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THE PRACTICAL GRAMMAR OF LAW AND ITS RELATION TO TIME

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For people committed to a given course of action, the objectivity of social facts is a non-reflexive resource which is organized in a way constrained by the conditions, context and purposes of the situation. This objectivity has a “practical grammar” which relates multiple times and sites. In a succession of takes and retakes, the documentation of the past period to which it is referred proceeds through the objectivizing *mise en abyme* of the facts, events or objects in question: the present organizes the referred-to past within a local structure of relevance.

Praxiological sociology – of law among other subjects – has often been criticized for being micro-sociological and, consequently, of being unable to encompass broader “social structures” and their historical dimension (i.e. time in the sense of *longue durée*). We would like to show that such criticism does not survive the challenge of actual praxiological inquiry. The praxiological study of law is neither “micro” nor “macro”. Macro-sociological relevancies find their place in such inquiry, insofar as they are of concern to the people whose practices are under study. Historical temporality is therefore integral to such practices, on the condition however that it is relevant to people committed to a given course of action and not of suppositions which are specific to and imposed by the sociologist.

In this chapter, we address members’ orientations to the temporal dimension of law. In order to do this, we will analyze how the practical grammar of law unfolds in situations beyond those involving immediate co-presence, before addressing how members sequentially weave the law into such situations. Secondly, we will specifically address the role that time and history can play in such an approach. At each stage we will present legislative and judicial material that enables us to make our case. More precisely, we shall examine extracts from parliamentary debates, court decisions and family law proceedings in Egypt. Among other things, we will show how a network of legal and judicial bodies, and the historicity of their actions, are endogenously objectivized by the parties involved in the particular courses of action. It should be noted, however, that the chapter has a

programmatic dimension, as space constraints make it impossible to dive into the details of the many temporal threads of any legal practice.

Describing the practical grammar of law means examining methods deployed and exhibited contextually and in practice in order to “be legal” (Garfinkel 1974, 16). It is possible to talk about legal “ethnomethods”, i.e. ordinary, although partly specialized, practices for making sense of a situation in such a way as to ensure that it can be addressed and processed according to the terms and purposes of law. In other words, legal ethnomethods are embedded within commonsense, although they cannot be reduced to it – contrary to what Atkinson (1978) seems to claim when examining coroners’ legal reasoning in suicide cases.

Carrying out a praxiological study of law entails envisaging a variant of what John Heritage (1984) calls the *morality of cognition*. This expression suggests that the activity of competent members of a given social group is thoroughly permeated with normative judgments informed by actualized, approved or contradicted background expectations, which in turn support other subsequent actions. If we apply this theme to the normativity of interaction rather than cognition, is based on “mundane” methods – which can be extraordinary as well as banal – of reasoning, understanding, interpretation, categorization and inference, all of which are orientated in relation to an intersubjectively constituted horizon of normality (Jayyusi 1984). The normativity involved is a continuous accomplishment, with no time-out, which updates underlying and shared schemes of understanding and projects them in turn into the future. This accomplishment is performed in the course of interaction, so that normative (including legal) relevancies both pre-exist and emerge from interaction. More precisely, legal activity deploys its different grammars according to the various contexts in which it is embedded. The constraints exerted by such contexts are to be described, not as static elements of the interaction but as reflexive and fluctuating frameworks that actors reassess, and in relation to which they continually realign their actions.

The sequential organization of law in action

Practicing law is done by people who actively work out the objectivation of facts, texts and institutions. It can be said of legal action that members weave it through a multiplicity of takes and retakes, in an arborescence for which the present time represents a provisional completion. The threaded functioning of law is one of the main characteristics of its

practical grammar that is reflected in its intertextual organization, but without being restricted to it. The sequential nature of law in action results in people orienting to past and future stages of the process, relying on the former and anticipating the latter, and referring to numerous “actants” for all practical legal purposes.¹ The sequential combination of speech takes, retakes and exchanges gives the thread of law-in-action an intersubjective dimension associating multiple times and places.

Although in many respects fundamentally different, the approach taken in this chapter draws on Nekvapil and Leudar’s (2002) concept of dialogical network as an extension of conversation analysis. Conversation analysis studies the internal production and recognition of order in conversational exchanges, which are taken as turns at talk. The relation of turns to one another is analyzed as a production and articulation of sequential order. In its most ordinary sense, a turn at talk (what we shall call speech turn) is an utterance by one of the parties present along with others in the conversation. However, some exchanges of speech are mediated exchanges without co-presence – without the different parties involved in the exchange being physically together. What Nekvapil and Leudar identify as a dialogical network demonstrates the complexity of exchanges in public discourse disseminate through the media. Their notion provides the possibility of describing the networks of sequences of exchanges among parties who are distant in time and space and whose actions are mediated and connected between them thematically, interactively and argumentatively (for example, in press conferences, press releases, and interviews).

We do not adopt the concept of dialogical network because of its theory-laden, formal-analytic character. Indeed, the dialogical network is a scholarly construct that does not properly account for the orientation of participants to the threaded nature of law – their contribution to and acknowledgement of the sequential co-weaving of the law. The difference between the concept of a legal dialogical network and our conception of the threading of the law is akin to the difference between the concept of traffic jam as a physical phenomenon observed from a hovering helicopter and the description of the same traffic pattern as a local phenomenon of order in which every driver actively and more or less competently participates (Livingston 1987).

