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## The Concept of Law:

### A Wittgensteinian Approach with some Ethnomethodological Specifications

Baudouin Dupret

The question “what is law” is devoid of relevance. There is no such thing as law *per se*. There are only ascriptive uses of normative words and expressions sharing family resemblances across languages, cultures, institutions, activities and contexts. By ascriptive, I mean that these words serve to qualify several kinds of entities, e.g. persons, actions, places and groups. As a consequence, there is no definition of law that should be looked for; one may only achieve descriptions of the surface and deep grammars of these normative “language games”. Law is not an empirical reality that must be discovered; it is a conceptual issue that cannot be severed from the context of its uses. This paper is an effort at clarifying all this. It will not reveal anything new, but will help to sort out questions, avoid logical deadlocks, put issues straight, and set the proper conditions for the adequate description of normative language games at work.

Centuries of definitional endeavours have not solved the question of *what “law” is*. This is not because there remains some additional factor that would make such a definition complete. Looking for the law as something material makes it look like the quest for the Holy Grail. But law is not something that belongs to a physical world in which words correspond to external realities. Law belongs to the conceptual world and, as such, gets its meaning from within the framework of its practical grammar, that is, its grammar in use. What must be avoided here is an original philosophical sin, that is, the category mistake that makes us mistake the mind for the brain and mind-related issues for neuronal physicalities.

Our inquiry into the grammar of the concept of law is an attempt at clearing the fog that surrounds the scientific definition of law. The first clarification concerns precisely the

“scientific” predicate. Instead of succumbing to the “enchantment of theories” (Hutchinson, Read and Sharrock 2008: 91), it is better to look at what lies before our eyes, that is, the language as used in contextually observable situations. This is not to say that the solution to our conceptual puzzle will come from empirically founded factual discoveries, but only that, since language is never on holiday (Wittgenstein in Monk 1991), it provides us with contexts in which we can observe how meaning is ascribed to the world, through words and in an intelligible way.

The idea of a science of law treating legal phenomena as if they were physical facts is simply absurd, as Peter Winch has already warned us with regard to the whole of the humanities (Winch 1990). The fundamental mistake, here, is to suppose that the “social” can be grounded out of any intentionality, that is, out of the orientation of human thinking toward something, as if one could describe it independently of its intelligibility for the members of any particular society. To phrase it bluntly, it is impossible to research “objects” like “social behaviour” as if they were “raw facts” providing us with a kind of empirical proof rather than as a concept whose usage must be elucidated (Hutchinson, Read and Sharrock 2008: 60, 70, 77). There is no such thing as a science of law, but there are conceptual investigations, the investigated concepts of which are those of the people whose (ascriptive) activity is under scrutiny.

This fundamental category mistake originates in the conception of our participation as individuals in society as if we were causally determined, in the sense of David Hume and John Stuart Mill, i.e. in a relation between “objects” and not between “intentions” (Hutchinson, Read and Sharrock 2008: 68 and the following, 145 and the following) The causal language of the sciences is not adequate to the social world. Moreover, the social world develops its own causal language games (Winch 1990: 38). Understanding a social phenomenon - and that obviously includes the law - consists of describing regularities in the

ways human beings understand each other; it is not catching what takes place independent of the ways human beings understand the social and, through their understanding, contribute to its production.

### **Studying Socio-Legal Phenomena is a Conceptual Investigation of Language-at-Work**

Empirical and conceptual issues must be sorted out. To take a famous example, the question to know whether the dodos of the Mauritius islands “exist” is empirical, and its answer requires criteria allowing to say “what counts as” a “dodo”, the “Mauritius”, and “existence”. But to know whether the world exists beyond my thoughts is something that cannot be solved through the experimental method; it is a conceptual question on the place of the concept “reality” in the life of those who live with this concept, a question relative to the purposes specific to those people and sensitive to circumstances from which it cannot be abstracted (without detaching it from what constitutes its identity). In the same way, to know whether there exist actions truly altruist is conceptual, since one cannot answer it but by attaching it to the circumstances and the purposes specific to the context that constrains it (Hutchinson, Read and Sharrock 2008: 75-79). Law belongs to this category of phenomena that are fully conceptual, that is, that cannot be severed from the specific circumstances of their use and from their recognition by members of society as such. To be sure, “conceptual” must not be understood as distinct from, or opposed to, “practical”, since a conceptual inquiry is necessarily an investigation into the deep grammar of the concept, that is, in the grammar of the concept-in-use.

