GENDER, RELIGION, LAW

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When France prohibited the wearing of Islamic veils in schools and, more recently, when it refused to grant French nationality to a woman who wore a *burka*,[1] the principal argument advanced in the debates that preceded and followed these measures was that these forms of apparel were not signs of an expression of freedom of religion, but rather that they jeopardized other freedoms, freedoms at once more mundane and more fundamental.

The first of these freedoms are the sexual and family-related freedoms of women, which these signs were considered to have flouted. A woman dressed in such a way (that is veiled, or in a *burka*), is not supposed to engage in sexual relationships before marriage; not to take birth control pills nor have abortions. She is expected to have an exaggerated sense of modesty and to submit herself to the dictates of her father, brothers, and husband. When it was replied that one was in France, that is, a country in which wearing such apparel was not a constraint but rather voluntary, the response was, in essence, that these women were dominated by their families or their husbands. Furthermore, it was not necessary to provide the proof of this domination as it was a fact simply deduced from a woman's wearing of this apparel. "Would women freely choose that which subjugates them?" asked the partisans of prohibition, abounding with the sentiment of being absolutely reasonable.

Yet these signs supposedly concerned other, even more fundamental liberties. From this perspective, the veil, like the *burka*, is not a religious symbol, but the visible sign of a totalitarian political project that seeks to transform not only the very foundations of the state but also the principles of political organization that constitute the fundamental rules of democratic organization from which all other liberties flow.

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[1] Arrêt du Conseil d'Etat du 8 juillet 2008.

Of course, we can very easily criticize the "mauvaise foi" or, "bad faith" of this type of discourse. However, since we need to respect freedom of religion, it becomes necessary that the veil or the *burka* be seen as signs related not to a religion, but rather, to other, much less respectable things.

Nevertheless, I think it is possible to take this operation of categorization and de-categorization of religious phenomena seriously, not so much in order to interrogate the practices of exotic cultures that assail us, but rather to interrogate our own institutions. Thus, we can ask ourselves whether rules in secularized societies like our own rules that organize sexuality, family ties, and gender, are not also imprinted with a form of religious rationale.

By this I am not alluding to the content of these rules, but to something much more general and more fundamental as well; that is, the forms by which these rules are created and transformed. My hypothesis is this: Christian law, which was integrated into the Western State in the thirteenth century, created a juridical ideology in the domains of sexuality, gender, and family. This ideology is always already active, such that nature, and the claims to truth that can be instituted by it, function to limit a society's power to create new norms for itself.

This ideology assumes that the legislator and, consequently, individuals in their inter-individual relations are not free to create new norms without respecting certain principles that are supposedly superior to positive law. The Law of the Old Régime called this third instance "the laws of nature."[2] During the secularization of Western societies, this instance became a principle of reason, a will to respect a truth of human nature and of society, which neither the state, in its role as legislator and judge, nor individuals, in their roles as creators of contracts, could transgress if they were not to sink into madness, social disintegration, or injustice.

I will now try to outline very briefly the history of the integration and development of this juridical ideology of Christian origin and propose, and even more briefly, the ways by which we can perhaps extract ourselves from it. In this way, we can perhaps give new critical power to the old juridical category of religious freedom, and as a result shift the debates that currently confine it to tracing the scope and limits of tolerance.

Our ancestors, the Romans, were proud to have utterly no constraint in the creation of law but that of their own will. Institutions were considered to have their origin uniquely in the will of law, and hence were not indebted to any sort of "nature" that preceded them.

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[2] JEAN-MARIE CARBASSE, INTRODUCTION HISTORIQUE AU DROIT PENAL (1990).

This was, in the eyes of the Romans, the "grandeur of law."[3] These fundamental beliefs explain, for example, the fact that adoption was held to be superior to biological procreation, or that it was possible to adopt someone older than oneself. By the same token, neither blood nor sperm were important in the creation of filial ties in marriage. Hence, one could be "born" of a dead person, or of a man who was absent at the moment of conception. The division of the sexes in Roman law in no way sought to constrain the real and actual exercise of sexuality, nor to imitate any sort of a nature that existed prior to these laws, but rather to distribute the population among two groups with unequal social powers. Hermaphrodites, who were arbitrarily qualified as men or women by a magistrate, posed absolutely no problems in terms of the "truth" of their sex. The only thing that counted was that they be attributed a status of man or of woman, a status they would keep until their death. Doctrines stemming from Canon Law, which shaped marriage, filiation, manners of conceiving sexuality, and the distinction of genders, distanced themselves from this artificialist ideology. In Canon Law, nature was an authority that had to be imposed on the legislator; it was a limit that juridical rules had to respect because it was willed by God. Hence the legislator was not free to decide in these domains, for example, that one could adopt someone older than oneself, or be born of a dead person. Otherwise, the legislator would be usurping the place of God.

