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► To cite this version:

Baudouin Dupret. The Practice of Judging: The Egyptian Judiciary at Work in a Personal Status Case. M.K. Masud, R. Peters and D. Powers. Dispensing justice in Muslim courts: Qadis, procedures and judgments, E.J. Brill, pp.143-168, 2005. halshs-00178768

HAL Id: halshs-00178768

<https://shs.hal.science/halshs-00178768>

Submitted on 12 Oct 2007

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THE PRACTICE OF JUDGING

The Egyptian Judiciary at Work in a Personal Status Case

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1. Introduction

It is commonly assumed that personal status is, in Egypt and in many other Arab countries, the last stronghold of Islamic law. Whereas in other legal domains, law is supposed to have been secularized and mainly imported from Western countries, the domain of personal status is held to have remained true to the *shari`a*, to the point that one should speak of Islamic personal status law as applied in Egypt, not of Egyptian personal status law. However, I contend that, when attempting to determine the extent to which this or that part of the law is Islamic and whether this or that part of the law can or cannot be attributed to some historical development of Islamic law, one imposes a structure on the legal phenomena and activities instead of trying to discover the manner in which they operate. This is mainly because most scholars start with strong assumptions about the general model of which a given legal system is a sample. Thereby, research misses the phenomena it seeks to document. Central to these phenomena are the ways in which people understand and manifest their understanding of what any given situation is about, orient themselves to any given setting and its constraints, and behave and act in a more or less orderly manner within such a spatially and temporally situated context. This is not something that can be observed from any overhanging standpoint; rather, it must be documented by the close scrutiny of how people actually and situationally understand their environment, make sense of it, try to find their way within its constraining framework, and produce, reproduce, and transform the social order. In other words, the *a priori* characterization of personal status law in Egypt as Islamic law does not provide access to what people do in the Egyptian judicial setting when dealing with personal status questions. Such access can only be acquired by describing people's practices outside any pre-conceived interpretive framework.

In a first section, I examine literature that focuses on the notion of harm (*darar*) as a ground for divorce. I argue that it relies on the assumption that e.g. Egyptian law belongs in the field of personal status to the family of Islamic law and, as such, must be read against its theoretical, formal, trans-historical and trans-geographical background. However, my contention is that this literature never addresses the practice of Egyptian personal status law as it unfolds during the many steps that precede the production of a formal ruling. I conclude the section by sketching the main lines of the praxiological re-specification I suggest in order to analyze the activity of judging in its fine-grained details. In the second section, I use some material from one recent Egyptian case involving judicial divorce issued on the ground of harm caused to the wife to show how the notion of harm is dealt with in a practical, unproblematic, routinized, and commonsensical way. First, I concentrate on the participants' orientation to procedural correctness. Second, I examine the production of legally relevant categories.

2. Causing harm (*darar*) as a ground for granting judicial divorce in Egyptian law: A Substantial account and its praxiological re-specification

In his excellent account of Egyptian personal status law as applied in *sharīʿa* courts in the first half of twentieth century, Ron Shaham devotes one chapter (Chapter 6) to judicial divorce on the wife's initiative.¹ From the very first sentence, the reader gets the impression that social phenomena take place against the immutable background of Islamic law and Islamic legal doctrines.

"In Islamic law, Shaham begins, a marriage may be dissolved either through *talâq* or through *faskh*. Each method of dissolution has specific legal and financial consequences, and each may be carried out either judicially or extrajudicially. Muslim jurists differentiate between *talâq* and *faskh* on the basis of the grounds on which a dissolution is sought, about which there is considerable disagreement among the schools" (p. 112).²

However, when discussing the different conceptions of *faskh* and *talâq* according to the various schools of law, Shaham himself illustrates the weakness of the distinction between legal concepts and interpreting practices: Shâfiʿîs and Hanbalîs consider *faskh* the rule and *talâq* the exception; Mâlikîs do the opposite; Hanafîs do not care (p. 112). However, no sooner has the door to a sociological perspective on legal practices been opened than it is closed again. Shaham writes, "[B]eyond [the limited cases in which the Hanafîs allow a woman to apply for a judicial dissolution of her marriage], she has no means of freeing herself from a prejudicial union, apart from negotiating a divorce by mutual agreement" (p. 112-3). It is clear that Shaham speaks of doctrine and not practice, and this is precisely my point: why should practice be considered against the backdrop of legal doctrine? The production of legal doctrine is an interesting topic *per se*, but it creates confusion when the study of doctrine serves as a framing device for the study of practice.

The codification of personal status law—the laws of 1920 and 1929—is presented as the culmination of the modernist call to offer women additional grounds for the dissolution of marriage (p. 114). Although this can be considered a historical fact, one wonders why nothing is said about the considerable technical and procedural consequences involved in this codification process. Without prejudging the net result of such transformations, it can safely be said that they must have changed the ways in which facts, evidence, and legal arguments are presented, the procedural constraints that affect people when appearing before a court, and, hence, the practice of personal status.

