# The Person in an Egyptian judicial Context

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# THE PERSON IN AN EGYPTIAN JUDICIAL CONTEXT
## An Ethnomethodological Analysis of Courtroom Proceedings

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## 1. Introduction

In this contribution, I am interested in the notion of the person and the way it is formulated in and practiced in what is called "law in action".* The notion of the legal person is closely associated with the concept of legal capacity and its opposite, incapacity. The article analyzes the legal and judicial uses of the category of the person as a natural artifact, This will lead to consider the normative and moral character of what is presented by law as coming from the objective nature of facts. I shall scrutinize those mechanisms of "naturalizing the normative" and "normalizing the natural". Both mechanisms sustain the institutional reality of law and contribute to its transformation.

A category like the person, which is historically contingent, is at the same time necessarily shaped by the context of its mobilization. It is on this constraining effect of the context that this article will focus. After some general considerations regarding the praxiological approach to law which is followed, it concentrates on legal practices related to these categories as they emerge from actual legal interactions in judicial contexts. First, I shall make some developments on the notions of norm and normality, arguing that it is through these notions that the category of the person takes its local and contextual meaning. Second, I shall examine this notion of context, institutional in particular. Turning to a case in which a person is accused of having intentionally killed a woman, though he claims to have been possessed by spirits, I shall document the influence of the legal setting in the production of meaningful categories like the person.

### *1.1. A praxiological approach to law*

This essay has a strong ethnomethodological inspiration. This cannot be interpreted as a call for the adoption of an alternative sociological theory or methodology. With regard to the former, on the contrary, ethnomethodology seeks to substitute to the building of grand model theories the close investigation of actual data reflecting the ways (methods) in which people (the members of any social group) make sense of, orient to, and practice their daily world. With regard to the latter, ethnomethodology's indifference policy "turns away from the *foundationalist* approach to methodology that gives rise to principled discussions of validity, reliability, rules of evidence, and decision criteria."[1] Following Stephen Hester and Peter

* I am deeply indebted to many people among which I wish to mention alphabetically Kilian Bälz, Jean-Noël Ferrié, Bernard Jackson, Pierre Livet, Greg Matoesian, Poul Pedersen, David Powers, Max Travers and Rod Watson.

[1] Coulter, J., "Method: measurement-ordinary and scientific measurement as ethnomethodological phenomena" in G. Button (ed.), *Ethnomethodology and the Human Sciences* (Cambridge: Cambridge University Press, 1991), 88.

Eglin, we can identify four principles that characterize ethnomethodology.[2] First, the focus on members' methods: ethnomethodological research is particularly attentive to the "the production and recognition apparatus"[3] of action, i.e. the means used to produce an action in a way that allows it to be understood by others. Second, the injunction to "treat social facts as interactional accomplishments."[4] Social facts, in this sense, are not givens but ongoing social productions of people engaged in courses of mutually constituted actions within mutually constituted self-organizing settings. Third, rather than predefining social phenomena or employing people's meanings as resources for explanation, ethnomethodology seeks to describe what participants in particular settings are oriented to and how these features enter into their perceptions, actions and accounts. Members' 'meanings' become topics of inquiry in their own right rather than resources for mapping out sociological relevance. Four, people, i.e. social actors, are rule-using, not rule-determined creatures. It means that, in the course of their actions, they eventually orient to bodies of rules. However, their actions cannot be depicted as rule-governed. As a whole, ethnomethodologically-inspired praxiological studies involve a radically non-mentalist approach, where, by non-mentalist, it is meant that processes related to mind, thought, emotions and the like cannot be reduced to mere neuronal firings nor relegated to any inaccessible inner self, but must be radically "sociologized."[5]. If methodology is about rigor, the rigor of ethnomethodological analysis has to be found in its capacity to reproduce the features of the phenomena it observes and not in its assuming about these phenomena anything that would specify in advance of investigating them.[6]

From the inception of ethnomethodology and conversation analysis, law and courtrooms were considered a privileged standpoint from which it is possible to observe language and action in context. The goal is not to identify how far legal practices deviate from an ideal model or a formal rule but to describe the modalities of production and reproduction, the intelligibility and the understanding, the structuring and the public character of law and of the many legal activities. Instead of assuming the existence of racial, sexual, psychological or social variables, ethnomethodological and conversational research focus on how activities organize themselves and on how people orient themselves to these activity structures, which they read in a largely unproblematic way. As Alain Coulon points it out, the sociological hypothesis of norms interiorization, from which "automatic" and "unthought" behaviors follow, does not give any account of "the way actors perceive and [understand] the world, recognizing what is familiar and constructing what is acceptable, neither does it explain how rules concretely govern interactions."[7] From this point of view, law is neither the law of abstract rules nor the law of principles independent from the context of their utilization, but the law of people involved in the daily practice of law, i.e. the law made of the practice of legal rules and of their interpretive principles. Hence, our attention is directed to "such matters as: (1) the methods by which particular legal actions such as legislating, accusing, complaining, identifying 'suspicious' persons, arresting, plea negotiating, (cross-)examining,

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[2] Hester, S., and Eglin, P., *A Sociology Of Crime* (London and New York: Routledge, 1992), 14-17.

[3] Garfinkel, H., and Sacks, H., "On Formal Structures Of Practical Actions", in J.C. McKinney and E.A. Tiryakian (eds.), *Theoretical Sociology* (New York: Appleton Century Crofts, 1970).

[4] Pollner, M., "Mundane Reasoning", *Philosophy of the Social Sciences*, 4(1974), 35-54.

[5] Cf. Coulter, J., *Mind In Action* (Atlantic Highlands, NJ: Humanieties Press International, 1989); Watson, R., "Ethnomethodology, Consciousness and Self", *Journal of Consciousness Studies*, 5/2(1998), 202-223.

[6] Benson, D., and Hughes, J., "Method: evidence and inference-evidence and inference for ethnomethodology", in G. Button (ed.), *Ethnomethodology and the Human Sciences* (Cambridge: Cambridge University Press, 1991), 128-129.

[7] Coulon, A., "Harold Garfinkel", in K.M. van Meter (ed.), *La sociologie* (Paris: Larousse, 1994), 648.

judging, sentencing and appealing are produced and recognized; (2) the methods by which legal settings and situations such as a call to the police, police interrogations and courts and trials are socially organized; (3) the methods by which legal and criminal identities such as lawyer, client, police, suspect, judge and defendant are achieved in social interaction."[8]

Many ethnomethodological or conversationalist works study law and legal practice.[9] One of their main themes is what John Heritage calls the morality of cognition,[10] i.e. the incongruity procedure by which social actors decide whether a situation should be considered normal or abnormal. In his study of the Kennedy Smith rape trial, Gregory Matoesian shows how "through a myriad of linguistic and sequential resources, the defense attorney creates a turn-by-turn disjunction between category bound activities/states and the rapist category, drawing attention to the abnormality of rapists, the normality of his client, and the irrationality of the witness's actions if he were a rapist (or the rationality of her actions with a nonrapist)."[11] In a similar way, Harvey Sacks's "Notes on Police Assessment of Moral Character" of alleged offenders shows how the work by which facts, objects and people are assessed is done from the perspective of typified and routinized situations.[12] In his paper on "normal crimes", David Sudnow demonstrates how this normality is made of the typified characteristics that are ascribed to these situations and that are expected from them.[13]

The attention which ethnomethodology and conversation analysis draws to situated practices sheds light on the mainly routinized nature of the formalizing work which law professionals accomplish. The work of attorneys, magistrates, and prosecutors consists mainly of the formalization of categories which are used in the clients', offenders' and witnesses' telling of the facts. Conversely, the work of the non-professional parties in a trial often consists in avoiding the blame-implicative inferences which results from the legal characterization of facts. As evidenced by Rod Watson, the categorizing processes that mark out the path leading to a court decision are as many means for the concerned people to give their act a motivation and, by doing so, to allocate and to negotiate accusation, culpability, motivation, responsibility and, therefore, grounds for excuse and justification.[14]

Methodologically, it must be noted that this article relies upon various written records, mainly the written transcription of public prosecutors' and judges' examinations of offenders, victims, witnesses, and experts in different criminal cases. The reason for the recourse to

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[8] Hester & Eglin, *supra* fn.2, at 17.