Describing, when one seeks to study social phenomena, is describing actions, not movements. “Action” means, in a deflating way, “meaningful acting”, and that implies understanding it in relation to the structure of intelligibility spontaneously mobilised by

members and not to a social structure conceptualised by social scientists. If we describe something as punching, we have necessarily included the intentions of the person who hit; otherwise, one would have only described a gesture. In other words, the description of an action is necessarily intentional. If we say of somebody who washes his hands that she is performing her ritual ablutions, we describe, through the inclusion of what accompanies her gesture, her action. What constitutes the identity of an action, that is, what makes somebody's gesture that of a particular category (what makes it a punch or an ablution ritual) is not an empirical issue, but only a conceptual one. The description that one will give it cannot be empirically falsified: the gesture will always remain the same. And if the meaning of the gesture seems obscure, one will make judgements about the internal relations that link it to its author's intentions. By internal, we mean that the relationship is not between two distinct entities, but rather between things that "go together" (like "burning", which goes together with "fire"). In that sense, the description of an action is also "intensional", that is, it includes the predicates that characterize it and make it different from another action that could be accomplished with the same gestures. Pleading, suing, writing conclusions or sentencing are actions, not movements of the hand or the mouth. They cannot be described independent of the authors' intentions, out of the specific context that makes them meaningful, and out of the internal relations that link them to the concept of law.

There is nothing to find beyond language-in-use; what must be described lies within the language. The word "law" is only one word among others, and its criteria will vary according to its usages. In other words, one must identify the language games within which it is used in order to discern its criteria of intelligibility. This does not mean that members of society invent the reality of law by language or that the word "law" circularly refers to things that are exclusively linguistic, but that they "orient to" its reality through the description

affordances (what is made possible in terms of description) of language: the language and the reality of law are related in an internal way.

Conducting a conceptual investigation is the opposite of any reductionist generalizing. The idea of a “science” of law is itself based on a methodological or a substantial reductionism, that is, on the adoption of some specific method or explanation prior to the examination of the phenomenon under scrutiny. All the social sciences pretend to furnish a methodological lens; they are obsessed with the forms of explanation (Hutchinson, Read and Sharrock 2008: 93). It is precisely this type of *a priori* conception of understanding that muddies the water. One must get free of any idea of an external, unique, reflexive and all-encompassing understanding - and of its capacity to absorb all empirical situations - and substitute the study of social phenomena in themselves and for themselves, so as to describe how specific activities are embedded in social environments. This also holds true for the law. In such a perspective, there is no reason to consider that social scientists are justified to exclude indigenous criteria for identifying legal situations and actions, and for making sense of them. These criteria are established in and only in the contexts within which these situations and actions take place, to the exclusion of any overhanging and ironic “scientific” attitude.

Severing the study of socio-legal phenomena from the obsession of theory and methodology and re-focusing it on ordinary people’s identification and comprehension of legal situations and actions contributes to the elucidation of what is ordinarily understood by these people because of their familiarity with the world within which they jointly live. This can be achieved providing we do not consider that the comprehension of something means understanding it reflexively, but rather its understanding it contextually for the practical purposes of the situation (which includes possible misunderstandings, errors, fuzziness, etc.) The descriptive elucidation of people’s understanding is not an interpretation, in the precise

sense of the word, since, as Wittgenstein justly remarks, one interprets only when one does not get the meaning of something. It is not about discovering something ignored so far, or about choosing among alternative hypotheses or interpretations; it is about describing, about producing a perspicuous presentation.

There is nothing obscure in the law that stands below the surface and is waiting for explanation, but rather only phenomena that are open to view and therefore to description. The criteria of identification of what is legal do not belong to social scientists but to the context in which an action take place. The adequate modes of description derive from the practices in which people are engaged and the criteria for their adequacy are those which are used by the people who participate in these practices. For instance, what counts as a “suicide” cannot proceed from a sociological explanation independent of, e.g., what the forensic physician, the police, the media or the family considers as a suicide. In other word, adequate identifications are these which are appropriate to the practices of a specific environment.