Shaham proceeds to review the four additional grounds for a judicial divorce that have been accorded to women in the new laws: defects and diseases of the husband, non-provision of maintenance by a husband, absence of the husband, and injury (p. 114 ff.). His argument follows a general pattern. For instance, Shaham states, with regard to defects and disease, that "these articles were based on a minority opinion of the Hanafî school (that of Muḥammad al-Shaybânî, d. 805 C.E.) and the majority opinions of the three other schools" (p. 114). Although this statement seems true from a panoptical retrospective look at the historical development of Islamic law, it is also symptomatic of the dynamic of legal orientalism. Shaham's statement assumes that law is constructed along the same lines according to which the scholarly discourse on law is constructed. In this case, Shaham states that provisions for judicial divorce on the ground of a defect or disease of the husband are accepted by a few Hanafî scholars and most other scholars. From this, he infers that the provisions of the Law of 1920

are based on this shared acceptance. This suggests, however, that despite all possible practices, Egyptian personal status law is the mere replication (with some methods for selecting preferred solutions) of the substantive body of preexisting Islamic legal rules. But the matter may not be as simple as that. Moreover, this approach has the potential effect to invert the practical modes of reasoning that were followed in the drafting of the laws. Instead of assuming that the Islamic provisions existed first and that subsequently the drafters of the law made their choice among the many possibilities Islamic law offers, we might argue that these drafters first determined their preference and only then looked back at the corpus of *fiqh* to find legitimate justifications. Be that as it may, once again, something is lost in this quest for the historical and religious “roots” of legal provisions: namely, the sense of what is done when drafting or practicing Egyptian personal status law.

With regard to the fourth ground for judicial divorce—*darar*, which Shaham renders as “injury” and which I prefer to translate as “harm”—his demonstration follows the same scheme. First, he states that Hanafî law “does not recognize injury caused to the wife by her husband as a ground for dissolution” (p. 116). Second, he provides us with the formulation of Art.6 of the 1929 Law. Third, he states that, according to the explanatory memorandum, this reform was necessitated by public interest. Fourth, he explains that, because of the imprecision in the definition of what constitutes *darar*, “the *qâdîs* [were obliged] to consult the Mâlikî literature, where *injury* is interpreted liberally in favor of the wife” (p. 117). Finally, Shaham wonders “whether or not the intent of the legislation was to apply the Mâlikî understanding of judicial dissolution” (p. 118), although he permits himself to use the term “judicial divorce” because “the legal consequences of the Egyptian legislation correspond to those of the Mâlikî school, and also because the legislator often uses the phrase, ‘[the *qâdî*] *talâqa `alayhi*’—that is, the *qâdî* divorced the wife on the husband’s behalf” (*ibid.*).

One may wonder about the utility of establishing genealogical connections between, on the one hand, Egyptian personal status law as codified in the laws of 1920 and 1929 and subsequently amended in the laws of 1985 and 2000, and, on the other hand, the provisions of the different opinions of the different schools of Islamic law. Although these connections are in some way obvious, there is no practical gain in scrutinizing their precise origins. Worse, this approach threatens to create confusion. First, to posit a connection does not imply that there is a relationship of causality. As mentioned above, the line of argument may easily be reversed: Mâlikî law was not the source from which the new legislation proceeded but the resource used to justify the new orientation of the law. Second, Shaham’s presentation suggests that legal change can occur only in some interstitial space left open by the imprecision of the law. For instance, the interpretation of *darar* in favor of the wife, along the lines of Mâlikî doctrine, was made possible only by the ambiguity of the law of 1929. However, Shaham argues, the inclusion of *darar* in Egyptian law was already an innovation grounded in Mâlikî law. Still, the Egyptian judges’ reading of the Mâlikî sources (e.g., by not recognizing a second or subsequent marriage of the man as a source of harm) did not correspond to the Egyptian legislature’s reading of the same Mâlikî sources (recognizing in Law No. 100 of 1985 that this second or subsequent marriage may constitute a possible source of harm, if demonstrated by the wife). Nevertheless, Shaham invokes the general model of Islamic law and its many schools, despite the ambiguities of the various sources and of the references to these sources, as the

background against which the notion of *darar* must be evaluated in Egyptian personal status law. I maintain that the net result of this quest for the origins is not only of limited value, but, moreover, it diverts our attention from the examination of what people do when practicing personal status law.

In the following sections, Shaham proceeds to address the practical content of adjudication in personal-status matters in pre-revolutionary Egypt. He offers a wonderful review of the many circumstances in which a woman may ask a judge to be judicially divorced from her husband on the ground of harm and the circumstances in which the judge did or did not grant such a divorce. Unfortunately, Shaham presents these cases, for the sake of comprehensiveness, in a way that abstracts them from the actual circumstances in which they developed and were reported and treated by the courts. In other words, he produces a kind of compendium of case-law principles similar to the compendia that summarize rulings issued by the Court of cassation (*Majmû'at al-ahkâm allatî qarrarathâ mahkamat al-naqd*). These compendia, used as practical guides for the interpretation of statutory legal provisions, constitute the basis on which precedents of the Court of cassation are constituted, referenced and referred to. In my view, however, the task of social scientists is, in addition to designing operational legal categories, to analyze the categorization process itself. To put it differently, legal researchers appear to be still ensconced within the scheme of the legal syllogism, according to which facts are presented to judges who, in a mechanical way, must identify the applicable law and apply this law to the facts. However, things happen differently. Facts are never raw facts, applicable law is itself an object of interpretation, and the legal characterization of facts is not an abstract and objective operation. This does not mean that everything is pure construction, since, as argued before, people (including judges) tend to objectify facts and legal categories. As David Sudnow has proposed, we must consider these categories “as constituting the basic conceptual equipment with which such people as judges, lawyers, policemen, and probation workers organize their everyday activities.”³ However, this means that we cannot be satisfied with the mere identification of the categories: we still need to examine how people practically orient themselves to them. Sudnow’s study on plea bargaining shows that actual legal encounters often result in the co-selection of lesser offenses (in exchange for pleading guilty) that are neither statutorily nor even situationally included in the more encompassing offense, but that are routinely associated by professionals with the crime as it is normally committed according to prevalent social standards.