¹ The terme “actant” must be understood in a flat way and without all the theoretical baggage of semiotics. It designates these entities people routinely refer to as acting ones, although they lack individual and autonomous agency (e.g. the legislature, the state, the law).

In judicial contexts, members weave together the threads of the case, while in parliamentary debates, MPs address various audiences in accordance with institutional and national relevancies. From within the group of people who collaborate in its weaving, the case or the debate can be given a name that allows it to be specified. Thus a case can be taken as specific and recognized as such (e.g. the “case of the Camorra pentiti” in 1986; cf. Jacquemet 1996), while being associated in many ways with a broader debate from which it nevertheless remains autonomous (e.g. the question of political power in Italy).

The threads to which members orient are composed of successive retakes of utterances articulated around a single theme. Members link the takes and retakes reflexively in a way that permits both their use and their extension. Thus, for instance, a parliament can intervene by taking up a debate that started at the judicial level, with the parliamentary debate and its legislative result subsequently being once again placed before the courts. The weaving is generally achieved through procedures such as transferring a case from the prosecutor to the judge, institutionalized exchanges such as answering a judge’s request, categorizations such as making the specific issue of divorce an instance of the general debate on women’s rights, and specific language games (cf. Klaus, Dupret, Ferrié, 2008). We illustrate such weaving of takes and retakes with a summary presentation of the development of Egyptian family law as members orient to it in an ongoing way.

Family law or personal status law in Egypt is the subject of constant and continuous debate. By 1870s reforms led to the adoption of a complete system of codified law and the creation of jurisdictions based on the civilist model, and family law remained the sole domain of the Islamic law courts (Sharia courts). It was only in 1920, and again in 1929, that family law, which is specifically isolated from the rest of civil law, became partially codified, among other things, on the question of the forms and conditions of divorce. Successive legislative authorities preferred not to reopen it for another half-century, because they deemed it to be particularly sensitive. In between these two periods, however, the new Republic of Egypt had unified the judicial system, eliminating the Sharia courts and transferring their powers to ordinary courts made up of judges trained in the law schools’ secular, positivistic tradition. In 1979, the President of the Republic, using prerogatives that allowed him to pass legislation for emergency reasons during parliamentary recess, enacted decree-law No. 44/1979 amending certain provisions of the laws on personal status. Among the many amendments that he brought to the decrees of 1920 and 1929, there was a provision giving a wife the right to obtain divorce

automatically when her husband contracts a second, polygamous, marriage. When the Egyptian parliament returned after the recess, it approved the enactment of the decree-law. During parliamentary debates, however, various members of the opposition noted the irregular nature of the emergency procedure, while others expressed their opposition to the provision allowing divorce in the event of polygamous marriage. The text of the decree-law also was the subject of intense controversy outside the parliamentary chambers. Factions of the press went to town on it. Numerous judges also claimed that the law raised constitutional issues. It is important to note here that the Egyptian Constitution, whose Article 2 stipulated that “the principles of Sharia are a main source of legislation,” had, following a 1980 amendment, stated that Sharia constitutes “*the* main source of legislation”. One of the questions, therefore, was to establish whether the new law was contrary to those principles. The Supreme Constitutional Court was asked to take the case and rule on the constitutionality of the law. In May 1985, on the very same day, the court handed down two major rulings of interest to our research. In the first ruling, on an issue unrelated to the 1979 decree-law, the Supreme Constitutional Court ruled that the amendment did not cover legislation passed before 1980. This decision therefore made it impossible to consider the decree-law of 1979 in relation to Article 2. In the second ruling, however, the court judged that that same decree-law contravened the constitutional provisions that granted the President of the Republic emergency powers to circumvent parliamentary procedure, arguing that the amendment of laws dating back as far as 1920 could not be considered appropriate motivation for exercising such powers. This placed the legal situation back to square one, except that now the cancelled decree-law no longer filled a gap in the system and that the Court’s decision to overrule it created a “legal void”. Once again, controversy broke out, especially in the press, and the authorities reacted quickly. A parliamentary commission was entrusted with the task of reformulating the 1979 decree-law. Law Number 100/1985 amending certain provisions of personal status was adopted in July. The new law reproduced most of the 1979 text with the major exception, however, of the controversial provision on the right to divorce in the case of polygamous marriage: the automatic ground for divorce was now replaced by a requirement for the first wife to prove that the polygamous marriage caused her prejudice. Adopted by the parliament in an ordinary session, the 1985 law could not be attacked on procedural grounds. However, subsequent to the constitutional amendment of 1980, this law opened up the possibility of appeals questioning its compliance with the principles of Sharia. Not surprisingly, such appeals were brought before the courts, but it was not until

the early 1990s that the Supreme Constitutional Court was required to hand down a ruling. It issued its first ruling on 15 May 1993, establishing a distinction between absolute and relative principles of Sharia: the absolute principles obliged the legislator, while the relative principles left room for interpretation. This distinction is a well-established precedent, but until then, the Court had never invoked the absolute principles to overrule legislation. The history of Egyptian family law does not stop there, however. In 2000, a new law was passed by Parliament, which opened up the possibility for the wife to unilaterally obtain divorce on the condition that she renounced any financial rights resulting from the marriage (the provision is known under the name *khul'*). This law too was attacked, and the Supreme Constitutional Court repeated the distinction it had drawn between absolute and relative principles, and ruled that the *khul'* rules were included in the latter (see Bernard-Maugiron 2004; Dupret 2000). (For a chart synthesizing the many developments of Egyptian family law and showing how they wove together threads of relevancies, see Dupret and Ferrié 2013, and for a full transcript of excerpts referred to in this chapter, see Appendix 1.)

