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Secularism, Sovereignty, Indeterminacy: Is Egypt a Secular or a Religious State?

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In this essay I offer a thesis about secularism as a modern historical phenomenon, through a consideration of state politics, law, and religion in contemporary Egypt. Egypt seems hardly a place for theorizing about modern secularity. For it is a state where politics and religion seem to constantly blur together, giving rise to continual conflict, and it thus seems, at best, only precariously secular. These facts, however, go to the heart of my thesis: that secularism itself incessantly blurs together religion and politics, and that its power relies crucially upon the precariousness of the categories it establishes. Egypt's religious-political ambiguities, I argue, are expressions of deeper indeterminacies at the very foundation of secular power. In what follows, I elaborate my thesis, how it differs from other, similar sounding arguments, and the shift in perspective on secularism that it entails. I begin with a famous Egyptian apostasy case.

HISBA, APOSTASY, AND THE CASE OF ABU ZAYD

In the summer of 1996, the High Court of Egypt[1] issued a stunning decision. It concerned Nasr Abu Zayd, a Cairo University professor of Arabic and Islamic

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[1] By "High Court" I mean the Court of Cassation (*Mahkamat al-Naqd*), Egypt's highest civil and criminal appellate court. A separate high court exists for administrative law: the Council of State (*Maglis al-Dawla*). There is also a Supreme Constitutional Court. Moustafa 2007.

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studies. Based on its reading of his scholarly writings, the High Court declared Abu Zayd an apostate from Islam even though he professed to be a Muslim, and it annulled his marriage, against both his and his wife's will.[2] Under Islamic law (the shari`a), which governs personal status relations amongst Muslims in Egypt, a non-Muslim man cannot be married to a Muslim woman. That is why the court annulled Abu Zayd's marriage when it judged him an apostate from Islam. The case was brought against Abu Zayd by a group of private citizens, using an Islamic concept that was nowhere to be found in the Egyptian legal codes. That concept, called *hisba*, technically means, "the commanding of the good, when it has become neglected, and the forbidding of the evil, when its practice becomes manifest." It was introduced in this case through a kind of loophole in the Egyptian personal status law that makes possible the use of un-codified Islamic principles for civil litigation.

The Court's decision was stunning not only because it adjudged Abu Zayd an apostate and annulled his marriage, and not only because it legitimized the legal use of *hisba*.[3] What was most stunning was its declaration that *hisba* was a *duty* of all Muslim citizens, who should raise a case in court anytime a wrong in society became manifest. The Court argued that the legitimacy of this use of *hisba* in civil litigation derived from the public interest and especially from the requirement to protect the public order (*al-nizam al-'aam*)—an interesting legal concept whose salience for secular practice and power has been largely neglected, and which I will discuss in some detail later in this essay.

The Court also emphasized that its decision did not violate religious freedom, because that freedom included maintaining the conditions for the practice and cultivation of religious belief. Nevertheless, the decision created tremendous, widespread anxiety, partly because no limits had been specified on this now legalized duty of *hisba*. This meant that a whole range of practices considered legitimately Islamic might now be put into question. But it also meant that potentially *anyone* could now legally intervene into and possibly break apart your marriage—a prospect that seemed to undermine the very integrity of a private domain of personal rights. *Hisba* had become a power of wide and indeterminate range, placed in the hands of private citizens, and backed by the coercive capacities of the state.

To quell this anxiety and ostensibly protect the private domain of personal rights, the legislature enacted a law restricting the use of *hisba* to state officials only. But this did not reduce any of the indeterminate range of *hisba*, and thus,

[2] The High Court decision upheld the Appeals Court's verdict from a year before. The case was initiated in 1993.

[3] Indeed, *hisba* had been used successfully in the courts before, albeit in a restricted fashion, during the 1960s, in a case where the husband had officially converted from Islam. That is different from Abu Zayd, who professed to be a Muslim even though the Court declared him an apostate. Johansen 2003.

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any of the anxiety caused by it. Indeed, both Islamists and secular liberals opposed the legislation, Islamists, because it reserved the power of *hisba* for the secular state and restricted their religious rights as private citizens, and liberals, because it recognized the legitimacy of a religious principle for public decision-making and reserved that power to the state, in contradiction to its constitutionally espoused principles of religious freedom. Liberals were pitted against Islamists, and both were against the state. Abu Zayd, fearing for the security of his family and himself, left the country.

A SECULAR OR A RELIGIOUS STATE?

The *hisba* decision poignantly demonstrates the blurring of religion and politics with which I am concerned here. This is in two related ways. First, *hisba* became a public, coercive power[4] that could potentially be used to punish people for holding to religious beliefs and practices defined as heretical. It thus violated liberal secular prescriptions for religion's proper boundaries. Second, and more importantly, the courts and subsequent legislation articulated *hisba* very differently from how it had been classically elaborated within the Islamic shari`a. Within the shari`a it was part of a set of carefully gradated disciplinary practices that aimed to cultivate and secure certain moral virtues.[5] But in the court judgments and in legislation *hisba* was articulated as a legal practice connected to the protection of public interest, public order, private rights, and religious belief.[6] So *hisba* had become attached to liberal legal concepts even as it violated secular precepts, as it seemed to remain a distinctly non-secular power exercised by the state.

The anxieties, conflicts and confusions created by the *hisba* decision also provoked with force and clarity a question that had long been and continues to be asked about Egypt: whether it is a secular or a religious state. This has been asked both within and outside of Egypt not just because of cases like *hisba* but also because the state exhibits a number of peculiar ambiguities. For example, its constitution names the Islamic shari`a as the principal source of law.[7] Yet, its legal system is largely derived from European, mostly French-based law. And so, many fundamental provisions of the Islamic shari`a are patently ignored and unimplemented. However, its personal status law—which deals with the private affairs of family—is based on codes derived from religious law. And yet the state continually tries to move personal status law in a liberal direction. Although the constitution guarantees freedom

[4] It was public initially in the sense that it was a power of the people, that is, of citizens, and subsequently, after state legislation, of state officials who ostensibly represent their interests.

[5] Agrama 2005.

[6] See: Agrama 2005; al-'Awwa 1998; Balz 1997; Berger 2003; Dupret and Ferrie 2001; Johansen 2003.

[7] Its article 2 states, "Islam is the religion of the State, Arabic is its official language, and the principles of the Islamic Sharia are the main source of law."

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of religious belief and worship, the courts have banned some forms of women's headscarf in public schools and professions.[8] But at the same time, they have upheld the use of religious principles—like *hisba*—for private litigation. While some religious institutions, like Al-Azhar and its Fatwa Council, are officially under the state, their role in state policy formation remains highly circumscribed. The state also refuses official status to any explicitly religious party and continues to repress such unofficial party formations, such as the Muslim Brotherhood, even though they have long renounced violence. However, it has allowed Brotherhood members to run and win as independent candidates.

So, is Egypt a secular or a religious state? That question has become even more pressing today. That is because Egypt is one important center in the Muslim world, which is, as we know, under tremendous transformative pressure. And this, in turn, has placed the Muslim world at the center of some of the fundamental questions of contemporary liberal political thought regarding tolerance, sovereignty, democratization, the proper uses of violence, and the limits of freedom of religion and expression. All of these have become wrapped up in the question of whether Egypt is a secular or a religious state, of what kind of state it actually is and what it might potentially become. But this is also a question now increasingly asked of many states, both Western and not; it thus expresses deeper anxieties about our contemporary secularity and the cogency of our criteria for it.

