints that are put on the autonomy of

²⁸ Ferrié, Boëtsch and Ouafik, 1994, p. 682.

²⁹ Ferrié, Boëtsch and Ouafik, 1994, p. 686.

³⁰ Joseph, 1991.

one's will. The patient's consent does not suffice since he does not exercise free will over his body. The concept of "physical integrity" is, indeed, considered as belonging to the public realm and the preservation of this integrity is a matter of public interest.³² The only justification for interfering with this principle of general interest is the pursuit of a higher general interest, i.e. the therapeutic aim. And so one can see the simultaneous development of a process of centring on the individual and of a strong assertion of the public order, the latter being able ultimately to spread to integral intimacy except for what is presented as its irreducible minimum: the "inner-self".

The rise of this irreducible minimum is well accounted for in Norbert Elias' chapter (in his work *The Society of Individuals*) on self-awareness and on the view on man under the title of the second part: "*The Reflecting Statues*". Today, our shared perspective on man and on self-awareness is felt to be the only normal one and thus naturally as not requiring any explanation even though this view is historically determined. The intensification of man's reflective activity, the repression of urges and the detachment that follows and the concrete expression given to the idea of a conscious subject that exists regardless of the world that he knows and the conception of man as a closed system are all are trends that are becoming mainstream today. This process of intensive, diversified and pervasive regulation has led to the creation of self-repressive mechanisms and the related assertion of the personal experience of the individual "drawing the limits of his 'interiority' with regard to the world that is 'external' to him, to other objects and to other beings".³³

The public-private dichotomy rests on historically determined premises whether with regard to the Western or to the Eastern setting. What matters here is to note that, whatever their leanings are, theories are always based on the sharp distinction between "me" and the

³¹ Watson, 1998, p. 211.

³² Council of State (Majlis al-dawla), 28 December 1997.

“rest”, “I” and the “others”. They acknowledge the existence of an autonomous “me” although perhaps while trying, at the same time, to restrain it as much as possible. This has never been clearer than in the Abû Zayd case. The principle of the petition for *hisba*, itself, which made instituting proceedings possible is that of an action to protect the public order. This thus implies that the principle of the existence of a distinction between the particular and the common and, therefore, between the private and the public, is founded. The claim to restrain what belongs to the inner-self of an individual (his freedom of conscience) leads to the acknowledgement of the existence of this inner-self. By attacking the right to freely express one’s convictions, in short, by making apostasy into a legal concept, it is paradoxically the right to the free expression of one’s convictions that is asserted even if one tries to define its jurisdictional realm in a restrictive way.

Therefore, the Court asserts the existence of a distinction between apostasy and conviction: “Apostasy necessarily belongs to material acts having an external existence. These facts must necessarily manifest themselves clearly (*labs*) (...). One cannot declare a Muslim ungodly as long as there is evidence ruling out his excommunication. As for conviction, it is what man confidentially holds within himself, that of which his heart is deeply convinced and that he wills.

This is clearly different from apostasy which represents a crime that is materially founded and that is presented before the courts so that, consequently, its occurrence may be concluded. This is part of what the courts can examine or of what must be judged and what pertains to it. Conviction is, on the contrary, what is located in the human soul and what is enclosed in its inner-self. This is a matter which is inaccessible to the courts. People must not inquire about it”.³⁴ Naturally, the jurisdictional realm (the self) of free conviction is defined in

³³ Elias, 1991, p. 164.

³⁴ Court of Appeal, Cairo, 14 June 1995.

a restrictive manner. This court of the conscience that is the inner-self is only competent in the realm of privacy of conviction: any publicity would be regarded as an abuse of power. The distinction between conviction and apostasy thus springs from a narrow definition of the realm particular to privacy and from confining its status to the secrecy of the conscience. However, one only has to recall the courts of the Inquisition to realise that the idea of an inner-self out of the reach of public intervention is not a biological fact, but rather a social and historical construct.

Privacy and public judgement

In the name of which principle can the autonomy of the will be restrained? As seen earlier, with regard to medical ethics, Egyptian law justifies this limitation by invoking public order, a notion generally understood as the set of fundamental standards and values of a society that one is not allowed to go against.³⁵ Without getting into the issue of the identification of these standards and values, let us simply note that they refer to a conception of intimacy or of the private realm that is publicly acceptable, to a definition of public morals. When the plaintiffs question the ruling of the Minister of Health that forbids excision in public hospitals, they clearly seek to make a matter of conviction and of religious practice into one involving the interests of the whole community. The whole technical aspect of the *hisba* and of the personal interest involved highlights the problem of determining what, on matters of a private order, concerns or does not concern society.

