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# Review of Baudouin Dupret Positive Law from the Muslim World: Jurisprudence, History, Practices

Alexis Blouët

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Baudouin Dupret, *Positive Law from the Muslim World: Jurisprudence, History, Practices*, Cambridge University Press, 2021. Pp. 328, US\$110. ISBN: 9781108954877.

As its generalizing title hints at, this book is an anthology covering substantial parts, yet not all, of its author's work. These selected pieces have been structured and rewritten to tackle with coherence and intensity a dense topic, *Positive Law from the Muslim World*, after having been already "all conceived originally as parts of a global book endeavor" (p. xiv). Baudouin Dupret has a perfect curriculum for this endeavor. Throughout his thirty years of research, he has held several positions located in the area (Syria, Egypt, Morocco), acquired an in-depth knowledge of Arabic and undertaken multiple collaborations with local researchers. The first part of the title reflects, in a way, the whole book, which takes a broad view on the field while being methodologically very precise. Thus, the Muslim World is not only defined historically, socially and quantitatively as referring to societies in which "Islamic norms had an all-pervading though diverse influence" (p.255), but also, implicitly, in a global perspective. Chapter 7 dealing with France suggests indeed that for Dupret the area can, depending on cases, stretch to countries where Islam has had historically a minor role, but is nonetheless playing a part in the contemporary fabric of society. The term positive law shows, by contrast, a willingness to narrow the object of study through a focus on modern state law. As we will see, this point is fundamental in Baudouin Dupret's approach which opposes strongly to ahistorical conceptions tying straightforwardly contemporary Muslim majority countries to traditional Islamic normative tradition.

*Positive Law from the Muslim World* is a very rich book. It articulates, without merely juxtaposing, multiple literature references of legal, social and historical theory, area studies, and philosophy. Dupret does that by engaging directly with authors after clearly and concisely laying out their ideas. Furthermore, the book provides very useful and powerful methodological tools to engage in academic research so as to understand and analyze law in the Muslim World. The scope of these is in fact not restricted to law but covers also state politics and relation between state and society. Indeed, Baudouin Dupret follows Kelsen's thesis that modern state and modern law are confused concepts (p. 65), and refers to Fernanda Pirie when she characterizes positive law by its transformative pretense and its aim to "comprehensively map, master, and reorder the world" (p. 254). The geographical reach of these tools is not limited to the Muslim World, because Dupret does not see this area as a fortified cavern but, on the contrary, as a window(s) to contemplate on the global world. By the same token, *Positive Law from the Muslim World* contributes to debates within legal science on various sub-topics, such as custom, legal pluralism, the substance of rules, law and politics, or law and moral. Baudouin Dupret combines his areal focus with a conceptual contribution to legal science by drawing on one of Herbert Hart's ideas. The concept of law has, according to the British author, a "core certainty" and "a penumbral zone": "The former hardly poses any conceptual problem: it is paradigmatic. However, the latter is problematic, some of its features linking it to the paradigm, while others diverge" (p. 260). For Dupret, the Muslim World tends to host more penumbral legal zones, following the assumption that "positive law globalized geographically (from the West) and what corresponded to its central meaning extended to situations that stood at its periphery" (p. 18). This propensity to legal marginality, which can go hand in hand with legal acculturation (p. 8), should not disqualify the Muslim World's study by legal science. On the contrary, it is likely to enrich the discipline and adapt it to the phenomena of globalization, as well as "better capture, by the negative image, the core of the concept of law" (p. 35). Finally, the book encompasses intensely documented case studies on diverse countries: Egypt, Morocco, Lebanon, Senegal, Indonesia. They are informative in themselves on the law of these countries, their historical

trajectories (spanning from 19<sup>th</sup> century colonial and imperial periods to nowadays) and some of their subjects (constitutional law, forensic, family law, penal law).