In the thirteenth century, with the birth of the modern State, these aspects of Canon Law were integrated into Civil Law.[4] Sexuality and procreation became behaviors that the state had to oversee, in order that the laws of nature be respected. This explains the appearance of capital crimes like sodomy, zoophelia, and incest, as well as, very strict rules in civil and family matters.

"Crimes against nature," which included the entirety of sexual relations which strayed from the only authorized sexual technique (that is, the one most likely to lead to children being born[5]), were supposedly outrages to, at one and the same time: nature, God, and the Prince, the representative of God on Earth. This made the state at once guardian and victim of crimes against nature, a crime that it could not keep itself from punishing because the rules that it transgressed were not negotiable by any terrestrial power.

This new ideology had equally important consequences in civil matters. Indeed the court even went so far as to introduce itself into the

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[3] YAN THOMAS, FICTIO LEGIS, L'EMPIRE DE LA FICTION ROMAINE ET SES LIMITES MEDIEVALES 17-63 (1995).

[4] FRANÇOIS ROUMY, L'ADOPTION DANS LE DROIT SAVANT DU XIIEME AU XVIEME SIECLE (Thèse, Paris, 1994); JACQUES CHIFFOLEAU, LES JUSTICES DU PAPE. DELINQUANCE ET CRIMINALITE DANS LA REGION D'AVIGNON AU XIVEME SIECLE (Paris, Publications de la Sorbonne, 1984).

[5] JACQUES POUMAREDE & JEAN PIERRE ROYER, DROIT, HISTOIRE ET SEXUALITE (1987).

marriage bed to measure erections and the depths of vaginal cavities whenever there was a denunciation of impotence, whether it was on the part of the man or the woman.

Sexuality was considered to have powers so strong that the simple fact of having sexual relations with someone created sexual and marital prohibitions between the entire families of the two people involved. The same held true for the force granted to procreation by the Laws of the Old Régime. Conceiving a child outside of marriage created obligations for the progenitor. At the same time, the fact that a man could end up not being the real progenitor of his legitimate son could lead to the annulment of filial ties. Similarly, adoptions were forbidden because they violated nature.

Hermaphrodites were subject to a fate wholly different from that reserved for them under Roman law. A hermaphrodite's status could never be definitively fixed. At times the hermaphrodite was considered a man, at times a woman, and in either case had to take an oath not to use the sexual organ in contradiction with the gender to which they had been provisionally assigned. In short, whatever they did with their sexuality, they were necessarily punished for it. This was because to be a man or a woman, after the Old Régime, was no longer a simple question of status but a question of truth as this could imply the correct or incorrect use of one's organs.

What became of this juridical ideology after the French Revolution? And what became of it after that other revolution, admittedly less grandiose, but very important all the same, that was the "Sexual Revolution" of the 1970s?

The former marked a clear political will to distance itself from Christian law in terms of sexuality, filiation, and marriage. Crimes associated with heresy, such as sodomy, incest, and zoophilia, were abolished. Filiation was separated from procreation not only for men but also, to a lesser degree, for women. Sexual relations and even childbirth were no longer events that played a role in determining issues of filiation outside of marriage. Sexual infractions were limited to the punishment of violence. The validity of marriage no longer depended on its being sexually consummated.

Granted, this model, derived from the Napoleonic Code, was very conservative and inequitable and it straightjacketed the will within very narrow confines. It was not a realm of contract, but rather one of institution, in the sense that, here, the will had to bend to a very precise framework and, outside marriage, there was no salvation. However, these codes did indicate a political will to distance itself from nature. During the parliamentary discussions that preceded the drafting of the Civil Code of 1804, legislators underscored the extent to which nature was capricious and blind and that they could hardly leave the destiny of

men up to such an arbitrary force.[6] This was a sort of return to the Roman "Grandeur of Law" but in a much more reprehensible manner, because what we see emerging is, on the one hand, a shift from what we would call the "laws of nature" towards a principle of reason. Thus, for example, those who committed suicide were no longer criminal but rather insane. On the other hand, the family system derived from the codes, while being artificial, was careful to protect the "appearances" of nature in contrast to Roman law, as if one had to soften the force of a definitely existing authority even if the law had decided to turn a blind eye to it.