[9] E.g. Atkinson, J.M., and Drew, P., *Order in Court: The Organization of Verbal Interaction in Courtroom Settings* (London: Macmillan, 1979); Maynard, D.W., *Inside Plea Bargaining: The Language of Negotiation* (New York and London: Plenum Press, 1984); Matoesian, G., *Reproducing Rape: Domination Through Talk in the Courtroom* (Chicago: University of Chicago Press, 1993); Travers, M., and Manzo, J.F. (eds.), *Law in Action: Ethnomethodological and Conversation Analytic Approaches to Law* (Aldershot: Dartmouth/Ashgate, 1997); Travers, M., *The Reality of Law: Work and Talk in a Firm of Criminal Lawyers* (Aldershot: Ashgate Dartmouth, 1997); Komter, M.L., *Dilemmas in the Courtroom. A Study of Trials of Violent Crime in the Netherlands* (Mahwah, New Jersey: Lawrence Erlbaum Associates, 1998); Matoesian, G., *Law and the Language of Identity: Discourse in the William Kennedy Smith Rape Trial* (New York: Oxford University Press, 2001).

[10] Heritage, J., *Garfinkel and Ethnomethodology* (Cambridge: Polity Press, 1984), ch.4.

[11] Matoesian, 1997, *supra* fn.9, at 174.

[12] Sacks, H., "Notes on Police Assessment of Moral Character", in D. Sudnow (ed.), *Studies in Social Interaction* (New York: The Free Press, 1972).

[13] Sudnow, D., "Normal Crimes", *Social Problems*, 12(1965), 251-276.

[14] Watson, R., "The Presentation of Victim and Motive in Discourse: The Case of Police Interrogations and Interviews", *Victimology: An International Journal*, 8(1983), 31-52; Komter, *supra* fn.9.

written documents is simply that I had no access to tape-recordings of court and prosecution hearings and was not granted permission to tape-record them myself. This reliance upon written material and not tape-recordings might be considered an apparent shortcoming of the data in which this analysis is grounded. It also explains why I do not follow the transcript symbols devised by Gail Jefferson[15] However, following J. Maxwell Atkinson and Paul Drew,[16] I defend the way I use these transcripts, even though I would have preferred to get access to tapes. First, I "have sought for the most part to avoid investigating things which cannot be read from the (…) transcripts". Second, I contend that "some understandings can be arrived at perfectly well from official and other 'cleaned up' transcripts from which such details [intonational variation, the serial placement and length of pauses within and between turns, overlaps, etc.] are excluded." Third, if the practice of transcription exists, "it is presumably based on the assumption that they are adequate for lawyers and others to understand for the practical purposes of submitting or deciding appeals". It means that, at least, these transcripts are considered reliable by professionals engaged in legal practice. There is no reason to consider that the analyst cannot rely upon data that are accepted as appropriate by practicing lawyers: "Providing the analyst confines his attention to understandings which can be arrived at from whatever data he has before him, however, there is still much that he can do even without access to other interactional features". Fourth, there remains an additional problem when data are not only transcribed from oral hearings but also translated from foreign language. *Mutatis mutandis*, the remarks formulated by Atkinson and Drew with regard to the capacity of English native speakers of English to understand and analyze courtroom exchanges between Americans hold true when turning to more alien languages and contexts. Namely, it means that it is analytically proper to proceed so long as the investigations are limited to readings of Egyptian Arabic data which can be arrived at by me as a competent but non native speaker of Egyptian Arabic. However, I am fully aware that the English translations of original Egyptian Arabic written records constitute a real problem to which I see no solution other than, first, acknowledging the difficulty, second, stressing the fact that these records are written transcriptions already partly cleaned-up by the courts' clerks from the original Egyptian colloquial, and, third, emphasizing our capacity to do much with such material. In sum, although I am very much aware of the transformations that happen during this transcription process and make oral statements and interrogations written records—in other words, I deal with statements that have already been partly re-shaped by the prosecution for all practical legal purposes—I can also, from my own personal experience, testify to the fact that public prosecutors do not totally re-phrase parties' utterances. Actually, the record is a mix of original and partly re-phrased utterances through which a good deal of actual interactions perspires.[17]

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[15] Jefferson, G., "The Transcript Symbols", in G. Psathas (ed.), *Everyday language: studies in ethnomethodology* (New York: Irvington, 1979). It also explains why I decided not to add any punctuation in the material that corresponds to the written transcription of oral investigations: original documents were devoid of any such punctuation.

[16] Atkinson & Drew, *supra* fn.2, at 191-193.

[17] On the question of producing legal relevance in police and prosecution records, see Komter, M.L., "La construction de la preuve dans un interrogatoire de police", *Droit et Société*, 48(2001), 367-393, and Dupret, B., "L'intention en acte : approche pragmatique de la qualification pénale dans un contexte égyptien", *Droit et Société*, 48(2001), 439-467.

## 2. The category of the person

In this section, I shall focus on the notion of the person as manifested in its legal treatment. Using examples taken from Egyptian criminal law, I shall stress the idea that this category is both normative and contextual. The person, in the specific context of Egyptian legal practice, does not correspond to something whose characters can *a priori* be identified. It is a type or a category and it normatively functions as such.

Usually, people are taken to assume that "events have 'normal patterns' and 'usual causes' of occurrence that can be relied upon."[18] As Schütz puts it, they hold their knowledge in a typified form, in a taken-for-granted basis, and these social constructs are valuable as a resource for navigating the social world because "the pattern of typified constructs is frequently institutionalized as a standard of behavior, warranted by traditional and habitual mores and sometimes by specific means of so-called social control, such as the legal order."[19] This typified form in which people hold their knowledge is a very indeterminate and indistinct one which very often receives its clarification progressively during the actual temporal course of action. Nonetheless, people firstly display their perception of the normality of events. In a situation of incongruity, they look for explanations for this threat to normality. In other words, people are (made) morally accountable for any breach in what is the perceived normal course of events. This means that any departure from the 'normal' is assumed to be motivated or at least explainable. One should note that the whole process is dynamic: people refer to an underlying pattern of the normal course of events, and this underlying pattern is itself defined and transformed by actors' actions.

Legal categories do not escape the scheme of naturalness and normality . In other words, the idea of the normal person constitutes the point of reference of practical legal reasoning. As such, the person, far from being an abstract and a non-accessible category, is made public through the culturally methodic deployment of public resources, i.e. linguistic resources, in social interaction.[20] As Douglas Maynard puts it, in his study of plea bargaining, "when persons are talked about in any conversation, descriptions are selected and produced according to what activity is being done (…) Who a person officially is, for others, depends on what activity is being accomplished in their talk."[21] The person is constituted in the public domain and is a thoroughly public phenomenon. The realization of the category of the person is, in such a perspective, oriented and constrained by the scheme of the natural and normal person, as in Garfinkel's seminal study of the case of Agnes, in which sexual identity is conceived as being a produced and managed feature of ordinary social interactions and institutional workings.[22] It works "as an invariant but unnoticed background in the texture of relevancies that comprise the changing actual scenes of everyday life."[23] This background is constantly mobilized, though it remains largely unexplained or loosely defined. Hence, being defined as a person largely depends on people's capacity to present normal appearances and to expect people to treat them on such grounds. As Sacks puts it, "persons using public places are concurrently expected by others to present appearances which can be readily so used, and

[18] Heritage, *supra* fn.10, at 77.
[19] Schütz, A., *Collected Papers*, vol. 1 (The Hague: Martinus Nijhoff, 1962), 19.
[20] Watson, *supra* fn.5, at 213.
[21] Maynard, *supra* fn.9, at 138.
[22] Garfinkel, H., *Studies in Ethnomethodology* (Cambridge: Polity Press, 1967).
[23] Garfinkel, *supra* fn.27, at 118.

expect others to treat their own appearances at face value."[24] Among the methods that are mobilized, one must point to the incongruity procedure, which treats in parallel the expected behavior and the perceived behavior, so as to infer from their congruence or from their divergence the nature of the person whose character is assessed. In other words, there is no natural person as such, but only naturalized persons, and this category is normative because people are confronted with the naturalized, normalized person so as to assess his/her conformity to the type, with all the rights and duties that are attached to membership to this type (this is what conversation analysts call 'membership categorization device').[25]

We shall give some examples of such production of the normal person in the Egyptian legal context. These examples are taken from the written records by which public prosecution transcribes the statements of different parties in a trial. The following is the account of a girl who allegedly was the victim of an attempted rape, subsequently characterized by the public prosecution as an indecent assault (*hitk 'ird*).