However, the question of Egypt has rarely been taken as a context for reflection on these deeper anxieties. Its ongoing conflicts and ambiguities have only led to a widely held view that it is an incompletely or precariously secular state, prone to serious setback at any time. But this view is somewhat unhelpful, if only because it is circular. That is, Egypt is still incompletely secular, and that is why it has religious-secular conflict, and Egypt has secular-religious conflict, so that is evidence of its being incompletely secular! And this does not give us much insight into the conditions of such conflict and ambiguity in Egypt. It does not tell us about the criteria we use to define incompletely secular states, or even fully secular ones, or about the processes by which secularism is implemented, and it does not tell us how our criteria might be connected to these very processes. Moreover, this view implicitly posits a scale of secularity whose pinnacle is defined by the paradigmatic secular states of Western Europe and North America; it thus takes as analytic categories secularism's normative standards, instead of exploring the processes that put and keep those standards in place. In other words, this view all too readily accepts secularism's own criteria for judging its failure or success, without carefully looking into the characteristic practices in which they are historically embedded, and their consequences for social life.

Here I pursue an alternative thesis that will allow us to see the *hisba* case, and the larger question of whether Egypt is a secular or religious state, in a very

[8] Balz 1999.

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different light. The thesis, as I mentioned above, is that it is secularism itself that incessantly blurs together religion and politics in Egypt. The question of whether Egypt is a secular or a religious state is therefore one that arises out of tensions within modern secularism and its distinctive modes of power. Those tensions and modalities of power, however, are not peculiar to Egypt; they are also characteristic of many states considered to be paradigms of modern secularity, such as France, Germany, and Britain.

No doubt, Egypt's peculiarities make it seem vastly different from such paradigm states. But my aim here is to show how in its very difference it registers a more profound mark of similarity that should provoke us into thinking about modern secularism differently. As I will argue, the question of whether Egypt is a secular or a religious state is but an expression of a question at the heart of secularity, one that has become increasingly hard to ignore and equally difficult to get beyond. In other words, the question of Egypt's secularity or religiosity is not an answerable question, but neither is it a false one; it is rather a question whose persistence, force, and irresolvability expresses the peculiar *intractability* of our contemporary secularity. My aim in this essay is to elucidate some of the conditions of this intractability, by showing how they incessantly raise the question of whether Egypt is a secular or religious state.

SECULARISM AS AN HISTORICAL PROBLEM-SPACE

Secularism, as we all know, has been the subject of much recent theorizing.[9] This has been, in part, an attempt to give a picture of secularism that better fits the actual practices of secular states, but that also allows for the important differences between them. Much of this theorizing has emphasized that secularism involves less a separation of religion and politics than the fashioning of religion as an object of continual management and intervention, and the shaping of religious life and sensibility to fit the presuppositions and ongoing requirements of liberal governance. These newer approaches have thus effected a separation between secularism's normative standards and the analytic categories used to understand them, in an effort to trace the processes of power by which these normative standards were fashioned.

My argument here is certainly in line with these more recent theorizations. However, I worry that there is a way in which they lay themselves open to collapsing the normative and the analytic all over again. Because even in tracing the processes by which normative secularity is fashioned, one can still speak of them as being almost fully, or only partially, completed. So that when it comes to Egypt, it does not matter whether one holds an older view or embraces recent theorizations of secularism: one can still cast it as only partially or precariously secular. And this is just to accept secularism's own criteria for success or

[9] Asad 2003; 2006a; Bilgrami 2006; Connolly 1999; Sullivan 2005.

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failure. A scale of secularity, with the paradigm secular states at its pinnacle, thus sneaks back in.[10] It is just such a scale, with its collapsing of the normative with the analytic, that I wish to avoid.

For this reason, I want to elaborate an alternative approach. It highlights two related things that have not together received enough attention. First, that as a process of defining, managing, and intervening into religious life and sensibility, secularism is historically and remains today an expression of the state's *sovereign* power.[11] And second, that secularism, as a feature of the modern state's growing regulatory capacity, has long been, and is increasingly, fraught with an irrevocable indeterminacy. Focusing on these two aspects will shift our attention more securely to what secularism *does*, without invoking its normative categories and standards as the analytic measure for what it does, and which facilitate notions of partial, precarious, or complete success. For the peculiar intractability of secularism lies not only in the normativity of its categories, but significantly, in the indeterminacies it provokes. These are not, however, the indeterminacies that arise from the vagueness and interpretability endemic in some degree to all human practices, and which are well known. Neither are they the ones that arise from changing social conditions, which sometimes require us to revise our definitions. The indeterminacies I will focus on here are, by contrast, highly specific and historically entrenched; they are fraught with distinctive sensibilities and anxieties, and indissolubly linked to the sovereign power of the modern state.

To better consider these two features together, I approach secularism as a set of processes and structures of power wherein the *question* of where to draw a line between religion and politics continually arises and acquires a *distinctive salience*. I say a distinctive salience because under a secularist framework this question never arises as a simply technical or merely academic one. On the contrary, it is ineluctably invested with high stakes, having to do with the definition and distribution of the fundamental rights and freedoms of citizens and subjects. The answers to it are thus thought to be of utmost consequence for how ways of life can be lived and fundamental freedoms are identified. And so it is a question always suffused with affects, sensibilities, and anxieties that mobilize and are mobilized by power.

[10] Here I can cite examples from several disciplines. Most telling is philosopher Charles Taylor's (2007) magisterial work on secularism. At its very beginning, he casts secularity as a European, Western achievement which is only partially evident in the rest of the world. Political theorist Partha Chatterjee (2006), writing on India, argues that different countries have historically managed the contradictions of secularism in different ways. However, he also writes that those states where religious reform was internally motivated—he points out Britain and France—were more successful. Even though this may have been inadvertent, Europe once again sets the standard of success. Talal Asad (2006b) notes a similar tendency in the work of sociologist José Casanova. One recent article by anthropologist Brian Silverstein that incorporates recent insights on secularism still speaks of it as being "almost complete" in Turkey (2008).

[11] See Asad 2006a.

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The connection between this question and these stakes is a historically distinctive one. For while there were certainly discussions and instances of the separation of temporal and spiritual power during, for example, medieval Christian and Islamic times, they nevertheless arose under very different presuppositions, and legal, political, and social conditions, and thus elicited and mobilized very different desires and anxieties.[12] In particular, the just distribution of the fundamental rights and freedoms of citizens and subjects in a diverse polity was not seen to depend on a *principled* distinction between religion and politics.[13] What therefore distinguishes secularism as a historical phenomenon is not just the question of where to draw a line between religion and politics—which may have medieval analogues—but its historical connection with a set of specific stakes, one that has ineluctably shaped the forms it now takes, the sensibilities and anxieties it mobilizes, the range of answers thought appropriate to it, and the kinds of power it facilitates.

In saying this, I adapt anthropologist David Scott's notion of a "problem-space," which he describes as:

> an ensemble of questions and answers around which a horizon of identifiable stakes (conceptual as well as ideological-political stakes) hangs. That is to say, what defines this discursive context are not only the particular problems that get posed as problems as such (the problem of 'race,' say), but the particular questions that seem worth asking and the kinds of answers that seem worth having. Notice, then, that a problem-space is very much a context of dispute, a context of rival views, a context, if you like, of knowledge and power. But from within a problem-space what is in dispute, what the argument is effectively about, is not in itself being argued over.[14]

Approaching secularism as a problem-space, then, means to see it in terms of the ensemble of questions, stakes, and range of answers that have historically characterized it. At the center of this ensemble is, as I have noted, the question of where to draw a line between religion and politics (and a presupposition that there *is* a line to be drawn). The identifiable stakes are the rights, freedoms, and virtues that have become historically identified with liberalism, such as legal equality, freedom of belief and expression, and tolerance, as well as the possibilities and justifications for peace and war.[15]

This approach has many virtues. In focusing us as much on the questions as on the range of answers given, it forestalls the tendency to single out any one answer, historical or contemporary, as more or less correct. Because what matters in this approach is less the propriety of the distinctions made than

[12] Ibid.

