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# The Concept of Positive Law and Its Relationship to Religion and Morality

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► **To cite this version:**

Baudouin Dupret. The Concept of Positive Law and Its Relationship to Religion and Morality. The Oxford Handbook of Law and Anthropology, 1, Oxford University Press, pp.368-380, 2021, 9780198840534. 10.1093/oxfordhb/9780198840534.013.22 . halshs-03920510

**HAL Id: halshs-03920510**

**<https://shs.hal.science/halshs-03920510>**

Submitted on 3 Jan 2023

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## **Chapter 21: The Concept of Positive Law and Its Relationship to Religion and Morality**

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My contention is that the extension of the concept of law beyond what is ordinarily understood as law in the present-day context is at best useless and at worst misleading. Producing an intelligible jurisprudence of the concept of law means keeping it within the reasonable boundaries of what is meant by both lay and professional people when practising ‘the’ law. Remarkably enough, the same people do not confuse the many normative systems surrounding them and do not equate the legal order with, e.g., moral or religious normativities. It does not mean that these many normativities do not influence each other. On the contrary, they actively do so, but in ways that maintain their specificities.

This chapter aims to develop a socio-historical jurisprudence of law, as distinct from other normativities. It entails a threefold analysis: conceptual, historical, and praxiological. Following the ground broken by analytical philosopher Ludwig Wittgenstein, conceptual analysis engages in the exposition of the grammar through which concepts acquire their signification and are meaningfully used. In a manner inspired by philosopher of science Ian Hacking and by historian Reinhart Koselleck, historical analysis emphasizes the description of the birth, development, and use of concepts. Drawing on the work of sociologist Harold Garfinkel, praxiological analysis describes the practical methods used by people to make sense of their environment, to produce their local order, and to act accordingly. The three approaches converge in their insistence on adopting the endogenous/indigenous perspective toward legal life and its production.

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## **Penumbral cases: Religion and morality in their relationships to law**

The concepts of law, religion, and morality should be understood from the vantage point of legal positivism, from which they originate, and not as universal categories which could be applied to any type of normativity. Considered as ordinary categories, they are particularly apt to describe the working of modern legal systems, while proving inept when addressing other contexts and normative settings.

The distinction between law and morality, including religious morality,<sup>1</sup> may be considered one of the basic principles on which modern legal theory was built. For example, John Austin argued that positive law is distinguished from other normative systems in that it is founded on a command issued by a factually legitimate authority that is endowed with the power to sanction (Austin 1954 [1832]). The same Austin made a distinction between ‘law properly so called’, metaphorical laws (for example, the laws of nature), and laws by analogy (laws that proceed from an opinion generally shared by a human group). Under ‘laws properly so called’, however, one can find ‘the laws established by God for His human creatures’ as well as laws made by men for other men. In both cases, there is a conjunction of the two criteria for the definition of a law: the existence of a command and a sanction. What distinguishes the different categories of ‘laws properly so called’ is the third criterion: effective authority, which can only be satisfied through the intervention of a human agent. In other words, intentionality coupled with the effective force of execution makes up, according to Austin, positive law (Jackson 1996).

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<sup>1</sup> Religion and morality should be analytically distinct, even though they can sometimes intersect.

Although he challenged Austin's theory of command, Herbert Hart (1961) sought to maintain a moderate positivist understanding of law. He therefore defined legal positivism as an expression of the thesis according to which it is not at all necessarily true that rules of law reflect or satisfy certain moral exigencies, although in reality they have often done so (Hart 1961: 224). What is at stake, therefore, is the need to demonstrate that no necessary relation exists between law and morality. Legal and moral obligations might indeed share certain characteristics, but they remain distinctive forms of social control (Hart 1961: 232) due to the importance of obligation (no moral rule can be considered unimportant), the inaccessibility of moral rules to deliberate changes, the necessarily intentional character of moral errors, and the form of moral pressure that invites respect for the rules due to their importance and shared nature (Hart 1961: 203–221). According to Hart, in order to be legally valid, a rule of law does not necessarily have to conform to moral standards, but to the formal criteria of a system of primary rules (i.e., duty-imposing rules) and secondary rules (i.e., power-conferring rules), even though some of these rules violate the specific morals of a society or trespass what one might consider to be authentic morals (Hart 1961: 250).