Question: What did happen
Answer: I was in the street this day … when I met these two … and they told me come along with us and they made me take a cab … and they went to the rear of the War Factory
Q: What was their purpose in so doing
A: They told me don't worry we go drink a tea together
Q: Why didn't you ask for help when they caught you …
A: I tried to cry out and to convulse on the floor but the street was empty
Q: What's the number of the cab in which they took you
A: I don't know it was going in the street
Q: Why didn't you ask the cab driver for help
A: The driver was afraid of them and he did what they asked him to do
Q: What was the purpose of them taking you along
A: I think that they wanted to assault my honor otherwise they wouldn't have taken me to that place
Q: Did you know them from before
A: No
Q: Do you have anything else to say
A: No
(Case No 5471 of 1977, Mahram Bey, Alexandria)

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[24] Sacks, *supa* fn.12, at 281.

[25] Membership categorization analysis is what Hester and Eglin (Hester, S., and Eglin, P., "Membership Categorization Analysis: An Introduction", in S. Hester and P. Eglin (eds.), *Culture in Action: Studies in Membership Categorization Analysis* (Washington: International Institute for Ethnomethodology and Conversation Analysis & University Press of America, 1997), 2) call one of the overlapping strands of inquiry in ethnomethodology (beside conversation analysis and the study of mundane reason). Membership categories are classifications or social types that may be used to describe persons, collectivities and non-personal objects. When linked together, they form what Harvey Sacks calls "natural collections" or "membership categorization devices", which he defines as "any collection of membership categories, containing at least a category, which may be applied to some population containing at least a member, so as to provide, by the use of some rules of application, for the pairing of at least a population member and a categorization device member. A device is then a collection plus rules of application" (Sacks, H., "On the analyzability of stories by children", in R. Turner (ed.), *Ethnomethodology: Selected Readings* (Harmondsworth, Middlesex: Penguin Education, 1974), 218). It must be noted that there are many categories that go together in what Sacks calls "standardized relational pairs". The rules of application in membership categorization devices are: the economy rule that "provides for the adequacy of using a single membership category to describe a member of some population" (Hester & Eglin, *supra* fn. 2, at 121, referring to Sacks, *supra* fn.30, at 219); and the consistency rule that provides that a category from some device that has been used to categorize a first member of a given population "may be used to categorize further members of the population" (Sacks, *supra* fn.30, at 219). Class of predicates can conventionally be imputed to membership categories. They include category-bound activities, rights, expectations, obligations, knowledge, attributes and competences (Hester & Eglin, *supra* fn. 2, at 122).

What this short account reveals about the person (the victim) is quite rich, notwithstanding the trivial nature of the exchange. First, the prosecutor aims at providing an account which gives mutual intelligibility of the actions of each party in the form of wh-questions ("what did happen", "what was their purpose", "why didn't you ask…", etc.) Second, it points to a typical conception of the distribution of roles between genders: women walk in the streets ("I was in the street"), completing their daily business, while men assume the entire responsibility in engaging in any kind of relationship ("when I met these two and they told me"). Third, in cases of illegitimate sexual intercourse, women are presumed to bear some responsibility for what happened to them and not to have done what they should have ("Why didn't you ask for help?"). In other words, they bear the burden of proof and have to justify themselves by showing they made an effort ("I tried to cry out and to convulse on the floor but the street was empty") in repairing the damageable consequences of this assumption. Fourth, action is presented as motivated. In this case, fear and confidence are combined in a way that gives motives both to the girl's acceptance of her going along with them (Q: "What was their purpose in so doing?" A: "They told me don't worry we go drink a tea together") and to her not resisting getting into the cab ("they made me take a cab"). However, fifth, there is a kind of ambiguity surrounding her accepting an invitation, on the one hand, and her being commanded and threatened, on the other. Realizing that accepting an invitation might be detrimental to her credibility as a victim, she might have tried a kind of repair by shifting from mere communication ("they told me") and invitation ("we go drink a tea together") to force and compulsion ("they made me take a cab"). Sixth, her answer to the question concerning her not asking for help seems very odd ("I tried to cry out and to convulse on the floor but the street was empty"). Following the former shift from communication and invitation to force and compulsion, it rather seems to confirm that the victim refrained from crying, either because it was useless or because she actually did not object to her accompanying them. Realizing that her apparent passivity could be very detrimental to her case, the victim seems to change her narrative so as to emphasize her active resistance. Finally, the prosecutor is always looking for individual action ("Why didn't you ask for help when they caught you …?"), motivated action ("Why didn't you ask the cab driver for help?"), and purpose or intention ("What's the purpose of them taking you along?"). The latter point must be emphasized, for it reveals how the way in which the prosecutor conducts the interview is organized for practical purposes, i.e. anticipating the steps through which the case must go, around the legally relevant questions of "who did what with which intention."[26]

Twice, the victim uses direct quotes in her answers to the prosecutor's questions ("They told me come along with us"; "They told me don't worry we go drink a tea together"). The use of direct speech is a central device in talk activities. As Matoesian and Coldren put it, "Direct quotes are a type of reported speech which minimizes the gap in the decontextualization and recontextualization of prior talk. They make the words being spoken here and now appear as an exact replica of the words spoken in historical context. They make the performed words appear close to previous words and, in so doing, make those historical words come alive—giving them an aura of objectivity and authority. In this way, direct quotes provide a rigid boundary between the quoting and quoted voices which maintains the historical authenticity and integrity of the reported speech, as the reporting speaker purports

[26] See Dupret, *supra* fn.17.

to represent the reported speaker's exact words."[27] Foregrounding the voice of one of her aggressors, the victim's narrative appears much more reliable, while her own voice is at the same time backgrounded. The authenticity of her statement becomes hard to challenge and the whole drama much more lively. However, it has detrimental implications. If it is credible that she was invited by these two guys, it is also credible that she consented to her flirting with them. This is not something young women are supposed to do. Consequently, her narrative, although it takes the form of direct quotes, is damageable to her morality. It creates a disjuncture between the legal characterization of the facts and the way in which they are reported.

The role played by the institutional function of one of the parties (offender, victim, witness) in his/her talk and in the general construction of the narrative clearly emerges from the following excerpt of the interview of one policeman in the same case:

Q: What information do you have

A: Today, when patrolling with my colleague policeman Ahmad Hasan al-Shannawi in the first zone of the police station of Mahram Bey in which 'Izbat Nadi al-Sayd is located when patrolling at the rear of the War Factory I and my colleague heard the sound of a woman who said help this sound was coming from the rear of the War Factory my colleague and I started searching for the origin of the sound and we witnessed a girl and two boys holding her they attempted to escape but I and my colleague hurried to catch them and to make inquiries about the girl and it came out that she was called Magda al-Sayyid Muhammad Qasim she reported to us that these two boys met her at the Prison of Alexandria and brought her by force in a taxi to this place and attempted to assault her

(Case No 5471 of 1977, Mahram Bey, Alexandria)

The categorization of events and people appear in a very detailed manner which is organized so as to be useful for all subsequent legal purposes: day, actors, place, circumstances, action, accounts. Moreover, we should note that this account provides for the professional character of its authors.[28] As noted by Sacks, one basis for this professional status seems to be the concern of the police to develop means for establishing their job "as business-like, i.e. impersonal, code-governed, etc."[29] Both the actors' actions and their accountings are institutionally organized with reference to some accounting framework.[30] This has consequences for the definition of the person whose circumstances are presented so as to fit the requirements of a proper accomplishment of legal characterization. "Here, the categories of the criminal law (…) are seen as constituting the basic conceptual equipment with which such people as judges, lawyers, policemen, and probation workers organize their everyday activities."[31]

The two former accounts should be contrasted with the accounts given by the two alleged offenders. As for 'Abd al-Hafiz Ahmad:

Q: What do you say with regard to what relates to you

A: It didn't happen I was walking on the Mahram Bey bridge and I met the boy Mahmud Basyuni walking on the bridge and this girl with him he asked me don't you know a place where to take this girl and I told him I don't know I'm on my way to give to someone at the War Factory he told me take me along my foot is hurting I

[27] Matoesian, G., and Coldren, J., "Evaluer la police de proximité : style indirect, ambiguïté et paroles rapportées dans un contexte juridique bureaucratique", *Droit et Société*, 48(2001), 395-415.

