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## **WHAT IS ISLAMIC LAW? A praxiological answer and an Egyptian case study**

In this essay, I first criticize commonly held assumptions about what Islamic law is. I suggest that it is at best useless and at worst wrong to start with a label like ‘Islamic law’ to describe something that is presumed to be an instance of such a label. I identify the source of confusion, i.e. the postulate that there must be a kind of genealogical continuity between what people refer to as Islamic law and Islamic law as it is found in the heterogeneous legacy of *shari‘a* and *fiqh* treatises.<sup>1</sup> My contention is that Islamic law is what people consider as Islamic law, nothing more, nothing less, and that it is up to theologians, believers and citizens, not social scientists, to decide whether something does conform or not to some ‘grand tradition’. Second, I argue that instead of looking at the hypothetical Islamic-law model which something like Egyptian personal status law would be an instance of, the task of social scientists is, rather, to describe the situations, the mechanisms and the processes through which people orient themselves to something they call ‘Islamic law.’ This position is grounded on a principle of indifference that seeks to avoid any normative and evaluative engagement: the focus is put on the description of practices, not on their evaluation. Moreover, this position is based upon the refusal of any ironical standpoint. In other words, it denies that social scientists occupy any kind of overhanging position vis-à-vis the social that would allow them to ‘reveal’ to ‘self-deceived people’ the truth that is concealed from them because of their ‘lack of critical distance’, ‘ignorance’ and/or ‘bad faith’. Third, I ground this praxiological re-specification in examples drawn from Egyptian judicial activity in the field of personal status.

### **The Nature of Islamic Law**

Neither law nor religion is endowed with intrinsic, substantial and natural authority. There are only punctual situations where people orient to something which they identify as being religious law and the authority of which they publicly acknowledge. There is henceforth no way to examine the reference to Islamic law outside its circumstantial and situated uses, outside practices of referring to an object explicitly characterized as Islamically legal in various contexts, each one having its own constraints.

#### *Searching for Law in Islam*

Literature on norms and law in societies dubbed Muslim has, as a whole, an essentialist attitude. According to interpretive theory, law is a cultural code of meanings for interpreting the world. In this hermeneutic project, words are the keys to understanding societies and cultures and to giving them a meaning. Geertz gives the example of the Arabic word ‘*haqq*’, which is supposed to come from a specific moral world and to connect to a distinctive legal sensibility. (Geertz, 1983: 185) This word would carry along with it all the specific meanings which are co-substantial with

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<sup>1</sup> Usually, *shari‘a* is understood as Islamic law as revealed by God (*Qur‘an* or Koran) through His Prophet Muhammad (*Sunna* or Prophetic Tradition), whereas *fiqh* is the knowledge of this Law and the body of jurisprudence that originates in it.

something that is called 'Islamic law.' In situations where many cultural systems are described as interacting law would produce a 'polyglot discourse.' (Geertz, 1983: 226) Interpretive theory fundamentally conceives of law in holistic terms, that is, as one of the many reverberations of a larger explaining principle: culture (cf. also Rosen, 1989). Accordingly, the laws that characterize societies carry along with them throughout history the same basic tenets. However, cultural interpretivists fail to consider that law is not necessarily and integrally part of culture and that culture is not a set of permanent pre-existing assumptions but something which is permanently produced, reproduced, negotiated, and oriented to by members of various social settings.

The same pattern of argument holds true when the culturalist attitude is combined with text analysis. Messick (1993), for instance, associates the shape of Islamic cities with Yemeni Islamic lawyers' calligraphic style to demonstrate that Muslim societies were embedded in a system of textual domination. The text, here, is the *sharī'a*, something described as much more than Islamic law, a 'textual polity' including 'a conception of an authoritative text' and 'a pattern of textual authority.' (Messick, 1993: 6) Although texts are important in the study of law in literate societies, Messick, by focusing his attention on disengaged documents, loses the phenomenon of law practice and its work of producing formalized records.

Most research considers human beings as rule-driven creatures, in societies dubbed Muslim in particular. Oussama Arabi (2001), for instance, states that Islamic law still determines the daily behavior of people in Muslim societies and constitutes a living reality in contemporary societies where it is implemented as the State's positive law. With regard to sexuality, for instance, Arabi seems implicating that provisions identifiable in *fiqh* treatises keep on influencing today's commonsense and legal conceptions. Empirically speaking, it would be utterly hard to demonstrate it. Actually, according to the author, commonsense considers that sexual relationships exceeding simple flirts belong to the category '*harâm*' (the forbidden) if they are not validated by a religious contract. The point is to know whether we can ground on the observation of the use of a contractual form the claim that a kind of internalized religious normativity still frames and determines the social.

Against incorporation theories, a praxiological approach shows that it is impossible to open the 'black box' of rule authority by substituting to it the other black box that makes of people the mere individual receptacle of cultural principles that would be somehow consubstantial to them. Authority must be understood as the modality of an action (one acts with authority), a person's 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 somehow it accompanies. In Arabi's approach, rules are independent of practice. They are endowed with clear meaning and determine people's behavior in a univocal way. They are invested with some intrinsic authority that proceeds from their belonging to the religious repertoire. This feature allows it escaping any hermeneutics. Whereas legal norms have an 'open texture' (Hart, 1961), religious norms are rigid and a-temporal objects escaping contingency by virtue of their divine inspiration. To the opposite, I consider that rules are practical accomplishments and their authority a modality linked to people's public orientation to the force they recognize to them. Rules do not pre-exist their practice and their authority is not an intrinsic feature.

Most literature on Islamic law tends to impose to legal phenomena and activities their structure instead of looking at their operating process. For instance, Layish and Shaham (EI<sup>2</sup>) give the Arabic word *tashrī‘* a religious signification on the ground of its etymology and ignore the fact it 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 to the legislative phenomenon a dimension that cannot be documented. Moreover, in their attempt to evaluate the transformations of *tashrī‘*, they posit a distinction between legal orthodoxy and deviance that places the scholar in the situation of telling which rules are orthodox and of 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 a normative ground, while dodging the central question of how and what people do when they refer to the *sharī‘a* in current contexts.