If we are to draw a parallel between Sudnow’s approach and that of Shaham, we reach the conclusion that what we miss in the latter is the practical operation by which Egyptian judges substantiate the concept of harm as a ground for granting judicial divorce. Apart from its formal definition, we fail properly to understand the concept of harm. For instance, we know that some judges interpreted Article 6 of the Law of 1929 by referring to Mâlikî sources, “because the article does not explain in detail which types of injury make a divorce mandatory.”⁴ However, this suggests that judges, in their attempt to define the notion of harm, are constrained by its formal definition in the Mâlikî legal sources. This may be partly the case, although we have no means to know it for sure. But it is only partly the case, for the features relating to the case at hand and the routine of the judges’ work certainly contribute to the definition of what counts as “normal harm”. Here again, if we follow Shaham, the judge seems to proceed syllogistically from the broad Mâlikî definition of harm to the

facts of the case, although everything that normally, routinely and situationally counts as harm in these many Egyptian legal settings is hidden behind the judge's quest for a satisfactorily formal justification of his decision. Sudnow has successfully shown, however, that it is not the statutorily conceived features of the harm but its socially relevant attributes that give it its status as a feature of the class "normal harm."⁵

Following Sudnow, we advocate a praxiological re-specification of the study of law. Praxiology, in the form of ethnomethodology and conversation analysis has, from its inception, regarded law and courtrooms as 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 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. If we are to take law seriously, it is, nevertheless, neither the law of abstract rules nor the law of principles independent of the context in which they are utilized; rather, it is 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.⁶

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 that 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 that result from the legal characterization of facts. As demonstrated by Rod Watson, the categorizing processes that mark out the path leading to a court decision are as many means for the people concerned 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.⁷

3. A praxiological account of causing harm as a ground for granting judicial divorce

a) Procedural correctness:

Personal status matters are organized in Egypt by a series of laws, mainly 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 *imâm* Abû Hanîfa". In practice, many judges still make use of Qadrî Pasha's unofficial codification,⁸ a compilation of Hanafî-inspired legal provisions. Subsequent to the unification of the Egyptian courts in one centralized national system, personal status has been subject to procedural rules that are common to all civil and commercial matters. Cases are adjudicated at the first level by summary courts (*mahkama juz'iyya*) and courts of first instance (*mahkama ibtidâ'iyya kulliyya*), according to the type of litigation and its monetary value. Courts are divided into circuits, one of which is the personal-status circuit (*dâ'ira al-ahwâl al-shakhsiyya*). The personal-status

circuit of the courts is competent with regard to matters relating to personal status, both financial (*wilâya `alâ al-mâl*) and non-financial (*wilâya `alâ al-nafs*), including the granting of judicial divorce on the ground of harm. One provision is particularly relevant, i.e. Article 6 of Law No. 25 of 1929 concerning judicial divorce on the ground of harm.

With regard to judicial divorce on the ground of harm, Article 6 of 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”.

As soon as a woman, represented or not by an attorney, submits a petition that asks the judge to pronounce the divorce on the ground of harm from which she allegedly suffers, the judge’s work is, at least formally, constrained by the many stipulations of this statutory provision. A sequential process is initiated in which the case follows a series of successive steps before reaching the stage of the judge’s decision. This is reflected in the way the ruling is designed:

“In the name of God the clement, the merciful”

In the name of the people
Gîza Court of First Instance
for the Personal Status for the Guardianship
of the Person
Ruling

At the session held publicly at the palace of the court on Monday...
Under the presidency of His excellency Mr ..., President of the Court
And the membership of Mr ..., court president, and Mr ..., judge
In presence of Mr ..., deputy of the prosecution
In presence of Mr ..., clerk

The following ruling was issued:

In the case No. ... of the year 1983, plenary, personal status of Gîza, submitted by:
.... against

The Court

After the hearing of the plea, the examination of the documents, and the deliberation:

Considering that the facts of the case and its grounds, as they appear to the Court from the documents, [reveal] that the female petitioner introduced, in pursuance of a form signed by an attorney and deposed at the office of the clerk of this court on ..., and declared legally the request for a ruling [that would] judicially divorce her [in the form of] an irrevocable divorce, with no right for him to reinstate her, on [the ground of] harm resulting from 1) the impotence that makes it impossible to realize the aims of marriage; 2) his violence against her in the form of beating, insulting, abusing, and formulating accusations against her. ... [1]

Considering that the petition was put to deliberation as indicated in the records of the sessions; at the session held on ..., this Court issued a ruling commissioning the forensic physician to conduct a medico-legal inspection of the defendant and the Court made public in its ruling the report issued by the forensic physician. [2]

Considering that His excellency the forensic physician conducted the medical inspection on the defendant and that his report has been put in the case file; it follows that it dated from ... and it concludes that ... [3]

Considering that the parties to the case appeared [before the court] after the release of the report and its constitution as one of the documents of the case; none of them petitioned or opposed it. [4]

Considering that the case was deliberated at the subsequent sessions. On the session of ... this Court issued a ruling transferring it so as to investigate by all the means of proof the existence of the material harm from which she [suffered]; it is up to the defendant to contest it by the same means. [5]

Considering that the court set out to execute the ruling of investigation, whereupon it heard the two witnesses of the petitioner ...

