

Anthropology, ethnography and legal practice. Law as a practical accomplishment

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There are definitely many ways to deal with the issue of law in general and in Arab countries, like Egypt, in particular, among which the anthropological, historical and political perspectives. Through the reading of, among others, Alan Watson², Brian Tamanaha³, Nathan Brown⁴, I learned a lot. However, I got the strong feeling that I did not learn what I wanted to know, that there was a kind of “missing-what” in what I call the classical approach to law. This missing-what is the phenomena of “codifying”, “code-referring”, “adjudicating”, “pleading”, “defending”, “suing”, “appealing”, “looking for grounds, excuses, justifications, causes, intentions”, “producing facts”, “characterizing facts”, the gerundive form of these many words indicating their activity nature. In other words, by looking for the law in the dynamics of history, research had lost the phenomenon of the law itself. These analyses are acutely grounded in concepts (codification process, positivization, modernization, etc.), categories (Islamic law, indigenous law, imported law, etc.) and theories (systemic, structural, realist, behavioral, etc.), but, by so doing, it probably misses an essential part of its object, perhaps even the core of its topic, i.e. the practice of codifying, code-referring, adjudicating, pleading, defending, suing, appealing, looking for grounds, excuses, justifications, causes, intentions, producing facts, characterizing facts, etc.. In sum, the law, in these scholarly works, is used as a resource for explaining larger issues, like change, power, domination, equality. However, the law is forgotten as a topic in its own right.

1. Natural accountability and formal renderings

To understand my argument, it is helpful to begin by insisting on what I call a gap between the “natural accountability” of the life-world and

the “formal renderings” produced by scholars and professionals of law. This gap is produced through a transformation of locally accomplished, embodied, and “lived” activities into disengaged textual documents⁵. In the following little story, I shall try to present a vivid account of two incommensurable descriptions of social structure, a complaint about a theft and the policeman’s documentation of the case:

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During my first stay in Cairo, I went shopping in the old market Khan el-Khalili with a relative. My relative was looking for typically Egyptian gifts and in the course of this rather typical activity for tourists in this part of Cairo we met a young Egyptian called Hânî at the famous coffee-shop El-Fishâwî. He proposed to guide us in this maze of little streets and to indicate us the good addresses, something he did quite expeditiously. When parting, he asked me my phone number and address in Cairo, something I gave him willingly. A couple of weeks later, after my relative had left, Hânî called me and told me he had a big argument with his father, could not stay there, and was looking for a shelter. I told him to come, he came, and we went to eat a pizza in the neighborhood. When returning home, I told Hânî that I must leave early the next morning, that he could sleep later and that I’d meet him later in the day. The day after, I came back home late and I found my flat empty, empty of Hânî and empty of most my valuable belongings. Reporting this incident to the police, I had a long story with which to justify my accusation. I described the circumstances of the first encounter, his coming at home, the theft, and most importantly my sense of his betrayal. After a couple of minutes, the police officer of the Gamâliyya police station stopped me and asked: «When and how did you meet him?» I started the story again describing as precisely as possible how and when I met Hânî. As soon as he got his answer the police officer interrupted again: «Did you know him from before?» I told him I did not. «Was he looking for something?», «Did you have sexual intercourse?» And so it went. Out of the flow of material with which I described my situation, the police officer wrote a record made of a general narrative (mainly re-written since the officer must have thought that my Arabic was not very stylistic) and a series of questions and answers establishing the identity of the parties, the place and the time of the incident, and the motives that seemed to have animated Hânî’s action. The officer understood, of course, that the situation as I described it was a bad experience for any person. But he consulted his colleague and according to the rules instructing police officers about the proper constitution of a record and his reading of the provisions of the Criminal Code, he undertook the process of selection and classification,

such that he came up finally with what from the standpoint of the legal record was “the case”. There was one description of the social structures that I provided to the police officer. The transformed description of my personal circumstances found in the record described a world which did not include my sense of injustice, my looking for some Egyptian support, etc. Such features, though known to the police officer, were not relevant. Instead, the police officer described a certain criminal misdemeanor which included identities, place, time, motives, with the expected result that these features all combined would compose a “normal crime”.