### **Clearing the Conceptual Confusion that surrounds the use of the Word “Law”**

Brian Tamanaha reveals some of the many weaknesses in the reasoning of the proponents of legal pluralism, among which is the ‘conclusion that all forms of social control are law.’ (Tamanaha 1993: 193) Calling all forms of ordering by the name “law” creates an analytical mist. When they use “law” as a synonymous for a social norm, legal pluralists produce an ambiguity since they use a word which has some commonsense meaning to perform an analytical task that runs contrary to this meaning. In other words, the use of the word “law” so as to describe what common sense would never associate with law (e.g. good manners) obfuscates the analysis, especially if this alleged concept either does not carry anything which

makes it distinct from other less connoted words (like norm) or surreptitiously carries the distinctive characters of what it is supposed to be contrary to.

Tamanaha goes further and states that ‘lived norms are qualitatively different from norms recognized and applied by legal institutions because the latter involves “positivizing” the norms, that is, the norms become “legal” norms when they are recognized as such by legal actors.’ (Tamanaha 1993: 208) This critique is most sound, although the dividing line is not so much between lived norms and positivized norms but between law as recognized and referred to by people (whoever they are) and other moralities and normativities as recognized and referred to by people (whoever they are). In other words, law is not an analytical concept, but only what people claim is law. The existence of law is evidenced only by its self-affirmation or, rather, by its identification as such by people. This does not preclude the study of normativity in general, on the contrary, but it seriously challenges the possibility of conducting it under the auspices of the non-descriptive notion of “legal pluralism”.<sup>1</sup> It is non-descriptive in the sense that it has used the legal vocabulary to describe general normativity while using general normativity to completely dilute law (as it is referred to by people in general). It must be added that one can speak of “pluralism” only among things of the same kind. When speaking of pears and apples, one can say that there is a variety of fruits, not that there is a variety of either one or the other. When speaking of law and morals, one can speak of a variety - or a plurality - of norms, but not of a variety - or a plurality - of either laws or morals. Speaking of “legal pluralism” when addressing the variety of norms, one commits a specific category mistake that consists of changing the denominator while not changing the numerator.

One risk of speaking of “law” when dealing with all forms of norms is, first, to equate them with something which people consider totally different. Second, it is to take a specific historical concept for a sociological tool. Third, it is to assume a functional definition of some

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<sup>1</sup> This is why I proposed to substitute the notion of “normative plurality” (Dupret, 1999).

general social mechanisms (social control), whereas non-intentional phenomena cannot be given any social function unless we assume the existence of a transcendental entity designing places, roles and goals for human beings and behaviors. Instead of elevating law to the rank of an analytical instrument, I suggest to go back to the observation of social practices and to consider, in the broad field of norms, that law is what people refer to as law in the various language games in which the word is involved. This is what Tamanaha (1997: 128) advocates. According to him, ‘the project to devise a scientific concept of law was based upon the misguided belief that law comprises a fundamental category.... [but] Law is whatever we attach the label law to’. In other words, it is a term-in-use: ‘what law is, is determined by the people in the social arena through their own common usages, not in advance by the social scientist or theorist.’ (Tamanaha 2000: 314)

The inquiry ‘into the comprehensibility of society, into the ways in which social life can be understood and described when seen from within by members’ should be substituted for the theoretical elaboration of ‘a specific mode of comprehending society, a theoretical framework within which a substantive conception of society is to be construed.’ (Sharrock and Watson 1988: 59) A Wittgensteinian, praxiological approach requires using ‘the criteria that participants have for determining the salient features of interactional episodes,’ (Maynard 1984: 19) and this does not provide an interpretation of people’s conducts. ‘Rather, analysis is based on, and made valid by, the participants’ own orientations, characterizations, and exhibited understandings.’ (Ibid.) In other words, while the opposition between meaning and behavior ‘requires its solution by means ... which are external to the orderliness observable in the sites of everyday activity,’ e.g. social structures, local cultures, schemes of behavior, the praxiological respecification considers “the problem of social order” as completely internal to those sites.’ (Sharrock and Button 1991: 141) It also means that it is not so much “why” questions which should draw the attention of legal studies, but rather “what” and

“how” questions, i.e. “what is involved in doing this or that?” or “how does X manage to do Y?”

As a conceptual inquiry, the study of law in action does not look for empirical evidence in the world grounding its theoretical assertions. However, investigating actual social situations may show how an inquiry into normative concepts is both grammatical and contextually dependent. The case of “Islamic law” is illuminating in that respect since it perfectly illustrates how a normative corpus was characterized in terms of “law” at a specific historical time. It is probably a truism to say that “Islamic law” is a concept belonging to a taxonomy. It is more striking and sometimes irritating in the current context to acknowledge that this concept is the product of a specific scholarly enterprise that aimed at better understanding, controlling and reframing the phenomenon of normativity in Muslim societies. Normativity existed prior to the attention Orientalist science gave it; Islamic law did not. Today, to speak of Islamic normativity in terms of “law” consists therefore in considering an historical concept as something natural.