The court heard also the two witnesses of the defendant ... [6]

Considering that the court, after the hearing of the witnesses ..., adjourned the case for the plea to the session ... [7]

Considering that more than one time the court proposed to the two parties to the litigation a conciliation; [considering] that the representative of the petitioner refused while the defendant accepted. [8]

Considering that the General Prosecution represented in the person of its deputy present to the session presented its opinion to the court. [9]

Considering that the two parties asked for the fixing of [the date of] the ruling; henceforth, the court fixed [the date of] the ruling to the session of ... and decided to delay the delivery of the motivation of the ruling to the session of today so as to complete the deliberation. [10]

Considering that the petitioner requested the judicial divorce for harm on two grounds, first, sexual impotence, second, blows, insults and abuse. [11]

Considering that, when the court proposed the conciliation to the two parties ...; this was considered by the court as an impossibility to reconcile ... [12]

Considering that, with regard to this, the representative of the petitioner refused the conciliation; henceforth, the court was led to proceed. [13]

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, so that the judge may issue the judicial divorce on the ground of harm, that ... [14]

Considering that the Egyptian legislature has imported (*naqala*) the rule of judicial divorce on the ground of harm from the doctrine of *imâm* Mâlik ... [15]

Considering that the Hanafî doctrine makes the acceptance of the testimony on the rights of believers conditional upon its congruence with the petition ... [16]

Considering that, with regard to the first ground of the petition, the forensic physician has established that ... [17]

Considering that, with regard to the second ground of the petition, namely the violence against her by the means of blows and insults, her two witnesses testified to the fact that ... [18]

Considering that, with regard to what precedes, the court realizes that the continuation of their marital life ... would be an injustice to her. ... The court has no choice but to grant her a judicial divorce. The General Prosecution does not object to this and, to the contrary, it gave an identical opinion to the court. [20]

Considering that, with regard to what precedes, the court concludes to the judicial divorce of the petitioner from her husband on the ground of harm. [21]

Considering that the expenses ... [22]

Considering that, with regard to the urgent execution, ... [23]

For all these reasons

The court rules in the presence [of the litigant parties] the judicial divorce of ... from her husband ... [in the form of] an irrevocable divorce and it compels the defendant to [pay] the expenses ... and it refuses the other demands.

Clerk

President of the Court

The statutory provision of Article 6 makes adjudication in matters of judicial divorce on the ground of harm follow the sequential scheme: petition – establishment of the mistreatment – attempt at reconciliation – ruling. Yet, the ruling discloses an internal structure that can be schematized as follows:

- 1) introduction
- 2) petition [“considering” 1]
- 3) procedures followed by the court [“considering” 2 to “considering” 10]:
 - o expertise [2-4]
 - o proof of the harm [5]: hearing of the witnesses [6]
 - o pleas [7]
 - o attempt at conciliation [8]

- Prosecution's opinion [9]
 - fixing of the ruling and issuing of the ruling [10]
- 4) examination of the legal grounds [11-16]
 - reminder of the petitioner's grounds [11]
 - attempt at reconciliation and failure [12-13]
 - concept of harm in Egyptian law [14-15]
 - witnessing in personal-status cases [16-17]
- 5) application of the law to the facts of the case [18-21]
 - first ground: impotence [18]
 - second ground: violence [19]
 - court's conclusion [20-21]
- 6) expenses and accessory demands [22-23]
- 7) ruling

This sequence, although it is formalized by the judge in the shape of a ruling, reflects the actual procedural constraints under which he operates. One of his major tasks, as a professional routinely engaged in his occupation, is publicly to manifest the correct accomplishment of his job. The production of a procedurally impeccable ruling is one of these priorities, and this is publicly demonstrated in the judge's recapitulation of all the necessary steps that must be taken and that were actually performed. At this procedural level, it is obvious that the judge orients exclusively to the technicalities of Egyptian procedural law. These technicalities may include some reference to provisions explicitly relating to Hanafî or Mâlikî law, but, as in our example and with regard to the testimony of witnesses in cases of judicial divorce on the ground of harm ["considering" 15 to "considering" 16], this is always through the provisions of Egyptian law, as eventually interpreted by the Court of Cassation:

Considering that the Egyptian legislature has imported (*naqala*) the rule of judicial divorce on the ground of harm from the doctrine of *imâm* Mâlik—may God be satisfied with him. It is not permitted, in order to establish it [viz., the harm], [to refer] to the same doctrine from which it is imported, and no particular rule was stipulated to establish it. In such a situation, one must go back, so as to prove the harm, to the prevailing opinion in the doctrine of *imâm* Abû Hanîfa al-Nu`mân, in pursuance of Article 280 of the Regulation of the *sharî`a* tribunals to which Article 6 of Law No. 462 of 1955 refers (Cass., Personal Status, Appeal No. 11, 48th Judicial Year, session of 25 April 1979). Henceforth, harm is established by its testimonial evidence (*bi'l-bayyina*), i.e., the testimony of two males or one male and two females. Oral testimony is not accepted to establish it, even if it is authorized in certain matters other than repudiation for harm (Appeal No. 65, 52^d Judicial Year, session of 12 March 1984; it [this ruling] also refers to the Compendium of Personal Status for Muslims of Counselor Nasr al-Gindî, Judges' Club edition, comment on Article 6 of Decree-Law No. 25 of 1929).