Islamic law can be the mere reference to Islam in a legal setting or it can be a legal system identified with the classical body of *fiqh*. In the latter case, there must be a substantial definition of Islamic law the criteria of which are satisfied by the specific law on which we concentrate so that it can be taken as a particular instance of a general model. This raises several questions about constitutive criteria, paradigmatic model, relevant instances, and authority to constitute certify the model. Literature on this issue drifts between different positions. Sometimes it claims that we must stick to people’s utterances. However, while Islamic law is what people refer to as Islamic law, we should not consider that the use of the same word at different times necessarily means that the word refers to the same meaning and technical definition. Sometimes literature claims that people deceive themselves. Thus, for instance, the statement that, although Egyptian judges no longer use the word ‘*dhimma*,’ the *dhimma* system<sup>2</sup> is still in force in Egyptian law (Berger, 2001). This is an ironic stance that assumes that scholars know better than the people engaged in a practice. It also contradicts the first assertion that we must stick to the words people use. Moreover, it is a metaphysical and deterministic position that claims that structures are permanent, even though people are no longer aware of them, and that people are determined by external constraints and neither produce nor transform anything, but only reproduce the past. The combination of these two positions makes the argument non-falsifiable.

### *Rephrasing the question*

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 actual practices; and it fails to address the phenomenon itself, i.e., the practice of referring to Islamic law. For the question, ‘What is Islamic law?’ we should substitute the question, ‘What do people do when referring to Islamic law?’

Legal actions, like all social actions, are irreducibly events or actions in a social order (Sharrock & Button, 1991: 157). In law like in any social activity, concepts, like words, are parts of what Wittgenstein calls ‘language-games’ (Wittgenstein, 1967: pars. 7-24 *et seq.*). Wittgenstein specifically targets ‘big concepts’ that are often constructed

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<sup>2</sup> The system of minority subjection and protection under classical Islamic law.

as floating entities, totally decontextualized, and then projected back into the world as its inner nature, as ‘something that lies *beneath* the surface’ (Wittgenstein, 1967: par. 92), independent of any instantiation or context of use. These remarks hold true with regard to concepts like ‘Islamic law.’

There is no case to make something ‘an instance of’ something else (e.g. to make personal status in Egypt an instance of the larger ‘model’ of Islamic law). The main problem with any model construction lies in the idea of correspondence between the model and the data it is supposed to aggregate, between the general and the particular, between an abstract proposition and its concrete instances. In our case, Egyptian personal status law is supposedly an instance of an abstract Islamic legal system. Model building requires that the different instances of the model share some common characteristics that satisfy the postulates of identity and equivalence so that they can be measured accurately and ascribed to the general model. For instance, the characteristics of Egyptian personal status law may be measured so that their belonging or not-belonging to the general Islamic law model may be assessed. However, when referring to local situations as instances of a general model, researchers use implicit assumptions about both and hide the fundamental fact that the same word ‘Islamic law’ means very different things in various contexts. The result is that we know little about the properties of the underlying phenomena and take for granted the very basis of what we propose to explain.

Rather, we should ask how the members of any social group conduct the activities by which they identify and characterize something as an instance of something else (cf. Lynch, 1991: 86 sq.). In terms of Islamic law, this means to focus on how *people*, in their many settings, orient themselves to something they call ‘Islamic law’ and how *they* refer personal-status questions to the Islamic-law model. Such attitude suggests that we focus on the methods people use locally to produce the truth and intelligibility that allow them to cooperate and interact in a more or less ordered way.

Egyptian personal status law can be categorized variously as an instance of Islamic law, Egyptian law, civil law, or heterodox codified *shari‘a*. Rather than asking to which abstract category it actually belongs, we should ask what is the purpose and the mechanism of the categorization itself (cf. Sacks, 1974, 1995; Jayyusi, 1984; Watson, 1994; Hester & Eglin, 1997). Attention must shift to the description of the phenomena and the properties they display. The consequence for social scientists is that their task is to observe and describe the methods used by the members of a society (the ethno-methods) in their everyday life—including their professional life—to produce intelligibility, communicability, and the capacity to be acted upon.

### **Re-specifying the sociological study of Islamic law**

The study of Islamic law needs focusing much more on living phenomena and actual practices. Anthropological research has shown its willingness to engage in that direction. It turned away from scholastic conceptions of law, which would only be the law on the books, and turned to law as something encountered and lived by flesh-and-blood people (Mir-Hosseini, 1993). It even sometimes attempted to capture the language of law in action in an Islamic setting (Hirsch, 1998) and sought to find out the practical ways of legal reasoning (Bowen, 2003). However, by concentrating on issues

like power and gender or by abstracting data from their context, it missed part of the phenomenon it was set to analyze. Our contention is that the whole issue of Islamic law needs a praxiological re-specification that can be argued around three central themes: the opposition between law in action and law on the books; the ‘missing what’ of law-and-society and statistical legal studies; the opposition between ‘hyper-explanations’ and description of situated activities.

#### *Law on the books and law in action*

In *Marriage on Trial*, Mir-Hosseini states that ‘from its inception, Islam has been both a political and a social order’ (Mir-Hosseini, 1993: 3-4) and Islamic law, ‘the divine law’, has constituted ‘the backbone of Muslim society [...] ever since’ (Mir-Hosseini, 1993: 4). With reference to modern times, she describes *shari’a* as still forming ‘the basis of family law, though reformed, codified and applied by a modern legal apparatus’ (Mir-Hosseini, 1993: 8). Opposing the theory of Islamic law to its practice, she adds that ‘what characterizes the Shari’a perhaps more than anything else is the distance between the ideal and the reality’ (Mir-Hosseini, 1993: 8). She concludes that ‘it is precisely because this Divine Will needs to be discerned by human intellectual activity, and, more importantly, because it is enforced by human courts, that it is bound to bear the influence of the time and environment in which it operates’ (Mir-Hosseini, 1993: 10).