In practice, for the participants involved, the threaded nature of law belongs to the objective dimensions of its grammar. Any attempt to describe it shows how these participants produce a plurality of actants, use referential intertextuality, and weave connections between sites and instances. We propose to examine the divorce proceedings on the ground of harm initiated by the wife against her husband as a perspicuous setting for the understanding of law's endogenous properties and of its constituent members' orientations to its threaded nature.

For the protagonists of any legal issue, there are many instances that must be involved, interrogated or solicited for practical reasons. In their use of the law, members weave these instances together, for example by referring to them (and thus positioning them as actants) in the legal process. The legislative actant (LA) in Egyptian debates about family law often takes the form of the "Egyptian legislator" and the texts this legislator produced (regarding the judge, see, for example, lines 82, 75, 115, and for the MPs, lines 19, 24, 28, 100 of Appendix 1). The judicial actant (JA) is brought into the talk in the form of the judges or courts that issued the relevant rulings (regarding the judges, see line 75, and, regarding the MPs, line 100). When referring to the constitutional actant (CA), both judges and MPs pose questions relating for instance to the status of the Sharia as the main source of legislation or the role of the Supreme Constitutional Court in conducting a constitutional

review (see lines 19, 79-87, 100, 103, 113, 119). The referential actant (RA) takes the form in our excerpts of references to Islamic rules as a source of legislation and a matrix for family law, a reference to Sharia that is incessantly invoked and debated while at the same time being subject to diverging interpretations (regarding the MPs, see lines 29-40, and concerning the judges, lines 113-125). Finally, the public actant (PA) is referred to when parties are speaking, for instance, of the “people” (line 25) or of “public opinion” (lines 61-72).

Participants in the production of law attend to its reticular nature and thread its relevancies through different techniques. Among these techniques are those that involve the intertwining of voices and texts and the incorporation of formulations of an earlier instance of talk into a later instance that uses such formulations as documentation and argumentative leverage. They weave this thread in an intertextual way (Bakhtin 1981, 1986; Matoesian 2001), associating actants and authorities in order to produce further legal formulations. In parliamentary debates, on one hand, this is achieved, through direct or indirect citations that refer back to a myriad of sources. The main sources are the Constitution (for example, line 102), the law (lines 22, 98), foreign legislative experiences (line 31), consultative bodies (lines 29-33), legal or religious expertise and different case laws (lines 29-33), previous debates (line 99), the press, the executive power (line 24), public opinion (line 26), the Koran and the Prophetic tradition. On the other hand, intertextuality is an inherent feature of judicial decisions. It is the preferred technique for integrating the network of normative references upon which the decision is based and on the basis of which its authority is constructed. It is the means through which a sentence can incorporate a series of different voices that, when contextualized in such a way as to be adjusted to the performance in progress and to what is relevant within this process, it secures the referential framework and thereby reinforces the production of a relevant, procedurally-correct legal statement (Dupret 2011). In the excerpts in Appendix 1, we observe the intertextual weaving of voices: constitutional voices (lines 76, 86, 112), legislative voices (lines 74, 79, 119) and voices that speak through case-law (line 113).

The legal threading of relevancies connects different sites and instances of production. The thread’s coherence is produced in a retrospective and prospective manner. In the legislative fabrication of the law, MPs knot together social context, prevailing texts and reference authorities for the practical purpose of making a law whose new ramifications are envisaged as a correction of the past, anticipating a suitable response to future

applications. In the excerpts, we can see how MPs debating personal status in Egypt identify a problem that needs to be remedied (lines 22-23, 26-27), sketch out a constitutional and legislative framework providing both a context for action and limitations to be respected and possibly modified accordingly (lines 36-37, 100-103), and design new legislation that aims to optimize the framing of future situations (lines 22, 102). With judges, a syllogism synthesizes the convergence of facts of the case and applicable law in a decision which is oriented towards a past situation, but which could also be used as a precedent, i.e. invoked in the future as a basis for deciding further cases. When ruling on personal status, such as when adjudicating a petition for divorce based on prejudice, the Egyptian judge interprets the facts presented in the case in an attempt to give them a legal characterization on the basis of existing legislations (lines 73-74). The same judge may also question the validity of the law with the regard to constitutional rules (lines 75-78) and therefore refer the case to the Supreme Constitutional Court, which will be asked to review it according to the constitutional reference to Islamic law (lines 112-124). In other words, the judge, who is initially required to rule on a past situation will also devise his ruling prospectively, in the anticipation of a future re-examination of that case (through appeal, for example) or with the idea of establishing a precedent.

When legislating or adjudicating, members weave the sequential thread of the law through the associations they make among sites, actants, texts and authorities in dialogue with one another. They do so in order to produce a text that presents the features of a formulation, that is, a version of events that apparently follows directly from other accounts but actually introduces a transformation (Heritage and Watson 1979, 1980). The sequential threading of the law is manifested, at the parliamentary level, through a review of past legislative and judicial statements and an anticipation of the future uses of the legislation currently discussed. At the judicial level, members oriented to the same sequential threading through their references to the “facts” in which the case originates, the “procedures” that were followed, and the successive provisions and precedents that they consider as relevant, combining past procedures, future stages, legislative and judicial instances in order to produce an authoritative statement.