This positivist conception can be considered as a global phenomenon, which was acculturated to settings peripheral to the original core of positive law. Egyptian legal doctrine asserts, for instance, that there is a distinction between law and morality. For example, Hassan Gemei (a.k.a. Hasan Jami'i) aligns himself with Austin's theory of command with regard to the definition of law. Gemei sees law as a set of rules governing the behaviour of individuals in society, which people must obey, lest they expose themselves to sanctions imposed by a competent authority (Gemei 1997: 6). According to Gemei, legal rules are not the only ones aiming to regulate and stabilize relations among members of any given society. They act in concert with other rules, like those of courtesy, customs, traditions, and religious rules. As for moral rules, they are principles and teachings that the majority of the members of society

consider as constraining behavioural rules that aim to realize elevated ideals (Gemei 1997: 15). Moral rules share a number of characteristics with legal rules: they change according to time and place; they tend toward organizing society; they have a constraining nature associated with sanctions. However, they differ from legal rules in three domains. First, with regard to their field of application: ‘Whereas morality includes personal and social manners, law addresses the relationship between the person and the others from the perspective of the ostensible aspect of behaviour without taking into consideration the intentions non-associated with physical action’ (Gemei 1997: 16). They also differ with regard to the type of sanction imposed: ‘Whereas the penalty of violating morality rules is a mere moral penalty ranging from remorse to denunciation and disdain, the penalty for violating legal rules is physical incarceration, imprisonment, hard labour, etc.’ (Gemei 1997: 17). They also differ in respect to their objectives: according to Gemei, while moral rules seek to attain perfection in man, legal rules seek to realize stability and order within society (Gemei 1997: 17). Finally, they appear in different forms: legal rules, Gemei asserts, generally appear in a clear and specific form, while moral rules are not so clear, because they are linked to internal feelings, which may vary from one person to another (Gemei 1997: 17). As to religious rules, they have a close relation to legal rules, but their field of action is far wider and violating them is punished in the afterlife (Gemei 1997: 18). Gemei insists that there is no difference between religious and legal rules, for such a difference ‘cannot be recognized from the perspective of Islamic sharia’<sup>2</sup> (Gemei 1997: 18), in the sense that Islam is a total faith that encompasses law. This means that the field of application of sharia is wider than that of law: Islamic sharia,

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<sup>2</sup> The term sharia is a polysemous concept that can refer in Islam to the divine teaching, Islamic law, Islamic ethics, or even an Islamic ‘virtuous abstraction’ (Berger 2013; see Dupret 2018).

he notes, is the source of legislation from which legal rules must be derived in Islamic states (Gemei 1997: 27): ‘Islamic Shari’ah was ordained as a divine law to govern the conduct of the Islamic society, formulate the thought of the Moslems, and regulate the human relations. Revealed by Allah, Shari’ah guides the society to the highest ideals and seeks to achieve wisdom for which God has created man on earth’ (Gemei 1997: 28).

This modern distinction between law, religion, and morality should not be taken as a universal truth. On the contrary, this type of discourse regarding the relations between law, religion, and morality is totally contingent. It is the direct heir of the process of legal positivization and of the building of law as an autonomous order. Doing the anthropology of law today means therefore studying positive law as a concept that has its own historical ontology and practical translation.

### **The conceptual analysis of law**

‘We should probably acknowledge the arbitrary element in language more than we do; for that would encourage us to invent new sounds for our new names, instead of taking an old sound and thus creating a new ambiguity’ (Robinson 1956: 138). This sounds very much like Wittgenstein’s prudential remark regarding the necessity to clear the mist surrounding our conceptual usages. Concepts are abstractions of features characterizing something which can be expressed with different words and in different languages. Of course, what seems relatively easy when the thing referred to is a material object becomes more problematic when this object of reference is by definition a social construct. If one considers that the word ‘law’ is a concept, the question is thus to know what are the features common to the many words referring to this abstraction.