[13] For some of the ways that rights and privileges were distributed in medieval Europe, and how these changed with the rise of the modern state, see Kim 2000.

[14] Scott 2004.

[15] This approach also highlights how liberalism and secularism are historically intertwined, in that it is presumed that the exercise of liberal rights and freedoms depends crucially upon how the line between religion and politics is drawn.

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what they are made in response to, the stakes that are involved, and the social consequences. It therefore does not easily lend itself to a scale of normative secularity. Also, in focusing us on the questions and connected stakes, this approach prompts us to consider the conditions under which they arise, endure, and acquire their compelling character, as well as the concepts, practices, and processes by which they are answered. And this is key for my argument.

My argument is that the processes by which secular doctrine is implemented incessantly generate the very question that doctrine aims to answer, namely, where to draw a line between religion and politics. That is, the processes by which that line is drawn work to unsettle that very line. And thus, what best characterizes secularism is not a separation between religion and politics, but an *ongoing, deepening, entanglement in the* ***question*** *of religion and politics*, *for the purpose of identifying and securing fundamental liberal rights and freedoms*. This ongoing entanglement is a feature of the expanding regulatory capacities of the modern state, and it is something we see throughout the history of the paradigmatic secular states right up to the current moment.

In saying this, I do not mean to say that we are all somehow incompletely secular, that is, to contrast an ideal with a reality, to show how it does not, or will never, measure up. Nor is this an attempt to "unmask" secularism, to show it up as a myth and thus a kind of religion that has its own articles of faith. Neither is my point simply to say that the secular and the religious mutually interpenetrate. For all of these positions presuppose, in one way or another, normative conceptions of the secular and the religious, as if they each had distinct, trans-historical essences. They thereby ignore the processes and practices by which the essences of the secular and religious are continually defined and redefined. More, they keep us focused too singularly on the normative categories, and thus on the idea that the power of secularism lies in their normativity. But this is mistaken, because the constant, often strident questioning and redefinition of these very categories has also been a distinctive historical feature of secularism.

The notion of a problem-space, however, allows for this contestation; it prompts us to consider instead how secularism's power may lie more in the underlying question it continually provokes and obliges us to answer, than in the normativity of the categories it presupposes. For the question of religion and politics has not only endured; it has become only more pressing, underlying a broadening array of concerns in contemporary social life. Thus: should polygamous, gay, or *any* form of marriage be banned—why? How do we respond to the claims of blasphemy and injury that circulated around the Danish cartoons of the Prophet and the demonstrations they provoked? Is it possible today to distinguish between anti-Zionism and anti-Judaism, and who decides—defenders or critics? In defense of which forms of life is violence, and consequent collateral damage, justified? The question of whether

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and where to draw a line between religion and politics is at the center of all these concerns. In order to address them in a manner both consistent and intelligible (whatever the positions taken), one cannot avoid addressing this question. It has an enduring, increasingly obliging, character.

It is this enduring, obliging character that I am concerned with here. I argue that it is historically connected with modern state sovereignty and its constitutive indeterminacies. In approaching secularism as a problem-space, then, I aim to highlight some of its durable structures of power and instability, and show how they incessantly generate a question whose answers and whose high stakes are ones to which no one, especially today, can remain indifferent.

PUBLIC ORDER, THE MODERN STATE, AND THE ACTIVE PRINCIPLE OF SECULARISM

What are these structures of power and instability, and how do they continually raise the question of religion and politics? This is a complex issue that has only begun to be explored systematically. Here I will only highlight three features, all of which underscore the centrality of the modern state, and especially its legal power, for secularism. The first feature is what I have elsewhere called *the active principle of secularism*.[16] This is the principle that the state has the power and authority to decide what should count as essentially religious and what scope it can have in social life. It is through this principle that, crucially, secularism has been established historically. And it is this same principle that is presumed in secular practice today.[17] Now this does not necessarily mean that the state can decide on matters of religious doctrine. But it does mean that it can decide what about doctrine is essentially a religious matter; it also decides which authoritative texts are relevant to making such a determination. More concretely, the state is authorized to distinguish between the "civil" and "religious" dimensions of an act, and on that basis decide whether the act is enforceable, punishable, or otherwise deserving of protection or exemption under the law. And that process always involves often-unarticulated understandings about what religion in the abstract is, or should be. Hence, the state is always drawing a line between the religious and the secular, and reserving its sole authority to do so. So one way to think about the active principle is to see the state as promoting an abstract notion of "religion," defining the spaces it should inhabit, authorizing the sensibilities proper to it, and then working to discipline actual religious traditions so as to conform to this abstract notion, to fit into those spaces, and to express those sensibilities.

[16] Agrama 2005; 2006.

[17] One example is a relatively recent decision by a U.S. court giving atheism the constitutional protections accorded traditional religions. Davis 2005.

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This leads directly to a second important feature of the modern state: the centrality of a public/private distinction. It is a distinction without which secular power could not be brought to bear. And the state is typically responsible for maintaining it. This means that the state plays an important role in maintaining the integrity of public and private spaces. These spaces, however, are never just empty ones. They are always suffused and structured by various affects, sentiments, and sensibilities. Maintaining the integrity of those spaces therefore means authorizing the various affects and sentiments that structure them. So the state, because it is responsible for maintaining the integrity of public and private spaces, also works to authorize the various sensibilities thought to be proper to them.

But if it is indeed the state that has the power and authority to draw the line, and to authorize and maintain the integrity of the proper spaces of religion, then we are already involved in a sort of contradiction. That is because the state is always seen as a pre-eminently political entity. To have it draw a line is therefore to collapse politics into religion in a way that threatens to subvert fundamental liberal freedoms. This leads to the third indispensable feature, whose importance cannot be overstated: a rule of law. The rule of law is important because it implies a law based on constitutional principles and which the governors and the governed must both obey. It is therefore a law that is supposed to be relatively insulated from those whims and trends of political power and fashion that would threaten basic liberties. The state's authority to draw a line, and to define the spaces and sensibilities appropriate to religion, are typically vested within the rule of law—in the courts, the codes, the constitutions and in judicial authority.

Vesting this power and authority within a modern rule of law, however, does not eliminate the contradiction. It only shifts the contradiction onto a different register, adding a level of ambiguity. That is because the rule of law itself is a complex structure, bound up with questions of sovereignty and governmentality within the modern state. This complexity is most fully expressed by a concept central to the liberal rule of law, namely, the legal concept of "public order," which refers to the fundamental legal rules and values of a particular society. Importantly, the three features I have so far highlighted—the active principle of secularism, the centrality of a public/private distinction, and the reliance on independent judicial authority—are all brought together and embodied in this legal concept of the "public order." It is therefore a crucial basis of secular power and decision. However, it also embodies a number of peculiar contradictions that render it deeply indeterminate.

Secular power and decision will thus reflect these indeterminacies. These indeterminacies continually provoke suspicions and anxieties around the legal resolutions of religious issues, which in turn spill out into a politics aimed at reforming the law. However, this politics rarely reduces any of the indeterminacy or anxiety that secular decision creates; on the contrary, it

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tends only to consolidate and expand the state's sovereign authority to decide what counts as religious, and what scope it should have in social life. The indeterminacies of the public order, then, incessantly generate the question of religion and politics.