The Legal Objectivation of Time

Classically, the knowledge of history is constituted as the crucial condition for understanding social action. In other words, the classical tradition establishes history as a

contextual structure that is necessary for the intelligibility of the subject under study. Contrary to that tradition, we contend that in order to understand a course of action, it is not necessary to take history into account beyond what is made relevant in and through the orientations to the temporal dimension that are specific to the settings in which people engage in that course of action. In other words, time (past or future) is a horizon of relevancies towards which actors turn, and is not a factor that is imposed upon their actions unbeknownst to them.

Suppositions regarding the need for historical depth ascribe non-falsifiable characteristics to singular contexts. One cannot adopt the “point of view of God” (or of “History”) and consider that there is an exterior and encompassing position that allows an investigator to understand what is happening inside a specific place, irrespective of the practical orientations of its participants. Consequently, we consider that there is an intrinsic rationality and an endogenous order which proceeds from the orientations of people towards this place and towards the actions in which they participate. While the past leaves its mark, resulting from accumulations of previous actions, the past must not be considered as a determinant by itself nor even as a context that takes a stable form. It is important to take account of the past, but only as we would take account of the organization of a library. Indeed, a library is organized, but its order is not imposed unilaterally upon the actions of those visiting it. The very choice that they make of consulting such and such a book depends contextually on the way the library is organized (and therefore the accessibility of books, according to the form of classification and indexing which exists therein (Carlin 2007), the state of the problem they are addressing and their capacities with the investigation. It must be added that the “state of the problem” is not a given from history; rather, it is the historical record of a question as the people orient to it in order to provide it a specific solution; in other words, the historical record changes according to members’ orientations (Garfinkel 1967; Rawls 2005).

When people act and speak, they do so in order to be intelligible: so it is the practical and concrete conditions of the production of this intelligibility that we need to study (Button 1990). The practical grammar of law and its threaded structure which encompasses multiple instances are key to the relationship that the law has with the temporal dimension of its activity. Indeed, far from being a category *in abstracto*, time is formed by the people involved in the practice of the law as an epistemic object upon which legal action has a grasp in two main ways. On the one hand, they seek to establish the reference past: an

authorized version of what happened, of the protagonists involved and of applicable rules. On the other, they develop a number of techniques allowing the law to “play out” over time, for example through prescription or retroactivity).

In law, the documentation of the reference past results from an objectivizing *mise en abîme* of the biography of the fact, the event, or the object in question. We mean by this that the past is reconstructed for legal purposes, in a cascade of retrospective readings proceeding from an initial point (set up, for example, as the triggering “causal” element) through to the present time (see Hart and Honoré 1985; Dupret 2011). In this respect, it is clearly the present that organizes the past of reference, inside a structure of legal relevance. In other words, it is the availability in the present of the events to which the speaker refers that is important here. Pragmatically, the historical object constitutes a reality to which one tends and the past constitutes an updating or a qualification linked to the present course of action and turned towards future implementation.

Past time, then, for law is not an object external to it. There is no “weight of history” in law in the sense of a structure that is inexorably imposed on the course of actions engaged by the protagonists. Instead, participants display a pragmatic orientation toward the structure of pertinence of time and, specifically, past time. Time therefore becomes what Michael Lynch calls an “epistopic” (Lynch, 1993), a practical topicalization of an epistemological theme or concept that can be described and analysed *in situ*. In the history of Egyptian family law, the theme of time is evoked recurrently to justify and construct arguments in the present. In 1979, at the People’s Assembly, time held center-stage in the debate between MPs who invoked the “ancient nature” of the 1929 law in order to challenge the emergency powers that the President of the Republic had assumed. Some MPs argued that the reform should have taken place “a long time ago,” while others insisted upon the “immovability over time” of the Sharia. Still others argued that principles relating to the Sharia can “be adapted in time and in space”. The notion of time is thereby projected on center-stage, as MPs attributed multiple meanings and practical legal consequences (first and foremost the legitimacy of the reform) to the temporality of relevant legislation and principles. The constitutional judge also uses this epistemic theme of time as a discriminating criterion in his 1985 ruling, when he formulates the principle that Article 2 of the Constitution, as amended in 1980, does not apply retroactively:

The obligation upon the legislator of taking the principles of Sharia as their main source of legislation (...) only extends to legal texts enacted after the date it [viz. the constitutional amendment] came into force (...). As for laws dating from before that date, they cannot for this reason alone be subject to this obligation, and consequently fall outside the sphere of constitutional review which results from it.

The practical grammar of law is based on a topicalization of time constructed broadly, first in terms of sequence and then duration. The production of a “causal chain” (Hart and Honoré 1985) made up of previous stages, which were necessary conditions for the occurrence of subsequent stages, closely conditions the judiciary’s capacity to objectivize facts, and consequently to justify the legislative or judicial consequences attached to them. In legislative terms, law is presented as a link unifying a “before”, constructed retrospectively as a series of events, which have led in a determinate manner to parliamentary intervention, and an “after”, which is prospectively envisaged as a range of possibilities encompassed by the general and abstract formulation of the law. The adoption of the law of 1985 by the People’s Assembly is thus presented as the causal result of the history of Egyptian law on personal status (lines 98-100). This presentation is similar to how the legislators saw the adoption of the decree-law of 1979 as promising greater future harmony in Egyptian families (lines 25-28). In judicial terms, law is presented as the identification of a causal sequence resulting in the occurrence of facts to which a judicial quality is attributed, and the consequences required by law are attached. The decision is structured in such a way as to appear as the inevitable completion of a factual succession identified by the judge. The switch from history to law here depends on facts and their causal sequence (a pairing that also is the subject of concerns about historical truth-telling) being categorized as natural and objective.² For example, the judge who rules on a divorce for reasons of prejudice proposes a retrospective view of the facts. The judge typically presents such facts as raw details, and piles them up in such a way that seems necessarily to result – factually, logically and judicially – in the ruling, while dismissing as purported “facts” or placing into the background what cannot find a place in the demonstration. In the following excerpt from a ruling issued in 1983, we can see how the judge mentions the husband’s impotence as the causal basis for a sequence of harms he inflicted upon his wife, thereby supporting the court’s ruling in favour of the divorce on the ground of prejudice:

² Critical social sciences tend also to produce normative evaluations of facts. As a result, they produce an alternative form of judgement. In the end, the analysis of law does not gain much from such normative criticisms, as actual legal change resides almost exclusively with the authority for stipulating which history is legally relevant.

For the same abovementioned reason the defendant's reproductive impotence and his inability to realize the aims of marriage led him to express his anger in revenge and hostility against the petitioner, by insulting and hitting her and finally by accusing her of dishonesty and telling the police that the petitioner, who is his wife, had stolen one thousand five hundred pounds and jewels (a golden bracelet, a necklace and a ring), falsely, aggressively and wrongly, so as to compel her to live with him under moral duress. Then, he denounced her for asking him to give back her marital belongings. The pursuance of marital life has become impossible, for there is antipathy and dislike between them and she is still a young person and she fears infidelity for herself and she fears God Almighty.

Duration is another fundamental element of the legal topicalization of time. Although no time period is normally specified for the application of law, law is surrounded by a number of markers that limit its scope of action. Prescription is one of those markers, as it establishes that a fact loses its legal pertinence after a specified and predetermined lapse of time. Retroaction expresses for its part a specific epistemic orientation, which allows a judge, legislator, or legal text to confer a present legal effect upon past fact. Prescription and retroaction both testify to the fact that duration and, more broadly, time constitute legal artifacts. This does not mean that they are arbitrary notions: although ontologically subjective, they are epistemically objective: i.e., individuals address them as tangible objects. In Egyptian legislative practice on personal status, the treatment of duration is particularly sensitive, to the possibility that the eternal nature of Sharia, whose principles are constitutionally the main source of legislation, may come into conflict with the need to adapt legislation to local and current circumstances. Thus, in its report, the Special Commission responsible for the modification of Article 2 established a distinction between the principles of Sharia whose origin and meaning are absolute – and therefore must in theory be applied without modification – and those whose origin and meaning are relative and thus can be adapted to the requirements of time and place (lines 45-51). We could say that *eternity* is subject to modalization, in the same way that Sharia itself actually is modalized. By this we mean that, for all practical-legal purposes, the Sharia must be subject to constitutional integration, thereby submitting it to the contingencies of the Egyptian society's transformations, even though such integration inevitably leads to the "positivization" of Sharia. The very fact that the deletion of Article 2 was recently referred to during debates on the constitutional reform of 2007, proves that Sharia is, legally

speaking, a temporal affair, which is both mundane and historically contingent. It is also true at the judicial level. An example is the Supreme Constitutional Court's interpretations of amended Article 2. In a famous ruling in 1985, the Supreme Constitutional Court stipulated that the requirement for the compliance to principles of Sharia could not be applied to laws dating from before the constitutional reform of 1980. In other words, as noted earlier, the judges of the Supreme Court decided that the new formulation of Article 2 did not apply retroactively: "As for laws dating from before this time, they are not subject to the application of the new obligation, because they were enacted previously, i.e. at a time when this limitation was not yet in application and compulsory." Although the formal/analytical grammar of the constitutional text seems to place it in an a-temporal frame, its practical grammar, as instantiated by the Supreme Constitutional Court, shows the extent to which the absolute principles of Sharia are subjected to legal interventions that can suspend their jurisdiction, halt their effect or rewrite their past – in brief, to temporalize the eternal.³

Time in law is a notion used by participants for all practical legal purposes. In other words, relevant legal history – the history that a given legal action engages and produces – is not a historian's story written for other professional historians. If historical truth-telling does not correspond to legal truth-telling, if time in law is not time in history, it is fundamentally because history and law are different practices whose final purposes do not correspond and towards which people orient and are committed in distinct ways. The objectivity of law thus is not what Latour (2002, 201, 25) speaks of as a particular form of subjectivity made up of distance, indifference and disinterestedness. Instead, it has more to do with an explicit will for objectivizing diverse epistemic resources. To paraphrase a distinction deployed by Searle (1995), we would say that law, although ontologically subjective, is epistemologically objective. This means that the subjects of law – both active participants in legal activities and the subjects enlisted by the products of their activities – concur in the way they confer a legally-objective dimension on the basis of which they produce suitable solutions in terms of the language game in which they participate. In this context, time is both lived as an objective constraint and used as an epistemic resource whose reification allows the practical modelling of law's relations of history and society.

³ For Albert Ogien (2007, 110), analytical grammar refers to "an abstract construction which, on the basis of logical reasoning, establishes rules that an individual should follow to speak or behave in a suitable manner," while practical grammar "accounts for correctness as it emerges from actual practices, i.e. considering the ordinary ways in which individuals judge the acceptability of statements and actions in a certain type of circumstance."