Most documents in a file of a trial show the orientation of judges, prosecutors, and other participating professionals to procedural correctness. This is directly linked to the general sequence of a trial, in which every participant eventually addresses people who at a certain time are not physically present in the room but constitute a kind of "over-reading" or "over-looking" audience,⁹ whose potential overruling of the participants' procedural accomplishments closely conditions these participants' attitude vis-à-vis the procedures which they are required to follow. These procedural constraints are not attended to by these participants as features imported from whatever external, historical, or overhanging legal system; rather, they constitute the direct, obvious, actual, and practical dimensions of the daily bureaucratic routine of people engaged in the various legal occupations in present-day Egypt. This is exemplified in the general structure of the forensic physician's report:

Pursuant to the decision of the Giza court for personal status (person [viz., the circuit competent with regards to personal matters]), I have examined the case file that has been transferred to us by [the court] in this case and I have examined the defendant ..., in order to determine whether he suffers from impotence that makes it impossible for him to accomplish of his marital obligations, and in order to evaluate this impotence if it exists, its date and whether it is susceptible of treatment. I report the following:

First: Circumstances of the case ...

Second: The procedures

We have examined the case file transferred to us by the court in this case and we have fixed the day of ... as the appointment for conducting it. We gave the two parties to the litigation notice of it by registered notification, which I sent them within the legally required time.

On the fixed day the petitioner ... appeared ...

The defendant ... also appeared.

The two recognized each other in the session. We delivered a report on this.

Third: The Medico-Legal examination ...

The opinion

According to this, we consider that:

- It emerges from the examination on ... that he seems to be in a normal health ...
- It does not emerge from his medical examination that he suffers from any pathological ... state...
- We consider that the defendant ... may suffer from ... psychological impotence ...
- It is well known that ... it is not possible to determine a precise term for the recovery. ...

Delivered on ...

Forensic physicians' High Deputy

Apart from the substantial basis of the harm (see below), about which the physician is supposed to testify, the general structure of this document shows that: 1) The report is an achievement in itself: in this report the physician produces all the features that attest to his quality to act and to his mastery of the formal, procedural, and medical technicalities that make it possible for him to produce the document called "medico-legal report"; 2) This report is part of an encompassing procedure: it mentions that it is part of the more comprehensive procedure that is followed in the adjudication of a case that was transferred to the forensic physician by the court, asking him to produce an expert opinion with regard to the alleged impotence of the husband, on the basis of which the court will elaborate its ruling; 3) This report anticipates its further uses by the court: it addresses all the issues that might be deemed relevant by the judge, i.e. the defendant's general health condition, his medical antecedents, etc.; more important, it suggests to the judge the possible characterization of a condition that, in itself, escapes any clinical examination, namely, psychological impotence. It is interesting to note that the forensic physician proposes this characterization as a possible explanation, without concluding as to its certainty, whereas the judge subsequently relies on this opinion as if it was a matter of scientifically-established factuality.

b) Legal relevance:

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 formal legal definitions. In the case of judicial divorce on the ground of harm, two questions must be answered: what counts as "harm" and what is the cause of this harm? The two questions are closely related, and all the participants in the judicial process orient themselves to them.

With regard to the harm itself, the statutory provision defines it broadly. Article 6 speaks of the wife alleging that the husband mistreated her in such a manner 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 it appears explicitly in the following excerpt from the ruling:

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 to allow the judge to issue a ruling of 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 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 (Cassation, Personal Status, Appeal No. 50, 52^d Judicial Year, session of 28 June 1983; its [the Court of Cassation's] standard is here a 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, 46th 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 of it if he wishes, but he continues to inflict it, or he has resumed it (Cassation, Personal Status, Appeal No. 5, 47th Judicial Year, session of 14 March 1979, p. 798; Cassation, Personal Status, Appeal No. 51, 50th Judicial Year, session of 26 January 1982).

Here again, the Court's formal definition does not totally extinguish the uncertainty which the judge faces when characterizing the facts. This does not mean, however, that the judge's work is utterly 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, i.e. the operations through which the judge routinely selects some of the features of a case that resembles a common, normal, usual type of case.¹⁰ It is to these "normal" categories, which have, beyond their legal definition, a commonsense dimension, that the judge, as well as the prosecutor, the attorney, the victim, the offender, the witnesses, etc. orient themselves.

In the aforementioned case, the wife mobilized two types of reason in order to substantiate the category of harm:

[The wife requested] a ruling [that would] judicially divorce her [in the form of] an irrevocable divorce, with no right for him to reinstate her, on [the ground of] harm resulting from 1) the impotence that makes it impossible to realize the aims of marriage; 2) his violence against her in the form of blows, insults, abuse, and formulating accusations against her. ...