[28] Jackson, B.S. "Towards a semiotic model of professional practice, with some narrative reflections on the criminal process", *International Journal of the Legal Profession*, 1/1(1994), 55-79.

[29] Sacks, *supra* fn.12, at 293.

[30] Wieder, L., *Language and Social Reality* (The Hague: Mouton, 1974).

[31] Sudnow, *supra* fn.13, at 255.

hailed a cab and he and the girl got in with me she was crying and when the cabdriver heard the girl crying he started to take her out of the cab at a station for used oils I headed for the (place) of the thing which stays at the rear of the War Factory and Mahmud Basyuni and the girl afterward I suddenly realized that the policemen had caught me

Q: Where and when did it happen

A: Today around 3 more or less on the Mahram Bey bridge Mahmud Basyuni met me and the woman who was with him

Q: Did you know one of them from before

A: I knew Mahmud Basyuni because he lives on our street but the girl I don't know her

Q: What was the situation you witnessed the aforementioned Mahmud Basyuni and the girl

A: The girl was walking along with Mahmud Basyuni and her hand was in his hand and she cried

Q: Didn't you ask why she was crying

A: No

Q: What did the aforementioned Mahmud Basyuni report to you when you met her

A: He told me Have you a place where we can take the girl and I told him I don't know this

Q: What have you to say concerning what the two policemen and the victim reported

A: What they told it didn't happen God is with us

Q: What's the reason of the arrest by the two policemen

A: I don't know I was walking like that and going to fetch some tip

Q: The victim reported that the taxi driver refused to drive you and started to push you out of the car at the Matches Company on the Suez road when he saw that she was asking for help

A: He met the girl crying and came to push her out

(Case No 5471 of 1977, Mahram Bey, Alexandria)

As for Mahmud Basyuni Muhammad:

Q: What do you say with regard to what relates to you

A: It didn't happen

Q: What's your explanation of the statement by the two policemen in plain clothes

A: I don't know what happened is that I was coming back from a journey today and this girl met me and I knew her from before we walked together and we talked and we met ʻAbd al-Hafiz Ahmad in Yasir b. ʻAmir street and he walked with us afterward ʻAbd al-Hafiz said that he was going to fetch some tip from someone at the War Factory I and the girl went with him and afterward the policemen caught us while we were walking like that

Q: Where did you meet the victim

A: In Suez Canal street at the Industrial Gas Company she and I were walking to Yasir b. ʻAmir street and afterward we met ʻAbd al-Hafiz

Q: How did you arrive at the rear of the War Factory

A: We walked

Q: What do you say with regard to what the victim reported

A: It didn't happen the policemen are the ones who persuaded her

Q: What do you say with regard to what the aforementioned ʻAbd al-Hafiz Ahmad reported

A: Nothing of what he said happened

Q: Why does he claim that against you

A: I don't know

(Case No 5471 of 1977, Mahram Bey, Alexandria)

In both accounts, the alleged offender attempts to present himself as a normal person, i.e. as a man who behaves in such a way that does appear incongruous to others. To be considered normal, people exhibit and display what seems to be, according to them, a normal behavior. Hence, the repetitive claim of ʻAbd al-Hafiz to be "on my way to fetch some tip from someone at the War Factory". Hence again, Basyuni's presentation of a quite normal way to spend one's time ("I was coming back from a journey today and this girl met me and I knew her from before; we walked together and we talked and we met ʻAbd al-Hafiz"). The presentation of oneself as a normal person is reinforced by the description of a banal sequence of events in a familiar environment: "(I met the victim) in Suez Canal street, at the

Industrial Gas Company, and she and I were walking to Yasir b. ‘Amir street, and afterward we met ‘Abd al-Hafiz”. Conversely, it is by the damaging of this self-presentation that people’s behavior is presented as abnormal, for which they can be taken as personally (and eventually criminally) responsible or accountable. This explains why the prosecutor asked ‘Abd al-Hafiz: “Didn’t you ask why she was crying?”. Indeed, there is a discrepancy between the presentation of his behavior as normal and the abnormal character of meeting a girl who is crying. In the case of Basyuni, the discrepancy between his account and the others' makes it abnormal, and he tries to repair it by providing an alternative account of the events (“Q: What do you say with regard to what the victim reported? A: It didn’t happen, the policemen are those who persuaded her”), though he fails to provide acceptable reasons for these discrepant accounts, as evidenced by his repetitive answers (“It didn’t happen”; “I don’t know”).

Returning to mentally deficient people, several conclusions can be drawn regarding the concept of the person from the following excerpts of a case which is related to an alleged attempt at indecently assaulting a mentally backward boy.

Prosecution of al-Sahil

Considering that (…) informed [the police officer] that the aforementioned Ayyub … tried to assault sexually the aforementioned Ayman …, who is mentally backward (*mutakhallif ‘aqliyyan*) and lives in the same building. (…) On today's date, with the opportunity of the presence of the accused outside the room of investigation, we asked him to enter it and we asked him verbally about the accusation directed against him, after having informed him of it, of its punishment, and of the responsibility of Public Prosecution in conducting an investigation with him. He denied them and we asked him whether he had an advocate representing him in the investigation proceedings ??? and he answered negatively. Then, we proceeded to hear the testimony of the police sergeant … and we put him to the side, inside the investigation room. We asked for the aforementioned Ayman …, the victim, inside the investigation room. He was introduced to us, with his mother Rasmiyya … accompanying him. We asked her to stay outside the investigation room and we kept the victim with us. He appeared to us like an adolescent (*sibî yâfi‘*) exhibiting the signs of mental backwardness (*al-takhalluf al-‘aqlî*). We asked him about what happened and we could not understand anything, except that he pointed with his middle finger and pronounced the sound ‘s’ (*sîn*), he pointed with his finger to his neck, i.e. he had a knife on his throat. We asked him another time about what happened and he pointed to the accused inside the investigation room and then he pointed to his rear and he pointed to him another time with his middle finger and pronounced the sound ‘s’ another time, and we found difficulties in understanding the rest of his answer.

(Case No 7158 of 1993, Sahil, Cairo)

First, the victim is never characterized by the technical legal terms, ‘insanity’ (*junûn*) or ‘mental disorder’ (*‘âha ‘aqliyya*). These terms are devised so as to characterize the liability of the offender, not the person of the victim’s. The only circumstances that aggravate the punishment for sexual assault are the use of force (Penal Code, Art. 268) and the minority of the victim (Penal Code, Art. 269), which is defined here as eighteen years of age. Hence, the mental backwardness of the victim should not play any role in this case, though his age and the use of constraint are very much relevant. However, the victim’s mental backwardness (*takhalluf ‘aqlî*) is systematically mentioned by the parties and by the prosecutor. The following is an excerpt of the interview with the victim’s mother:

Then, we asked his mother to enter the investigation room another time and we asked her the question as follows. She answered:

A: My name is Rasmiyya Muhammad Nubhan (…)

- oath -

Q: What information do you have

A: What happened is that I was sitting in my flat on the third floor and my son Ayman went out to go to the workshop he is working in at 10:00 in the morning a few minutes after he left a girl whose name is Wazza Muhammad ‘Abd al-Razzaq and whose actual name is Umm Hashim who lives with us in the house came and

said help me auntie Umm ‘Aziza it’s Magdi he made Ayman enter in the room and he locked the door I feared and I said ??? I went down immediately to Magdi’s room which is under the stairs I found the door closed then I broke the door and I entered I found Magdi tearing away my son Ayman’s clothes and bunching up the gown he wore lying down on my son I screamed and Magdi stood up from Ayman the neighbors gathered when the heard my voice and he began to insult the neighbors and he went to inform the police when the police came to know about it I went to the police station afterward he denied this is what happened

(…)

Q: What’s your relationship with the victim

A: He’s my son

Q: What’s his age approximately (*tahdîdan*)

A: He’s 17 or 18, and he has been mentally backward since his birth onward

(…)

Q: From the facts you witnessed was your son submissive to the assault or was he resisting

A: My son is mentally backward and he doesn’t know anything and he stood silent

(…)

(Case No 7158 of 1993, Sahil, Cairo)

The implications of the characterization of the victim as mentally backward clearly emerge from this excerpt. Firstly, the characterization is directly associated with his age (“He’s 17 or 18, and he has been mentally backward since his birth onward”). Second, the characterization is invoked so as to assess his consent to the alleged sexual relations (“My son is mentally backward and he doesn’t know anything and he stood silent”). In other words, being mentally backward allows for a presumption of the absence of consent.