Conclusion

Ethnomethodology is interested in the “procedures by which actors analyse their circumstances and devise and carry out courses of action” (Heritage 1984, 9). It is, to paraphrase the title Eric Livingston gave to his wonderful inquiries (Livingston 2008), an ethnography of legal reasoning. Such ethnography is praxiological in the sense that it describes the practices of intelligibility of the world specific to the members of that group. These practices are concerned with the infinity of the objects of the social world and primarily with what Collingwood (1940, 47) calls “absolute presuppositions”: metaphysical notions (e.g. birth, death, love, time) that are common to all “cultures”, even though their treatment differs from one another.⁴

An investigation of these practical methods involves a sort of re-enactment of culturally and/or historically different ways of thinking, regardless of whether those methods belong to the present or the past. This approach requires accepting the common humanity of the observer and the observed and the commensurability of different human societies, and leads to a re-enactment of conditions of intelligibility that are specific to the particular groups observed, while also recognizing that it is only possible to do so on the basis of the observer’s specific knowledge (Collingwood 1936, 15; Winch 1958; Lepetit 1995; Hutchinson, Read, Sharrock 2008). This form of praxiological inquiry is therefore necessarily reflexive, since it combines the study of the “ethnomethods” of one group with the mastery of conditions of knowledge specific to that group. This reflexivity has a dual aspect. First, it applies to the observer on the one hand, who must be able to situate the observation with the “object” observed, but, because it can only be done within the observer’s own universe of intelligibility, it will always return to those conditions. Second, this reflexivity is characteristic of what is observed, to the extent that knowledge is socially organized in a way which is both retrospective and prospective, going back to available elements of interpretation and anticipating reactions and developments to come.

Praxiological study of legal objectivation of time and history requires the observer to maintain an orientation to the specific conditions of adequacy in the practice being studied. This requires the attainment of some background understanding specific to the object of study, as well as a degree of mastery of specialized practices related to that understanding. In other words, in the Egyptian case that we discussed in this chapter, it requires a grasp of

⁴ M. Marion (2009) emphasizes an analogy between these absolute presuppositions and Kuhn’s “paradigms”, mentioning Nelson Goodman’s “world versions” or Wittgenstein’s “hinge propositions”.

the specific environments in which the relevant legal practices were developing, as well as an ability to master the knowledge associated with legal work achieved within it. As Michael Lynch (1993, 302) contends, this requirement is tantamount to “a method for demonstrating what a description says about a practice by enabling readers to see what is said by entering the phenomenal field of that practice.” In Wittgensteinian terms (1967, §126), this is an urgent requirement to move away from explanatory models and to take more interest in what “lies open to view,” though not necessarily anyone’s view, given the requirements for competent “viewing”. In a word, this requires an epistemological attitude that does not require constructing a privileged epistemic vantage point from which to disclose the singular essence of anything. Instead, it is a condition for understanding a characteristic “form of life” (Wittgenstein 1967, §19) and its specific “grammar” (Wittgenstein 1967, §90). This returns the object of social-science observation back to the sphere of routine social phenomena, as lived and practiced by the members, and it subsequently allows the observer to transform the “seen but unnoticed” features of those routine phenomena into remarkable practices that are open to description.

In the law, time is oriented to in a documentary way. Law’s members objectivise time, use it, and produce history for all practical legal purposes, something that the observer must account for. This documentary method of legal interpretation is therefore a practice that contends with an epistemic object, such as the accomplishment of an investigative task that links time to a specific activity. In their study of televised testimony at the 1986-87 American congressional hearings on the the Iran-Contra affair, Lynch and Bogen (1996) painstakingly delve into a contentious effort to produce a master narrative that would establish an official version of the facts. Analyzing the testimony in relation to written documents used as evidence of past actions, with the eventual aim of writing an official report, gives Lynch and Bogen an opportunity to explore the teleological (and televisual) organization of archives, the use of terms and activities predicated on mind and cognition (e.g. “memory”, “recollection”, “forgetting”) or the linkage of categories of history and law. From this kind of study emerge further suggestions both for the study of the uses of history in law and for the writing of the history of law. More broadly, as we have argued in this chapter, rather than aiming primarily to report on past actions, documentary production achieved in the course of a legal activity seeks to orientate future legal action. In other words, it is more about guides or prospective markers for action than retrospective descriptions of it. Taking documents solely as sources for the reconstruction of a factual

truth would be wrong on three counts. First, it would ignore the fact that such documents were written for the practical purpose of future usage (including, as Lynch and Bogen highlight, the future “deniability” of actions currently undertaken). Second, it would neglect the fact that such documents take into account the modalities of their production only to the extent that they exercise selective care for procedural correctness and legal relevance. And, finally, it would forget that these documents constitute legal “generalizations” and not factual “singularizations”.⁵

Appendix 1

Decree-law No. 25 of 1929

[divorce on the ground of prejudice]

1. Article 6: **LA**
2. If the wife claims that her husband has caused prejudice in such a way that life together is no longer possible
3. between people of their condition, she can ask the judge to pronounce the divorce. The judge shall **JA**
4. pronounce irrevocable divorce in favor of the wife when this prejudice is established and where he has been unable
5. to reconcile the spouses (...)