Through the described encounter between the police officer and myself, my narrative was transformed into an intelligible, procedurally correct and legally relevant document⁶. As a disengaged document, the police record anticipated a body of identities, rules and criteria that have an arguable relationship to the “victim’s situation” while at the same time it systematically omitted reference to the legally irrelevant details that suffused my own narrative. Accordingly, we have a relational pair (victim’s narrative/police officer record). As a whole, it is the second part of this relational pair that is most often used by analysts and professionals, i.e. they tend to privilege the disengaged document’s objective, analyzable, and formal properties. Here, I suggest that we go beyond or upstream the disengaged document and that we look at, first, the surplus relevancies, significations, and temporal parameters of the natural account that are irretrievably lost as soon as the disengaged record becomes the official record, and, second, the work that is achieved from the rendering of the case, i.e. the transformation from a natural narrative to a formalized record.

2. Referring to the code as a practice achieved in situ and in context

I can now turn to the issue of referring to the code. Using the phenomenon of the code as a resource, not a topic in its own right⁷, formal/classical research forgot that, before being part of an explicative scheme, the code is a “doing”. This can be called the shop floor problem. Re-specifying the issue of the code as a practice, as an ongoing accomplishment every time an action is oriented toward the provisions of the code, means that analysis must develop an inner understanding of these practices, i.e., an understanding that is capable of exhibiting the many constitutive features of sense-making of, interpreting, referring to, applying the code

provisions. This cannot be done from any position external to the settings in which these practices unfold, i.e., it necessarily means that, first, research steps back at the shop-floor level and, second, it aims at describing these practices in a way that would allow to instruct practitioners about the practical modalities of the accomplishment of their work. In other words, the code must be looked at as a set of instructed actions.

34 In endless many professions, practitioners are required to read descriptive accounts alternately as instructions. «They do so occupationally, as a skilled matter of course, as vulgarly competent specifically ordinary and unremarkable work-site-specific practices»⁸. Such is the activity of code-referring, code-using, code-implementing. It is a phenomenon that is made of the two constituent segments of a pair: (a) the first segment that consists of a collection of instructions; and (b) the work of, just in any actual case, following these instructions, which somehow turns the first segment into a description of the pair. Let's take a case to show you the point.

In the Prosecution office of Shubrâ al-khayma, a neighborhood of Cairo, one day I was sitting in the back of the room, a woman came to make her deposition about her son who had died after drinking methylated spirits. In such cases, the Prosecution is legally required to conduct an investigation. Among the questions which are raised and which the Prosecution is asked to document, is whether the death was accidental or not, intentional or not, and whether the Prosecutor must order an autopsy of the body. The mother expresses her grief and mourning, accompanying the Prosecutor's interruptions with various invocations and gestures. However, it seems that the Prosecutor is puzzled, he goes to the other side of the room and discusses with his colleague. He's wondering about the credibility of the testimony; he feels that these expressions of grief are weak considering they come from a mother who lost her son. She doesn't seem to be enough affected. Then, he borrows a book from his colleague headed *General Instructions to the Prosecution*. He looks for the provisions telling him how to deal with witnesses, how to conduct investigations, the provisions of the code instructing him about the way he must accomplish his job in just this case. He's looking for the first part of the pair I mentioned before, for objective instructions giving him a definite sense of what he must do. Of course, he doesn't find precisely what he's looking for. He finds a "docile version of instructions", a disengaged text, and it remains up to him to give it its punctual, actual, situated sense, that is, it remains up to him to produce the second part of the pair, the work of following these instructions. And this somehow

will turn the codified instructions to the Prosecution into a description of the phenomenon of code-using. In other words, the phenomenon of code-using, code-referring, code-practicing is identical to the “indissociable” pair (codified instructions/following the instructions). The code is a practical accomplishment that consists of the provisions of the code and the following of these provisions, the former providing with a disengaged set of rules, the latter being the practice of searching for the clarity, consistency, truth and correctness of the code, both working reflexively.

3. The code as instructed practice

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One way to describe an actual case of code practice is synoptic. Here I present in parallel the two segments of the pair constitutive of the phenomenon of the (code), i.e. the [instructions] on the one hand, the <following of the instructions> on the other. It manifests how much, at least in this single ordinary case, the phenomenon of the code is instructed action.