All these consequences are more evident when we contrast the former excerpt with the following, which is from the offender’s interview:

Q: How long have you known the victim

A: I have known him since the first time I lived in the house in 1978

Q: At first glance is he an understanding person (*shakhs mudrik*)

A: He speaks in a jerky way

Q: Is he mentally backward

A: I don’t know

Q: You have seen the victim since 1978 and you don’t know whether he’s mentally backward or not despite the fact that it is obvious that he’s mentally backward

A: I don’t know

(Case No 7158 of 1993, Sahil, Cairo)

This excerpt can be considered at different levels. First, we note that the prosecutor uses another term for characterizing the state of the victim (“At first glance, is he an understanding person?”). Then, we can observe the manner in which the offender avoids using damaging characterizations. On the one hand, he engages in rhetorical understatement or euphemism (“He speaks in a jerky way”). On the other hand, he refuses to adopt the characterization provided by the prosecutor (“Q: Is he mentally backward? A: I don’t know”). Finally, the prosecutor’s last question raises many fundamental points and gives us very interesting clues about the understanding of the role of background assumptions, consequential inferences, and institutional settings in the construction of the category of the person in Egyptian law.

All these excerpts and, in particular, the last one demonstrate that participants in legal interactions share a background understanding of the nature of legal inquiries, so that they

know it is often not in the interests of a defendant to co-operate beyond a minimum level.[32] This is what Komter calls the dilemmas of conflict and cooperation: "the dilemma of the suspects is to produce defenses that are not heard as defenses but as cooperation and to show cooperation without foregoing opportunities for mitigation."[33] We see also that the sentence "I don't know" is uttered so as to avoid confirming the knowledge of something that would further the blame-implicative nature of the facts.[34]

The excerpt also underlines the function of questions in criminal prosecution, which is mainly to extract from the interviewee "answers that build up to form a 'natural' argument for the jury."[35] It creates the kind of incongruity that has already been referred to above. From the sense of normality that is mobilized and the discrepancies that are identified vis-à-vis this normality, many inferences can be drawn. As Matoesian puts it, in his study of a rape trial, "through a myriad of linguistic and sequential resources, the defense attorney creates a turn-by-turn disjunction between category bound activities/states and the rapist category, drawing attention to the abnormality of rapists, the normality of his client, and the irrationality of the witness's actions if he were a rapist (or the rationality of her actions with a non-rapist). There is no way the witness can do 'normal' things with someone who is supposed to be an 'abnormal' person. In this way, we can see how social structure is mapped onto categorization work, and how categorization, in turn, is harnessed as an interpretative resource in the constitution of grammatical sequential structures."[36]

Finally, the same excerpt points to the goal-oriented nature of all these activities that together make up a judicial setting. These teleological activities[37] are consequential for the definition of the person in the sense that the goals which people seek to define the strategies that are used so as to achieve these goals, and these strategies, in turn, imply the characterization of the person in specific ways. In other words, legal interaction is a linguistic game, in the sense Wittgenstein gives to the notion, i.e. an activity which in part determines the role that language will play and the particular strategies or procedures that are used within this activity.[38] In sum, the use of language is dependent on the context of its use and in particular on its institutional setting.

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[32] Levinson, S.C. "Activity types and language", in P. Drew and J. Heritage (eds.), *Talk at work: Interaction in institutional settings* (Cambridge: Cambridge Univ. Press, 1992), 77.

[33] Komter, *supra* fn.9, at 129.

[34] Drew, P., "Contested Evidence in Courtroom Cross-Examination: The Case of a Trial for Rape", in P. Drew and J. Heritage (eds.), *Talk at Work. Interaction in Institutional Settings* (Cambridge: Cambridge Univ. Press, 1992), 480ff.

[35] Levinson, *supra* fn.37.

[36] Matoesian, G., "'I'm sorry we had to meet under these circumstances': Verbal Artistry (and Wizardry) in the Kennedy Smith Rape Trial", in M. Travers and J.F. Manzo (eds.), *Law in Action. Ethnomethodological and Conversation Analytic Approaches to Law* (Aldershot: Dartmouth/Ashgate, 1997, who refers to Watson, R., "Some General Reflections on 'Categorization' and 'Sequence' in the Analysis of Conversation", in Hester & Eglin, *supra* fn.30, Jayyusi, L., *Categorization and the Moral Order* (London: Routledge & Kegan Paul, 1984), and Matoesian, G., "Language, Law, and Society: Policy Implications of the Kennedy Smith Rape Trial", *Law and Society Review*, 29(1995), 669-701.

[37] See for example Meehan, A.J., "Record-Keeping Practices in the Policing of Juveniles", in M. Travers and J.F. Manzo (eds.), *Law in Action. Ethnomethodological and Conversation Analytic Approaches to Law* (Aldershot: Dartmouth/Ashgate, 1997).

[38] Levinson, *supra* fn.37, at 92.

## 3. The person in the judicial context

In this section, I shall examine the notion of institutional context so as to demonstrate that the person and its definitions, as encountered in an Egyptian legal setting, are shaped and transformed by the procedural and structural context of their utterances. This will be exemplified by means of a case involving conflicting conceptions of the person. [39]

Three features characterize speech in an institutional context, although they can be found in other settings. Firstly, "both lay and professional participants generally show an orientation to institutional tasks or functions in the design of their conduct, most obviously by the kinds of goals they pursue,"[40] though such an orientation may fluctuate according to the local contingencies of interaction and to the locally defined status of interacting people. Secondly, behavior in institutional settings is often shaped by reference to goal-oriented constraints. Moreover, considering specific contexts like the judiciary, we can observe that "the participants shape their conduct by reference to powerful and legally enforceable constraints which impart a distinctly 'formal' character to interaction.[41] These contexts are generally manifested in the particular actions of interacting people, and in turn they shape these actions. Thirdly, there will also tend to be institutional aspects of the inferences and implications that are developed in institutional interaction.

All these characteristics have important consequences: the turn-taking system of the institutional setting under consideration powerfully structures many aspects of conduct in it; participants organize their conduct so as to display and realize its institutional character; options and opportunities for action are reduced and specialized; institutional experience is subjectively perceived as unusual; procedures are sharply defined and departures from them attract sanctions, so that there is a general compliance with them; choices among lexical descriptive terms are context-sensitive, like turn designs, which embody both an action selection and a selection of how the action is to be realized in words; sequences are substantially shaped by such context, so that they become characteristic of it; there are standard patterns of institutional encounters as well as standard practices of professionals for managing the tasks of their encounters; professionals generally adopt neutral stances through lexical choice, turn design and sequence organization. Last but not least, one should point to the fact that institutional interactions characteristically reveal an asymmetrical nature, though this should primarily be documented with factors that are endogenous to the interaction. Asymmetries can be observed at the predominantly question-answer pattern of interaction. It lays also in the differential states of knowledge of professional and lay interactants, as the use of terminology can reveal. There is another asymmetry between the professional treatment of a 'routine' problem and the lay conception of the unique character of the case.

Returning to the person, in relation to what has been said regarding context, we should note that interacting people are very much committed to the characterization of each other, i.e. to the identities or attributes they ascribe to one another. Members of a group characterize, identify, describe, refer to, conceive of persons in talking to others. These category terms are organized in collections, some of them adequate to categorize any

[39] On the context and, in particular, institutional context, cf. Drew, P., and Heritage, J., "Analyzing talk at work: an introduction", in P. Drew and J. Heritage (eds.), *Talk at Work. Interaction in Institutional Settings* (Cambridge: Cambridge Univ. Press, 1992).

[40] Drew & Heritage, *supra* fn.44, at 22.

[41] Drew & Heritage, *supra* fn.44, at 23.

member of any population, some of them usable only on populations already specified. Among all these categories, people choose some so as to categorize others and this choice is relevant to the participants for producing and interpreting conduct in the interaction.[42] In other words, it is on the people's actual characterizations of each other as persons that we must rely, not on our assumption of their belonging to any category. Analysts must warrant the relevance of any characterization in its actual setting. Bearing this in mind, we can conclude that any categorization or characterization of the person is context-sensitive, and that this context proves very constraining when it is of an institutional nature. Institutional activities assign particular roles, classes of intentions, to people participating in them and this in turn allows for consequential inferences.