By looking for the nature of law, Mir-Hosseini misses the phenomenon of the practice itself. In the core of the book, theory takes the form of a synthesis of applicable legal provisions, whereas practice is represented by twenty cases, duly summarized, and statistical data that supposedly provide the necessary basis for understanding the underlying patriarchal ideology of the *shari’a* model. However, even though she gives *shari’a* a meaning, a content, an ideological orientation, people do not seem to address it directly in the cases summarized by Mir-Hosseini. In other words, we suffer from a double bind: social actors remain external to the fundamental significance of the law they are practicing; researchers who claim to have access to the meaning of the law have little grasp of its practicalities. This double bind is in part the result of the scholarly construction of a dichotomy between theory and practice.

Hirsch does not look for any substantial description of what is Islamic law and does not attempt at giving it any trans- or an-historical meaning. When she uses the expression, it is generally to refer to *kadhis*’ conception or representation of it, not to ascribe it an essentialist meaning. Actually, her bias stems from the marginal dimension of the legal setting in the design of her argument. Her analysis is neither about law nor about legal practices. It is about gender as observed from the vintage point of the Kadhi court. Law is not a topic in its own right, it is ‘a symbol of both Muslim governance and its vulnerability in the postcolonial era’ (Hirsch, 1998: 136). There is something which is lost in this process, and this is the coherence of the legal setting in which all this happens, its recognizability for the participants, and the ways in which this recognizable coherence is produced.

Law as a social phenomenon cannot be reduced to the mere provisions of a legal code (law on the books). However, it would be misleading not to consider law on the books as an integral part of the practice of law. We must give credit to the natural

attitude of people who do not experience reality as purely subjective and law on the books as purely formal. By merely opposing theory to practice and legal provisions to the 'living law', we fail to understand fully what, for instance, Egyptian personal status law is. We are more likely to gain such an understanding through the close description of people's orientation to, and reification of, legal categories as it emerges from their actual encounter with legal matters.

*The 'Missing What' of Law-and-Society and Legal-Statistical Research on Law*

Describing her personal research experience in Iranian Courts, Mir-Hosseini (1993: 18) says:

One judge [...] assigned me the task of drafting court notes, the usual duty of the court clerk. This helped me a great deal to see the case from the court's viewpoint (or, more accurately, his), and I learned how to construct 'legal facts', how to translate the petitioners' grievances into court language, and how to discern the principles upon which the court operates.

From a praxiological point of view, this statement sounds most promising. Indeed, praxiology advocates precisely that scholars pay closer attention to, and better describe, the modalities of the construction of legal facts and people's orientation to, and manifestation of, their understanding of the judicial setting, its constraints, and its structure. However, Mir-Hosseini continues, '[L]ater this duty became cumbersome as it prevented me from paying full attention while following the disputes during that session' (Mir-Hosseini, 1993: 18).

Hirsch's approach suffers from the same kind of bias, which is related to her focus on law as one strategic device among others through which power relationships are negotiated. In the sequence of her book, gender and power come first, language, as their vehicle, second. And law has an ancillary role, it is considered as an arena where conflicting narratives oppose each other. But law and the practice of law are not a bunch of mere narratives competing with other narratives, it is also an activity accomplished on a daily basis, of an overwhelmingly routine character, the place of production and reproduction of professional practices which are oriented to nothing but the accomplishment of the law.

Mir-Hosseini's use of the techniques of judicial statistics and case reports and Hirsch's focus on discourse content and strategic uses eschew addressing law as a practical activity. This is the 'missing what' problem in the study of work. With regard to legal professions, this means that 'sociologists tend to describe various 'social' influences on the growth and development of legal institutions while taking for granted that lawyers write briefs, present cases, interrogate witnesses, and engage in legal reasoning.' (Lynch, 1993: 114)

The problem with statistical data is that it largely erases the 'here and now' dimension of every case, i.e. it obscures the necessarily situated character of every activity. The correspondence between statistical entries and the social reality it codifies so as to make it statistically relevant is, however, far from obvious. As a result, we fail to understand the two operations that are at the core of law: formulating legal categories and providing legal characterizations of facts. To paraphrase Michael Moerman (1974:

68), socio-legal scientists should describe and analyze the ways in which legal categories are used and not merely take them as self-evident explanations.

With regard to case reports, the problem is of a different nature.<sup>3</sup> Many studies have tried to capture some aspects of court activities through ethnographic observation, but very few attend closely to what is really done within this institutional setting. This is particularly true in studies that rely on participant observation and interviews. There is a real descriptive failing, which only permits researchers to advance worldviews alternative to those of the actors or to remain insensitive to legal work as it is understood by its daily practitioners. Travers (1997) speaks of a descriptive gap. In order to bridge the descriptive gap and to fill the ‘missing what’, we must re-orient ourselves to the content of legal work, to its mainly practical character, and thus to its technicalities, situated character, and specific modes of reasoning.

#### *Hyper-explanation vs. description of situated activities*

This last consideration leads to the question of macro- and dualistic explanations, what I call ‘hyper-explanations’. Mir-Hosseini produces a historical sketch of Islamic law that allows her to examine the characteristics of *shari‘a* that are relevant to her study. She states that ‘a historical perspective is essential to appreciate the current place of law in Muslim societies, and in particular to explore the dynamics of the changing relationship of law and society’ (Mir-Hosseini, 1993: 3). Although she claims that ‘those who ardently argue for the rule of the Shari‘a (...) tend to hold an idealized and totally ahistorical version of the development of the Islamic faith and its institutions’, she asserts at the same time that ‘Islamic law’ has a ‘nature’ that is related to the ‘nature’ of ‘Islamic civilization’ (Mir-Hosseini, 1993: 3). This paradox is strengthened when Mir-Hosseini claims that modernization ended in ‘the creation of a hybrid family law, which is neither the Shari‘a nor Western’ (Mir-Hosseini, 1993: 11). In conclusion, she (Mir-Hosseini, 1993: 191 sq.) argues that there is a ‘Shari‘a model’ according to which actual patterns of marriage and family structures can be evaluated and that is based on a patriarchal ideology. Yet, one wonders what models, patterns of marriage or ideologies look like outside their embodying practices. More important, we can also raise the issue of the explicative capacity of notions like patriarchy.