The conception of local norms largely followed, in Muslim societies, the evolution of legal thought in continental Europe, which was characterized by national legislation and codification. In this process, it belonged to scholars to decide whether a norm was qualified to be elevated to the status of “law”. When ratified at a political level, these scholarly opinions became the new law of colonial and even indigenous administrators. There are many reasons for this conceptually-ethnocentric legal positivism, e.g. the fact that colonial administrators were often trained in law and that a majority of scholars combined oriental and legal studies. This orientalist, positivist conception perpetuated and remains; it was reproduced, from generation to generation, in the West as well as in the East. It became natural to speak of Islamic normativity in terms of law. While using the expression “invention of Islamic law” is often perceived as an attack against Islam, suggesting that this law is man-made and not

divinely inspired, the question is not the divine nature of “Islamic law”, but that speaking of Islamic normativity in terms of law is, first, contingent to a specific time and place and, second, deeply influential on the understanding one has of that normativity.

The process of codifying Islamic and customary normativities started during the colonial era and was inspired by this positivist conception of law. It extended after independence and is today more alive than ever. One can find this positivism within legislative, judicial and educational practices. The nature and epistemology of the reference to Islamic norms was totally transformed within two centuries. Even the so-called “Islamization process” that can be observed from the beginning of the 1970s is not a return to classical forms of normativity, but the adoption of legislative texts that refer to Islamic Law (*shari‘a*) and jurisprudence (*fiqh*) as a source of inspiration. In Egypt, for instance, the authority of Islamic normativity transits, at the legislative level, through the parliamentary institution, which has specific rules of speech, voting and majority; and, at the judicial level, the judge always operates via Egyptian legal rules as codified by the legislature and interpreted by the Supreme Court. It is therefore obvious that Islamic normativity is today mediated by constitutional and legislated law to the point that its general balance, fundamental principles, sources and references, i.e., its grammar, radically changed. This holds true at both the institutional level (with constitutions consecrating the separation of powers, the hierarchy of jurisdictions, the legislative principle, popular sovereignty, and fundamental rights and freedoms) and at the substantial level (with statutes passed in a spirit of non-contradiction more than continuity with Islamic normativity).

### **Nominalism, Linguistic Heterogeneity and Family Resemblances**

Today, the word “law” has become hugely polysemic, creating more confusion than clarification. Of course, the history of one specific word, e.g. “law”, can partly explain the shape its grammar has taken. However, its meaning is not determined by its genealogy but by the intelligibility it contextually and practically takes. Moreover, it is obvious that if one word can refer to very different phenomena, different words can point to similar phenomena. It is only the inquiry into the deep grammar of such word - which points to the morphology of its many uses - that will help to clarify the conceptual mist created by dazzling nominalism or blinding linguistic heterogeneity.

A grammatical inquiry’s first task is to escape the slippery slopes of definitional endeavors. In that respect, characterizing law as what people refer to as law does not constitute a definition but a way to deny definitions any relevance. It clears the way for the grammatical inquiry by showing that the question of what the law is does not exist outside the actual uses of the word and those that share a family resemblance with it. Any scholarly definition is an enigma, whereas the practical grammar of the word lies open to view. Attempts at defining the law are most often either over-inclusive, i.e., they include phenomena most people would not consider to be law, or under-inclusive, i.e., they exclude phenomena many would consider to be law. They also underestimate people’s practical and context-sensitive understanding of the word “law” or its equivalents. People do not loosely use one word to refer to different phenomena; they specifically use one word to refer to specific phenomenon, to the production and intelligibility of which they orient in the local and temporal context in which they interact; the same word “law” can be used to refer to another phenomenon in another context or in another sequence. This is what the grammatical inquiry is all about.