The many [provisions/instructions] of the two relevant codes read as follows:

Instruction to the General Prosecution (IGP):

Art.204 – The name and surname of the accused must be established on the record, if available, the date of his birth, in day, month and year, [...]

Art.205 – The questions that are addressed to the accused people and the witnesses, as well as the answers to them, must be established in the investigation record in a complete way, without summarizing, deletion or correction, under the supervision of the responsible [member of the Prosecution].

Art.216 – The responsible member of the Prosecution [...], after having scrutinized the accused and established whatever consideration he found useful, interrogates him orally on the accusation that is brought against him; if [the accused] confesses the accusation he undertakes to interrogate him in detail, caring to put forward what consolidates his confession; if [the accused] denies it, he asks him on whether he has a ground he wants to suggest and whether he has witnesses supporting his denial [...]

Art.218 – If the accused confesses during the investigation the accusation that is brought against him, [the prosecutor] shall not be content

with this confession. The responsible [member of the Prosecution] must look for the evidences that consolidate it [...]

Criminal Code (CC):

Art.40 – Is considered an accomplice in the crime:

This who instigated the committing of an action constitutive of the crime if this action happened as a result of this instigation;

This who agreed with someone else to commit the crime, and it happened as a result of this agreement;

This who gave to the actor or the actors a weapon or instruments or anything else that was used in committing the crime while knowing it or who helped in any other way in actions that made possible, easier or achievable its committing.

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Art.48 – There is criminal agreement when two or more persons agree upon committing a crime or a misdemeanor or doing what makes possible or easier its committing. [...]

This who participated in a criminal agreement, with the goal of committing the crimes or its committing being a means to achieve the goal intended, shall be punished for his simple participation to prison. [...]

This who instigated the criminal agreement in this way or by organizing its making shall be punished by temporary hard labor [...] or prison [...]

Art.267 – This who had sexual intercourse with a female without her consent shall be punished by permanent or temporary hard labor

Art.280 – This who arrested anyone or imprisoned him or detained him without any order of an authority competent in this and outside the circumstances that are specified by the law [...] shall be punished by imprisonment or a fine that cannot exceed 100 pounds.

Art.290 – This who abducted a female by ruse or duress, himself or by means of someone else shall be punished by permanent hard labor. This who committed this crime shall be condemned to the death penalty if this crime is cumulated with the crime of sexual intercourse with the abducted woman without her consent.

On the other hand, we have the following excerpt of an investigation interview conducted by an Egyptian Public Prosecutor in a case of rape. This can be read as the Prosecutor's <following of the instructions> given by the codes:

	<i><following of the instructions></i>
1.Q:	When did it happen
2.A:	On Thursday the 17 th of January 1985 at 3:30
3.	in Ma`âdî
4.Q:	What are your ties with the other accused
5.A:	Ashraf and Mitwallî are my buddies
6.Q:	What are your ties with the rest of the accused
7.A:	I don't know them
8.Q:	How did you meet them a little before the
9.	events
10.R:	I and Mitwallî and Ashraf after we left the
11.	movies we took the cab of the driver Ashraf's
12.	buddy and we met Salâh while driving and he
13.	went up with us
14.Q:	What conversation had you got during that time
15.A:	When Salâh went up he said there was a girl
16.	with me now and a cop took her from me and he
17.	gave her five pounds we sat to discuss together
18.	and Salâh said I'll take a woman for you
19.Q:	Did you agree to take any woman on the
20.	street
21.A:	We were agreed to abduct a woman and that
22.	Salâh took her for us

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	<i><following of the instructions></i>
23.Q:	What were the means you used to execute
24.	what you were agreed
25.A:	We got turning with the cab in Ma`âdî to
26.	find a woman
27.Q:	What got you to that
28.A:	We saw a car stopped and inside a girl and a
29.	boy and we stopped close to it and Salâh went
30.	down for them
31.Q:	Who occupied the car with you
32.A:	I and the driver Ahmad and Mitwallî and
33.	Ashraf and Anwar
34.Q:	Who among you carried a weapon
35.A:	Salâh had a knife with him and Ahmad had
36.	with him a gazelle horn knife
37.Q:	Did the accused Salâh carry the knife when
38.	heading to the place where was stopped the car
39.	of the young boy and the young girl
40.A:	Yes he had the knife with him and he held it
41.	in his hand
42.Q:	What was your goal when sending Salâh to
43.	aggress the young boy and the young girl
44.A:	He went abducting the girl