I should emphasize that the legal concept of public order should not be confused with more generalized notions of *social* order. That the public order has become identified with social order more generally only shows how deeply this legal concept has insinuated itself into social life, as a result of the state's expanding regulatory capacities. While notions of social order are longstanding, various and often highly diffuse, the legal concept of public order that I discuss here is, by contrast, relatively recent historically and well defined within legal doctrine—although, as we will see, it displays a labyrinthine structure that reminds of an Escher print.

Having discussed this in the abstract, I now turn to concrete examples from Egypt. Note that my argument here is that Egypt has adopted these three characteristic features of secular power, with all of its consequent entanglements. In other words, the problem-space of secularism is firmly entrenched there. In what follows I elaborate upon the paradoxical structure of the public order, its imbrications with state sovereignty, its centrality to secular power and decision, and how it renders indeterminate the line between religion and politics. The first section shows how the active principle of secularism is enacted through the public order. The next two illustrate how the public order works to authorize sensibilities of the public/private distinction to which religious practice must conform, but in ways that blur religion and politics. In particular, I highlight how a historical connection between the family and state sovereignty has been crucial for secular power and indeterminacy. Finally, I return to the case of *hisba*, and, based on the preceding discussion, offer a highly counterintuitive reading of its significance. *Hisba*, I argue, is better understood less as an aberration from secularism than a consolidation of that which is most crucial to it: the state's sovereign power of decision within social life.

THE PUBLIC ORDER PARADOX AND CHRISTIAN POLYGAMY

As I mentioned earlier, in Egypt family matters are governed by religious law, and the family law by which an Egyptian is governed thus depends on his or her religion. For example, in marriage, Muslims are subject to Islamic law, and Christians to the specific laws and rites of their respective denominations. However, in cases of mixed marriage, that is, between a Muslim and a Christian, or between Christians of different denominations, Islamic law prevails. Islamic law allows for polygamous marriage; does this mean that Christians in a mixed denominational marriage can also be polygamous? This was the question addressed in a court case that took place in the late 1970s.

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The case is discussed by legal scholar Maurits Berger;[18] I base my discussion here partly upon his. The case is about a Christian man in a mixed denominational marriage who opts to marry a second wife. His first wife sues him, saying that this second marriage is null and void, and that it violates the principles of the public order (*al-nizam al-'aam*), since Christian laws do not allow for polygamy. The husband, however, argued that he had a right to polygamy, since his mixed marriage is subject to Islamic shari`a, which allows polygamy. Thus, to prohibit him from marrying another would itself be a violation of the public order.

In reviewing the case, the High Court decided that, in principle, the husband was correct. There was, however, a caveat, which I will get to in a moment. But in order to decide between them, the Court was required to determine just what is entailed in the public order. The Court thus defines the public order in a way that forcefully expresses the contradictions embodied in it:

> [Public order] comprises the principles (*qawa'id*) that aim at realizing the public interest (*al-maslaha al-'amma*) of a country, from a political, social as well as economic perspective. These [principles] are related to the natural, material and moral state of affairs (*wad'a*) of an organized society, and supersede the interests of individuals. The concept of [public order] is based on a purely secular doctrine that is to be applied as a general doctrine (*madhab 'amm*) to which society in its entirety can adhere and which must not be linked to any provision of religious laws.
>
> However, this does not exclude that [public order] is sometimes based on a principle related to religious doctrine, in the case when such a doctrine has become intimately linked with the legal and social order, deep-rooted in the conscience of society (*damir al-mujtama*), in the sense that the general feelings (*al-shu'ur al-'amma*) are injured if it is not adhered to. (…) The definition (*taqdir*) [of public order] is characterized by objectivity, in accordance with what the largest majority (*aghlab 'a amm)* of individuals in the community believe.[19]

The public order, as defined by the Court, expresses a seemingly irresolvable tension. For on the one hand, the public order is to apply equally to all citizens. On the other, it expresses the sentiments and the values of the majority, even if they are rooted in religion, so long as they have become integral to the cohesiveness of society. The Court sees Islamic shari`a as integral to society, being the belief of the majority, and which allows for polygamy. Therefore, it was an allowance that had to be applied to all. The husband was thus technically correct.

However, and this is the caveat, the Court also says that *exceptions* to the public order can be made. They can be made in those cases where a person's following a law of the public order would violate the essence of the person's

[18] See Berger 1999; 2001; 2003; 2004; 2005.

[19] Berger 2001: 104. Berger translates "public order" into "public policy," its Anglo-American legal term; I maintain the term "public order" because it translates more directly from the Arabic, "*al-nizam al-'aam*," and better reflects that concept as expressed in continental, international, and Egyptian law.

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religion, rendering him, or her, an apostate from it. So the Court had to decide whether monogamy was essential to Christianity, the violation of which would render a Christian an apostate. After a review of theological literature, it determined that monogamy is in fact essential to Christianity. Thus, it made an exception to the requirements (or in this case, allowances) of the public order and prohibited the husband from marrying another woman, rendering his second marriage null and void.

This case illustrates how the active principle of secularism is rooted in the legal notion of the public order. To make an exception to public order requirements, the Court presumed its authority to determine what is essential to Christianity. But more, it decided that, as the belief of the majority, Islamic shari`a was integral to the cohesiveness of the society. Thus, the Court's right to determine what is entailed in the public order also amounts to a right to decide and interpret which are essential religious principles of society.

Berger discusses another case, where the "question laid before the court was whether Catholic spouses of different rites could use their rights of divorce as stipulated under Egyptian Muslim family law,"[20] even though divorce is prohibited for Catholics. In this case, the Court declared that Islamic shari`a is essential to the public order, and that an essential principle of the shari`a is the protection of the faiths of the People of the Book (*Ahl al-Kitab*), that is, Jews and Christians, which means exempting them from following certain shari`a provisions.[21] They were thus exempt from Islamic divorce provisions, and prohibited from using them. So what was before an exception to the public order here becomes in this latter decision a substantive norm of the public order, based on the Court's reading of the shari`a's essence.

These court cases show how the public order is a basis for the state's legal power to define the essence of both Christianity and Islam in Egypt. But they also highlight just how contradictory the concept of public order is, as between the principles of equality and the values of the majority, and between norm and exception. These contradictions, however, are not specific to the Egyptian notion of public order. Importantly, they are also features of the concept as defined within European and international law, from which the Egyptian one was derived.

Established within Egyptian law by the end of the nineteenth century, the public order is originally a European concept. Its complicated legal history, which I can only touch upon here, is wrapped up with emerging conceptions of the modern state, its sovereignty, and its regulatory powers. The notion of public order took its distinctive form during the mid-to-late nineteenth century as a central part of the development of European private international law. Private international law concerns relations among private persons from

[20] Berger 2004: 357.
[21] Ibid: 119.

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different states, and thus deals primarily with commercial and personal status law. It is a doctrine that guides whether and how judges should apply foreign laws in their own states in cases between private persons. Within this doctrine, public order is defined as those laws and values that are essential to a state's social and legal cohesion and that are usually held by the majority of its citizens.

As an international law concept, public order is understood to consist of the general principles that underlay liberal legality, such as procedural fairness, and formal legal equality. But as a concept bound to the state, it is also understood to consist of the *particular* values and laws deemed by specific states to be foundational to their own social and legal cohesion. The public order is therefore seen as an intrinsically flexible concept whose contents, because they change over time and between states, are for judges to decide. It is in this capacity that it acquires its importance for private international law; it enables a state to invoke a "public order exception" to reject foreign laws or judgments that it should normally honor, if it finds them to be repugnant, or threatening to its public order. Thus, the public order became a legal expression of the state's domestic sovereignty. This was happening at a time, however, when states were vastly expanding their regulatory capacities through a spate of social reform legislation and legal codification.[22] What could therefore count as part of the public order, and thus, the state's domestic sovereignty, was correspondingly widened.