Explanatory memorandum of decree-law No. 25 of 1979

[need to change the law]

6. (...) Laws 25-1920 and 25-1929 relating to certain provisions of personal status were issued **LA**
7. around fifty years ago; since that time, society has undergone substantial material **PA**
8. and moral change (...). This has demonstrated the shortcomings of certain legislative provisions
9. and led to the search for rules which may be applied to new situations resulting from changes
10. in Egyptian society (...)

Decree-law No. 44 of 1979, article 1 *[assumed prejudice in case of polygamous marriage]*

11. Article *6bis* 1 [added to law 25-1929]: **LA**
12. The husband must present the notary with a written declaration specifying his personal status. If he

⁵ Concerning this relationship between the narrative and the account of the narrative, or, to use the English idiom, the contingent transformation of stories into history, there exists a whole body of ethnomethodological work including Garfinkel (1974) on the compilation of medical files, Cicourel (1968) on police reports, Zimmerman (1974) on the establishment of factuality as a practical achievement, Meehan (1997) on the documentary activity of the police and Komter (2001) on the construction of proof in police interrogations.

13. is married, he must mention the name or names of his wife or wives, to whom he is linked by marriage
14. at the time of the new contract as well as their domiciles. It is the notary's job to inform the latter
15. of the new marriage, by registered post.
16. The marriage of the husband with another woman without consent [of the wife previously married] is
17. considered harmful to the woman, even if it was not specified in her contract that he could not
- JA**
18. have another wife than her (...)

Parliamentary session of July 3rd 1979 [*debate on the emergency nature of the law and on the Islamic nature of the assumed prejudice*]

* M.P. Ibrahim Shukri (leader of the opposition)

19. (...) The presentation of the decree-law made yesterday and today to the Assembly is questionable (...).
20. Since we are talking about modifications to the law of personal status, the proper procedure was
21. to present the Assembly with a proposal on the subject so that it could be discussed calmly and that
- LA**
22. necessary modifications could be introduced, so that the law could become more relevant to
23. today's realities. (...)

* M.P. Jibril Muhammad Hasan [member of the ruling National Party]

24. (...) we must not blame the President for having promulgated this decree in the absence of the
25. Assembly. He's a leader who feels compassion for his people. He has taken this initiative
- PA**
26. to safeguard Egyptian families. (...) If President Sadat expresses his feelings towards the people,
27. we, in the Assembly, should express the feelings of the people and accept the modifications
28. to the law (...)

* His Excellency Sheikh Gad al-Haqq 'Ali Gad al-Haqq (Mufti of the Republic)

29. (...) We consider marriage to another person as prejudicial, according to Hanbalite law, and as the
- RA**
30. rule of Malachite law also dictates. In the explanatory report (of the unified draft law signed by
31. Egypt and Sudan), it is said that this rule is derived from the law of the two schools (...)

32. This text does not constrain or contradict the Koranic verse “Marry as you will two, three or four women, but if you fear that there is a problem of fairness, take one wife only” (...)

* The President of the Assembly

34. (...) The issue affects our belief, our system and our whole being. We must therefore precisely and exactly adhere to Sharia (...)

36. It seems that the rules stipulated in the decree are based on a legitimate jurisprudential

37. opinion (...) But if there is a rule in this decree which is not based on a jurisprudential opinion

38. in respect of Sharia, we would ask Sheikh Salah Abu Isma‘il to indicate it to us. **RA**

* M.P. Sheikh Salah Abu Isma‘il

39. (...) The fact of granting the wife the right to divorce contradicts all doctrines of Muslim **RA**

40. legal schools (...)

Report of the Commission drafting the Constitution, April 1980 [Constitution, Art. 2]

41. Article 2 requires the legislator to refer to the standards of Islamic law, and not other laws, to

CA

42. meet its needs. If it does not find any clear text in Islamic law, other means **RA**

43. of deduction of standards through interpretation sources (*ijtihad*) in Islamic law

44. allow the legislator to find the necessary standards which do not violate the fundamentals and **LA**

45. general principles of Islamic law (...) [Islamic standards are divided] into two categories:

46. standards that are certain in terms of their source and their meaning do not require an effort of interpretation

47. and standards that require an effort of interpretation because their source or their meaning are conjectural

48. These standards are subject to changes in time and space (...) This confers a certain elasticity and vitality

49. upon Islamic law, allowing us to say that Islamic law is right at any time and in any

50. place. (...) These secondary standards change from one period to another, and from location to the other, thus

51. fulfilling the general objectives of Islamic law. (...) The fact of mentioning Islamic law as “the main

52. source of law” dissipates any doubt that some might have when wishing to limit the deduction of

53. Islamic standards to the work of jurists of the past alone, thus preventing the possibility of

54. finding solutions to new problems and social relations that society could encounter and which are **PA**
55. not governed by the said works. This would be contrary to the letter and the spirit of Islamic law,
56. which is a flexible law which traces the general framework and sources from which standards can be
57. deduced for new facts encountered by our society.