The following case will help us to exemplify the main findings of the former sub-section. We start with the Cairo Criminal Court's narrative of the facts in its ruling of 15 October 1997.

> Considering that the facts of the claim, to the extent of the conviction of the court and the maintenance of their existence, indicate that the accused, Twingir …, knew the victim, Qiddisa …, who was bound by marriage relationship to the widow of the brother of the accused and who lived in the same building; after visiting her, he advised her that a devil had inhabited her and he declared that he had knowledge of these things and that he knew that the devil, who was dressing in her clothes, would harm her children; their life was exposed to danger because of this devil; the victim lived in anxiety and she feared for her children; when the accused convinced her to address her case to him and she had become obedient to his will, he convinced her that he could extract this devil from her; he gave her an appointment for his confronting him, when he would accompany her to one of the places and would keep on extracting the devil from her; he warned her not to mention anything to anybody about this appointment; the victim was overcome and she accepted it so as to ward off from her children the alleged danger which the accused had suggested to her; on the day of the appointment, she went out of her house, after having informed her grand-daughter of this appointment, and she warned her not to mention anything to anybody about it; she met the accused, who accompanied her to the city of the 10th of Ramadan, and he went with her in a house in a building which was in an uninhabited area in a remote zone; he had decided in his self and had persevered in his conscience to isolate himself with her in this distant place to get rid of her so as to dispose of what she had with her as money and jewels and what he would find on her in this place, until he put a handkerchief on her mouth and her nose and pressed hard on her; he suffocated her and he did not let anything but an inanimate corpse; then, he put the corpse in plastic bags he had prepared before and he put them in a carpet that was in the house; he dragged her downstairs and threw her in the bag in a deep pit close to the house in which he had killed her; then, he went back to his lodging in the district of Zaytun and he stayed entrenched and quiet as if he had not done anything; later that night, when the victim's children realized her absence all the day, they feared for her when her grand-daughter informed them about what she had told her of her going to the appointment with the accused; they contacted him so as to ask him about her, but he denied having seen her or met her; he persevered in his denial from the day of her murder, on August, the 8th, 1996, till the 19th of August, 1996, when he went to the police station of Zaytun and acknowledged that he had accompanied the victim to a flat in the city of the 10th of Ramadan, claiming to extract the devil from her, and that while he was performing some prayers the victim fell on the ground, and then he realized that she had died; he found some plastic bags and he put her corpse in them, then he threw it in a pit; he indicated the place where the corpse was. …
>
> (Cairo Criminal Court, Case No 2783 of 1997)

In this narrative, we note the presence of conflicting conceptions of the person. On the one hand, the judiciary's conception seeks to establish the criminal liability of the accused for his premeditated willful homicide. As the Court puts it, referring to the Prosecution's report:

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[42] Sacks, H., "An initial investigation of the usability of conversational data for doing sociology", in D. Sudnow (ed.), *Studies in Social Interaction* (New York: The Free Press, 1972); Sacks, *supra* fn.30; Schegloff, E.A., "On talk and its institutional occasions", in P. Drew and J. Heritage (eds.), *Talk at Work. Interaction in Institutional Settings* (Cambridge: Cambridge Univ. Press, 1992, 107-108).

Considering that Public Prosecution accused the aforementioned of having, on 17 August 1996, District of Zaytun, Governorate of Cairo, killed willfully (*qatal ʻamdan*) Qiddisa … with premeditation (*maʻa sabaq al-isrâr*); he acted with resolution and carefully so as to kill her, and consequently he inveigled her into his son's house and he succeeded in murdering her intentionally. She was injured in the way described in the forensic report, and it led to her death in the manner documented in the file.

(Cairo Criminal Court, Case No 2783 of 1997)

On the other hand, the accused claimed neither to have been acting willfully, nor to have been mad, but to have been possessed by a devil. As the Court put it:

It emerges from the statements of the accused during the investigations and in his cross-examination during the session that he and his defense agree that he accompanied the victim to a flat owned by his son in the city of the 10th of Ramadan whose design is not finished in an uninhabited area in a remote zone, and this so as to extract from her the devil that lived in her and who caused her some sufferings …

… the accused went to the police station and informed them that the victim suffered from headaches and nightmares, that he had accompanied her to his son's housing in the 10th of Ramadan, that he had begun to pray on her to clear her from what she suffered from, claiming that a devil was inhabiting her, that she was injured during this, that she had spasms and that she quit the life…

What the defense means is that it is the devil who killed her because of the incapacity of the accused to extract him from her, since he was more powerful than the accused.

(Cairo Criminal Court, Case No 2783 of 1997)

These are not so much conflicting conceptions of the person, but common conceptions to which people orient differently. Indeed, the Court never negates the possibility of the existence of spirits or devils and of being possessed by them. To the contrary, it explicitly acknowledges them, though contesting the consequentiality the defense would like to attach to such recognition.

The attempt of the defense to attribute the crime to the devil by claiming that it is the latter who killed the victim when the accused tried to extract him from her, because of the devil's power superceding the power of the accused, is contradicted by what is revealed by all the divine revelations, according to which the devil, while being able to harm human beings in their body, cannot harm their soul and make an attempt at their life because, as revealed in the Holy Koran, "They will ask you about your soul. Say: The Soul is among my Lord's matters" (xvii, 85), and as also revealed in the Holy Gospels, "Do not fear people who kill the bodies, they cannot kill the souls, but fear those who can consume both the soul and the body", and as revealed in the Torah, in Job's journey, first part, "God the Very High permitted to the devil to tempt our lord Job, but He ordered him not to extend his hand on his soul".

(Cairo Criminal Court, Case No 2783 of 1997)

In other words, the position of each party within the organization of adjudication has strong procedural consequences on the definition of the person. This has much to do with assumptions as to what behavior is considered as normal or not. Consider the following extract:

Present with the accused, Mr. Nabil …, advocate,

He said that the death of the victim was a natural death in which the accused had no role … Is it natural that people, if they face a crime whose penalty is strengthened in such a way, surrender after having prayed on the Muqattam mountain? … If the accused had wanted to steal from or rape the victim, he would have chosen a young girl or a rich one.

(Cairo Criminal Court, Case No 2783 of 1997)

Here we find an attempt to show that there is a discrepancy between normal criminal behavior and the actual behavior of the accused. The disjunction between criminal abnormality and the normal and natural behavior of the accused suggests that he must be innocent. This categorization gives us important clues for understanding what the concept of

the person represents in Egyptian law. It is a category whose normality is continuously produced and reproduced by interacting people, such normality bearing normative consequences and being used as a yardstick in the evaluation of any situation. At the same time, the context here contributes greatly to the definition of normality, in the sense that people look for characteristics that seem to be more significant and more relevant in this precise frame. This can be deduced from the cross-examination of the accused by the judge:

The Court considered the cross-examination of the accused. The defense of the accused, the accused and the people claiming damages agreed to the Court's cross-examination of the accused.

Q: Why did you take Qiddisa … to the 10th of Ramadan

A: At the request of the victim because nobody knew that she was possessed by a devil's spirit and she feared that people would find out

Q: How did you know that the victim had a devil (*shaytân*) or wicked spirits (*arwâh najsa*) inside her

A: She told me that that she had headache (*sudâ'*) and nightmares (*kawâbîs*) and I told her that you have a devil

Q: Did you observe that she had other symptoms

A: She told me that she got suffocations (*khunaq*) and headache

Q: What clothes was the victim wearing

A: A black gown (*jalbâb*) and a shawl and a veil (*tarha*) under the shawl and shoes

Q: What happened to the victim when you prayed for her

A: I got shocked (*hasal liyya dhuhûl*) and in a state of utter confusion (*irtibâk*) and I removed the veil she was (unclear) and she did not answer I didn't know what to do

Q: Did you move the corpse by yourself to its position below the building

A: There was nobody to help me and I don't know how I left her

Q: The forensic physician established that the victim was in her underwear

A: She had all her clothes

Q: How was her nightdress torn

A: I don't know

Q: Describe the veil she wore on her head

A: It was black and I don't know whether it was tied or not

Q: What was the position in which you placed her in the pit

A: I don't know

Q: What's your opinion about the forensic physician's report according to which the victim died as a result of asphyxiation