(Using and referring to the code), as a phenomenologically propertied practice, must be read, in just this case and so in every singular case, as a two-segment pair in which the [code instructions] and the <following of the code instructions> are indissociably bound:

(code use) (code referring)		
[instructions]	<following of the instructions>	
IGP 204, 205, 216, 218 CC 40, 48; IGP 204 CC 40, 48 IGP 216, 218; CC 40, 48 CC 40, 48, 290 CC 40, 48, 267, 280, 290 CC 290 CC 40, 48, 290 IGP 204, 205; CC 40, 48 CC 290 CC 290 CC 40, 48, 290	1.Q: 2.A: 3. 4.Q: 5.A: 6.Q: 7.A: 8.Q: 9. 10.R: 11. 12. 13. 14.Q: 15.A: 16. 17. 18. 19.Q: 20. 21.A: 22. 23.Q: 24. 25.A: 26. 27.Q: 28.A: 29. 30. 31.Q: 32.A: 33. 34.Q: 35.A: 36. 37.Q: 38. 39. 40.A: 41. 42.Q: 43. 44.A:	When did it happen On Thursday the 17 th of January 1985 at 3:30 in Ma`âdî What are your ties with the other accused Ashraf and Mitwallî are my buddies What are your ties with the rest of the accused I don't know them How did you meet them a little before the events I and Mitwallî and Ashraf after we left the movies we took the cab of the driver Ashraf's buddy and we met Salâh while driving and he went up with us What conversation had you got during that time When Salâh went up he said there was a girl with me now and a cop took her from me and he gave her five pounds we sat to discuss together and Salâh said I'll take a woman for you Did you agree to take any woman on the street We were agreed to abduct a woman and that Salâh took her for us What were the means you used to execute what you were agreed We got turning with the cab in Ma`âdî to find a woman What got you to that We saw a car stopped and inside a girl and a boy and we stopped close to it and Salâh went down for them Who occupied the car with you I and the driver Ahmad and Mitwallî and Ashraf and Anwar Who among you carried a weapon Salâh had a knife with him and Ahmad had with him a gazelle horn knife Did the accused Salâh carried the knife when heading to the place where was stopped the car of the young boy and the young girl Yes he had the knife with him and he held it in his hand What was your goal when sending Salâh to aggress the young boy and the young girl He went abducting the girl

Here we see how a set of instructions, i.e., a code, «can be read alternatively so that the reading provides for a phenomenon in two constituent segments of a pair: (a) the-first-segment-of-a-pair that consists of a collection of instructions; and (b) the work, just in any actual case of following»⁹. The pair can be called an instructed action.

When formal/classical analysis shows any interest in the second part of the pair, it is only in a relation of more or less adequate correspondence between [instructions] and <following the instructions>. It looks at the case as an instance of a general pattern of following the rules that corresponds to the code's provisions in a deterministic way. Therefore, it so takes the singular case into consideration as to transform its phenomenological nature into the correspondent abstract and general version of the code provision. What I suggest is to consider that [instructions] and <following the instructions> (or <instructions in use>) are related as two indissociable segments of the same pair. Together, they provide us with the praxiological validity of instructed actions. Factual adequacy, completeness, ambiguity of expression, followability, effective procedure are available to the analyst «under the condition that the issue poses *in vivo*», in which he or she is going to have to take up and deal with «what does completeness, followability, sequence, correct sequence, local historicity (and the rest) *come to look like*»¹⁰.