Neither impotence nor violence are explicitly mentioned in Egyptian law. However, 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. In addition, Hanafî law recognizes impotence as a ground for marriage dissolution,¹¹ and this is confirmed in our case by the judge:

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 whose prolongation cannot be accepted and

which nothing can resolve but separation (The Personal Status of *imâm* 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. Art. 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 suffers and on the basis of which the judge grants a judicial divorce according to Art. 6 of the 1929 Law:

Considering that, with regard to what precedes, the court concludes to the judicial divorce of the petitioner from her husband on the ground of harm.

The judge seeks to substantiate the legal category of harm, and what counts as harm for him is not totally dependent on statutorily-defined¹² or Islamically-defined¹³ provisions, even though they may play an important role. This substantiation varies also according to the judge's conception of "normal harm", i.e. the way he typically characterizes a certain type of behavior which he encounters in the performance of his routine activities. As mentioned above, what counts for the judge as harm includes 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 an event can take place, etc. The judge's conception of harm functions reflexively: he orients himself to a conception which, he thinks, he shares with, and that will be confirmed by, other people participating in the judicial process, while these other people lean 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. Unfortunately, this process cannot be properly documented in an empirical way, since most of the judge's work happens in his writing of the ruling, which is not a publicly available phenomenon. The only thing that can be stated with some certainty is that there is a gap between the formal rendering of documents like the ruling and the facts which these renderings claim to document. This gap "is produced through a transformation of locally accomplished, embodied, and 'lived' activities into disengaged textual documents."¹⁴ The ruling operates in a justificatory way, orienting to a body of procedural and substantive rules while hiding the practicalities of its own constitution.¹⁵ Some of these practicalities can be retrieved, however, by a close examination of the many steps that support the judge's work (although these steps are themselves transformed into somewhat disengaged textual documents).

In this judicial procedure, 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. As we noted, the forensic physician's report is very much oriented to the accomplishment of its procedural correctness. However, this report is equally oriented to the production of categories of legally relevant facts and people. The forensic physician's medical examination is largely directed at the construction of the record, which, in turn, is largely directed at its future readers. To paraphrase Martha Komter, this record looks backward to establish the medical circumstances of the case and to show its procedural correctness, and it looks forward to its use as evidence in the judicial process, "not only containing 'the facts', but also displaying those elements that are legally required,"¹⁶ i.e. it establishes that the necessary conditions have been met that

can lead to the assimilation of some physical situation to the legal category of 'male impotence'. This orientation towards legal relevance is reflected in the fact that, despite the absence of any physical disability and of any psychological examination, the report concludes to the probability of psychological impotence, although it is acknowledged that psychological impotence is hard to establish scientifically.

The opinion

According to this, we consider that:

- It emerges from the examination we conducted on ... that he appears to be in normal health, that his growth and constitution are natural, and that he bears the signs of manliness (*`alamât al-dhukûra*) in a normal way.

- It does not emerge from his medical examination that he suffers from any pathological or constitutional state, either generally or objectively, that would cause him permanent organic impotence.

- We consider that the defendant, even though, from the forensic medical point of view, he is devoid of the causes of organic impotence (*`unna `adawiyya*), is likely affected at the same time by psychological factors that may cause him psychological impotence (*`unna nafsiyya*), although we know that it cannot be conclusively concluded to the existence of this type of impotence from the clinical examination.

- It is well known that, in cases of psychological impotence, it [the condition] lasts as long as its causes last, so that it is not possible to determine a precise term or a date of recovery, taking into consideration that the necessary period of time depends on the extent of the intrusion of the psychological factor, its type and the sufficient character of the therapy; it also depends on the extent of the wife's readiness to help and to assist in the therapy in particular. If the wife lacks attachment to her husband, respect for him and readiness to assist him in the therapy, this therapy will be either exceptionally long and arduous or simply impossible.¹⁷

The second type of evidentiary technique is oral testimony, intended to document the alleged mistreatment of the wife by her husband. As mentioned above, this is the one of the few sections of the ruling in which reference is made to Islamic law, although mediated here again by positive law mechanisms, i.e. the Court of Cassation's jurisprudence:

Considering that the Egyptian legislature has imported (*naqala*) the rule of judicial divorce on the ground of harm from the doctrine of *imâm Mâlik* (...) It is not permitted, in order to establish it [viz., the harm], [to refer] to the same doctrine from which it is imported, and no particular rule was stipulated to establish it. In such a situation, one must go back, so as to prove the harm, to the prevailing opinion in the doctrine of *imâm Abû Hanîfa al-Nu`mân* (...).Henceforth, harm is established by its testimonial evidence (*bi'l-bayyina*), i.e., the testimony of two males or one male and two females. Oral testimony is not accepted (...).