A: I don't know

Q: Was there anybody with you during the prayer on the victim

A: No there was nobody during the prayer and she died alone

Q: Did the victim wear any gold jewels on her ears or on her breast

A: No

Q: The victim wore gold jewels on her ears and her breast

A: She had no jewels on her

Q: Was it made possible through prayer to know the wicked spirit she had inside her

A: She didn't speak nor did the wicked spirit

Q: For how long have you known the victim

A: My sister's daughter is married to her son

Q: Was there any other relationship

A: No there's no relationship except kinship

Q: How much time elapsed from the time of the prayer over her

A: Approximately five minutes

Q: What conversation took place between you and the victim before the prayer

A: There was no conversation

Q: What means of transportation did the victim take to the 10th of Ramadan

A: (unclear)

Q: Is the housing unit completed

A: It's the door of the flat and the structure of cement and there are interior walls the flat is not completed

Q: On what did she sit and what was her position before the prayer

A: She sat

Q: You mentioned in the investigation that she was standing
A: I didn't mention it
Q: Have you ever prayed and extracted wicked spirits from anyone before
A: Yes
Q: Did you suggest to the victim that she had a wicked spirit
A: Yes
Q: The victim's son says that she was sound (*tabî'iyya*)
A: No she didn't speak to anybody else
Q: Was there any material compensation in exchange for this
A: No this was crazy
Q: The forensic physician says that you strangled her
A: No she died naturally
(Cairo Criminal Court, Case No 2783 of 1997)

Many features observed in previous sections of this article are confirmed in this excerpt. There is, firstly the frequent use of the "I don't know" pattern of response. As shown by Drew, this is clearly used as a way to avoid confirming. The accused may be anticipating that what he is being asked to state will turn out to be prejudicial to his situation.[43] A claim of ignorance may be interpreted as a strategic avoidance of potentially damaging information. But, at the same time, claiming not to know or remember makes it unnecessary to disconfirm what is proposed in the question, i.e. one avoids a direct challenge to the interpretation of the judge. Finally, claiming not to know or not to remember is a strategy to highlight the unimportance of a detail. It appears to be much more beneficial for the accused to rebut the judge's versions of events, "not by directly challenging his versions, but by implying a different characterization of events."[44] (Q: The forensic physician says that you strangled her. A: No, she died naturally). Following Komter, we can argue that "the dilemma of suspects is to produce defenses that are not heard as defenses but as cooperation and to show cooperation without foregoing opportunities for mitigation. (…) Suspects manage their dilemma by offering partial admissions or qualified versions that downplay or camouflage their participation in the events or by confirming the morals while dissociating themselves from negative inferences about their guilt and moral character."[45] The description of the person in terms of his moral character seems to be of great importance in the process. This is why, as shown previously, one advocate stresses the normal, hence moral, character of the accused who went on praying in the Moqattam hills. This also explains why the accused denied receiving any material compensation for performing the exorcism (Q: Was there any material compensation in exchange of this? A: No, this was crazy).

Parties are oriented to the specificities of the setting in which they are embedded. This can lead them to many anticipations with regard to the possible blame-implicative nature of some of the judge's questions. For instance, in response to the question about his relationship with the victim, the accused emphasizes that he has only kinship bonds, thereby implying that there were no sexual relations between the victim and himself (Q: How long have you known the victim? A: My sister's daughter is married to her son. Q: Was there any other relationship? A: No, there's no relationship except kinship). This is confirmed in his denial that the victim was in her underwear (Q: The forensic physician established that the victim was in her underwear. A: She had all her clothes). Another example is his denying that the victim had any jewelry on her; the question clearly anticipates the possibility that he will be

[43] Drew, *supra* fn.39, at 481.
[44] Drew, *supra* fn.39, at 486.
[45] Komter, *supra* fn.9, at 129.

accused of stealing from the victim (Q: Did the victim wear any gold jewels on her ears or on her breast? A: No. Q: The victim wore gold jewels on her ears and her breast. A: She had no jewels on her). Obviously, the accused is aware that he may be accused of stealing (as in fact happened).

The goal orientation of the parties vis-à-vis the setting and its procedural implications (the trial) means that the parties are sensitive to the issue of personal involvement and intentions. One of my main points in this article is precisely to show that the definition of intention must be inferred from actual interactional circumstances and data and do not necessarily emerge from theoretical treaties. The meaning of intention emerges from actual judicial settings and interactions, not from the logic of motives in, for instance, in the work of the famous Egyptian jurist Sanhuri.[46] In the case that we used to exemplify the argument, we observe a complex game of intention, purpose, personal participation, etc. I maintain that it is from these precise data that we can infer the contextual, local, limited meaning of the person and his characteristic features.

- Motivation and initiative (Q: Why did you take Qiddisa … to the 10th of Ramadan A: At the request of the victim, because nobody knew that she was possessed by a devil's spirit and she feared that people would find out // Q: Did you suggest to the victim that she had a wicked spirit A: Yes): On the one hand, the judge seeks to give a precise motivation to the circumstances, so as to characterize them properly (e.g. willful homicide vs. unintentional manslaughter). On the other hand, the accused seeks to demonstrate that he had no personal interest in initiating the interaction between the victim and himself, without however damaging his credibility. This is what Komter calls the dilemma of interest and credibility.[47]

- Intention and agency (Q: What happened to the victim when you prayed on her A: I got chocked and in a state of utter confusion and I removed the veil she was (unclear) and she did not answer I didn't know what to do): Here again, the judge is interested in knowing whether the accused acted with purpose or not. The accused is himself interested in making his personal agency disappear, while not appearing as a fool and/or damaging the credibility of the narrative of devils. Actually, the accused claims that the responsible agency was that of the devils, not his own, that the devils have a personality who inhabited the woman, attacked him when he tried to extract them, and killed her in a way he cannot remember. In other words, the accused tries to displace the question of agency and to state its transferal from himself to the devils, hence, to underplay his active participation in the events through the formulation of an alternative version implying the participation of a third actor. By

[46] Arabi, O., "Intention and Method in Sanhûrî's Fiqh : Cause as Ulterior Motive", *Islamic Law and Society*, 4/2(1997), 200-223.
[47] Komter, *supra* fn.9.

so doing, he confirms common understandings of what is moral and immoral (e.g. killing is immoral), while avoiding negative inferences about his own moral character. Moreover, whereas his moral character could be compromised by the emphasis on his lack of mental capacity, in the narrative, the accused makes himself completely disappear from the scene, with the consequence that he claims to be neither personally responsible nor mentally irresponsible.[48]

- Excuses, consciousness and agency (Q: Did you move the corpse by yourself to its position below the building A: There was nobody to help me and I don't know how I left her): The judge is interested in proving the personal and intentional participation of the accused in the crime, hence denying the relevance of any excuses the latter produces. On the other hand, the accused attempts to produce excuses for what he did, including the action of an external constraint obliterating his intentional agency. Here again, both the judge and the accused seem committed to the production of narratives that could account for the personal role, i.e. the intentional and motivated participation of people involved in the case. We may say that they show solidarity in identifying the relevant issues of the file, although they lack consensus with regard to the characterization of the parties' role in it. In other words, they share a common understanding of what constitutes the relevant features of the characterization process and they fight, in an asymmetrical way, so as to document the fulfillment of these features in the case under scrutiny.

- Normality and agency (Q: Was there anybody with you during the prayer on the victim A: No there was nobody during the prayer and she died alone. // Q: The forensic physician says that you strangled her A: No she died naturally): Agency and normality seem to be related in a very interwoven structure. Each situation is characterized according to what is considered to be the normal behavior of actors who have been implicated. In the case of death, normality or naturality is defined with regard to the non-intervention of human agency in its production. Abnormal death is that which is occasioned by the intervention of an external human agency. Hence, the death of someone due to the action of wicked spirits cannot be considered abnormal, since it is not the consequence of any human agency. To the contrary, suicide is deemed abnormal, since it is the result of the victim's own agency. This shows that the definition of normality can differ from place to place and from time to time.

[48] Komter, *supra* fn.9.