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If we just take lines 19-22, we can properly describe how, first, the Prosecutor oriented to the provisions of the Criminal Code instructing how to define who is an accomplice, when there is a criminal agreement, and how to punish abduction. Second, we can observe how the Prosecutor's work is accomplished, step by step, in an often redundant way, so as to painstakingly establish the components of the narrative that are legally relevant (participation, intention, victim's lack of consent). Third, we see how the very same Prosecutor publicly organized the interview so as to exhibit the procedural correctness of the investigation he conducted (offender's and victim's identity; fulfilling of procedural requirements: non-quoted lines: "you're accused of participation ..."; "do you have past record"; "do you have anything else to say"). Fourth, we see how the alleged offender acknowledges his participation in the crime while foregrounding the first accused's personal agency. And fifth, we observe the way in which the alleged offender orient to the provisions of the code whose meaning and implications are manifested by the prosecutor's questions.

4. The local production of legal categories: The person

In this section, I want to stress the idea that legal categories are, and how they are, both normative and contextual. If we take the example of the "person", in the specific context of Egyptian legal practice, we observe that

it does not correspond to something whose characters can be identified *a priori*. It is a type or a category and it normatively functions as such.

Usually, people are taken to assume that «events have “normal patterns” and “usual causes” of occurrence that can be relied upon»¹¹. People firstly display their perception of the normality of events. In a situation of incongruity, they look for explanations for this threat to normality. In other words, people are (made) morally accountable for any breach in what is the perceived normal course of events. This means that any departure from the “normal” is assumed to be motivated or at least explainable.

40 Legal categories do not escape the scheme of naturalness and normality. In other words, the idea of the normal person constitutes the point of reference of practical legal reasoning. As such, the person, far from being an abstract and a non-accessible category, is made public through the culturally methodic deployment of public resources, i.e. linguistic resources, in social interaction. As Douglas Maynard puts it, «when persons are talked about in any conversation, descriptions are selected and produced according to what activity is being done (...) Who a person officially is, for others, depends on what activity is being accomplished in their talk»¹².

Here follow cases which exhibit such production of the normal person¹³ in the Egyptian legal context. The following is the account of a girl who was allegedly victim of an attempted rape, subsequently characterized by the public prosecution as an indecent assault:

Question: What happened

Answer: I was in the street this day ... when I met these two ... and they told me come along with us and they made me take a cab ... and they went to the rear of the War Factory

Q: What was their purpose in so doing

A: They told me don't worry we go drink a tea together

Q: Why didn't you ask for help when they caught you ...

A: I tried to cry out and to convulse on the floor but the street was empty

Q: What's the number of the cab in which they took you

A: I don't know it was going in the street

Q: Why didn't you ask the cab driver for help

A: The driver was afraid of them and he did what they asked him to do

Q: What was the purpose of them taking you along

A: I think that they wanted to assault my honor otherwise they wouldn't have taken me to that place

Q: Did you know them from before

A: No

Q: Do you have anything else to say

A: No¹⁴.

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

purpose of them taking you along?»). The latter point must be emphasized, for it reveals how the way in which the prosecutor conducts the interview is organized for practical purposes, i.e., anticipating the steps through which the case must go, around the legally relevant questions of “who did what with which intention.”

Twice, the victim uses direct quotes in her answers to the prosecutor’s questions («They told me come along with us»; «They told me don’t worry we go drink a tea together»). The use of direct speech is a central device in talk activities. As Matoesian and Coldren put it,

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Direct quotes are a type of reported speech which minimizes the gap in the decontextualization and recontextualization of prior talk. They make the words being spoken here and now appear as an exact replica of the words spoken in historical context. They make the performed words appear close to previous words and, in so doing, make those historical words come alive – giving them an aura of objectivity and authority. In this way, direct quotes provide a rigid boundary between the quoting and quoted voices which maintains the historical authenticity and integrity of the reported speech, as the reporting speaker purports to represent the reported speaker’s exact words¹⁵.

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

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

Q: What information do you have

A: Today, when patrolling with my colleague policeman Ahmad Hasan al-Shannawi in the first zone of the police station of Mahram Bey in which ‘Izbat Nadi al-Sayd is located when patrolling at the rear of

the War Factory I and my colleague heard the sound of a woman who said help this sound was coming from the rear of the War Factory my colleague and I started searching for the origin of the sound and we witnessed a girl and two boys holding her they attempted to escape but I and my colleague hurried to catch them and to make inquiries about the girl and it came out that she was called Magda al-Sayyid Muhammad Qasim she reported to us that these two boys met her at the Prison of Alexandria and brought her by force in a taxi to this place and attempted to assault her¹⁶.