Considering that the Hanafî doctrine makes the acceptance of the testimony on the rights of believers conditional upon its congruence with the petition for what it [viz., the testimony] conditions in it [viz., the petition]. Its contradiction is not acceptable [viz., the testimony cannot contradict the petition]. The congruence is complete when what the witnesses testify to is exactly what the petitioner has claimed; the congruence is implicit when it has been testified to part of the case. The latter is accepted as an agreement. The judge considers what the witnesses testified to as the 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^d 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,¹⁸ they allow us to get closer to the interactional details of the practice of judging. These can be read as follows:¹⁹

[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

17- Q: Anything else to say

18- A: No

[2]

19- The petitioner's second witness was called and he said:

20- My name is ... **oath**

21- Q: What's your relationship to the case

22- A: The neighbor of the petitioner

23- Q: What are you testifying to

24- A: The petitioner is the defendant's wife by virtue of a legal marriage contract there were disputes between them and I saw him hitting her more than once in front of their home and I also heard him addressing her with words like you filthy you bitch

25- Q: Did you see the defendant hitting the petitioner

26- A: Yes I saw him hitting her in front of their home

27- Q: What's the cause of your testimony

28- A: Because I'm their neighbor and I saw him hitting her

29- Q: Did you hear the defendant insulting the petitioner

30- A: Yes I heard him addressing her with the words you bitch you filthy and other words

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

32- A: Yes harm affected the petitioner because of this because she's young and a public servant at the post office

33- Q: Anything else to say

34- 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
[4]
49- The court called the defendant's second witness and he said:
50- My name is ... **oath**
51- Q: What's your relationship to the two parties
52- A: The neighbor.
53- Q: What are you testifying to?
54- A: The defendant is the petitioner's husband by virtue of a legal marriage contract and he lives close to me and she for one year and a half and he didn't hit her and he didn't insult her except once when the policeman came and took her and took him I don't know the cause
55- Q: Did the defendant hit and insult the petitioner
56- A: No
57- Q: The petitioner's two witnesses reported that the defendant had hit her and insulted her
58- A: No I didn't see him hitting her
59- Q: Anything else to say
60- A: No

Even though testimonies are supposed to be transcribed in the witnesses' own words, they clearly appear to have been reformulated, at least partly, 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."²⁰ 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, 21, 37, 51). This credibility can be further investigated by asking the witness to produce a first account of his testimony (turns 5, 23, 39, 53) and then assessing the reliability of this global narrative by asking the same witness to confirm his statements piecemeal (turns 7-14, 25-30, 41-44, 55-56). 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 (turns 45 and 57: "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 25, 29, 41, 43, 55), temporal dimension of the demeanor (for how long?: turn 11), content of the demeanor (words used by the husband: turns 13, 16, 32), responsibility (who did it?: turns 11, 25, 29, 41, 43, 55), prejudicial nature of the demeanor (what effect on the wife?: turns 15, 31)—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; turns 22, 38, 52: neighborhood), duration of his witnessing (turns 8, 12: nearly two years)—or which appear as very plausible—exact wording of the insults (turns 14, 30: “bitch” and “filthy”), effects of these insults (turns 16, 32: her breaking down at the post office). With regard to the content of his testimony, the witness clearly orients himself to what appears to him as the constitutive element of the harm, either denying or confirming its having occurred. Interestingly, the witnesses who deny the existence of any harm directly orient their 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.

In response to the judge’s question confronting them with the petitioner’s witnesses who testified to the existence of harm (turns 45 and 57: the petitioner’s witnesses reported that the defendant had hit and insulted her), the defendant’s witnesses respond with a total denial. This is an indirect way to address the challenge to their testimonies and to defend themselves against the blame-implicative nature of this challenge to their credibility. However, this total denial produces a paradoxical picture: on the one hand, two spouses living in perfect harmony (turn 40: “nothing like a misunderstanding happened between them and he didn’t assault her and he didn’t hit her and he didn’t insult”) and, on the other hand, a policeman coming and taking them to the police station (turns 40 and 54). One of the witnesses apparently tries to repair the damage created by this contradiction by saying that he does not know the cause of this police intervention, thereby acknowledging that this intervention occurred, something that contrasts his previous claim that the two spouses lived in harmony. The judge seems to have considered this paradox problematic. Even though he does not directly challenge the sincerity and honesty of the defendant’s witnesses, he does not take their testimonies into account in his final ruling.

Considering that, with regard to the second ground of the petition, namely the assault against her by the means of blows and insults, her two witnesses testified to the fact that they heard him insulting and slandering her in the street; moreover, one of them saw him hitting her more than one time and testified that the words with which he slandered her cannot be accepted. Life together became impossible and she suffered from harm because of this. Pursuant to the above, the testimony of her witnesses is congruent with the petition and is acceptable.

Conclusion

In this essay, I have shown how legal concepts can operate in practical and situated contexts. I argued that it is misleading to characterize “law” in advance as an instance of some general model like “Islamic law”. There is no reason to assume that what people refer to as Islamic law is identical to the set of technical provisions that form the idealized model of Islamic law. Nor is there any reason to assume the contrary. To a certain extent, the question is not relevant. It cannot be answered because it is totally

disembodied from actual practices, while it fails to address the phenomenon itself—the practice of referring to Islamic law. To the question “what is Islamic law?” we should substitute the question “what do people do when referring to Islamic law?”.

