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Baudouin Dupret

► **To cite this version:**

Baudouin Dupret. Foreword: Law in Sudan. An anthropological perspective. *Anthropology of Law in Muslim Sudan: Land, Courts and the Plurality of Practices* (B. Casciarri and M. Babiker, eds, Leiden, E.J. Brill, 2018), 2018. hal-01844322

HAL Id: hal-01844322

<https://hal.science/hal-01844322>

Submitted on 19 Jul 2018

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Foreword: Law in Sudan. An anthropological perspective

This volume is part of a broad comparative program dealing with the anthropology of law in Muslim contexts. Different countries were surveyed, among them Indonesia, Algeria, and Morocco. Although the theme of property was initially central, the program turned out to also focus on two other issues: legal pluralism and law in Islam. In this short preface, I will concentrate on these three themes.

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Faced with the problems arising from attempts at defining law and from the static approach of the norm, some authors promoted a method founded on practical case studies and the processes of conflict resolution (court room studies). The study of problematic cases has been the focus of American legal realism: how law is practiced, informed by a certain mode of behaviour (behaviourism). Another trend attempted to show how the parties in a litigation conceive the norms and negotiate them during the conflict, how the norms are stated and applied and also neglected or violated. It is therefore the conflict itself which became the focus of attention. These perspectives are fruitful, but do not necessarily constitute the dominant paradigm today, as the theories of legal pluralism currently prevail. Here, the centrality of state law is seen as an ideology. In its most radical formulation, the plurality of laws is considered as the result of the ever-increasing gulf between legal practices and textual legal provisions.

In our view, however, the plurality of practices is not an expression of legal pluralism.¹ We actually contend that we must adopt a much more praxeological look at legal phenomena. If we closely examine the fine details of cases, and especially the ways in which people orient to the supposedly many laws and norms, we get a much better picture of what law is and is not for these people. We also get a much better understanding of its plural sources and the non-

¹ As an introductory reading on legal pluralism, see Dupret et al. 1999.

pluralistic ways of its implementation, and of the many places where laws interfere with each other and the very few places where they remain totally autonomous. Last but not least, norms, laws and legal practices cease to be confounded. Any set of norms is not necessarily law, and law is no more diluted in the all-encompassing and little-analysed category of “social control.” Many practices can be characterized as legal practices, and not as parallel social, normative or legal fields. Legal practices are those practices that develop around an object of reference identified by the people as law (which can be state law or any other law recognized as such). In other words, a legal practice is everything that is done in a way in which it would not be done if the law of reference did not exist.

With regards to legal practices of Muslims, very few studies have followed this praxeological path. Our intention was to investigate “into the *comprehensibility of society*, into the ways in which social life can be understood and described when seen from within by members” (Sharrock and Watson 1988, p. 59). This praxeological approach requires using the “criteria that participants have for determining the salient features of interactional episodes” (Maynard 1984, p. 19), which does not provide an interpretation of people’s conduct. Rather, analysis is “based on, and made valid by, the participants’ own orientations, characterizations, and exhibited understandings” (*ibid.*).

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The program was interested in legal practices related to the questions of land ownership, commercial transactions and family relationships, originating from various places functionally devoted to the resolution of litigations, which can arise in these matters, or to the formulation and registration of documents related to property. These places can be linked to a State (or not), and the laws of reference can also be official or unofficial. Thus, it is advisable to give an account of plural situations. However, instead of a dichotomic analysis of the legal fact opposing the monism of State law to the pluralism of unofficial bodies, it would surely be necessary to propose a double shift of the point of view. First, it means carrying out the analysis of normative systems connected with official law, in the sense that they are based on written or oral rules that a group of people are supposed to know and interpret, that they are equipped with bodies (this group of people precisely) charged with enforcing them and that people refer to them as an alternative legal system to official law. Second, it means considering the ways by which the actors perceive, understand and act in their legal environment, permanently opposing the plurality of the social norms of reference to the “unique” character of the prevailing law.

Durkheim (1950, p. 144) made the protection of “personal property” the second rule of human morals. Contractual law is related to the issue of property since it concerns its acquisition and transfer, e.g. through inheritance.

The program intended to conduct research to identify – in the context of societies wholly or partly Muslim – those systems which objectify property relations between a person and an asset (contract, inheritance, gift), create a legal norm in this respect, and offer support to those who are charged with ensuring its observance. The study of legal practices concerning these relationships was done starting from a locus: that of the institutions in charge of property management.