But the public order also became an important expression of state sovereignty in *public* international law, during the time when sovereignty was becoming the doctrinal foundation of statehood.[23] It remains an important expression of state sovereignty today. This is attested to by its inclusion in all the fundamental international rights declarations and covenants that together define contemporary liberal legality,[24] as a basis for the suspension of the rights agreed upon in them. Note here that, whether in public or private international law, the public order, as an expression of state sovereignty, is articulated as a basis for exceptions to legal norms. This fact is crucial to the paradox that the public order represents.

The paradox of the public order arises not just from the tension it embodies between formal legal equality and the substantive values of the majority, that is, between competing norms. It is also because those substantive values have become identified with state sovereignty, which, in turn, is legally expressed

[22] Rueschemeyer and Skocpol 1995.

[23] For a discussion of the intertwined histories of private and public international law, see Mills 2007.

[24] Thus: the Universal Declaration of Human Rights (article 29:2); European Convention for the Protection of Human Rights and Fundamental Freedoms (9:2); International Covenant on Civil and Political Rights (12:3; 14:1; 19:3b; 21; 22); International Covenant on Economic, Social and Cultural Rights (8:1a; 8:1c).

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through exceptions. This results in a profound confusion about whether a court, in invoking the public order, is promoting norms or making exceptions to them. We saw this in the court cases discussed above; in the polygamy case, the Court made an exception to public order, and the shari`a norms seen to comprise it, to protect religious belief. But in the divorce case, the Court saw the shari`a principles that comprise public order norms as including protections for Peoples of the Book—that is, Jews and Christians—and saw itself as simply applying those norms. It becomes unclear, then, whether the protection of religious belief constitutes a norm of the public order or an exception to it, and whether it is based in a secular principle of religious freedom, or in Islamic precepts on protections for specific faiths.

This confusion between norm and exception is compounded by the fact that, due to the continual expansion of the state's regulatory capacities, the public order has come to partake of a broader semantic and conceptual field. Thus, it is often associated in judicial reasoning with the notion of public interest, and sometimes with "public sentiment." In authoritative legal documents, both national and international, it is always coupled with the notion of morality, as in the phrase, "public order and morality." These, in turn, are often explicitly linked with public health and national security. And, as we will see in the case of Egypt, public order has a constitutive historical relationship with the notion of family. In current and historical legal practice, the distinctions between these concepts are quite diffuse, frequently slipping into each other, even though in principle they entail very different concerns. One consequence of this is that the public order expands out of the judicial domain and into that of executive authority, and, through its links to national security, becomes associated with exceptional and emergency powers. It is interesting that, for all the recent theorizing on emergency states and the logic of the exception,[25] little attention has yet been paid to the contradictions and indeterminacies of this legal concept of the public order.

And while much has been written on it,[26] its history and role in secular power and decision has been given little systematic attention. This is even though religious freedoms are always subject to concerns of public order, morals, family, health and national security within domestic law and especially within international law. Interestingly, international forums, such as the European Court of Human Rights, have accorded greater latitude to individual states in interpreting public order and morals for the purpose of deciding *religious* freedoms, as opposed to *political* ones. And on the basis of public order considerations, states have successfully argued in principle prohibitions on

[25] E.g., Agamben 2005.

[26] Bernier 1929; Berger 2001; 2003; 2005; Forde 1980; Hibicht 1927; Husserl 1938; Lloyd 1953; Mills 2007.

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proselytizing and conversion, as well as the upholding of blasphemy laws for specific religions.[27]

What is important here is not just that public order considerations typically trump religious freedoms. It is that *through the public order the state enacts its sovereign authority to decide what counts as essentially religious and what scope it can have in the social order*, as we saw in the court cases I described above. And this points to the fact that the active principle of secularism is a principle of *sovereign* state power.

No doubt, the notion of public order is not the only means by which the active principle of secularism is exercised.[28] It is, however, a common one, employed by a very wide variety of states—including and especially the paradigmatic secular ones[29]—and recognized within international law. It tersely expresses some of the basic contradictions of liberal thought and practice, and demonstrates how the active principle of secularism is connected to the state's sovereign power.

But my attention to this concept of public order is also meant to illustrate how indeterminacy goes to the very heart of secular power and decision. To see that, let us return briefly to the polygamy case. As a Personal Status case, it is governed by religious law. Yet the court finds it necessary to invoke the public order, which it defines as an essentially secular concept. After defining it as secular, however, the court states that it is comprised of essential Islamic values. Is the public order now an Islamic, and thus, religious, order? Furthermore: after determining that Islamic values are essential to the pubic order, the court goes on to make an exception to it so as to protect essential religious beliefs that contradict those values, which is a characteristic secular practice and principle. Yet, by so doing, it restricts the rights of the defendant (the husband) whose beliefs it aims to protect. Has the court thereby defended religious freedom or diminished it? The indeterminacy goes to the very core of secularism's categories and connected stakes.

This indeterminacy arises not just because the public order might contain principles from religious traditions. It is also that the courts are always involved in interpreting the principles of the public order, which colors abstract notions of equality with the changing values and sentiments of the majority of the state. As a result, the courts' decisions can always be accused of perpetuating, under the guise of neutrality, the moral, ethical, and political sensibilities of the constituted majority concerning religion. Such claims have been made throughout the history of all Western secular states, and are even more today, as political contestations are increasingly enacted through law and legal categories. But my point here is not to argue for the truth of these accusations; it is rather to elucidate

[27] Stahnke 1999: 295–96; Meyler 2007: 537–47.

[28] Thus, while "public policy," the term used in Anglo-American law, is rarely invoked in U.S. religion cases, many of its associated concepts are. See Sullivan 2005; Fish 2007.

[29] See, for example, Bowen (2001) on public order thinking in France.

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some of the conditions whereby they arise and acquire their resonant political force. And one central condition is the legal concept of the public order, which, in blurring the difference between legal equality and majority values, between norm and exception—and thus, the restriction and protection of rights—relentlessly raises the question of religion and politics.

PUBLIC ORDER AND PRIVATE SENSIBILITY

There is another reason why I pay attention to the public order: its role in fashioning the public/private distinction so crucial to secular power. For besides representing public sentiment and values, the public order also helps authorize private sensibilities. But it does so in ways that undermine the integrity of the public/private distinction whose sensibilities it authorizes. It is a well known—though never banal—fact that public and private domains possess multiple, related, overlapping, and often shifting meanings, and that the distinctions between them are rarely stable. What I wish to highlight here, however, is the historical emergence of a particular set of conceptual and affective relationships through which they continue to be both mutually entailed and undermined, where a domain of intimacy has become attached to the public order as part of the development of a rule of law and the consolidation of the state's sovereign power through it. These relationships have been crucial to the way that secular power has worked.

The following discussion has two parts. The first is largely ethnographic, and highlights the distinctive ways the concept of public order authorizes private sensibilities through and within the law and the courts. The second, more historical, traces the conditions of this authorizing capacity, and the processes and practices of power they were part of and continue to facilitate. In particular, it shows how the notion of family became and remains attached to and foundational for the public order, and the consequences of this for the public/private distinction and how secular power exerts itself through it. Together, the two parts illustrate how secularism's power lies in the very precariousness of the categories it presupposes. They also set the stage for a return to the case of *hisba*, with which this essay began.