The categorization of events and people appear in a very detailed manner which is organized so as to be useful for all subsequent legal purposes: day, actors, place, circumstances, action, accounts. Moreover, we should note that this account provides for the professional character of its authors. As noted by Sacks¹⁷, one basis for this professional status seems to be the concern of the police to develop means for establishing their job «as business-like, i.e. impersonal, code-governed, etc.» Both the actors' actions and their accountings are institutionally organized with reference to some accounting framework. This has consequences for the definition of the person whose circumstances are presented so as to fit the requirements of a proper accomplishment of legal characterization. «Here, the categories of the criminal law (...) are seen as constituting the basic conceptual equipment with which such people as judges, lawyers, policemen, and probation workers organize their everyday activities»¹⁸.

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

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

A: It didn't happen I was walking on the Mahram Bey bridge and I met the boy Mahmud Basyuni walking on the bridge and this girl with him he asked me don't you know a place where to take this girl and I told him I don't know I'm on my way to give [something] to someone at the War Factory he told me take me along my foot is hurting I hailed a cab and he and the girl got in with me she was crying and when the cabdriver heard the girl crying he started to take her out of the cab at a station for used oils I headed for the (place) of the thing which stays at the rear of the War Factory and Mahmud Basyuni and the girl afterward I suddenly realized that the policemen had caught me

Q: Where and when did it happen

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

Q: Did you know one of them from before

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

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

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

Q: Didn't you ask why she was crying

A: No

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

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

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

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

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

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

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

A: He met the girl crying and came to push her out¹⁹.

As for Mahmud Basyuni Muhammad:

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

A: It didn't happen

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

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

Q: Where did you meet the victim

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

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

A: We walked

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

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

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

A: Nothing of what he said happened

Q: Why does he claim that against you

A: I don't know²⁰.

In both accounts, the alleged offender attempts to present himself as a normal person, i.e. as a man who behaves in such a way that does appear incongruous to others. To be considered normal, people exhibit and display what seems to be, according to them, a normal behavior. Hence, the repetitive claim of 'Abd al-Hafiz to be «on my way to fetch some tip from someone at the War Factory». Hence again, Basyuni's presentation of a quite normal way to spend one's time («I was coming back from a journey today and this girl met me and I knew her from before; we walked together and we talked and we met 'Abd al-Hafiz»). The presentation of oneself as a normal person is reinforced by the description of a banal sequence of events in a familiar environment: «(I met the victim) in Suez Canal street, at the Industrial Gas Company, and she and I were walking to Yasir b. 'Amir street, and afterward we met 'Abd al-Hafiz». Conversely, it is by the damaging of this self-presentation that people's behavior is presented as abnormal, for which they can be taken as personally (and eventually criminally) responsible or accountable. This explains why the prosecutor asked 'Abd al-Hafiz: «Didn't you ask why she was crying?». Indeed, there is a discrepancy between the presentation of his behavior as normal and the abnormal character of meeting a girl who is crying. In the case of Basyuni, the discrepancy between his account and the others' makes it abnormal, and he tries to repair it by providing an alternative account of the events («Q: What do you say with regard to what the victim reported? A: It didn't happen, the policemen are those who persuaded her»), though he fails to provide acceptable reasons for these discrepant accounts, as evidenced by his repetitive answers («It didn't happen»; «I don't know»).

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

Prosecution of al-Sahil:

46 Considering that (...) informed [the police officer] that the aforementioned Ayyub ... tried to assault sexually the aforementioned Ayman ..., who is mentally backward and lives in the same building. (...) On today's date, seizing the opportunity of the presence of the accused outside of the room of investigation, we asked him to enter it and we asked him verbally about the accusation directed against him, after having informed him of it, of its punishment, and of the responsibility of Public Prosecution in conducting an investigation with him. He denied them and we asked him whether he had an advocate representing him in the investigation proceedings [???] and he answered negatively. Then, we proceeded to hear the testimony of the police sergeant ... and we asked him to stand on the side of the investigation room. We asked the aforementioned Ayman, the victim, [to be introduced in the room] ... He was introduced to us, with his mother Rasmiyya ... accompanying him. We asked her to stay outside the investigation room and we kept the victim with us. He appeared to us like an adolescent (*sibî yâfi'*) exhibiting the signs of mental backwardness (*al-takhalluf al-'aqlî*). We asked him about what happened, and we could not understand anything, except that he pointed with his middle finger and pronounced the sound 's'(*sîn*), he pointed with his finger to his neck, i.e., he had a knife on his throat. We asked him another time about what happened, and he pointed to the accused inside the investigation room and then he pointed to his rear and he pointed to him another time with his middle finger and pronounced the sound 's'another time, and we found difficulties in understanding the rest of his answer²¹.