The question ‘what is law’ per se is devoid of relevance. There are only words and expressions sharing family resemblances across languages, cultures, institutions, activities,

and contexts. As a consequence, there is no universal definition of law that should be looked for independent of its context of expression; one may only achieve descriptions of the surface and deep grammars of the language games surrounding words closely or loosely associated with what we mean by ‘law’ in English (or *droit* in French, or *qanun* in Arabic, etc.).

However, when describing the grammar of such language games, we proceed with a paradigm from which to extend the analysis beyond its ‘core of certainty’ (Hart 1961). Although law is not an empirical but a conceptual reality, its core of certainty is contingent and not universal. The core of certainty of law is made of the empirical object of which positivist legal theories were the description. In other words, the concept of law corresponds to what legal theorists designated as positive law, as distinct from natural or religious law, or any other type of law, at the time of what one might call the ‘positivist turn’. Other instances can share some features with this core of certainty – these are what Hart calls penumbral cases, i.e., instances having some resemblance to the paradigm – but this is only a resemblance and its relationship with the core is metaphorical. This is not to say that such theories are correct or complete, but that, despite their possible flaws, they constitute generalizations and abstractions from one specific and contingent object working as their paradigm.

*Pace* Montesquieu, law in the natural sciences does not belong to the same game as law in ... law. One must therefore identify the language games within which the word is used in order to discern its criteria of intelligibility and the concept of which it is an expression. However, every language game always relates to a core of certainty, in respect of which it is contextual and perspectival: it is ‘relative to the purposes specific to those people and sensitive to circumstances from which it cannot be abstracted (without detaching it from what constitutes its identity)’ (Hutchinson et al. 2008: 75–79). Accordingly, it is clear that everything normative cannot be called legal, as it would run against the meaning constitutive of the core object of the concept of law – and this holds true if there are many concepts.

Calling all forms of ordering by the name 'law' creates an analytical mist. Using a word which has some common-sense meaning to perform an analytical task that runs contrary to this meaning generates an ambiguity, especially when this alleged concept either does not carry anything which makes it distinct from other, less connoted words (like 'norm'), or surreptitiously carries the distinctive characteristics of what it is supposed to be contrary to. For instance, claiming that *dharma* is law (Davis 2012; Geertz 1983) presupposes the existence of a concept of law including all cultural forms of normativity. On the contrary, taking the criterion of the union of primary and secondary rules (Hart 1961) excludes from the conceptual spectrum a series of configurations called, e.g., infra-law, primitive law, proto-law, social, ethical, deontological norms, etc. It would exclude *dharma* because of the very composite nature of primary rules and absence of secondary ones. Both claims are conceptual. The grammatical inquiry into the many uses of the word *dharma* can tell us whether there is any heuristic value in speaking of *dharma* in terms of law. Heuristic concepts share two qualities: the capacity to precisely identify what they are the concept of; their affordance to a grammatical inquiry. It is conspicuously difficult to identify the object of the over-inclusive concept of law, not to speak of describing it. With Hart's positivist theory, and despite its many flaws and approximations, we have a clear object whose description it is possible to carry out.

An inquiry into normative concepts is thus both grammatical and context-dependent. The case of 'Islamic law' is illuminating in that respect since it perfectly illustrates how a normative corpus was characterized in terms of 'law' at a specific historical time. It is a truism to say that 'Islamic law' is a concept belonging to a taxonomy. It is more striking and sometimes irritating in the current context to acknowledge that this concept is the product of a specific scholarly enterprise that aimed to better understand, control, and reframe the



phenomenon of normativity in Muslim societies. Normativity existed prior to the attention Orientalist sciences gave it; Islamic law did not (Buskens and Dupret 2015).

### **Historical ontologies of a contingent concept**

Law is not an empirical reality that must be discovered; it is a concept that was intended, at a specific point in history, to express the idea of a contingent normative order. In that respect, its study must be both historical and praxiological. In other words, it cannot be severed from the context of its uses and the practices of its accomplishment.