To follow along the lines of Norbert Elias' argument, one notes this paradoxical requirement of an individual who is constantly more individualised, independent and having control of himself but also an individual in compliance with public opinion, normal in the statistical, hygienic and social sense of the term and integrated into the standard. The law of

³⁵ Carty, Carzo and Jori, 1993.

medical ethics perfectly reflects this centring on the individual coupled with a wide-ranging conception of the public order. As always, the judicial power, when facing this type of loosely-defined categories, enjoys considerable power regarding assessment, interpretation and determination. When a text's level of formality is particularly low, the judge reproduces the letter of a legal statement of which it is up to him to determine the meaning. He is only bound by a linguistic operation whose guarantees of accuracy and justice are, to the least, difficult to assess. The real constraint for him is having to justify himself in the public eye, that is, to give his interpretation a meaning that he will consider shared by most people. In order to protect himself from criticisms of subjectivity or arbitrariness, the judge refers to supposedly objective standards such as morals or social consensus.³⁶

Thus, the whole question revolves around these standards, their elaboration and their performance. It is the judge's task to make the morality that he is trying to establish appear as common evidence, as normality itself. We talk of naturality when the judge emphasises the normality of the biological or transcendental order of things and of communality when the stress is on the normality of the sociological order. In the first case, that of conformity to the things of nature, the judge claims to model behaviour on "previously set" rules of Nature whether immanent or transcendental. As for the second case, that of communality, on the contrary, the judge will claim 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 of normality, sometimes invoking a principle of an external order and sometimes of an order that is specific to the society. It is very tempting for the judge to refer to an external principle, whether it be morals or religion.

³⁶ Ost and Kerchove, 1993.

The arguments put forward do not generally well conceal **the private philosophical or religious views**,³⁷ that is, supposing they are trying to conceal them at all. Indeed, the advantage of a principle with an external order is that it is located radically outside what may be put into question, thus asserting its inviolability. In this situation, disagreeing publicly is particularly difficult, a fact which explains the existence of an apparent unanimity unable to find the means to protest; this is what J.-N. Ferrié calls negative solidarity.³⁸ We have here one of the most efficient mechanisms for imposing a collective morality by individuals who do not necessarily support these prescriptions but who are unable (in fact or supposedly) to publicly oppose them for fear of being sanctioned by the community to which, as virtual as it may be, is attributed a set of specific intentions and desires.

The biblical narrative of a paradise where the first representatives of mankind were unaware of their nudity before touching the forbidden fruit of knowledge offers a perfect metaphor of this concomitance of individuation, that is, of becoming self-aware and of the rules of self-restraint that it carries with it as well as the imposition of a collective morality. This imposition most often functions on the mode of individual summons (or of the acceptance of such a summons) to subscribe to a moral code shared by society and by all of its members. But, what is important to note here is the simultaneous development of individual self-awareness and of the formation of a moral conscience.

Conclusion : Privacy, morality, and the public realm

To conclude, I would like to suggest an avenue of research allowing one to link privacy, morality and the configurations of the public realm.

³⁷ Ost and Kerchove, 1993

³⁸ Ferrié, 1997, pp. 80-82.

With the help of Norbert Elias and by taking the example of the law pertaining to medical ethics, we are able to locate the process going from monopolisation to individualisation and interdependence within the Egyptian setting. This phenomenon carries with it the necessity to control emotions, feelings and affects. All moral codes revolve around this control. But at the same time, morality, which is the product of this individualisation, tends to restrain the rights of the individual. Or more to the point, the only way for an individual to request that his rights be respected is to do so in the name of prevailing morals with which he shows his compliance. Of course, this prevailing morality is not the product of the aggregation of individual wills, but rather the attribution of a will to a silent majority by politically-driven actors. If we are right to say that moral rules are set by political actors, by moral entrepreneurs, then, we must admit the fact that morality is both a public and a political issue. Public, obviously, since morality is strengthened through a process creating modern society. Political, also, insofar as imposing the moral rule becomes a means of participating in the power game. It is, then, probably possible to view morality as the political “euphemisation” of power struggles.

Abbreviations

AFEMAM Association Française d’Etudes sur le Monde Arabe et Musulman

LGDJ **Librairie Générale de Droit et de Jurisprudence**

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