The reforms that began to operate in the name of equality and justice from the end of the nineteenth century that were given to women led astray and to children born out of wedlock, did not take as their source the idea of contracts or individual freedom, but set about dipping into the old Christian well to thwart the norms derived from the Napoleonic codes.

Thus, little by little, the importance that Christian law granted to sexuality and procreation worked its way into secular legislation regarding filiation. Because it was "true" that a man or a woman who engendered a child was the father or the mother of this child, it was necessary for the law to acknowledge this truth regardless of the willingness of the protagonists to assume such roles. Later, it was the law that took responsibility for the right to turn towards procedures of artificial insemination such that we only perceive these procedures as ways of correcting nature rather than imagining them as a willful act to become a parent.

But this idea of the law limiting individual freedom went much further when the law began to speak in the interests of the child in order to decide the pertinence of new family configurations emerging from the sexual revolution. This notion of the interest of the child, which informs a significant number of norms, requires the knowledge of experts to determine what is supposedly good and bad for the development of children. Thus, having two parents of the same sex is bad, as is not having a father or a mother, and having more than two parents—even worse.

In terms of sexual infractions, modernity was a strange return to the idea of nature. First, toward the end of the nineteenth century, there appeared a discourse regarding sexual perversions whose typology was modeled after many Christian prohibitions. This time, however, they were not founded upon divine will but rather upon a type of psychiatric knowledge of the truth of sexuality.

Almost a century later, following the sexual revolution, a

[6] MARCELA IACUB, L'EMPIRE DU VENTRE: POUR UNE AUTRE HISTOIRE DE LA MATERNITE (2004).

legislative arsenal was built which presupposed a veritable state knowledge about what sex was, about the stages of its development, and about the psychological evils it supposedly produced when there was a violation, or when the young, or not so young, were exposed to certain kinds of scenes.

Sexuality was not an activity whose value, importance, and significance were left to the beliefs of each individual. The state imposed these values supposedly founded upon official knowledge, and more or less elaborated by psychological discourse.

With regards to gender, the forced division of the population into two groups continued to operate as in the past, with institutional identities assigned to each individual. But this was occurring in a context where statutory distribution made less and less sense considering the advances made towards the equality between the sexes. Those who wished to change their sex had to base their request in nature. They had to demonstrate that they were sick, that they were victims of a syndrome, and that they had undergone irreversible hormonal and surgical interventions.

Thus this sexual revolution made in the name of freedom shackles itself to a Christian past in a much more fundamental way than during Napoleonic codification.

It might well be asked what could have been done to rid ourselves of this juridical ideology of religious origin. The response is fairly simple: it would have entailed the state abstaining from either encouraging or prohibiting the realization of certain values within institutions, that is, values founded on a truth-seeking type of knowledge. This abstention would have afforded possibilities to individual freedoms and contracts that would have been far more vast than those enjoyed today.

In order to do this, the State would need to stop dividing the population into two genders in such a constraining way and no longer endorse a series of beliefs organized around nature, around values, and around the importance and seriousness of sexuality. It would need to limit itself to punishing the corporal violence that one individual inflicts upon another.

In terms of family, the end of this ideology would allow for the possibility of inter-individual contracts, that is, the possibility of individually modeling the form that one's couple or filiation would take according to one's wishes.

The role of the State would be that of guaranteeing each individual the possibility of freeing themselves from the cultural spaces into which they are born. This would enable the State to continue the task that it defined for itself at the end of the nineteenth century, namely, to provide a counterbalance to the family, to religious communities, to

fundamental social groups and, to permit the peaceful co-existence of different beliefs in matters of family, sexuality, and identity.

Thus, following the example of the Marquis de Sade, who said to the revolutionaries that it was necessary to "[m]ake more of an effort" if they really wanted to be "republicans,"[7] we can recommend the same to those in favor of secularizing our societies.

[7] MARQUIS DE SADE, LA PHILOSOPHIE DANS LE BOUDOIR 126 (Jean-Christophe Abramovici, ed. Paris, Flammarion, 2007).