The coming into being of concepts is thoroughly historical. ‘Historical ontology’ is how I call the description of both the concept itself and its history. Concepts are historical objects that do not exist until they are created. For instance, in the past, before the concept of homosexuality was formed, there could be sexual acts between two people of the same sex, but there was no specific kind of person categorically called a ‘homosexual’ (Davidson 2001; Hacking 2002: 82). Historically and etymologically speaking, most of the many words used to express the contemporary concept of law have existed for a long time. However, as we observed in the first section, they were not used with their current meanings. To take but one example, between the meaning of the word *constitutio* in Medieval canon law and the current notion of national constitution, there is what Michel Foucault (1961) called, when writing about madness, a ‘great divide’, that is, a radical and often incommensurable discursive gap.

Discourse on ‘modern law’, ‘positive law’, or ‘law’ *tout court* was made possible through the emergence of a conceptual space articulated by a style of reasoning (Davidson 2001: xii). This is not the place to explore the complex history of the concept and of the discourse in which it is embedded. It is enough to say that the concept evolved, spread, and transformed itself. It progressively referred to something like a homogenous, autonomous,

autopoietic normative system. In this process, it was associated with values, which were themselves changing, but it always remained attached to an idea of the state, the rule of law, and the control of the population. Describing the ontological history of concepts allows us to understand how we think and why we seem compelled to think in certain ways (Hacking 2002: 71). It can be done *à la* Foucault with snapshots taken on either side of the Great Divide, showing the transformation of one tradition into another, or it can be done in a synchronic way, with snapshots taken from two concurrent repertoires addressing a seemingly identical concept. In both cases, the discourse must be analysed within the circumstances and conditions under which the sentences comprising it have ‘archeologically’ acquired their truth value and can therefore be uttered (Hacking 2002: 79).

Ontological analysis can be conducted hypothetically. Through his fable about King Rex, Hart suggests a ‘genetic-analytic’ (Hacker 1977: 11) approach to the birth of law understood as a legal system. Although conceptual and not anthropological, this hypothetical story is anthropologically illuminating: ‘We are asked to envisage a purely notional situation in order to perceive what crucial features characterize our own complex situation’ (Hacker 1977: 11). The fable goes as follows (Hart 1961). There is a population living on a territory governed for years by an absolute monarch, Rex. He controls his people through general orders coupled with threats to do or to abstain from doing certain things. His people generally obey him, based on their personal relationship with Rex. After a happy reign, Rex dies, leaving an heir who starts giving general orders. The simple fact that his father was generally obeyed does not guarantee Rex II to be habitually obeyed. If orders are laws only when habitually followed, one must wait a certain time before knowing whether Rex II is in fact legislating. In other words, there is a legal discontinuity between the reigns of Rex I and Rex II. However, a pre-legal system has been born if one observes a continuity of the power to legislate through rules facilitating the transition from one lawmaker to another. Such is the

case if Rex II has a title to succeed his father. This title gives him the right to legislate after his father's death, and his first orders can be considered laws, notwithstanding the eventual obedience of his subjects. It is not the habit of obedience that transforms orders into laws, but the issuance of these orders on the basis of secondary rules that recognize Rex II's orders as valid, that is, as conforming to the rules of the same system that give him the right to succeed and thus to legislate. The fable does not end here. Other secondary rules must be added in order to produce a full-fledged legal system. Hart calls them rules of adjudication and rules of change. Rules of recognition constitute remedies to the problem of uncertainty affecting the authority entitled to issue primary rules. Rules of change respond to the problem created by the static character of primary rules whose issuance is not governed by superior norms. Rules of adjudication are functional responses to the inefficiency of mere social pressure. Together, primary rules creating obligations and secondary rules (of recognition, change, and adjudication) organizing the power to issue primary rules are the elements necessary to the constitution of a full-fledged legal system. In this sense, Hart's conception can be considered genetic. It does not mean, however, that it is normative, in the sense that it does not imply that a legal system is per se a moral good (Gardner 2013).

This conception of law as the union of primary and secondary rules is contingent upon the specific legal systems scholars like Hart were aiming to describe. It was widely applauded, discussed, and criticized for its formal flaws as well as for its ethnocentric or evolutionary stance. However, despite its inconsistencies, it can be safely taken as a valuable attempt at describing a legal historical paradigm. In that sense, Hart's concept of law is what is meant today by the word 'law'. It corresponds to the contemporary state of conceptualization obtained by the word if we are to describe its historical ontology.