The book's ambitious scope does not prevent it from developing a clear and tightly articulated approach which goes beyond and bridges the practice/theory dichotomy as well as disciplinary borders. It is reflected by its ternary structure, by which three parts encompass each three sub-parts, and which operates globally as a funnel starting with the highest degree of generality and finishing with the lowest. In the first part *The Concept of Law*, Baudouin Dupret lays out his methodological apparatus composed of several theories, concepts and analysis tools. The second part *Historical Ontologies* comprehends modern historical studies on distinct general topics through the common perspective of their relationship to law. The third part encompasses contemporary case studies related to tightly circumscribed phenomena, through the main perspective of jurisdictional cases. The book's plan can also be read this way so as to underline how each part proceeds from the former. First, Baudouin Dupret outlines his stipulative (p. 44) conception of modern law, then he demonstrates its historically grounded heuristic value and finally he draws directly on this conception to analyze contemporary law in the Muslim World.

In the first part, Dupret clearly and dynamically highlights his general approach. This part, the densest, is in itself original and particularly interesting, because it combines three epistemological trends rarely, if not ever, articulated in legal science. Dupret's conception of law builds on: (1) Foucault's vision of history as made-up of ruptures and where modernity is characterized by the technicity and scientificity of power (chapter 2), (2) formal and positivist legal theory (which Dupret calls "jurisprudence") with Herbert Hart, Hans Kelsen and Michel Troper among his most cited references (chapter 1), (3) Wittgenstein's emphasis on the ability of language to constitute social reality (chapter 3). One can sum up Dupret's paradigm in the following way: Throughout the 19<sup>th</sup> century, Europe has witnessed a deep social and political upheaval which has spread globally, particularly through imperialism and colonialism. This transformation can be synthesized through the notion of positivization, understood as the dissemination of sophisticated power techniques which are both grounded on scientific discourses and articulated to a will to efficiently regulate the human and its environment. The historical ontology of the concept of law, which, in the process, has turned from a mere instrument of subjugation to an instrument of government, has been completely altered. In this respect, Dupret uses Jean Louis Halperin's term of "legal revolution" (p. 54). This historically distinct and contingent concept of positive law refers, in each country, to a "a set of norms organized in a systemic and systematic, all-encompassing, hierarchical, logical, rationalizing, quasi-mathematical, objectifying, state-centered, judicially pyramidal, prospective, and self-referenced manner" (p. 253). In order to better grasp its ontology, one ought to feed on the work of legal theorists producing an analytical, descriptive and general meta-discourse on positive law. To that end, Dupret draws, as a matter of example and in relation to the aforementioned authors, on Hart's dichotomy between primary and secondary rules (pp. 190-191), Kelsen's conception of the legal system as both dynamic and static (p.14), and Troper and Champeil-Desplat's theory of legal constraints (p. 250). However, these works do not touch directly to the empirical reality of law, which is, *in fine*, defined by the language practices of legal actors when they accomplish their legal activities. Thus, the core object of the analysis, which makes up the discipline of legal praxeology to which Dupret claims an affiliation, is how these language practices are orienting towards the aforementioned historically and socially situated concept of positive law (p.19). These "language games" (p. 10), continuously and on a daily basis, reproduce the concept of positive law's social entrenchment while, possibly, making it evolve.

The second part tackles legal transformations in the Muslim World by and towards positive law in the modern period. Baudouin Dupret does not adhere to the idea that the Western legal positive core has simply been translated and smothered endogenous legal expressions. Instead, he refers to the notion of glocalization (p.116). Thus, the concept of (positive) law has been acculturated in the Muslim World and has, to some non-fundamental extent, embodied the local specificities of the area. One could say that the Muslim World has brought along its lexicon without radically altering law's grammar. In that respect, Baudouin Dupret is highly critical of legal pluralism and legal hybridity's approaches relating to customs and Islamic normativity in the area. He rather conceives an incorporation of substantive endogenous elements within the positive's law paradigm and, to convince, uses this striking musical metaphor: "The piece called Islamey by Mili Balakirev is not a hybrid of Islamic and Russian music but one Russian composer's musical understanding of certain elements of Asian folklore... and thus Russian music inspired by, and not mixed with, Islamicate musical folklore" (pp. 154, 174). The second part is organized around three historical analyses outlying the introduction and development of positive law in the Muslim World regarding distinct objects. Each analysis corresponds to a single country but also, at times, contains broader areal perspectives. Chapter 4 concerns political institutions and the spread of constitutional law in Morocco, which throughout the modern history of the country has served a great variety of purposes related to state efficiency, ideology or the adaptation to international constraints. Chapter 5 deals with the idea of madness and its integration in forensic as part of the performance of state justice in 19<sup>th</sup> century Egypt. To that end, Baudouin Dupret draws on Khaled Fahmy's book *In Quest of Justice: Islamic Law and Forensic Medicine in Modern Egypt* to show the mutual constitutive effects of different fields of positivization. Medicine's positivization, with the development of psychiatry as a sub-discipline, has thus accompanied the transformation towards positive law's adjudication in relation to the attribution (or not) of legal responsibility to individuals. Chapter 6 is about the gradual integration of (some) customary norms as part of codified family law in Morocco. Not surprisingly, Dupret's thesis is that this process has stripped the custom's concept of its relevance to analyze these new legal norms.