Let me begin with a brief historical note on the Personal Status courts. In the late nineteenth century the Egyptian state instituted a national court system, based largely on French law, alongside the older shari`a courts. This was an attempt by the state to establish a liberal rule of law, in order to consolidate its sovereignty over and against the broad European influence that had deeply entrenched itself there. As part of this process, the shari`a courts were gradually reorganized to reflect the procedural precepts of a liberal rule of law, and their jurisdiction was increasingly restricted, making space for the national courts. The two existed side by side until 1955, when the shari`a courts were absorbed into the national court system, creating a single, unified court structure. What had once been the shari`a courts thereafter

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became known as the Personal Status division of the national court system, and while the substance of Personal Status was still based in the Islamic shari`a, its procedures came to be governed by the general law of civil procedure.[30]

One important element of my ethnographic fieldwork was to attend Personal Status hearings. I wanted to see how the shari`a was being shaped as part of modern legal practice, and the consequences of its being embedded within a largely liberal, Western legal framework. But I had enormous difficulty accessing Personal Status hearings, at least at first. Upon entering the courtroom, I would find it packed with people with barely a place to stand, but the chairs of the judges' bench would be empty. Off to the side was a door that led into a smaller chamber. Standing in front of it would be a man with a list. He would call out numbers or names, and a few people would enter the smaller chamber, and leave again after a few minutes. This would continue until the end of the session. It turned out that the judges were in that chamber, conducting case hearings within it. The man before the chamber door was the court usher.

The door of the chamber was almost always left ajar, but if you tried to move up to see or hear what was happening inside (as I often did), the usher would harshly intervene and push you back. This was the set-up for almost all Personal Status hearings. Although I sometimes encountered open hearings, they were on the whole rare. In effect, Personal Status hearings were secret.

This bewildered me, because the publicity of court hearings was a foundational legal principle enshrined in both the Egyptian procedural codes and the Constitution. Violating this requirement typically rendered judgments null and void. The Court, however, was allowed to make exceptions. The laws state that exceptions can be made for considerations of public order, morals, or the sanctity of family (*hurmat al-usra*).[31] However, what was an exception under the law had apparently become the rule for Personal Status hearings.

At this point in the discussion, the reader may not be so surprised. But for me, at the time, it brought up a slew of questions. How, after all, does a public personal status hearing threaten public order? What does the "sanctity of the family" mean, anyway? And would not concern over the family only entrench the importance of public trials as a foundational procedural principle of its protection? My curiosity piqued, I began to ask lawyers I knew about this. One lawyer, Khalil, a specialist in both public and personal status law, insisted it would be impossible for me to observe personal status hearings, because the law *explicitly* required them to be secret. But when I asked him to show me where in the codes these secrecy requirements were, he could not find them.

[30] For histories of nineteenth- and twentieth-century Egyptian legal transformation, see Brown 1997; and Cannon 1988.

[31] Egyptian Code of Procedure for Civil and Commercial Law, article 101.

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All he could find was the already well-known article in the Egyptian procedural code I noted earlier: hearings must be public except when the judge deems secrecy necessary to protect the public order, morality, or the sanctity of family.

There were, however, two articles of the procedural code—numbered 871 and 878—which required Personal Status requests to be heard in judges' consultation chambers; one of these referenced speed in the expediting of cases.[32] It was unclear, though, if they implied a secrecy requirement, since they were not *explicit* about that. But Khalil told me this did not matter. Personal status cases, he said, are about intimate affairs, and that is why they are heard in judges' deliberation chambers. He said that even the brother or a sister of a spouse would be expelled from the hearing if they bore no legal relation to the case.

Yet the equation of these articles with a secrecy requirement turned out to be less than straightforward. Articles 871 and 878 were added to the procedural codes in 1951. But ethnographic descriptions of Personal Status hearings done much later, in the early 1970s, show that they were largely public. Here is one such description of an urban Personal Status court in Cairo:

> The participants in the court are characterized by a high degree of informality. Litigants usually came accompanied by friends, relatives and neighbors. One woman decided to feed her baby whilst other women were seen eating *'tameya'* [a common Egyptian food]…. Whilst the Court was in session most of the litigants were talking so that not only was the room overcrowded … but it was also quite noisy … the litigants themselves were quite informal in their manner before the judges. They would walk right up to the bench with hardly any physical distance between them and the judges. Very often the women would drag their small children along.[33]

As this and other descriptions show, Personal Status sessions in the early 1970s were largely open, and highly informal. Despite the articles requiring Personal Status requests to be heard in deliberation chambers, what could or could not be heard in the courts was not, according to these descriptions, strictly policed.

However, in the mid-to-late 1970s, a shift towards secrecy seems to have occurred. This shift is registered in High Court judgments of that time, which show a willingness to overturn lower Personal Status court decisions issued from hearings not conducted in secret. This was even though there were no explicit provisions nullifying Personal Status decisions issued from public hearings.

The High Court, however, justified its stance through a set of concepts and sensibilities that it saw as central to the public order. Thus, in one judgment, the

[32] Article 871 states, "The Court will hear [personal status] requests in the deliberation chamber with the presence of the Public Prosecutor if he is a party to the case, and will issue its judgments publicly." Article 878 states, "The Appeals Court will hear [personal status] cases in the deliberation chamber as quickly as possible and will adhere to the procedural requirements stated in article 871." Recent reforms have removed these requirements.

[33] Azer and Zaalouk 1972: 52.

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Court began by emphasizing that the publicity of court hearings is a basic, foundational procedural principle essential to the legal order and to public confidence in the judiciary, and whose violation therefore nullifies judgment. Hence, the Court reasoned, in those specific types of cases where the legislature intended secrecy in hearings, such secrecy should be considered an equally foundational principle, whose violation equally implies nullity of judgment. To help interpret articles 871 and 878 as implying a secrecy requirement, the Court defined the family as a unit of intimate, personal relationships. It also noted that the Constitution had placed the family at the foundation of society. Secrecy on family issues, it argued, was therefore as foundational to society as judicial publicity. Only by addressing its affairs within a highly restricted space could a family's secrets be preserved in the courts. This is just what articles 871 and 878 provide, by requiring Personal Status requests to be made in judges' consultation chambers. And this, the Court argued, confirms that the legislative intent behind those articles must be secrecy in Personal Status hearings.[34] Since the 1970s, the Court has, through similar reasoning, interpreted articles 871 and 878 as a secrecy requirement aimed at protecting the public order. Note here how the Court's reasoning brings together a set of concepts and affects—family, intimacy, publicity, secrecy, and public order—in a distinctive way that made it possible to invert the fundamental procedural principle of court publicity. Through them, the intimacy of the family is made foundational to the public order.

The sensibilities emphasized by the courts to justify secrecy are now well established in them. This was made clear to me, when I finally got to sit in on personal status hearings, as I was always made to feel acutely that I was intruding. During the hearings, I was often the only person in the court chamber besides the panel of judges and the litigants of a particular case, and I was often made to sit at least three rows back. The chief judge of one court I had been attending never told other senior judges about me, and straightforwardly refused my requests to introduce me to other judges. He explained that these were matters on which some judges would not like to be approached, implying that they were sensitive. When once we came upon some of his fellow senior judges after the court session, he introduced me with a false name and profession: "Omar, a journalist."

But besides suffusing the space of the courts and dispositions of the judges, sensibilities around family, intimacy, and secrecy are also woven into judicial deliberation, sometimes trumping more technically correct legal arguments. Thus, in one case, judges awarded a little boy's financial guardianship to his stepmother over his uncle (the child's deceased father's brother), even though legally the uncle should have had priority. This, however, was not

[34] Abd el-Tawwab 2000: 69–71.

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due to any fault on the part of uncle. Rather, the—unpublicized—reasoning amongst the judges that led to their decision was prompted by the perceived intimacy between the stepmother and the child, demonstrated to them by how closely he clung to her during the fierce and unruly argumentation that characterized the hearing. In the personal status courts today, sensibilities of secrecy and intimacy are woven together with notions of family, producing a courtroom ambience that contrasts strikingly with what we saw in the descriptions of the early 1970s.