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

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

A: My name is Rasmiyya Muhammad Nubhan (...)

- oath -

Q: What information do you have

A: What happened is that I was sitting in my flat on the third floor and my son Ayman went out to go to the workshop he is working in at 10:00 in the morning a few minutes after he left a girl whose name is Wazza Muhammad 'Abd al-Razzaq and whose actual name is Umm Hashim who lives with us in the house came and said help me auntie Umm 'Aziza it's Magdi he made Ayman enter in the room and he locked the door I feared and I said [???] I went down immediately to Magdi's room which is under the stairs I found the door closed then I broke the door and I entered I found Magdi tearing away my son Ayman's clothes and bunching up the gown he wore lying down on my son I screamed and Magdi stood up from Ayman the neighbors gathered when they heard my voice and he began to insult the neighbors and he went to inform the police when the police came to know about it I went to the police station afterward he denied this is what happened

(...)

Q: What's your relationship with the victim

A: He's my son

Q: What's his age approximately (*tahdīdan*)

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

(...)

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

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

(...)²²

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

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

- 48 Q: How long have you known the victim
 A: I have known him since the first time I lived in the house in 1978
 Q: At first glance is he an understanding person
 A: He speaks in a jerky way
 Q: Is he mentally backward
 A: I don't know
 Q: You have seen the victim since 1978 and you don't know whether he's mentally backward or not despite the fact that it is obvious that he's mentally backward
 A: I don't know²³

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

All these excerpts and, in particular, the last one demonstrates that participants in legal interactions share a background understanding of the nature of legal inquiries, so that they know it is often not in the interests of a defendant to co-operate beyond a minimum level. This is what Komter calls the dilemmas of conflict and cooperation: «the dilemma of the suspects is to produce defenses that are not heard as defenses but as cooperation and to show cooperation without foregoing opportunities for mitigation»²⁴. We see also that the sentence «I don't know» is uttered so as to avoid confirming the knowledge of something that would further the blame-implicative nature of the facts.

The excerpt also underlines the function of questions in criminal prosecution, which is mainly to extract from the interviewee «answers that build up to form a “natural” argument for the jury». It creates the kind of incongruity that has already been referred to above. From the sense

of normality that is mobilized and the discrepancies that are identified vis-à-vis this normality, many inferences can be drawn. As Matoesian puts it, in his study of a rape trial,

through a myriad of linguistic and sequential resources, the defense attorney creates a turn-by-turn disjunction between category bound activities/states and the rapist category, drawing attention to the abnormality of rapists, the normality of his client, and the irrationality of the witness's actions if he were a rapist (or the rationality of her actions with a non-rapist). There is no way the witness can do 'normal' things with someone who is supposed to be an 'abnormal' person. In this way, we can see how social structure is mapped onto categorization work, and how categorization, in turn, is harnessed as an interpretative resource in the constitution of grammatical sequential structures²⁵.

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

5. Conclusion

There are probably many ways to deal with the issue of law. However, I've contended that the emphasis on anthropological, historical or political processes leads us to miss the fundamental phenomenon which should be addressed when dealing with the law, that is, the practice of the law. Indeed, claiming that historical dynamics explain current situations makes us assuming that there are external factors that condition people's actions independent of what makes sense for these people and what they orient to in the course of their daily occupational practices. Instead of looking for this kind of deterministic factors, my contention is that we must turn to people's actual practices in concrete settings and within specific and identified constraints. In other words, it means that we must observe and

describe people's practical orientations to what they identify as law, the way they refer to, use, follow, manipulate, substantiate, or invoke it. This cannot be done from any overhanging position from which scholars would tell people what the practice of a law is in place of the latter's manifested understandings and public performance of the law. On the contrary, it must be done through the close scrutiny and description of situated circumstances in which participants in a legal or judicial process make the law relevant for their own practical purposes. I've argued that the law is a contextualized practical accomplishment that cannot be described and understood outside the institutional and interactional embeddedness of its performance.