The third part is composed of three praxeological studies on contemporary topics more tightly delineated. As mentioned above, Baudouin Dupret focuses, here, directly on legal actors and adopts a perspectivist (p.82) approach of positive law, through its practical discursive achievement by individuals within everyday cases and phenomena. There, Dupret's main material is textual transcripts of utterances which he analyzes by the mean of "legal ethnomethods" (p.15) aimed at describing their authors' alignment with the abovementioned concept of positive law. This emphasis on "legal documents" (p. xiv) relies on the assumption that they "incorporate the reasons why they were written and that they are oriented toward the goals of their production" (p.254). Chapter 7 concerns France and a legal and political controversy in 2016 around the "burkini", a women bathing suit whose wearing is widely considered as a Muslim practice. It analyzes the mobilizations, sometimes contradictory, of a set of norms attached to French laicity by political figures as well as administrative and judicial authorities. Dupret thereby shows that the generality of norms, one of their epistemic properties within the positive law's paradigm, cannot be conceived abstractly beyond the use of these norms. Its degree varies according to the context of enunciation, which includes actors' institutional positioning within the legal system, and, beyond all, depend on the practical purpose which they seek to achieve by mobilizing norms. Chapter 8 deals with the topic of marriage recognition in the context of Indonesian Moroccan and Egyptians courts. All these countries' legal systems have in common, for certain cases, to refer to *fiqh*, the

Islamic hermeneutic tradition, in order to decide over the issue. Dupret, nonetheless, highlights that though some substantive (primary) norms of the *fiqh*'s tradition subsists, the way they are nowadays applied by courts radically differs from traditional *fiqh*: "The methodology and epistemology adopted by contemporary judges, the legal material upon which they draw, and the means by which they refer to this material have fundamentally altered the nature of legal cognition (the ways in which people think legally) and thus of law itself" (p. 196). Chapter 9 covers penal courts' cases in Egypt, Senegal, Indonesia and Lebanon in which homosexual practices are targeted, even though these countries' penal codes do not repress explicitly homosexuality. Dupret highlights the moral substrate of these incriminations which reflects the inscription of the cases in very conservative societies. He thus underlines that despite the fact that morality is exterior to positive law's ontology in its formal conception, the notion reappears in "legal cognition" as part of the context and practical purposes of actors engaging in norms interpretation.

The book's conclusion points to research perspectives likely to prolong it. The first extension is areal and Baudouin Dupret mentions references to "*sharia*" and "Islamic law" in the case law of European courts, which, according to him, reproduce rigid and conservative understandings of Islamic normativity. The second looks at other contemporary types of normativities than positive law which are, nonetheless, also consubstantial with world's positivization. Dupret refers to managerial norms, good practices and standards. Taking the example of *halal* and Islamic finance, he highlights that they have also transformative effects on the Islamic field.