The emerging shift towards secrecy and intimacy during the 1970s did not happen just in Egypt; it has also been noted in Europe and the United States, where the law has increasingly cast family, and especially marriage relations as emotional, intimate bonds. This trend has been attributed to a growing legal emphasis on individualism and equality on the one hand, and the gradual usurpation of traditional family functions by state agencies on the other, making it more difficult to define just what a family bond is and does, and reinforcing the emphasis on its intimate, personal, and emotional dimension.[35] Yet what such explanations, plausible as they might be, do not tell us is just how it is that family becomes associated with both intimacy and state power through the law in the first place. The links are simply assumed.

Here we might briefly compare the conceptual and affective affinities displayed by the Personal Status courts with those of the Fatwa Council of Al-Azhar, whose sessions I also attended as part of my ethnographic fieldwork. Such a comparison will help us against taking these affinities for granted. The Fatwa Council addresses many of the same issues as Personal Status courts, also basing its decisions on Islamic shari`a, except that the fatwa is not binding upon its recipients. The Fatwa Council was a very popular place, frequented by people from all walks of life seeking a fatwa about one thing or another.

I cannot present here a detailed discussion of the Fatwa Council[36]; I bring it up for comparison because, unlike the courts, there was almost no policing of what one could hear within it. The issues addressed by the sheikhs of the Council were, by the standards of the courts, as intimate as could be—about sexual practices, adultery, past child abuse. Indeed, they were often more intimate than what I typically heard during Personal Status sessions. For example: a young unmarried man tells the sheikh that he cannot have wet dreams and has fornicated twice so far—what is to be done? A married couple, recently converted to Islam, wants to know if they will be forgiven for the oral sex they

[35] For example, Glendon 1996: 291–314. One might also want to attribute this shift to the rise in Islamic religiosity that also began during the 1970s. But the subsequent comparison with Al-Azhar's Fatwa Council troubles this explanation, since the Council does not display the same sensibilities.

[36] For greater detail, see Agrama 2005; 2010.

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used to perform, or whether they could still do it. A long-married couple recently finds out that they were, as young children, breastfed by the same woman—an act that, by the shari`a, renders them as siblings and thereby prohibits them from marrying each other. What is to become of their marriage, and what of their children? A young woman has come to see her older husband as more of an uncle than a spouse, and has become attracted instead to her cousin who desires her too; should she divorce her husband and marry her cousin, or persevere with patience? A distraught man tells the sheikh that he has just learned that his sister was as a child raped by his father years ago, and that all the family had known, except for him, until now—what should he do? Despite the seemingly evident intimacy of such questions, I listened in with little problem, and neither was there any emphasis on secrecy in the Council.

This is not to say that listening was completely unrestricted—but the restrictions were differently articulated than in the courts. Thus, once, a woman complained to the sheikhs about the continual insults she suffered at the hands of her in-laws, which were serious enough for her to want a divorce. When asked by the sheikhs what the insults were, she, realizing that others (myself and another) were listening, kept silent, eyes averted. The sheikhs looked at us, then told her and her husband they would continue the discussion a little later. Clearly, her verbalizations of her in-laws' insults were not for us to hear. Notably however, it was she, and not the sheikhs, who initiated the need for privacy. The sheikhs simply respected her desire.

There were, however, some cases that the sheikhs themselves treated as needing secrecy. Yet they seemingly had nothing to do with intimacy. Instances of possession by *jinn*,[37] for example, were sometimes treated with secrecy, but not considered intimate matters. On the other hand, otherwise intimate issues were discussed with a kind of unconcerned openness, in that others could hear, or even in some cases participate in, the discussion between a questioner and a sheikh.

Both the Personal Status courts and the Fatwa Council of Al-Azhar are products of modern reforms,[38] and both are institutions under the state. Both are based in the Islamic shari`a, and they deal with a broadly overlapping range of issues.[39] Yet secrecy reigns in one in a way that it does not in the other. This comparison alerts us to just how distinctive the configuration of concept and affect expressed by and within the courts is. The Fatwa Council shows us that intimacy and secrecy need not be conflated as they are in the courts,

[37] According to Islam, the *jinn* are creatures of free will who inhabit a separate, independent plane of existence largely invisible to humans. Made of "smokeless fire," they have extensive supernatural powers, including that of possession. Though they have a variety of beliefs and dispositions, they tend toward evil, and are generally seen as harmful to humans.

[38] Skovgaard-Petersen 1997.

[39] There are, of course, important differences between the two, but they are not what they are often surmised to be. See my discussion of the differences in Agrama 2010.

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and neither need they together be linked to (and the links between) concepts of family and public order, as is found by the courts. We are thus led to the following question: how did the notion of public order, this ostensibly secular and originally European concept, become part of a religiously-derived law in Egypt, and linked with concepts of family and sensibilities about intimacy?

FAMILY AND STATE SOVEREIGNTY

The answer takes us back to a set of wide-ranging procedural reforms of the shari`a courts that were instituted in 1897. The concept of public order was first introduced through these reforms. And, by a seemingly strange coincidence, it was introduced in relation to the publicity of court hearings, in a provision that explicitly requires public hearings except when the court decides to hold them in secret due to considerations of public order and morals.[40] Before these reforms, publicity of trial hearings was not a matter of explicit mention or concern in the shari`a courts. Notably, the wording of the 1897 provision parallels almost exactly the one of the current procedural codes, except that the phrase "sanctity of family" is added in the current codes. That phrase was added in the 1931 codifications of the shari`a courts. Nevertheless, it was in 1897 that the phrase "public order and morals" first appeared in the shari`a courts, and that the publicity of trial hearings first became an issue of explicit concern.

The novelty and significance of this provision can only be understood within the broader context of the 1897 reforms. As I mentioned earlier, such reforms were aimed at establishing a liberal rule of law in Egypt, a process that restructured the shari`a courts and restricted their jurisdiction to make space for the emerging national court system that eventually absorbed and replaced them. As part of this process, the state sought to regulate Islamic practice by defining the essence of the Islamic shari`a as comprised of "family" matters. The 1897 reforms, in particular, restricted the shari`a courts' jurisdiction to all and only those issues now defined as family issues, exactly the ones governed by today's Personal Status law.[41] Classical shari`a treatises, however, had never featured a distinct category of family law, or even personal status law. These reforms, then, helped carve out a legal space for a new concept of family. This was happening, moreover, at a time when a (largely European-derived) discourse of family as a distinct unit of intimate, personal relationships had taken hold very widely amongst Egyptian reformers and became pivotal to emerging nationalist discourses.[42]

[40] Law for the Organization of the Shari`a Courts and Its Associated Procedures, 27 May 1897, Book 4, Chapter 2, Article 61 (Compendium 1898).

[41] These include: marriage, divorce, inheritance, alimony, child custody, visitation rights, and financial guardianship of orphans.

[42] See Asad (2003: 206–56), especially his discussion of Muhammed Abduh's 1899 report on shari`a court reform, which argued that the courts, in looking into matters between spouses and close kin, deal with intimate issues not for others to hear. See also Kholoussy 2003; Pollard 2005.

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We thus have three specific reforms coming together. First, the shari`a courts are confined to a set of affairs that come to define a new, distinctive domain of family. Second, family comes to be seen as essentially involving personal, intimate relations. This corresponds to the formula whereby "religion" is placed within a "private" domain. But third, shari`a court proceedings are required to be public. All three reforms were set in motion and authorized by the modernizing Egyptian state as part of the establishment of a liberal rule of law. But they pulled in opposite directions: toward publicity in court hearings on the one hand, and toward family as an intimate space of secrecy on the other.