The same remark holds true when considering Hirsch. Although she seems clearly reluctant to engage into generalizations taking the form of cultural explanations, she advocates the substitution of other hyper-explanations like history, power, legitimizing, ideology, and globalization. This is in particular reflected in her dealing with language as a media that contributes to, and shapes, ‘the gender-patterned production of accounts of conflict in relation to ideologies that link women to storytelling and men to authoritative speech.’ (Hirsch, 1998: 222) Although concentrating on actual verbal interactions within Swahili Kadhi courts, her focus is on discourse content rather than on the discourse sensitivity to the context of its production and the constraints which result from its institutional embedment and organization. It results in an overstatement of the strategic, reflexive and ideological dimensions of court interactions and an

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<sup>3</sup> Case report has also become a common method in political sciences (see, for instance, concerning the Middle East, Brown, 1997).

understatement of their institutional, conversational, contextual, procedural, technical, and legal constraints.

### **The praxiological study of Islamic law: Egyptian cases**

I turn now to actual Egyptian cases to show how the reference to Islam is practically achieved. In these contexts, the many people engaged in the production of a legally relevant description of facts to which legally relevant consequences are attached pay little attention to the question of ‘Islamic law.’ This does not mean that this or that legal provision has no history. Rather, it means that so long as a legal concept is used in a stable, unproblematic and unquestioned manner, any account of its theoretical and historical basis has no special relevance to its current uses. Conversely, exclusive attention to the theoretical and historical genesis of the concept leads to the disappearance of its contingent and situated character.

Personal status matters are organized in Egypt by e.g. Law No. 25 of 1920 and Law No. 25 of 1929, both amended by Law No. 100 of 1985, and Law No. 1 of 2000. In the absence of any statutory provision, Law No. 1 of 2000 stipulates that the judge must refer to ‘the opinions which are prevalent in the school of imam Abû Hanîfa.’<sup>4</sup> In practice, many judges still make use of unofficial codifications compiling Hanafite-inspired legal provisions. Personal status has been subject to procedural rules that are common to all civil and commercial matters. Cases are adjudicated by specialized circuits within the courts. The personal-status circuit of the courts is competent with regard to financial (*wilâya ‘alâ al-mâl*) and non-financial (*wilâya ‘alâ al-nafs*) matters, including the granting of judicial divorce on the ground of harm, with regard to which Article 6 of the Law No. 25 of 1929 states: ‘If the wife alleges that the husband mistreated her in such a way as to make it impossible between people of their social standing to continue the marriage relationship, she may request that the judge separate them, whereupon the judge shall grant her an irrevocable divorce if the harm is established and conciliation seems impossible between them. If, however, he [viz., the husband] refuses the petition and she subsequently repeats the complaint without establishing the harm, the judge shall appoint two arbitrators and he shall judge according to the provisions of Articles 7, 8, 9, 10 and 11.’

In the following example, we can observe the form taken by a ruling in personal status matters:

#### **Excerpt 1 (Case No 858, 1998)**

‘In the name of God the clement, the merciful’  
In the name of the people  
Gîza Court of First Instance  
for the Personal Status – Persons / First Circuit *shar‘î*  
Ruling

At the *shar‘î* session held publicly at the palace of the court on Tuesday 25/12/2000 m.<sup>5</sup>  
Under the presidency of His Excellency Mr. ..., President of the Court  
And the membership of MM. ... and ..., judges

<sup>4</sup> Sunni Islam is divided into four legal schools (*madhhab*): Hanafites (after its eponyme Abû Hanîfa), Malikites (after Mâlik b. Anas), Shafî‘ites (after al-Shâfi‘î), and Hanbalites (after Ibn Hanbal).

<sup>5</sup> « *Milâdî* », i.e. A.D.

In the presence of Mr. ..., deputy of the prosecution

In the presence of Mr. ..., clerk

The following ruling was issued:

In the petition submitted by Mrs. ...

Against

Mr. ...

Registered on the public roll as No. 858 of the year 1998 m., P.S., plenary of Giza

The Court

After the hearing of the plea, the examination of the documents and the Prosecution's opinion, and the deliberation according to the law:

Considering that [it appears] from the facts of the case that the female petitioner introduced her petition in pursuance of a form deposited at the office of the clerk of this court [...] about which the defendant was legally notified, in conclusion of which she asked for a ruling [that would] divorce her, asking that it would be required from him not to oppose to her in her marital affairs and compelling him to [pay] the expenses [1]

In support of this, it is said that she is the wife of the defendant [...] He kept on inflicting on her bad treatments [...] by assaulting her, insulting her and abandoning the marital domicile [...] She asked her the divorce [...] but he did not accept [...] [2] ['considering' 1 and 2 = petition]

Considering that... ['considering' 3 to 'considering' 7 = procedures followed by the court]

Considering that... ['considering' 8 to 'considering' 15 = examination of the legal grounds]

Considering that... ['considering' 16 = application of the law to the facts of the case]

Considering that... ['considering' 17 = expenses and accessory demands]

For all these reasons

The court rules the judicial divorce of the petitioner [...] from the defendant [...] in the form of an irrevocable divorce on [the ground of] harm, requires him not to oppose to her in her marital affairs and compels the defendant to [pay] the expenses and to [pay] 10 pounds for the attorney's retainer.