The grammar of the concept of law must be examined in its contexts of use. This is a concept-in-use whose contexts can host various languages. The fact that many phenomena

take place in different linguistic environments does not mean that they cannot be translated from one language to another. The untranslatability argument asserts that a given concept, formulated in, e.g. Arabic (*qanun*), cannot be understood adequately in French (*droit*) or English (*law*), because its essence is accessible only in the language in which it was originally formulated. This argument runs against evidence: words are commonly translated from one language to another and nobody would ever deny the relevance of any such translation, even though nuances must sometimes be introduced to make the linguistic journey adequate. Every phenomenon, whatever the language in which it is expressed, can always be translated into another language, and rendered accessible to observation and description. This implies, however, '[r]ather than pretending to read a culturally standardized finished text over the shoulder of an imagined native, we will be living in the line-by-line production of ongoing actual native talk.' (Moerman 1987: 5) As nicely phrased by Jeff Coulter (1989: 101), 'meanings are knowable and, of course, known: they are governed by grammatical conventions which are determinable, and form part of the conceptual endowment of the human species, notwithstanding their differential empirical distributions of actual usage and the different kinds of language-games played with them in different cultures.'

A grammatical inquiry into concepts translated into various words in different languages cannot but be contextual. Contextual does not refer here to assumptions about "social structure", but to what is publicly relevant and procedurally consequential for members of society (Schegloff 1987). According to this conception, an analyst is not free to invoke whatever variables she feels appropriate as dimensions of context, but must demonstrate in the events being examined that the participants themselves are organizing their behaviour in terms of the features being described by the analyst (Duranti and Goodwin 1992: 192). What is relevant and procedurally consequential for participants is therefore necessarily grounded on tacit background knowledge of the whereabouts of the setting, its members and

the resources on which they draw to act competently and make sense of their environment. In other words, “contextual” must not be conflated with the background of understanding that is required to make sense of any situated action or utterance. Although the context is what is relevant and procedurally consequential for participants, there is no access to the understanding of this emerging context outside the sharing of background knowledge, first, among participants, and second, between participants and analysts. This is a reasonable unique adequacy requirement, that is, an empirically contextualised inquiry into the grammar of concepts. It differs from traditional ethnographic policies by its injunction to master the practical knowledge of competent members of the activity under study. It has to do with a manner ‘for demonstrating what a description says about a practice by enabling readers to see what is said by entering into the phenomenal field of that practice.’ (Lynch 1993: 302) It seeks to gain access to the way in which members observe, describe, explain, represent or otherwise engage in practical actions. It requires an epistemic attitude that, first, repatriates the objects of social-sciences discoveries into members’ seen and practiced routine social phenomena and, second, permits the transformation of the “seen but unnoticed” nature of such routine phenomena into noticeable practices open to description.

Ethnomethodological respecification requires the researcher to study the practical or praxiological grammar of contextualized doing and saying. It is necessary to study language games, in which linguistic usage and practical behaviour are seen as intertwined in a complex manner (Coulter 1991: 27). Instead of being ‘something beneath the surface’ (Wittgenstein 1963: §92) independent of their actualization or of the context in which they are used, ‘grammars of concepts are “rules” which not only specify the linguistic frameworks within which words, phrases or types of words or phrases may be used, but also ‘what counts as an application of’ such expressions.’ (Coulter 1989: 49) Carrying out a grammatical investigation is a means of eliminating misunderstandings concerning the use of words, which

are caused, among other things, 'by certain analogies between the forms of expression in different regions of language.' (Wittgenstein 1963: §90)

A word's grammar, therefore, refers in a descriptive manner to the modes of usage of that word. To investigate the grammar of concepts - in our case, legal concepts - therefore supposes inverting the traditional manner of doing research. Traditional philosophy encourages us to give an essentialist or definitional significance to terms. Researching the grammar of concepts, in contrast, allows us to problematize epistemology by showing, in the daily use of expressions, variations, systematic ambiguities, and manifest sensibilities. For 'grammars reveal the manifold connections between words and other words, phrases and expressions as these are used by "masters of natural language", and the manifold connections between kinds of expression and sorts of circumstance within which and about which they may be used.' (Coulter 1989: 49)

An excellent illustration of the fog that is created by a nominalist, etymological attitude is given by Layish and Shaham, in the second edition of the *Encyclopaedia of Islam*, in which they give the Arabic word *tashri'* a religious signification on the ground of its etymology, while ignoring the fact this word is used today to designate the notion of legislation in its most general sense. Starting from their pre-established knowledge of the etymological trajectory of the word, they impose on the legislative phenomenon a dimension that cannot be documented. Moreover, in their attempt to evaluate the transformations of *tashri'*, they posit a distinction between legal orthodoxy and deviance that places the scholar in the situation of telling which rules are orthodox and adopting an ironical stance vis-à-vis the many ways in which people deceive themselves when adhering to one or another conception of Islamic law. All this places the debate on normative ground, while dodging the central question of how and what people do when they refer to the word "Sharia" and its translation as Islamic law in current contexts.