Rex's story can be told in a purely anthropological manner, as demonstrated by Testart (2012) in his analysis of the evolution of societies in prehistorical times. It can also be told in

a historical way. This is somehow what Jean-Louis Halpérin (2014) attempted in his collection on legal revolutions. Making a distinction between ordinary changes, which take place within a system, and revolutionary changes, which imply the substitution of an ancient order with a new one, Halpérin observes ‘the possibility of “fits and starts” in legal history, contrary to the classical evolutionist schemes that insist on elements of continuity’. Going further, he states that these breaks are ‘complete upheavals of the structure of legal systems based on secondary rules’ (2014: xi). They can take two forms: either the passage from a pre-legal system, made of primary rules only, to a full-fledged legal order, made of the combination of both primary and secondary rules; or the substitution of a new system for an old one. Addressing the specific issue of codification, Halpérin stresses the revolutionary character of legal systematization. This can be contrasted with Roman law, which lacked the static and dynamic hierarchy of norms regarded by Kelsen as characteristic of both state and state law (Kelsen 1945; Troper 1994: 194).<sup>3</sup> The legal break Europe went through at the turn of the 19th century was the outcome of dynamics of ‘legal systematization’, which used inter alia the technique of codification frequently associated (from the end of the 18th century) with an idea of planning oriented to the construction of a new legal order (Halpérin 2014: 35), an idea rather different from earlier compilations. Not surprisingly, Max Weber saw in the great

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<sup>3</sup> Troper adds, ‘One pays a huge price for this definition, as one cannot anymore speak of feudal law nor even of Roman law, at least during the Republican era, but it offers two advantages: – It allows [one] to understand the law and thus the state as a specific form of political power ... ; – [I]t can contribute to the explanation of theories regarding the state, [that is, the] influence the historical emergence of this specific system exerted on the formation of concepts and theories’ (1994: 195).

codes of the 19th century and especially in the French Civil Code of 1804 the paradigmatic example of formal rationalization (Halpérin 2014: 37; Weber 1978).

Legal positivism, nation-state building, and codification were an extraordinary success story. The 19th and 20th centuries witnessed the transplantation (Watson 1993) of the Napoleonic code template at a global level. One can identify many reasons for this phenomenon: the unifying capacities of codes, their flexibility and adaptability, their symbolic force as ‘talismans of modernity’ (Halpérin 2014: 49). Both codes and systematized case-laws were major tools supporting national projects. In Muslim societies, to take only one example, the conception of local norms largely followed the global movement. In this process, it was left to scholars to decide whether a norm was qualified to be elevated to the status of ‘law’. When ratified at a political level, these scholarly opinions became the new law of colonial and even indigenous administrators. There are many reasons for this conceptually ethnocentric legal positivism, e.g., the fact that colonial administrators were often trained in law and that a majority of scholars combined oriental and legal studies. This orientalist, positivist conception perpetuated itself and remains in place; it was reproduced, from generation to generation, in the West as well as in the East. It became natural to speak of Islamic normativity in terms of law. While using the expression ‘invention of Islamic law’ is often perceived as an attack against Islam, suggesting that this law is man-made and not divinely inspired, the question is not the divine nature of ‘Islamic law’, but that speaking of Islamic normativity in terms of law is, first, contingent on a specific time and place and, second, deeply influential on the understanding one has of that normativity.

### **Praxiological ethnography: The concept of law in context and in action**

I conceive of my task as the description of the actual uses of the concept of law. Drawing on its historical ontology, I have identified the period of its birth, some of its contingent,

fundamental elements, and the ways in which it became autonomous from other normative repertoires such as religion and morality. This paves the ground for a contemporary inquiry into the ways professionals and laypeople refer to law in the ordinary accomplishment of their lives and tasks. This is what I call ‘legal ethnomethods’ (Dupret et al. 2015), which are the ordinary methods used in order to ‘be legal’ (Garfinkel 1974: 16) in the performance of ‘law properly so-called’ (Austin 1954 [1832]). These ethnomethods concern the practice of the law understood not as an equivalent to any kind of normativity, but as this very specific thing which appeared together with the emergence of nation-state, which was made the object of the science of law, and which positivist theories attempted to describe.