Clerk

President of the Court

This structure reflects the actual procedural constraint under which the judge operates. One of his major tasks, as a professional routinely engaged in his occupation, is to publicly manifest the correct accomplishment of his job. At this procedural level, it is obvious that the judge orients himself exclusively to the technicalities of Egyptian procedural law. These technicalities may include some reference to provisions explicitly relating to Hanafite or Malikite law, but this is always through the provisions of Egyptian law, as eventually interpreted by the Court of Cassation:

#### **Excerpt 2 (Case No 858, 1998)**

Harm is established through the testimony of two men or one man and two women, in pursuance of the prevailing opinion of the doctrine of Abû Hanîfa and in application of Article 280 of the By-law [organizing the courts] of the *shari'a*<sup>6</sup>: 'Evidence belongs to two men or to one man and two women.' (Cass., Civil, 28/2/1960 m., 11<sup>th</sup> judicial year, p. 181)

Most of the documents in any judicial file show this orientation of judges and other professionals to procedural correctness. This orientation proceeds from the general sequence of the trial in which every participant addresses in turn people who, at certain times, are not physically present in the courtroom, although they constitute silent auditors to whom the members of the trial turn beyond their direct and immediate verbal exchanges. This notion of 'over-hearing' audience (Drew, 1992) can be extended to absent people to whom a document, like the ruling, is addressed (Dupret, 2004). The potential overruling that such an appeal might eventually produce is directly taken into consideration by the participants and translates in the very careful attitude they adopt

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<sup>6</sup> Law No. 1 of 2000 integrally reiterates this provision.

vis-à-vis the procedures they are required to follow. These procedural constraints must not be considered as elements imported from a foreign, ancient or external legal system. Rather, they represent the direct, obvious, real and practical dimensions of a daily, bureaucratic routine of people engaged, in today's Egypt, in various legal, professional activities.

To illustrate the point, I reproduce a conciliation report written by the Arbitration and Conciliation Committee of Giza in a case of unilateral divorce at the wife's request (*khul'*). This conciliation attempt is imposed by virtue of the new procedure settled by Article 20 of law No. 1 of 2000. This document reflects the mainly bureaucratic and routinized nature of the practice of personal status, even though it originates from an explicitly religious institution, al-Azhar.<sup>7</sup>

**Excerpt 3 (Case No. 180, 2000)**

In the name of God the clement, the merciful	
al-Azhar al-sharif	Concerning : Report in Case No. 180
Department of Islamic Research	of the Year 2000 introduced by Mrs. [...]
General Office of Preaching and Religious Information	against [...]
Preaching Area of Giza, Arbitration and Conciliation Committee	
Report	

His Excellency Mr. Counsellor [...], Court of North Giza, First *shar'i* Circuit, Plenary, North  
Peace upon you, God's clemency and His benediction

The honourable court has appointed us to arbitrate in the petition No. 180 of the year 2000 introduced by Mrs. [...] against [...]

Execution of the warrant

1- The wife appeared before the Arbitration and Conciliation Office of the Preaching Area of Giza and it was proceeded to record her words in writing and orally and to hear her. Many sessions were held concerning her. It appears from them that an agreement and a conciliation between her and her husband is impossible, given that her husband did not appear despite his knowledge of these sessions. The wife reported through her words that she had faced humiliation, slander, insult and assault to her honour from her abovementioned husband. He so pronounced calumniating words, that led to psychologically cause harm to the children and to her hating him and her wanting to divorce in a unilateral way (*mukhâla'a*) in order to preserve the future of the children. She said: I fear not to respect God's limits with him (*allâ uqîm hudûd allâhi ma'ahu*).

2- We proceeded to send telegrams to the husband and he did not appear on the premises of the Arbitration and Conciliation Committee of the Preaching Area of Giza until the writing of this report.

Opinion of the two arbitrators

After the examination of the documents of the case, the accompanying documents, the wife's words and what is asked from the husband, the impossibility of cohabitation and marital life between them appeared manifest. We bring this forward to your Excellency. It belongs to the justice of the court to adjudicate in the manner that is deemed adequate.

Peace upon you, God's clemency and His benediction

First arbitrator

Second arbitrator

Beyond the attempt to conciliate the spouses, to which this report testifies, the structure of the document reveals at least two things. First, the report is an accomplishment in itself, in which the arbitrators produce all the features that manifest their acting in their capacity and their mastering of the procedural and technical aspects that make it possible to produce a report from the *ad hoc* office of al-Azhar. Second, this report is part of a global procedure. It mentions that it belongs to the more

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<sup>7</sup> Old and famous mosque in Cairo that hosts one of the most prestigious universities of the Muslim world.

encompassing procedure that is followed in the trial of a case that was submitted to the arbitrators by the court, asking them to perform the action required by the law.

Besides the constraining effect of procedural rules, legal issues must be addressed by the many people engaged in the judicial process. These issues mainly consist in giving a factual substance to some formal legal definitions. In the case of judicial divorce on the ground of harm, two questions must be dealt with: What counts as harm? What is the cause of this harm? The two questions appear to be closely related to each other, and all the participants in the judicial process orient to them.

As for the harm itself, the statutory provision defines it broadly. Article 6 speaks of the wife alleging that her husband mistreated her in such a way as to make it impossible for people of their social standing to continue the marriage relationship. Hence, it is up to the judge to characterize the facts under review so as to fit them into the definition of Article 6. Here, the judge is constrained by the definitions given by the Court of Cassation, as appears explicitly in the following excerpt of the ruling:

**Excerpt 4 (Case No. 701, 1983)**

Considering that, as it emerges from the text of Article 6 of Decree-Law No. 25 of 1929 concerning certain provisions on repudiation, the Egyptian legislature requires, in order for the judge to rule for judicial divorce on the ground of harm, that the harm or the prejudice comes from the husband, to the exception of the wife, and that life together has become impossible. The harm here is the wrong done by the husband to his wife by the means of speech or action or both, in a manner that is not acceptable to people of same status, and it constitutes something shameful and wrongful that cannot be endured (Cassation, Personal Status, Appeal No. 50, 52<sup>d</sup> Judicial Year, session of 28 June 1983; its standard is here the non-material standard of a person, which varies according to environment, culture, and the wife's status in the society: Cassation, Personal Status, Appeal No. 5, 46<sup>th</sup> Judicial Year, session of 9 November 1977, p. 1644). The harm also has to be a specific harm resulting from their dispute, necessary, not susceptible of extinction; the wife cannot continue marital life; it must be in the capacity of her husband to stop it and to relieve her from it if he wishes, but he continues to inflict it, or he has resumed it (Cassation, Personal Status, Appeal No. 5, 47<sup>th</sup> Judicial Year, session of 14 March 1979, p. 798; Cassation, Personal Status, Appeal No. 51, 50<sup>th</sup> Judicial Year, session of 26 January 1982).