This was a contradiction, however, that the state empowered itself to resolve, through its determination of what is constituted in the public order. That is precisely the significance and novelty of the 1897 provision, which gives the state, through the courts' interpretation of public order, the power to decide what should and should not be heard publicly. In other words, the 1897 provision, when viewed in the larger context in which it occurs, *can be seen as facilitating the emergence of a new legal distinction between public and private, one that the state was now responsible for defining and upholding*. More precisely, these reforms established and brought into affinity a new set of concepts and affects—family, intimacy, publicity, secrecy, and public order—through which the domains of public and private could be mutually entailed and authorized by the state.

These concepts and affects have become only more tightly bound to each other through subsequent legislation. Thus, as mentioned earlier, the 1931 shari`a court codifications expanded the public order's semantic field to include "the sanctity of family." And the constitution of 1956 under Gamal Abd el-Nasser declared the family to be the foundation of society. As we have seen above, these were precisely the connected concepts and sensibilities the courts used to authorize the necessary secrecy of personal status hearings.

The 1897 reforms were thus a pivotal moment in the establishment of state secular power in Egypt. They set in place the three features of secular power I described earlier. For not only did they introduce the notion of public order for the first time into religious law, but they also placed it at the center of the concepts and affects through which the state defines a public/private distinction, and to which religious practice must conform. However, the very conceptual and affective affinities used to define this public/private distinction also work to undermine its integrity. That is because religion has become identified with family, and family has been placed at the foundation of the public order. The principles of public order therefore blur into the principles of religion. At the center of secular power and indeterminacy in Egypt, then, lies an historical relationship between family and the state.

But the connections between religion, family, and public order that enable this indeterminacy are not exclusive to Egypt. We find them also in the history of the paradigm secular states of Europe, where they were crucial to developing

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conceptions and practices of sovereignty. In France, whose law was the basis for Egypt's, the rise of "family" as a special domain of intimacy was historically tied up with the notion of public order as part of a process whereby the state acquired and demonstrated its sovereign authority over its territory and against the Church.[43] They were thus connections that the state maintained as necessary for its own unity. But they also take hold more broadly across Europe[44] during the very period that public order becomes the focus of systematic elaboration within domestic and international law. The regulation of family came to be seen as the quintessential expression of domestic sovereignty[45] at a time when sovereignty became the doctrinal foundation of statehood internationally. And within international law today, family is still seen as the nucleus of society and foundational to the public order.

Egypt therefore only brings into bold relief a contradictory setup that is characteristic of the paradigmatic secular states more generally: on one hand, "religion" as defined by the state is placed in a private space, separated off from the state. On the other, family is also placed in this private space, but the state continually sees the need to regulate and authorize it, as part of its sovereign power to maintain and regulate the public order. The historical relationship between family and state sovereignty thus becomes a source of continual entanglements between religion and politics.

This is not simply because of the intrusion of public power into private life. It is also that principles deemed proper to a private domain can emerge as practices of public power, blurring the difference between them. That is exactly what happened with *hisba*, to which we now return.

BACK TO *HISBA*: THE INDETERMINACY OF SECULAR POWER

As implied by the story I have told, the Islamic shari`a in Egypt, under the law, has become significantly shaped by liberal legal concepts and precepts. Indeed, my broader field research has shown how, under the law, the shari`a has become largely "liberalized"—that is, restricted to a private domain of family, imbued with recognizably liberal sensibilities and highly circumscribed from state policy-making.[46] All of this conforms to liberal secular expectations of religion.

But this brings us back to the beginning, to the *hisba* case against Nasr Abu Zayd, which certainly does not conform to liberal secular expectations. A university professor of Arabic and Islamic studies, a professed Muslim, Abu Zayd was nevertheless, through the use of *hisba*, declared an apostate by the court, his marriage forcibly dissolved. The state, instead of granting him amnesty, or legally abolishing *hisba*, enacted legislation reserving its use solely for

[43] Vogel 2000; also Bowen 2001.
[44] Ibid.
[45] For Anglo-American law see *parens-patriae* doctrine. See also Gordon 2001.
[46] Agrama 2005.

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itself. We are therefore led to ask: how can liberalized shari`a and the *hisba* decision arise out of the same legal framework? Was *hisba* just an anomaly? If so, why did the state subsequently reserve its usage solely for itself?

As should be clear now from our discussion, *hisba* and liberalized shari`a are not as incompatible as they might first seem. The perception that they are, I submit, arises from the view that accepts secularism's own criteria for its success or failure, a view contested throughout this essay. But if we see secularism in terms of the historical structures of power and instability I have described, and particularly how secular power and decision arises out of the legal principle of the public order, then we get a different picture.

This is because, importantly, both the essentially intimate nature of family as the core of the Islamic shari`a and the legitimacy of *hisba* litigation were justified by considerations of the public order. The public order that imbued the shari`a under the law with a private sensibility and authorized the protection of family secrecy also transformed the religious practice of *hisba* into a wide-ranging, anxiety inducing, public power. But more importantly, *hisba*, in the way it was articulated in the court judgments, represented a power to decide what was essentially religious and what scope it could have in society. That is, *hisba*, as presented in the courts, *was not so different from the active principle of secularism*. The state's reserving of *hisba* to itself and out of the hands of private citizens *could therefore be seen as a move of secular power, towards maintaining and extending the state's sovereign authority to decide on the essence of religion and of politics*.

In reserving the power to do this, is Egypt so different than, say France, which recently invoked public order considerations to decide which symbols were essentially religious and where and how they should be displayed?[47] Or even its consistent past practice of compelling religious divorce actions in some cases for couples that had undergone a civil divorce?[48] Or is it so different from England, which has successfully resorted to notions of public sentiment to uphold Christian blasphemy laws?[49]

But then, one might ask, is *hisba*, as now reserved by the state and rooted in the public order, now a secular principle? Or does it remain a religious one? My answer is that this is precisely the indeterminacy of secular power, which relentlessly entangles us in such questions and conflicts of religion and politics, even as it consolidates and extends the state's sovereign power to decide them.

CONCLUSION

Is Egypt a secular or a religious state? I have argued here that this is neither an answerable, nor a false, question. Rather, it expresses a question at the heart of

[47] Asad 2006a.
[48] Glenn 1980.
[49] Rivers 2000.

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secularity itself, namely, where to draw the line between religion and politics so as to secure fundamental liberal rights and freedoms. This question, in turn, is raised incessantly by the very conditions of secular power, and especially through the indeterminacies of the public order, whereby religion and politics continually blur into each other. The question of Egypt's secularity or religiosity is therefore an expression of secularism's characteristic tensions and its distinctive modes of power, sensibility, and instability.

Secularism, supposed to separate religion from politics, hopelessly blurs them; ideally a principle of peace, it fosters political-religious conflict instead. Law offers no way out, being instead a condition of this intractability. Should we then conclude that secularism undermines itself? To make such a conclusion would be to accept secularism's own criteria for its failure or success, to collapse its normative categories into the analytic ones we would use to understand what it is, and does. This is just what I have tried to avoid by approaching secularism as a problem-space—in terms of its historical ensemble of questions and stakes, the processes and practices of power used to variously answer them, and the conditions that continually raise and entrench them within social life. What this approach has helped clarify is that secularism is less a principle of peace than an historical practice of state sovereignty, and thus, an expression of its constitutive indeterminacies and anxieties. The indeterminacies of secularism should not therefore be seen as undermining it; on the contrary, they tend, as in the case of *hisba*, to further consolidate and extend the state's sovereign power of decision over social life. We should therefore see the indeterminacies of secularism as integral to its workings, and the state sovereign power that it secures.

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