Let us use examples extracted from studies into Egyptian lawmaking and application in order to sketch the lines of such a praxiological inquiry into legal ethnomethods and their relationships with religion and morality, or perhaps in this case religious morality (Dupret and Ferrié 2015). Firstly, one must note that law is practised with both technical and mundane languages. Take the example of divorce trials in Egypt, for which a reconciliation committee is required by the statutory divorce law. If the committee in a given case states that the wife has faced ‘humiliation, slander, insult and a blow to her honour from the husband’, the praxiological attitude involves analysing these statements in their ordinary sense, whilst noting that they are reformulated by a specific institution (the reconciliation committee) within the context of a judicial proceeding (reconciliation in a divorce trial) and for practical purposes (coming to a decision).

Secondly, one must emphasize the importance of context, e.g., institutional. Context means the constraints towards which people actually orient themselves in the course of their activities (Dupret and Ferrié 2008). In describing what parliamentarians do, for example within the Egyptian People’s Assembly, we must show how a declaration such as ‘the law proposal in its current format is contrary to the sharia ... [and] must be modified in order to

comply with jurists' unanimous opinion' manifests the desire of the MP concerned not only to produce an utterance which has a meaning understandable by his colleagues (the non-compliance of the law proposal with 'Islamic law'), but also and especially to act as a MP committed to the adequate accomplishment of his work (voting for a law proposal that complies with the Constitution).

Thirdly, the grammar of interactions unfolds according to the various contexts in which interactions are embedded. The constraints exerted by such contexts are to be described not as a static element of interaction but as a reflexive and fluctuating framework that actors permanently reassess and in relation to which they constantly realign themselves. When the Speaker of the People's Assembly declares that 'the modification proposed by the government is in conformity with prevailing Maliki doctrine<sup>4</sup> in the Kingdom of Morocco as well as in several other Arab countries and is in line with the suggestions of MPs', he is manifesting and updating the institutional context in which he moves. In this sense, his intervention is contextualizing (it makes the context of this affirmation available) and contextualized (it situates the intervention retrospectively – what is done in other countries and what the MPs have suggested – and prospectively – it inscribes this intervention in the extended perspective of the parliament's passing of a law).

Fourthly, legal procedures belong to the constraints exerted by the context. The legal sequence follows certain stages which, although formalized, nevertheless respond to a series of empirically observable accomplishments which are also explicitly produced by the participants. The production of a procedurally correct law is one of the priorities towards

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<sup>4</sup> Islam's majority doctrine, Sunnism, is divided into four schools of jurisprudence: Malikism, Hanafism, Shafi'ism, and Hanbalism. In Morocco, Malikism is the official doctrinal school of the state.

which practitioners tend. These procedural constraints do not correspond to a set of abstract rules drawn from an external, historical, and overhanging legal system, but to the routine and bureaucratic dimension of the activities of those engaged in legal practice. When the reconciliation committee writes that ‘the Honourable Court has designated us to arbitrate in case number [x] of the year 2000’, it is producing procedural correctness in addressing judicial bodies, which subsequently will consider its report, more than it is describing the procedural rule that it followed.

Fifthly, the participants in the judicial activity also orient themselves to what we might call sets of relevancies. The idea of relevance refers to the operation which relates a practice to the categories within which it must be embedded in order for it to take on its full sense, claim its validity, and produce its effects. Relevancies take on very different aspects according to the activity within which people are engaged. In the Egyptian parliamentary context, we can discern, for example, national, constitutional, and Islamic relevancies which in some way constitute what Goffman calls the ‘footing’ that those involved will adopt to support their speech turn. The Islamic relevance often predominates in MPs’ talk, but it is also important for them to recognize democratic relevance as the parliamentary order principle. This is demonstrated in the following extract, which combines reference to an Islamic relevance (the discussion of the project before an Islamic body), a legal relevance (the procedure of adopting the law), and a democratic relevance (respecting the principle of a majority vote): ‘The discussion of this proposed law at the Academy of Islamic Research lasted three months to allow members to express their opinions; we voted with the majority of the voices and that is quite normal; it is the opinion of the majority and this opinion engages all its members.’ In the judicial context, relevance has more to do with legal characterization (i.e. matching selected facts with the text of the law), as in the following extract in which the reconciliation committee observes ‘the impossibility of coexistence and marital life between them’,



characterizing in this respect relations between the spouses according to the legal category available and opening the way to the subsequent inferences of the judge.