Here again, the Court's formal definition does not totally extinguish the uncertainty the judge faces when characterizing the facts. This does not mean, however, that the judge's work is problematic or arbitrary. On the contrary, the categories to which the judge refers have, for him, an objective nature, even though it is his characterization that objectifies them. Moreover, the legal process of characterization is thoroughly supported by the sociological process of normalization, that is, the operations through which the judge routinely selects some of the features of a case resembling a common, normal, usual type of case. It is to these 'normal' categories, which have, beyond their legal definition, a common-sense dimension, that the judge, as well as the prosecutor, the attorney, the victim, the offender, and the witnesses orient themselves.

In the case of 1983, the wife mobilized two types of grounds in order to substantiate the category of harm: (1) the husband's alleged impotence and, (2) the violence from which she allegedly suffered. Neither impotence nor violence is explicitly mentioned in Egyptian law. However, on the one hand, impotence is traditionally assimilated with either permanent illness (Article 9 of the 1920 Law) or harm (Article 6 of the 1929 Law), while violence is considered as the exemplary type of harm; on the other hand,

Hanafite law recognizes impotence as a ground for marriage dissolution (Shaham, 1997: 125), and this is confirmed in our case by the judge:

**Excerpt 5 (Case No. 701, 1983)**

Abû Hanîfa and Abû Yûsuf permitted separation on the ground of a permanent defect that impedes intercourse between the man and the woman, if he is impotent, emasculated, or disabled, because the goal of marriage is the protection of procreation, so that, if the man is not capable of this, it becomes impossible to implement the provision of the contract and there is no good in upholding it. Its upholding despite this [constitutes] a harm for the woman the prolongation of which cannot be accepted and which can only be resolved by separation (The Personal Status of imam Abû Zahra, p. 414, par. 297, ed. 1957).

However, this reference to Islamic law is made so as to substantiate a positive-law provision, i.e., Article 6 of the 1929 Law. Impotence and violence are not presented as Islamic-law provisions that must be directly implemented by the judge, but as two forms of the harm from which the wife suffered and on the basis of which the judge grants a judicial divorce according to Article 6 of the 1929 Law. The judge seeks to substantiate the legal category of harm, and what counts as harm for him is not totally dependent on statutorily-defined<sup>8</sup> or Islamically-defined<sup>9</sup> provisions, even though they can play an important role. What counts as harm varies also according to the judge's conception of 'normal harm', i.e., the manner in which he typically characterizes a certain type of behavior he encounters in the performance of his routine activities. As mentioned above, what counts as harm for the judge includes, e.g., his knowledge of the typical manner in which a wife may suffer prejudice, the social characteristics of given classes of male offenders and female victims, the social and physical features of the settings in which such a situation can take place. The judge's conception of harm functions reflexively: he orients to a conception which he thinks he shares with, and which will be confirmed by, other people participating in the judicial process, while those other people bear on the judge's conception, which they are asked to confirm, and produce reports that in turn serve as the basis for the judge's final ruling.

**Excerpt 6 (Case No. 858, 1998)**

It is established in the [Court of] cassation's jurisprudence that 'the harm committed by the husband is either positive or negative. Positive harm consists in the evil inflicted by the husband toward his wife by [means of] blows and insults, which is not authorized by Islamic *shari'a* and from which the wife suffers. As for negative harm, it consists in the husband's neglect of his wife. This is the most severe harm, the harm that dishonours the wife. It suffices that it happens because of the husband, against the wife, only once, to entitle her to ask for a divorce on the ground of harm (Cass., 31/3/1984 m., p.287, Majallat al-qadâ', 1984 m.).

The criterion for harm in the sense of Article 6 of Law 25/1929 m. is personal, not material, and its assessment is what makes the prolongation of marital life impossible. [Its criterion] is objective, left to [the discretion of] the judge [adjudicating on] the substance, and it varies according to the environment of the two spouses, their cultural level, and their social milieu (Cass, 1/11/1978 m., p.1174).

Harm is established through the testimony of two men or one man and two women, in pursuance of the prevailing opinion of the doctrine of Abû Hanîfa and in application of Article 280 of the By-law [organizing the courts] of the *shari'a*: 'Evidence belongs to two men or to one man and two women.' (Cass., Civil, 28/2/1960 m., 11<sup>th</sup> judicial year, p. 181)

Article 6, although it makes judicial divorce on the ground of harm conditional upon the judge's inability to conciliate the spouses, does not design any precise way [to follow] for the conciliation attempt between the two spouses. The court henceforth proposed conciliation to the two parties. The husband

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<sup>8</sup> The 1920 and 1929 laws.

<sup>9</sup> The abovementioned stipulations of Abû Hanîfa and Abû Yûsuf.

accepted and the wife refused. This is considered an [expression of] the inability of the court to conciliate the two spouses as required by Article 6 (Cass., 14/47, 30<sup>th</sup> judicial year [sic !]<sup>10</sup>, p.906).

In the case of 1983, two evidentiary techniques are mobilized in order to establish the types of prejudice that result in the harm. With regard to the husband's impotence, the forensic physician is asked to give a medical report, while the husband's violence is established through the oral testimony of witnesses. The latter technique is one of the few sections of the ruling in which reference is made to Islamic law, although here again it is mediated by positive-law mechanisms, i.e. the Court of Cassation's jurisprudence:

**Excerpt 7 (Case No. 701, 1983)**

Considering that Hanafî doctrine requires, in order to accept the testimony (*shahâda*) regarding the rights of believers, that it be congruent (*muwâfaqa*) with the petition (*da'wâ*) with regard to what is stipulated in it (*fî-mâ tushtarit fîhi*). The contradiction [of the petition by the testimony] is not acceptable. The congruence is complete when what the witnesses testify to is exactly what the petitioner has claimed; the congruence is implicit when he has testified to part of the case. This is accepted as an agreement. The judge considers what the witnesses testified to as evidence of what the petitioner claimed. The congruence need not be literal; congruence in meaning and intention suffices, whether the expressions are the same or different (Cassation, Personal Status, session of 23 November 1982, published in the Judges' Review; Appeal No. 2, 53<sup>d</sup> Judicial Year, session of 20 December 1983).