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Note

¹ A different version of this article was published in Japanese for the *Tokai Law Review*.

² Cfr. A. WATSON, *Legal Transplants: An Approach to Comparative Law*, University of Georgia Press, Athens 1974.

³ B.Z. TAMANAHA, *Realistic Socio-Legal Theory: Pragmatism and A Social Theory Of Law*, Clarendon Press, Oxford 1997; B.Z. TAMANAHA, *A General Jurisprudence of Law and Society*, Cambridge University Press, 2001.

⁴ N. BROWN, *The Rule of Law in the Arab World*, Cambridge Univ. Press, Cambridge, New York 1997.

⁵ Cfr. M. KOMTER, *The Suspect's Statement: Talk and Text in the Criminal Process*, Cambridge University Press, Cambridge 2019.

⁶ Cfr. F. FERRAZ DE ALMEIDA, P. DREW, *The fabric of law-in-action: "formulating" the suspect's account during police interviews in England*, in «International Journal of Speech Language and The Law», 27, 2020, pp. 35-58.

⁷ Cfr. M. POLLNER, D. H. ZIMMERMAN, *The everyday world as a phenomenon*, in J. D. DOUGLAS (ed.), *Understanding Everyday Life: Towards a Reconstruction of Sociological Knowledge*, Chicago, Aldine Publishing 1970, pp. 80-103.

⁸ H. GARFINKEL, *Ethnomethodology's Program: Working Out Durkheim's Aphorism*, edited and introduced by A. W. Rawls, Rowman & Littlefield Publishers, Lanham 2002, p.105.

⁹ *Ivi*, p. 106.

¹⁰ *Ivi*, p. 202.

¹¹ J. HERITAGE, *Garfinkel and Ethnomethodology*, Polity Press, Cambridge 1984, p.77.

¹² D. MAYNARD, *Inside Plea Bargaining: The Language of Negotiation*, Plenum Press, New York 1984, p. 138.

¹³ H. SACKS, *On doing "being ordinary"*, in J. M. ATKINSON, J. HERITAGE (eds.), *Structures of Social Action: Studies in Conversation Analysis*, Cambridge University Press, Cambridge (U.K.), 1985, pp. 413-429.

¹⁴ Case No 5471 of 1977, Mahram Bey, Alexandria.

¹⁵ G. MATOESIAN, J. R. COLDREN, *Evaluer la police de proximité. Style indirect, ambiguïté et paroles rapportées dans un contexte juridique bureaucratique*, in B. DUPRET (dossier coordonné par), *Le droit en action et en contexte. Ethnométhodologie et analyse de conversation dans la recherche juridique*, in *Droit et Société*, 48, 2001, p. 404.

¹⁶ Case No 5471 of 1977, Mahram Bey, Alexandria.

¹⁷ H. SACKS, *Notes on Police Assessment of Moral Character*, in D. SUDNOW (ed.), *Studies in Social Interaction*, The Free Press, New York 1972, p. 293.

¹⁸ D. SUDNOW, *Normal Crimes*, in «Social Problems», vol.12, 1964, p. 255.

¹⁹ Case No 5471 of 1977, Mahram Bey, Alexandria.

²⁰ Case No 5471 of 1977, Mahram Bey, Alexandria.

²¹ Case No 7158 of 1993, Sahil, Cairo.

²² Case No 7158 of 1993, Sahil, Cairo.

²³ Case No 7158 of 1993, Sahil, Cairo.

²⁴ M. KOMTER, *La construction de la preuve dans un interrogatoire de police*, in B. DUPRET (ed.), «Droit et Société», vol.48, 1998, p. 129.

²⁵ G. MATOESIAN, *Law and the Language of Identity: Discourse in the William Kennedy Smith Rape Trial*, Oxford University Press, New York 2002.