Sixthly, legal activities are instructed, that is, they are oriented to a norm of reference (Livingston 1995). By instructed action, I mean an action whose normative reference is immanent to the particularities of the site and the actions that are appropriate to it. Sometimes, the normative reference even transcends the site and the action itself, in the sense that it is not stipulated in a corpus (which may be tacit) of specific instructions. In sum, language games are referring in complex ways to demonstrably textual sources or to supposedly shared moral values (Livingston 1995, 2008). Thus, an individual within the parliament can carry out an action which is both instructed by a procedural rule and inspired by a religious relevance: ‘The text submitted to us complies with the provisions of the Islamic sharia. [Nevertheless,] further to the request of MPs, the government proposes a modification to Article 20 so as to give the tribunal the right to call before it ... two arbiters in order to attempt to reconcile the spouses in case of *khul*’.<sup>5</sup> In the judicial situation, the instructed nature of the action is demonstrated by an orientation to procedural correctness and legal relevance, whilst the possibility for it to be inspired can only appear in a superfluous manner (like the notation ‘in the name of God the Clement and Merciful’ at the top of the written ruling, which is not legally required) or when judicial standards such as public order or good morals are referred to.

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<sup>5</sup> *Khul*‘ is a specific form of repudiation in which the husband grants his wife a divorce in exchange of her renunciation of all the material benefits she has gained from her marriage with him (gifts, alimonies, dowry). In Egypt, the law No. 1 of the year 2000 transformed it into a divorce initiated by the wife without her husband or the judge having any capacity to oppose it, providing she renounces the same material benefits.

## **Law, religion and morality: A pragmatic socio-historical jurisprudence**

Under the denomination of ‘pragmatic history’, Simona Cerutti calls for the development of an approach that accounts for the practical attitude of members of society toward the many social institutions, reasons, logics, and norms that they actively help to craft (Cerutti 2008). Contesting Carlo Ginzburg’s interpretive attitude, which uses biographical trajectories to provide for the reconstruction of complex cosmogonies, she advocates the search for non-anachronistic, indigenously relevant, and practical categories. Speaking of law, she insists that legal cultures constitute resources that are locally mobilized for all practical purposes. More specifically, legal documents incorporate the reasons why they were written; they are oriented to the goals of their production. In that sense, the analysis does not consist of the correction of the actors’ versions of facts or of the disclosure to the actors of a reality of which they are not aware; it consists of the reconstruction of their capacity to make their own actions comprehensible, acceptable, and legitimate. Regarding the law, it means exploring legal cultures in their contextual, situated, local uses, including the reciprocal relationships between formal norms and social practices.

What Cerutti calls pragmatic history can be easily extended to contemporary contexts. I advocate a pragmatic socio-historical jurisprudence that concentrates on the concept of law and its ‘glocal’ translations. Combining analytic, grammatical, and praxiological approaches with legal theory, history, and ethnography, I seek to bypass at least two dichotomies opposing lawyers’ law in the books and anthropologists’ law in action, on the one hand, and positivist and realist socio-legal theories on the other. I also seek to dilute the conundrum of the definition of law through, first, a conceptual analysis; second, its re-specification as the theoretical conceptualization of a contingent object: the positive legal system of the nation-state; and third, the close description of the practices associated with the enactment of the

concept. Within the frame so defined, speaking of law, religion, and morality as separate entities whose relationships must be investigated is closely associated with the positivization process that posited these repertoires as distinct though comparable entities. As a consequence, it is meaningful to speak of them in such terms if we confine ourselves to the specific context of their theoretical distinction, whereas using the same categories to speak of times and societies that did not conceive of the issue of normativity in such terms borders on absurdity. There is no way to properly understand how legal, religious, and moral repertoires interact in contexts where these very categories do not make sense. However, the case is completely different when societies claim the (total or partial) autonomy of their legal system from that of religion or morality.

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