It is interesting to contrast the accounts given by the accused with the following account of the plaintiff's advocate:

Present with the parties claiming for damages, Mr. Samih …, advocate,

He said that the accused performed this heinous crime, that there were bonds between the accused and the victim; the victim was helping everybody; that is why the accused chose to tell the victim, as the witness mentioned in the former session, that her children were in danger; the victim had gold and money with her; hence, the goal was to steal from the victim, the proof being that he brought her far away from her family and her neighbors, to a building in the 10th of Ramadan close to nothing; if he intended to really extract the spirit, as mentioned, he could have done it before the family and the neighbors …

(Cairo Criminal Court, Case No 2783 of 1997)

This excerpt clearly shows how an advocate can contribute to the production of a normal pattern of behavior (e.g. the victim being known by and helping everybody) that should have led to normal consequences (he could have extracted the spirit in the presence of the family and neighbors) and whose breach must therefore be accounted for (why did the accused take her to this remote place?), which in turn moralizes the case ("a heinous crime"). Furthermore, it gives a direct account of the possible motivations of the accused (to steal from the victim) and his strategies so as realize his purposes (frightening the victim so as to lure her into the trap of such a remote place). In sum, the production of normality makes it possible to infer normative consequences from the congruence with, or divergence from, what is supposed to have happened.

Finally, we note that it is only in a subsidiary manner that the defense claimed that the accused was insane in order to avoid his criminal liability. However, the Court rejected this argument, largely on the basis of the impression it got when cross-examining him.

Considering that the defense asked … for the transfer of the accused to a hospital for psychological and mental diseases …

The Court rejects it according to what follows:

First: …

Second: The Court is convinced that the accused was at the time of his committing the crime in full possession of his mental capacities and that he is criminally responsible for his deeds, because the Court's cross-examination of the accused … contradicts it, since his answers to the Court's questions went logically … The Court considers from all the above that the accused was conscious and capable of discretion at the time of his committing the crime, and that makes him responsible for his deeds, because the mental disease which is characterized as mental disorder impeaches the responsibility, in accordance with article 62 of the Criminal Code, is this disease that impeaches consciousness and discretion; however, all the other psychological states that do not impeach the person's consciousness and discretion are not deemed to impeach responsibility. and the defense did not prove that the accused is affected by insanity or mental disorder.

(Cairo Criminal Court, Case No 2783 of 1997)

As noted earlier, the accused did not claim insanity as an excuse for his behavior and what happened. However, since actors are fully oriented to the production of legal consequences to the facts of the case, i.e. since they are constrained in their statements and actions by the institutional context in which the case is situated, insanity appears as a convenient way to mitigate the implications of any incrimination, provided the Court rejects the justification of spirit possession. In other words, this can be analyzed as a shift from justification (the accused acted under constraint) to excuse (the accused is insane). For the Court, however, the acceptance of insanity would have meant that possession is not an acknowledged state of the person, but can only account for the manifestation of mental disorder. This was obviously not its opinion. If spirit possession was not to be considered as the expression of mental disorder, the Court had no choice but to convict the accused for willful homicide. Indeed, it must take

into consideration the procedural constraints that allow an appeal before another jurisdiction. In other words, it must consider the existence of a kind of 'overreading' audience, an instance that would eventually review its own ruling. If this ruling was based on non-substantiated grounds (and spirit possession is not recognized as such in Egyptian law), it would have exposed itself to the reform of its ruling and eventually to its being sanctioned. This definitely constitutes a procedural constraint on the judge's work.[49]

## 4. Conclusion

I have attempted to demonstrate that the definitions given to categories like the person do not depend on any substantial and essential meaning but are context-sensitive, i.e. they are shaped and oriented according to the setting within which they occur. Given the fact that these settings are mainly institutional, we could further argue that the meaning which is given to categories is related to the institutional circumstances of their use. This holds particularly true for law and judicial institutions. In other words, institutions constitute what we could call frameworks of procedural constraint, and people actively contribute to the production, reproduction and transformation of these frameworks. If this argument is convincing, a major consequence follows: the creation of new institutions, including the environment, the language, the specialists, etc. that accompany them, must necessarily create new procedural assumptions that reflect on the ways people act both physically and verbally and on the meaning they will give to categories.

In Egypt, the emergence of new legal and judicial institutions had pervasive consequences, not in the sense that they introduced new foreign conceptions of the person that parallelled the old conceptions, but in the sense that they created new frameworks of procedural constraint with which people had to deal, willingly or not. The progressive understanding of this new institutional environment led to the assumption of new procedural patterns, which in turn closely contributed to the meaning of many categories like that of the person. However, instead of explaining this change by assuming the existence of an internalization process that cannot be properly described, we suggested a praxiological approach that focuses specifically on the activities through which the many meanings of these categories can emerge and which reveal the constituting ways of background understandings.

Institutions are social facts; and language is a major instrument in creating, maintaining and transforming institutions. Berger and Luckmann[50] try to deal with the question of institutionalization by connecting historical and biographical processes through the notions and processes of memorization, sedimentation, common stock of knowledge, intersubjectivity, anonymous status, transmissibility, etc. However, their formulation seems to be very mentalistic and cognitivistic, in the sense that everything is described as if it happened in the mysterious sphere of the mind, by the means of internalization. As Coulter puts it, following Wittgenstein,[51] "the so-called 'inner' stands in need of 'outward criteria'". In other words, "every category of the 'mental life' is, without exception, available for members' use within situated practical actions, interactions and the circumstances they

[49] On spirits in Egyptian society, cf. Drieskens, B., "The misbehavior of the possessed: on spirits, morality and the person", in B. Dupret (ed.), *The Person and the Law: Meanings and Transformations of the Person In Middle Eastern Laws* (London: Tauris, forthcoming).
[50] Berger, P., and Luckmann, T., *The Social Construction of Reality* (London: Allen Lane, 1966).
[51] Wittgenstein, *supra* fn.18, at §580.

inhabit."[52] If the past history and meaning of any particular notion or concept tends to be framed in a linguistic form through which it is communicated, this form manifests itself only in its contextual instantiation and substantiation, in the sense that it emerges from the local orientation of members toward institutions and from the local practices through which the members reify and reproduce these institutions in their interpretive activities.[53] According to Jeff Coulter,[54] institutions, collectivities and macrosocial phenomena are the referring points either of descriptions, explanations or narratives, or of reciprocal operations of identification or categorization realized among members. Hence, these collectivities exist only in and through the circumstances within which it is relevant to apply membership categories. As a consequence, the study of language in relation to institutions, at the level of their creation, maintenance or transformation, deserves full attention, and this must be done in context. Like rules and procedures, language cannot be studied in the abstract. It must be linked to its practice, in a frame of background understandings that take their signification in the context of their utterance.[55] Legal language, in such a situation, depends on the familiarity people have with legal and judicial institutions. In Egypt, people became acquainted with and used to submit to a civil-law system administered by a centralized judiciary. These institutions provide frames of understanding and procedural constraints to which people openly orient in the course of their actions.

I tried to document some of these judicial and legal constraints on the accomplishment of the category of the person. One of its features is related to the question of intention. I think that one of the main insights which the praxiological sociological approach proposes is that the shape, the content, and the realization of such question lays in the contention that the definition of intention must be inferred from actual interactional circumstances and data. Moreover, the exclusive focus on textual productions, changes and legacies,[56] completely disregards the major significance of institutional contexts of discourse and action. In that sense, we can be sure that, even though some legal words and formulations seem identical to former formulations, their understanding, accomplishment and practice is totally dependent on the situated environment in which they take place.

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[52] Coulter, J., "The Grammar of Schizophrenia", in W.F. Flack, D. Miller and M. Wiener, (eds.), *What is Schizophrenia?* (London: Springer, 1991), 189.

[53] Hilbert, R.A., "Ethnomethodology and the micro-macro order", *American Sociological Review*, 55(1990), 794-808.

[54] Coulter, J., "Human practices and the observability of the 'macrosocial'", *Zeitschrift für Soziologie*, 25/2(1996), 337-345. This paper is a critique of Hilbert (*supra* fn.53) and his having made the macrosocial level a distinct order.

[55] Livet, P., *La communauté virtuelle. Action et communication* (Combas: Editions de l'éclat, 1994).

[56] E.g. that the Egyptian Civil Code gives the judge the sole responsibility to pronounce the interdiction whereas the Majalla (the Ottoman Civil Code) and the Iraqi Civil Code return to old *fiqh* (Islamic jurisprudence) conceptions, according to which insanity can be presumed by people without judicial intervention. See Arabi, O., "The Regimentation of the Subject: Madness in Modern Arab Civil Laws", in B. Dupret (ed.), *The Person and the Law: Meanings and Transformations of the Person In Middle Eastern Laws* (London: Tauris, forthcoming).