According to the grammar of its uses, Islamic law can be, e.g. the reference to Islam in a legal setting, a slogan claiming the illegitimacy of a political regime, a concept identified with Islamic normativity in pre-nineteenth century history, a symbol of Muslim societies' backwardness, or a word belonging to constitutional vocabulary. There is no substantial definition of Islamic law which these many uses of the expression would be an instance of. Moreover, while "Islamic law", "Sharia" and other concepts sharing a family resemblance to them are only what people refer to as such, we should not assume that the use of the same expression at different times necessarily means that the word denotes the same meaning and technical definition. There is no reason to assume that what people refer to as Islamic law is identical to, or different from, the set of technical provisions that form the idealized model of Islamic law. The question is not relevant, because it is totally disembodied from the expression's actual and practical grammar and fails to address the phenomenon itself, i.e., the use of the expression and the practice of referring to it.

Starting with a concept such as "law" in order to characterize normativities in historically, geographically and linguistically different contexts distorts the analysis. There is a logical order that must be respected. This consists in exploring the grammar of the terms and concepts under scrutiny and, on the basis of this grammatical map, clearing at least three related issues. First, the nominalist conundrum: through the description of a "word at work" in different settings, one can see how it can have, despite its formal identity, different meanings. Second, family resemblances between different words: despite their formal heterogeneity, many words and concepts share grammatical features that make some of their specific uses resembling one another. And third, the translatability between languages: linguistic heterogeneity does not preclude the capacity of words to have a grammatical resemblance, that is, a similarity of meaning.

### **Rule and Rule-Following: a Grammatical Relationship**

Against incorporation theories, a praxiological approach shows that it is impossible to open the “black box” of the rules and their authority by substituting another black box that makes people mere individual receptacles of cultural principles consubstantial to them. Authority must be understood as the modality of an action (one acts with authority), a personal feature (someone has authority on others) or the quality specific to a norm (the authority of rules). It is always the predicate of something that it somehow accompanies. Essentialist approaches consider rules independent of practice: they are endowed with clear meaning and determine people’s behaviour in a univocal way; they are invested with some intrinsic authority that proceeds from their belonging to the religious repertoire. This allows it to escape hermeneutics. On the other hand, a praxiological approach considers that rules are practical accomplishments and their authority a modality linked to people’s public orientation to the force they recognize in them. Rules do not pre-exist their practice and their authority is not an intrinsic feature.

The type of grammar we seek to describe is a deep, practical one, which relates words and concepts in an internal way. This is not a relationship of formal logic, in which words correspond to external things (like the correspondence theory of Wittgenstein’s *Tractatus*); nor is it an *a priori* relationship specific to scientific taxonomies - in which items like “cats” and “bats” are subsumed under the genre “mammals”. We seek instead to describe a practical grammar in which concepts are at work in contexts, so that an item like a “tomato” is not considered as a “fruit” but as a “vegetable” because of its specific use in cooking. This is also a deep grammar, not the surface in which sentences are ‘taken in by the ear’ (Wittgenstein 1963: §664). A deep grammar reflects the practical and meaningful specificities of each of the many combinatorial possibilities in the use of words. Such a deep grammar is “perspicuous”

in that it produces ‘just that understanding which consists in “seeing connexions”.’ (Wittgenstein 1963: §122) These are not external connexions true by virtue of their relationships to something other than the game to which they belong. In the frame of law, it means that rule and rule-following are connected, but this connexion is not true because of its relationship to Nature or God. They are related in an internal way. The rule is a rule with regard to the game to which it belongs; rule-following is an application of the rule in the sense that it correctly applies the way of doing the rule prescribes. And learning the rule does not compel me to do anything, but it equips me with the ability to act in a right way. The rule is a template for a course of action (Sharrock and Dennis 2008: 42)

Rules prescribe a way of doing things; they are not truth propositions (Sharrock and Dennis 2008: 41). “Following a rule” is acting on an instruction explicitly or implicitly formulated by the rule. “Acting in accordance with a rule” is a normative practice, as assessment of the accord between the rule and its practice requires the application of a standard of correctness. Rules are not causes of behaviour, like the contact of a staff with my leg is the cause of its being broken. Rules can be reasons for my behaving in one or another way, as when I shake hands of people in my office. Here, I follow the rules of politeness blindly, since I do not ask myself whether it is proper to behave in this manner: it is simply the normal way to behave in such circumstances. But it does not follow that the relationship between rule and rule-following is causal. The connection between the steps in a rule-governed sequence is internal and normative, not external and causal. Rules contain within themselves what includes compliance with them. I always retain the capacity to act differently, as in the case where I want to show a person I host that I am angry or so conceited that I do not need to condescend to treat him politely. A relationship is causal by necessity, but this is not the case between rule and rule-following, where the relationship is internal, i.e. grammatical: rules are mandatory only as custom in a social context (Harré and Tisaw 2005).