Our intention was thus to explore property phenomena and to offer an ethnographic description of the practices linked to them. It included the identification of the appropriation modes of an asset, of the means allowing one to attest to rights of ownership, of the channels available in order to assert these rights, of the ways of reasoning in those instances, of the part played by the oral or written language, and of the conceptions of property as they operate “in action”. What is often characteristic of the anthropology of the contract is its propensity to model the transactions and to put them in a deterministic sequence. In that sense, the contract is not studied in and for itself, as an instrument of transaction formalization, documentary support, evidence, reference, etc. Our aim was thus to look for what was left aside and to carefully describe it.

All in all, the management of property rights is the focal point of norms and methods of using and referencing them. For instance, the analysis of a conflict about a question of property and its resolution can make the laws on property in force in a certain context explicit, the various ways in which the people concerned refer to it, the form that a disagreement can have as soon as it is taken up by an authority entrusted to deal with it, but also the relations between law or other types of normativities and the structure, even the nature, of these relations such as they are perceived from the legal places.

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The Anthropology of Islam and of Muslim countries is deeply influenced by culturalism, where Islam becomes the central and dominant code of significances. This is also true for anthropological investigations on Muslim minorities in Europe. Islamic law is thus, with Clifford Geertz, perceived as a cultural code of significance making it possible to interpret the world: “The ‘law’ side of things is not a bounded set of norms, rules, principles, values, or whatever from which jural responses to distilled events can be drawn, but part of a distinctive manner of imagining the real.” (Geertz 1983, p. 173). In this hermeneutic project, “the words are keys to understanding the social institutions and cultural formulations that surrounds them and give them meaning” (Merry 1988, p. 886).

Our aim was also to break away from the postulate of cultural exceptionality of legal interpretations in totally or partially “Muslim” societies. The works on law in these societies seem to focus on looking for the Islamic portion of law and to stop there – the multiplication of the works on properties, *waqf*, *habus*, on Islamic finance and more largely on “Islamic law” is a perfect example. Still analyses to determine to what extent such or such a portion of law is Islamic, and to what extent such or such a portion of law should be explained or not by any historical development of Islamic law, tend to impose their structure to the legal phenomena and activities, instead of seeking to discover how they operate. In doing so, research fails to describe the phenomena it should nevertheless document and, in particular, the ways people understand and express their understanding of any given situation, to take its bearing with respect to a context and its constraints, and to behave and act in a more or less orderly fashion inside a similar context delineated spatially and temporarily. Still, even in situations where an Islamic genealogy of things can be identified (such as family law in numerous countries), an a priori characterisation of “Islamic law” fails to depict what people do in a particular legal context when they address issues related to family, acts which can only be carried out by describing people's practices

outside any pre-established interpretative framework. What can we then say of these domains where the relation to Islam cannot even be established genealogically?

It should be clear by now that the purpose of this program was not to force the secret of an "exotic" legal universe. On the contrary, it attempted to describe this activity without any prejudice on what, from a legal viewpoint, a priori differentiated these societies from other contexts. It does not even postulate the existence of such differences. In other words, this program is related to legal practices in an overwhelmingly Muslim environment, not to the Islamic culture observed through the prism of law. To tell the truth, the Islamic culture is but one of the multiple components of the context, which is always unique and never uniform, in which the law practices are deployed. To assume that this cultural component is primordial runs the risk of not paying sufficient attention to the other possible components, as is such with many things which the members of the judiciary and legal environment of these societies conveniently focus on during their actions. This also involves the risk of overestimating the impact of culture. The corollary of culturalism is non-translatability. Thus, such a concept formulated in Arabic could not be perceived in French adequately because its essence would only be accessible in the language it was originally formulated. We consider, on the contrary, that any phenomenon, regardless of the language in which it is expressed, remains translatable into another language and accessible to observation and to description. This implies, however, "rather than supposedly reading over the shoulder of an imaginary native a text completed in a culturally standardised form [to read] line after line the continuous production of a real autochthonous speech." (Moerman 1987, p. 5).

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This volume on Sudan is an excellent example of what can be achieved in the anthropological study of law, in general, and of property, particularly in a Muslim environment. Its chapters, which are all empirically documented, detail the ways in which some conflicts, e.g. on land issues, are dealt with, how the law is produced, managed, used and also dodged, how conflicting norms are practically attuned. It will certainly break grounds for further studies in the praxeological spirit of the program in which it was part advocated.

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