Accordingly, the court decided to collect the testimonies of the witnesses designated by the petitioner and the defendant. Although these testimonies are written documents,<sup>11</sup> they tend to reproduce *verbatim* the parties' exact wording and they allow us to get closer to the interactional details of the practice of judging. These can be read as follows:

**Excerpt 8 (Case No. 701, 1983)**

[1]

1- The court called the petitioner's first witness and he said:

2- My name is ... **oath**

3- Question: What's your relationship to the two parties

4- Answer: My workplace is close to the post office in which the petitioner works

5- Q: What are you testifying to

6- A: The petitioner is the defendant's wife by virtue of a legal marriage contract there were disputes between them and I saw the petitioner's husband whom I know although I don't know the place of his residence he was addressing to her words in front of the post office in which she works calling her I heard him addressing her as you bitch you filthy and other words of this kind for nearly two years and one month ago he called the police against her because there was between them something I don't know

7- Q: For how long have you known the petitioner's husband

8- A: For nearly two years

9- Q: Does he live in your neighborhood

10- A: I don't know

11- Q: For how long has the defendant addressed bad words to the petitioner

12- A: For nearly two years

13- Q: What are the words he's addressed to her

14- A: He told her you bitch you filthy and words of this kind and this was in front of the post office

15- Q: Did any harm affect the petitioner because of this

16- A: Yes she broke down while working at the post office

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<sup>10</sup> The 30<sup>th</sup> judicial year corresponds to 1962 and 1947 corresponds to the 15<sup>th</sup> judicial year.

<sup>11</sup> Legally, testimonies made in front of the court are considered written testimonies.

17- Q: Anything else to say  
18- A: No [...]  
[3]  
35- The defendant's first witness was called. He said:  
36- My name is ... **oath**  
37- Q: What's your relationship to the two parties  
38- A: The defendant lives with me at home  
39- Q: What are you testifying to  
40- A: The petitioner is the defendant's wife by virtue of a legal marriage contract and the defendant lives with me and he's lived in my home for one year and eight months and nothing like a misunderstanding happened between them and he didn't assault her and he didn't hit her and he didn't insult her and the policeman came and took the defendant and locked him in the station  
41- Q: Did you see the defendant assaulting the petitioner  
42- A: No  
43- Q: Did you hear the defendant insulting the petitioner  
44- A: No  
45- Q: The petitioner's two witnesses reported that he insulted her and hit her in front of her workplace  
46- A: No it didn't happen  
47- Q: Anything else to say  
48- A: No [...]

Even though testimonies are supposed to be transcribed in the witnesses' own words, they clearly appear to have been at least partly reformulated by the judge (and his clerk). This is why the witness is always reported to have begun his testimony by stating that the petitioner and the defendant are spouses 'by virtue of a legal marriage contract.' In addition to this re-writing or editing process, the overall stereotypical nature of the organization of the testimony and the pre-allocated sequence of turns in the production of the testimony are noteworthy. Both depend on the institutional context in which these testimonies are given. As noted in a seminal study of courtroom interactions, 'the talk in each stage of court hearings shares the feature that although it occurs in a multi-party setting (...), the parties who may participate are limited and predetermined.' (Atkinson & Drew, 1979: 35) Moreover, whatever is done in this context is necessarily managed by the participants within the constraining framework of this pre-allocated turn-taking organization. In other words, unlike ordinary conversations, turn order in judicial settings is fixed, as is the type of each speaker's turn.

Within this system of turn allocation, both the judge and the witnesses are oriented to the production of information that may be legally relevant and to the credibility of this information. On the judge's side, the credibility of the information provided by each witness is tested by questions directed at the credibility of the witness himself. This is why the interrogation always begins with a question about the witness's 'relationship to the two parties' (turns 3, 37). This credibility can be further investigated by asking the witness to produce a first account of his testimony (turns 5, 39) and then assessing the reliability of this global narrative by asking the same witness to confirm his statements piecemeal (turns 7-14, 41-44). Some of the judge's questions are clearly directed at challenging the witness's version of the facts by confronting him with another witness's testimony (turn 45: 'The petitioner's two witnesses reported that the defendant had hit her and insulted her'). Clearly, the judge also seeks to extract some elements of information—nature of demeanor (insulting and hitting: turns 41, 43), temporal dimension of the demeanor (for how long?: turn 11), content of the demeanor (words used by the husband: turns 13, 16), responsibility (who did it?: turns 11, 41, 43),

prejudicial nature of the demeanor (what effect on the wife?: turn 15)—that are the constituting features of the legal category of harm. Indeed, together, the spare parts of this query for information are in congruence with the many conditional elements of the notion of harm as defined, in the ruling and according to the Court of Cassation, as ‘the wrong done by the husband to his wife in the form of speech or action, or both, in a manner that is not acceptable to people of same status, and it constitutes something shameful and wrongful that cannot be endured.’

At the same time, the witness attempts to establish his credibility by offering some elements of information that reasonably can be considered to qualify him as a reliable witness—the nature of his perspective (turn 4: workplace; turn 38: neighborhood), duration of his witnessing (turns 8, 12: nearly two years)—or which appear as very plausible—exact wording of the insults (turn 14: ‘bitch’ and ‘filthy’), effects of these insults (turn 16: her breaking down at the post office). With regard to the content of his testimony, the witness clearly orients to what appears to him as the constitutive element of the harm, either denying or confirming its having occurred. Interestingly, the witness who denies the existence of any harm directly orients his first global narrative, the elements of which were not elicited by the judge, to the husband’s having neither insulted nor hit her. Accordingly, one may conclude that the normal conception of harm is made of either blows or insults, or both, in a manner largely independent of any formal legal definition.