## **Rule-following**

Wittgenstein's reasoning aimed to demonstrate the absurdity of a "quasi-causal" representation of rule-following, which treats rules as abstractions engaging mental mechanisms. This deterministic vision should, he argued, be replaced by a perspective that emphasizes the practical basis of rule-following (Shanker 1987: 17-8; Lynch 2001: 171). Wittgenstein shows a praxeological turn as he examines the grammar of something like "rule-following". He was attempting to show how the internal relation between the rule and the actions undertaken in accordance with the rule was sufficient to engender the rule's extension to new cases, without it being necessary to look for causal, that is, biological, psychological or sociological, bases for this extension. In other words, the intensional composition of the rules opens its extensional applications.

There is an internal relation between rule and rule-following. The rule is understood as a rule only because it serves in practice as a guide for action. It finds meaning only in the order of concerted activities that are already in place when the rule is enunciated, violated, ignored, or followed. The understanding of the rule is manifested in and through these practices, and cannot be abstracted from them (Lynch 1993: 171-4; 2001: 132-3). Following a rule, then, is not just a matter of interpreting it, as if its significance were already wholly contained in its abstract formulation, but rather of acting and manifesting our understanding by acting in accordance with this rule. This does not preclude faulty interpretation of the rule or doubt as to its meaning or the steps to be taken in order to obey it; but these are exceptions, i.e. secondary language-games: their mere possibility is conditional upon the knowledge of a primary language-game that sets the vocabulary for addressing rule issues.

Understanding a rule and interpreting it are necessarily not the same thing. Interpretation is a reflexive activity concerning something that is not fully understood, whereas understanding is neither a mental activity nor an experience that accompanies the act of hearing, seeing, or reading; nor is it a behaviour:

What distinguishes my actually understanding, i.e. having knowledge, from merely supposing or thinking that I do, from merely believing so, is nothing interior to my mind or brain (which I might find difficult to describe), but is my correct, ratifiable performance, my proper application, my exhibited capacity to do, say or in some other contextually appropriate manner to satisfy the relevant criteria for my having, indeed, actually understood whatever it was I claimed to have understood'. (Coulter 1989: 63)

An action may occasionally be qualified as a flawed interpretation of the rule, but this expression has meaning only to the extent that it is made from within the recognized institution of a normative system. Rules are acquired and embedded in explanations, instructions, examples, errors, training, verification, etc. In other words, they are embedded in practices (Coulter 1989: 67). Lack of understanding manifests the failure of understanding, not the relative nature of the rule's meaning and application. The established practices and techniques of a normative system may not be separated from the terms in which a precise action is described as understanding, alternative understanding, or misunderstanding. A rule can only have meaning, be applied and followed against a general backdrop of institutions, practices, and behavioral techniques that are socially shared and that provide criteria allowing one to distinguish a situation in which a rule is really being followed from another kind (Coulter 1989: 66). Rules and the practice of rules are the expression of a "form of life" exhibited in the very coherence of our activities. And, because of this coherence, one notices errors, disturbances, and misunderstandings and their authors are held accountable (Lynch 1993: 176-80). There can still be, of course, a place for fuzziness and uncertainty.

## Deontic and Legal Ontology

One might argue that the term “law” has been grammatically misconceived. It has been taken as an abstract, a-historical, scientific concept, without considering its overloaded meaning, the many features it surreptitiously conveys, and therefore the false analogy its use suggests when describing normative phenomena. Or it has been taken in a sense that runs against its ordinary understanding in contexts in which the word is used, with the consequence that this word when used in its “scientific” sense does not serve to describe the same word when used in its “ordinary” (including its “professional” and “technical”) senses. The term “law” is a word inserted in historically-situated language games. Law may then be considered as a situated and specific concept which found its sociological definition with Max Weber, for whom it was closely associated with the emergence of formal-rational bureaucratic states in the nineteenth century. Of course, the concept has gone through major changes during the last two centuries, but this does not preclude our capacity to speak of it as “law” since these changes did not affect the phenomena to which scholars would have decided to anachronistically and anageographically apply it. Indeed, the concept of law as used by John Austin, when drafting his *Province of Jurisprudence Determined* (1832), and the concept of law as used today in a New York law firm show radical differences. Nevertheless, they share the same family name, which means that they can be compared on the same footing: their resemblances and differences constitute a property endogenous to the family and its evolution, i.e. to the situated concept of law.