The book has a minor formal shortcoming. Its anthological character accounts for the occurrence of numerous repetitions. Thus, some theories, concepts, analysis tools and historical references outlined in the first methodological part are then explained in the case studies chapters, as if they were introduced for the first time. These repetitions can even go beyond double, if the same elements are used in several case studies. *Positive Law of the Muslim World*'s reading can also arise some frustrations. Legal praxeology's analysis tools, such as for instance the documentary method of interpretation (pp. 92-96), and their mobilization in the third part can be difficult to understand and generate several readings in this purpose. These hardships are explainable by the deep heuristic ambition of legal ethnomethods which is, in Harold Garfinkel's words, to "make remarkable things that are seen but unnoticed in the ordinary world" (p. 83). Before reaching an understanding, the reader is thus pushed to accept to depart from what appears normal and unquestionable in legal activities. Furthermore, given the emphasis put by Dupret on the historical rupture of positivization in the 19<sup>th</sup> century, one can regret that, out of pedagogical purposes, he does not outline in a more systemic way the legal paradigm(s) which positive law has replaced in the Muslim World. Clues are spread out throughout the book (law as an instrument of subjugation, a pluralistic understanding of legal truth, case-oriented adjudication) but a couple of dedicated paragraphs would have helped the reader to grasp more rapidly the scale of the changes. Finally, though the Muslim World's notion is at the core of the book and is rapidly sketched out, Dupret does not explain how the countries of the case studies are included in his general understanding of the area.

Despite that and in addition with what has already been said about the book's richness, *Positive Law of the Muslim World* is extremely powerful. Part of this has to do with the author's style which is at the same time passionate and pedagogical. The tone is essentially argumentative, confrontational with the literature while respecting its authors, and contains sharp and memorable sentences encapsulating sophisticated ideas in few words: "In fact, it is

not the *sharia* that is stable and invariable but the *sharia*-made-into-positive-law by the Court” (p. 257) ; “In other words, a legal practice is everything that is done in a way in which it would not be done if the referring law did not exist” (p. 172).

This lively style is at the service of a content whose contribution to legal science unfolds at several levels.

At the most general one, the author sharply presents and develops a scientific tradition, legal praxeology, whose operability is, by definition, not restricted to the Muslim World. One of the main merit of Dupret’s praxeology is to articulate and hold together the perspectives, on the one hand, of formal and positive legal theory considering modern law as a specific object of study, and on the other hand, of social theory highlighting the influences of exterior determinations (or of “context” if one uses Dupret’s terminology) on law. Whereas these two viewpoints are often opposed or juxtaposed in the literature without methodological and conceptual coherence, legal praxeology succeeds in interlocking two heuristical perspectives within one clearly outlined approach.

At the level of Muslim World’s law, especially concerning religion, this book (or some of preceding Dupret’s works) appears unavoidable. Though *Positive Law of the Muslim World* is not structured as a handbook, its erudition, the breadth of its scope, and the existence of a comprehensive index, render it adapted to beginners in the field and undergraduate students who seek solid and general information on the topic. For those engaging in more developed academic reflections, it seems difficult, if not impossible, to not define their position vis-à-vis the ideas defended by Dupret. In this regard, he does not hesitate to scrutinize the work of renowned colleagues (Hallaq, Brown, Fahmy...), so as to highlight the specificity and acuteness of his approach. Dupret rejects both the chimeric quests for an authentic Islamic law which could serve as a standard to evaluate contemporary positive law, and one-eyed perspectives underlining Islamic law’s monolithic and continuous influence on Muslim societies from the 7<sup>th</sup> century onward. Dupret pushes researchers to consider with utmost seriousness the changes implied by modernization(s) (p. 134) in the area as well as the hypothesis it has revolutionized, without “denaturing”, the relationships between law and religion and altogether law’s conception.

Finally, the book contributes greatly to the sprawling field of law and globalization. It enlarges the focus so that it does not comprehend only the study of legal phenomena tied to globalization, such as, for instance, legal transfers. The aim is that globalization bears equally a more structural impact on the methodology of legal science. One can refer to what Dipesh Chakarabarty calls “provincializing the North”, which amounts here to not give preeminence to the Western area as a field of research. It consists in accepting to confront methodologies, conceived in relation to the West, to laws of the Global South in order to potentially rethink and enrich legal science in general. Even if Dupret’s outlook is essentially descriptive (p. 261), one can infer a political subtext from his approach, which is perhaps not intentional. Globalization has engendered and continues to reproduce asymmetrical power relations between the North and the South to which law is attached. Nevertheless, practices of legal science can attempt to not reproduce these relations and, to some extent, to subvert them by moving its geographical fringe to its methodological core.

Alexis Blouët  
Grenoble Alpes University, University of Edinburgh

Email: [alexis.blouet@univ-grenoble-alpes.fr](mailto:alexis.blouet@univ-grenoble-alpes.fr), a.blouet@hotmail.fr