If we turn now to the practical ways in which members of the judicial setting orient to the issue of causation and agency in the production of harm, we observe that, although Article 6 of the 1929 Law deals with harm for which the husband is deemed responsible, whereas Article 9 of the 1920 Law deals with harm resulting from the husband’s permanent defect, for which he cannot be deemed responsible, however, in the case examined here, the judge merges the two sources of harm and mentions only the statutory reference of Article 6. Moreover, we see that, for the people engaged in judicial procedures, causation takes many forms that are directly linked to commonsense conceptions. These conceptions depend on commonly shared assumptions and vary according to the position people occupy within the judicial procedure. In the case under scrutiny, people orient to an institution like marriage in terms of its normal goals. This teleological approach to marriage is clearly manifested in the petitioner’s request and in the judge’s ruling:

**Excerpt 9 (Case No. 701, 1983)**

Petitioner: The petitioner is the wife of the defendant in pursuance of a valid legal marriage contract; she was married to him and discovered suddenly that her husband the defendant had a constitutional defect, that is, he was totally incapable of having marital relations with her, which therefore made it impossible for her to procreate and this put her life in trouble and made her psychologically sensitive, and her life became deeply sad as it became clear that this kind of marriage would not realize the aims of marriage.

Ruling: Considering that [...] the forensic physician has established that the defendant [...] is affected by psychological impotence [...]. Abû Hanîfa and Abû Yûsuf permitted separation on the ground of a permanent defect that impedes intercourse between the man and the woman if he is impotent, emasculated, or disabled, because the goal of marriage is the preservation of procreation, so that, if the man is not capable of this, it becomes impossible to implement the provision of the contract and there is

no good in upholding it. Its upholding despite this [constitutes] a harm for the woman the lasting of which cannot be accepted and which can only be resolved by separation. [...]

The many parties to the case commonly consider the absence of marital relationships and the inability to procreate an incongruity that disturbs the normal course of a marriage. This is precisely what must be accounted for. A causal factor—here impotence—is invoked so as to remedy this incongruity. Impotence is elevated to the rank of the main causal source, from which all other factors are derived.

Besides this teleological conception—the cause of harm is the element that forecloses the realization of the goals of marriage—harm causation is considered in terms of successive integrated factors. This means that events are presented as necessarily following each other. In our case, the argument proceeds as follows: the wife risks committing infidelity, because of antipathy between her and her husband, because marital life has become unbearable, because the wife is compelled to live under moral duress, because of the blows, insults, and false accusations that she must suffer, because of her husband's bitterness, because of his impotence. In this causal argument, Islam and Islamic law may play a role, but it is only one among the many different reasons why people abide by the rule. This is reflected in our case in the presentation of the petitioner's request in which her motives are exposed:

**Excerpt 10 (Case No. 701, 1983)**

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.

Explicitly 'Islamic' considerations are few. Moreover, they are generally mediated by reference to law books and case-law. In that respect, we must be concerned only with the way in which the judge (as also the Public Prosecutor, the forensic physician, and the attorney) orient to the provisions of Egyptian law, including those rules that originate in classical Islamic *fiqh*. In our cases, impotence and violence are not characterized by the parties as Islamic-law provisions *per se*<sup>12</sup>. Rather, we observed the ways in which the parties refer to impotence so as to exhibit the workshop level of their practices, which are publicly and accountably made up of considerations for institutional setting, procedural correctness and legal relevance.

**Conclusion**

Many scholars claim that, despite major transformations in law and adjudication in Egypt during the last two centuries, it is still an Islamic judge who issues Islamic rulings in the field of personal status law, the last stronghold of Islamic law. I argued that such claims must be challenged on two different levels. On the first level, these claims fall

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<sup>12</sup> This is an assumption that can be justified only because scholars know in advance that these are grounds for divorce in classical Islamic *fiqh*

short of any satisfactory definition of what is specifically Islamic that would make this law an Islamic law and its provisions something better characterized by their Islamic and not their national Egyptian dimension. On the second and more fundamental level, I my contention is that these claims are sociologically irrelevant, for they eschew the praxiological dimension of adjudication. Instead of assuming that there exists something called an Islamic personal status law to which judges necessarily conform, it would be better to examine and describe judges' actual daily activities and practices, through which they manifest their legal knowledge, their formal and practical legal training, and the routinized nature of their activity in the field of personal status law. Thus scholars should not presume the Islamic nature of rulings on the basis of their genealogical connection to the provisions of an earlier legal system, for this would be to adopt an ironic position by which scholars tell judges what is Islamic and what is not in their daily judicial activities. Instead, any ascription of an Islamic dimension and authority to rulings should proceed from the judges' personal characterizations and orientations, to which only a close scrutiny of actual interactions and utterances bears witness. In other words, there is no valid preconceived model to the yardstick of which one can evaluate actual judicial practices. The Islamic nature of rulings is something that is instantiated and realized by the actual written and oral performances of judges.

At the very place where it is supposed to be massive and overwhelming, i.e., in personal status law, references to Islamic law are conspicuous for their paucity. This suggests that the issue of Islamic law in contemporary Egyptian law does not proceed from what the scholarly tradition generally claims. The reference to Islam is occasional; moreover, it is always mediated through the use of Egyptian law's primary sources, that is, legislation and case-law. Henceforth, this reference takes place in the banality and the routine of judge's activity, which consists mainly in legally characterizing the facts submitted to him. By so doing, the judge is obviously more interested in manifesting his ability to judge correctly—according to the standards of his profession, the formal constraints that apply to its exercise, the legal sources on which he relies and the norms of the interpretive work his activity supposes—than he is to reiterate the Islamic primacy of the law he implements. There is no doubt that, if asked, the same judge would underscore the conformity of his activity and the law he applies with Islamic law. However, such an attitude would only be retrospective, *a posteriori*, and justificatory. In the course of his work, the judge does not orient himself to the necessity to assess the Islamic dimension of any object, even in this domain of law where the Islamic genealogy of rules seems most evident. The close description of the modes of usage of, and reference to, legal rules, some of which have an Islamic genealogy, shows us the extent to which law is a practical accomplishment, not the archaeological search for the Islamic pedigree of the norm.

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