What is true when shifting across time is equally true when shifting from place to place. Here again, family resemblances can be so strong that one can speak of family identity. The name of the family changes, but not the fact of belonging to the family. Here we see how the meaning of words is not an issue of etymology but of practical use. As noted earlier, the

word “*tashri*” has an etymology that relates it to the Sharia, that is, to Islamic normativity; today, however, the expression “*al-tashri‘at al-misriyya*” is given the very secular meaning of “Egyptian legislation”. The translatability of words is a practical and effective achievement: if I use today the Arabic terms “*dustur*”, “*qanun*”, “*huquq*”, “*mudawwana*”, and “*tashri*”, I will be understood, according to the context of this use, as saying in English “constitution”, “statute”, “rights”, “code”, and “legislation” respectively; if I have to translate from one language to another, I will use these words as equivalents. Something can be lost in the process - “*traduttore traditore*”, as they say in Italian, “the translator is a traitor” - but it is wrong to start by assuming intercultural miscommunication, especially when a vocabulary has been crafted so as to fit the requirements of a foreign language.

There is also a distinction to be made between an ontological conception of the law and an ontological analysis of the law. In the former case, the law is considered as part of the historical and structural ontology of the world (i.e. the *being* of the world and of the law); in the latter, it is considered as a phenomenon whose being, e.g. in language, deserves an analysis in action and in context (the *way of being* of the world and of the law). The former is a metaphysical conception; the latter, a praxiological one. I suggest renouncing the former and adopting the latter. There is no place for legal historicism, in the sense of law being a necessary component of human societies and social structures. Law is a contingent fact, dependent on specific and contextual histories. Most often, when we speak of law in non-state, non-globalized and/or non-contemporary societies, we do so from within our own categories, not from those of the people to whom we attribute the use of this law. By so doing, we proceed by analogy: it is as if these people conceive of this or that as we conceive of the law. However, this is a false analogy for two main reasons. First, it does not present itself as such, but rather as a scientific description. Second, it does not construct ‘new similes’ and does not ‘show connections’ (Wittgenstein, as quoted in Monk 1991: 357, 407), but hides the

grammatical features that make it either amenable to an analysis in terms of law or comparable to similes (other than the law) with which it shows connections that help us to see it anew.

The law is a specific, historical and contextual form of normativity. It is both an anachronism and a category mistake to attribute the quality of law to all normative phenomena. The normative character of cognition - what Heritage (1984) calls the morality of cognition - is something shared by humans-in-society; the law is not. There were and there still are social groups who live without law; there is no such group living without norms, as the relationship between norms and societies is necessary and internal. Our task is to describe the way these groups use and refer to norms, i.e. their “ethnomethods”.

For instance, when referring to Islamic normativity (the Sharia) as law, one commits a category mistake consisting of describing one specific phenomenon with the taxonomy in use for the description of another. Islamic law does not equate with Islamic normativity; it is an historical phenomenon that appeared with the will to build legal systems based on the formal-rational bureaucratic model. One can describe the ontology of Islamic law, but it cannot dodge its situated character, which is contemporary and local. And one can describe the ontology of Islamic normativity, which is based on the Koran and the prophetic tradition, including the family resemblances its grammar can have in specific situations with present-day (Islamic) law. In that sense, Islamic law is what people refer to as Islamic law and not what scholars ascribe to phenomena independent of the orientations of these people.

To conclude, one must add that it is wrong to say that, by limiting the concept of law to what is recognized as such by the people, i.e. the members of society, one misses the possibility of critique, e.g. that law is an instrument of power and domination. On the contrary, making the law a generalized process of controlling and disciplining deprives us of the capacity to examine what this specific form of normativity consists of, i.e. its ontology,

and therefore identifying the precise elements against which the critique can be directed. To the contrary, the description of the deep grammar of language games relating to the concept of law permits us to distinguish the occurrences and significations of this concept-in-use, as well as allowing us to clear the fog surrounding philosophical and sociological debates on the concept of law.

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