Constitution, 1980 amendment *[modification of constitutional status of Sharia]*

58. Article 2: **CA**
59. Islam is the religion of the State, Arabic is its official language.
60. The principles of Islamic Sharia are the main source of legislation. **RA**

al-Nur (weekly), January 12th 1983 *[opinions in the press on the difficulties of applying the law]*

61. On the occasion of his meeting with the female leaders of the National Studies Institute, Dr. Sufi **PA**
62. Talib, president of the People's Assembly, declared that the prevailing law on personal status **LA**
63. results from an effort of interpretation [of religious Law] (*ijtihad*), which can be amended.
64. However, it is important to allow it a chance to prove itself, because it is only three years old. The
65. president of the People's Assembly reminded us that an initial version of the law had
66. emerged in 1929, and that it adhered to the Hanafite school; it caused as much controversy as the new law
67. has caused today. In 1964, the same controversy resulted from its modification (...) As for the law on
68. personal status adopted three years ago, it abandoned Hanafite law and adopted Malikite law. **RA**
69. The latter takes the psychological situation of the wife into account in the case of the second marriage
70. of her husband, and envisages the case of prejudice. Clearly, such psychological prejudice
71. cannot be established in material terms, but we cannot accept a conjugal existence where the spouses
72. detest each other. And that is why we allow the first wife the right to request divorce in this case (...)

Al-Badari Court, September 15th 1980 *[application for alimony, issue of constitutionality]*

(as reported by HCC, 4/5/1985)

73. The applicant brought case 29-1980 – al-Badari’s custody on the people– against her husband,

JA

74. the defendant, requesting that he should be ordered to pay alimony as required by law (...)

LA

75. The court judged that this legislation (cf. decree-law No. 44 of 1979) was unconstitutional overall,

76. inasmuch as it contravenes articles 108 and 147 of the Constitution, the President not having

CA

77. published by virtue of delegation of the People’s Assembly and as the conditions which

78. justify recourse to the emergency procedure, in the absence of the Assembly, did not prevail.

The Supreme Constitutional Court, ruling of May 4th 1985 [*ruling on unconstitutionality because of absence of emergency*]

79. (...) This being said, and given the case made, which shows a simple desire to amend the law on

LA

80. personal status after a long period of application during which changes to different areas of

81. society had not been taken into account, whilst it is true that this desire can appear as one of the

PA

82. motives and objectives which incite the legislator to adopt new laws or to make up for shortcomings

83. in current legislation, in order to carry out the expected reform, it remains true that (...) the

84. reasons given indicate that no circumstances causing a situation whereby

85. the President of the Republic is required to give exceptional authorization to legislate, existed

86. in the absence of the People’s Assembly, in compliance with article 147 [of

87. the Constitution].

CA

Explanatory memorandum of law No. 100 of 1985 [*requirement to adopt a new law*]

88. (...) Since the question of union with more than one wife has become a social problem that needs

PA

89. to be addressed, the draft law considers that on account of [the husband’s subsequent]

90. marriage the wife suffers prejudice of a particular nature which can be included under the general

91. regulations on judicial divorce. If the first wife does indeed suffer prejudice on account of the

JA

92. [the husband’s subsequent] marriage with another woman, she is within her rights to apply for legal

93. divorce for prejudice, whether it be material, moral or psychological. This ruling is based on

RA

94. the school of Imam Malik; it complies with Sharia rules stipulated in the prophetic tradition according

95. to which there can be “ no prejudice nor counter-prejudice”; it is also deduced from the school of Imam

96. Ahmad and the legal rules of the people of Medina.

Parliamentary session of June 30th 1985 *[debate on divorce for polygamous marriage]*

* M.P. Ibrahim Shukri (leader of the opposition)

97. In the name of God, the Clement and Merciful, **RA**

98. I have observed the enthusiasm of all my colleagues to debate this draft law. **LA**

99. This discussion could have taken place in 1979, but it is taking place today because of the ruling

100.handed down by the Supreme Constitutional Court on the unconstitutionality of decree-law

JA

101.No. 44 of 1979. In this respect, I would say that we need

102.to be very careful that our work is in compliance

103.with the provisions of the Constitution and that in the future we do not **CA**

104.see this proposed draft law being challenged on the grounds of unconstitutionality (...)

Law No. 100 of 1985, Article 1 *[prejudice to be proved in case of polygamous marriage]*

105.Article 11*bis* [added to law 25-1929]: **LA**

106.In the marriage contract, the husband must provide a written declaration specifying his personal status.

107.If he is married, he must mention the name or names of the woman or women with whom he is linked

108.by marriage as well as their domicile. The notary must inform the latter of this new marriage, by

109.registered post with acknowledgement of receipt.

110.The wife may request divorce if her husband has remarried another woman and if she has

111.suffered material or moral prejudice which makes life between the spouses impossible, **AJ**

112.even if it is not specified in the contract that he could not have another wife than her (...)

The Supreme Constitutional Court, ruling of May 15th 1993 *[interpretation of the constitutional status of Sharia]*

113.(...) The fact is that article 2 of the Constitution as amended and according to this court's **CA**

114.case law, establishes that this rule applies to legislation enacted after it came into force, **JA**

115.from which the provisions of law 100/1985 are derived. This means that a legislative text cannot

116.contradict the formal rules of Sharia whose affiliation and meaning are conclusive **RA**
117.*(qat'iyya al-thubut wa al-dalala)*. These rules and their definition cannot be subject to an
118.effort of interpretation (*ijtihad*). In Sharia, there are superior principles and established
119.foundations which accept no interpretation or permutation. (...) The role of the Supreme
Constitutional
120.Court is limited in this case to ensuring that we adhere to those principles and that they **LA**
121.override any legal rule which contradicts them (...) On the other hand, there are rules authorizing
122.individual reasoning (*ahkam zanniyya*) (...) This means that the role of the interpretive
123.effort is limited to them and does not extend to others. They are modified by the change in time
124.and place to guarantee their flexibility and dynamism and in order to face up to different situations
125.by organizing the affairs of people in such a way that satisfies their legitimate interests (...)

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