The case examined in this essay reveals what Herbert Hart calls the open texture of law²¹ as well as its constrained nature. Hart clearly means that legal provisions are open to interpretation. However, and simultaneously, this open texture of the law is framed by various constraints, among which, as shown, is the orientation of law practitioners toward procedural correctness and legal relevance. This orientation reflects the law practitioners’ anticipation of the possible further usages of the official reports which they must produce, their bureaucratic reluctance to possibly be overruled, and their preference for conformity. Procedural and substantive provisions are not phrased in self-evident formulations. At least, legal provisions must have been read and understood in order to be implemented. Most often, their reading and understanding is not problematic. Sometimes, as in Dworkin’s hard cases,²² their reading implies some interpretation. In both cases, however, law practitioners, in their quest for procedural correctness and legal relevance, manifest the many methods they use in order to produce shared meanings, understandings and characterizations of the law and the facts that are submitted to legal review. In this sense, the study of law can only be the study of law in action, and this can be achieved only through the close examination and description of legal practices in their fine-grained linguistic, textual, and interactional details.

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¹ Shaham (1997): 113ff.

² Thus formulated, it becomes difficult to account for the provisions on *khul'* in Law No. 1 of 2000.

Khul' cannot be considered a repudiation, i.e. a unilateral divorce by the man, nor a judicial divorce (the judge has no power of appreciation), nor a ground for the nullification of the marriage. With such a backdrop model of Islamic law, legal transformations must necessarily be considered as conforming to, or deviating from, the “pure paradigm”. However, this way to proceed leaves totally unaddressed the question of what people do and say when confronted by *khul'*.

³ Sudnow (1976): 158.

⁴ Shaham (1997): 130.

⁵ Sudnow (1976): 167.

⁶ Ethnomethodology and conversation analysis find their common origins in the work of Harold Garfinkel and Harvey Sacks. The central idea is that reality is self-describing or “accountable” and that the task of social scientists is to describe how social orderlinesses are continually produced and reproduced, understood, structured and publicly manifested in people’s talk and action. It constitutes an appeal to conduct empirical research without distorting how reality is experienced in the interests of making a theoretical or a political point. With regard to law, it means that ethnomethodology and conversation analysis ambition to analyze law in action, i.e., not the law of principles independent of the context of their use, but the law in the concrete enfolding of the practice of its rules and interpretive principles. Some of the best studies of law in the tradition of ethnomethodology and conversation analysis, including contributions of Garfinkel, Sacks, Drew, Watson, Lynch, Matoesian, Maynard and Meehan, are collected in Travers & Manzo (1997). Other major works in this perspective include

Atkinson & Drew (1979), Maynard (1984), Pollner 1987), Hester & Eglin (1992), Matoesian (1993, 2001), Lynch & Bogen (1996), Travers (1997), Komter (1998), and Dupret (2003).

⁷ Watson (1997); Komter (1998).

⁸ Qadrî (1875).

⁹ Paul Drew speaks of an “over-hearing audience” in order to designate the silent auditor to whom the participants in a trial address themselves beyond their direct verbal exchange (Drew 1992; 1997). I extend the notion and speak of an “over-reading” or “over-looking” audience to encompass the absent people to whom a written document, like a ruling, is addressed.

¹⁰ Cf. Sudnow, *supra*.

¹¹ Shaham (1997): 125.

¹² The 1920 and 1929 laws.

¹³ The above-mentioned stipulations of Abû Hanîfa and Abû Yûsuf.

¹⁴ Lynch (1993): 287.

¹⁵ This justificatory character appears in the conclusion of the ruling: “Considering that, with regard to what precedes, the court realizes that the continuation of their marital life ... would be an injustice (زواج *ulm*) against her. It is up to the judge to stop it in his quality of protector of justice. Although repudiation is the most hated permitted act in the eyes of God, it is equally forbidden to maintain a wife tied by the marital bounds to a husband who inflicts her harms that make it impossible to continue marital life for women of same status. The court takes into consideration the words of the Almighty: “But do not take them back to injure them” [Qur’ân 2: 231]; and the words of the Almighty: “after that, the parties should either hold together on equitable terms, or separate with kindness” [Qur’ân 2: 229]; and the words of the [Prophet]—may God pray for him and give him peace: “Neither harm nor counterharm [viz., a harm inflicted to counter another harm]”. It did not belong to the petitioner to ask for a repudiation if she found life with her husband enjoyable. However, she turned to the court, made her public statement and refused the conciliation on the ground of the impossibility for them to live together. The court has no choice but to grant her a judicial divorce. The General Prosecution does not object to this, to the contrary, it gave an identical opinion to the court.”

¹⁶ Komter (2001).

¹⁷ We must note the authoritative character attributed to medical expertise. Indeed, the judge concludes to the existence of the husband's impotence, as one of the two sources of harm, despite the fact that the physician speaks only in terms of probability.

¹⁸ Legally, these testimonies made in front of the court are also considered written testimonies.

¹⁹ In these transcriptions, I do not follow any specific system, like the symbols system devised by Gail Jefferson (1979: 287-289). However, I try to stick to the mix of vernacular and technical language that is used by the participants. I also decided not to add any punctuation in the material, for two main reasons: first, these are translations of written transcription of *oral* testimonies in which there is no punctuation; second, the original Arabic written transcriptions are devoid of any such punctuation.

²⁰ Atkinson & Drew (1979): 35.

²¹ "Even when verbally formulated general rules are used, uncertainties as to the form of behavior rebuked by them may break out in particular concrete cases. Particular fact-situations do not await us already marked off from each other, and labeled as instances of the general rule, the application of which is in question; nor can the rule itself step forward to claim its own instances." (Hart (1961): 44).

²² Dworkin (1985).