



HAL
open science

Legal Traditions and State-centered Law

Baudouin Dupret

► **To cite this version:**

Baudouin Dupret. Legal Traditions and State-centered Law. D. Chatty. Nomadic Societies in the Middle East and North Africa: Entering the 21st Century, E.J. Brill, pp.280-301, 2005. <halshs-00178830>

HAL Id: halshs-00178830

<https://shs.hal.science/halshs-00178830v1>

Submitted on 12 Oct 2007

HAL is a multi-disciplinary open access archive for the deposit and dissemination of scientific research documents, whether they are published or not. The documents may come from teaching and research institutions in France or abroad, or from public or private research centers.

L'archive ouverte pluridisciplinaire **HAL**, est destinée au dépôt et à la diffusion de documents scientifiques de niveau recherche, publiés ou non, émanant des établissements d'enseignement et de recherche français ou étrangers, des laboratoires publics ou privés.



HAL Authorization

Legal Traditions and State-Centered Law: Drawing from Tribal and Customary Law Cases of Yemen and Egypt

Baudouin Dupret

Two short stories will give us the clues to enter into the field of this chapter. The first one happened in Yemen. In a car accident involving tribesmen, a member of the Hamdân was killed by a man belonging to Banû Matar. Death is something important and is supposed to be either avenged or compensated. Henceforth, men belonging to the victim's clan group blocked the roads in order to retaliate. As the news spread out, many intermediaries mobilized to avoid that the incident transform into an open conflict. Three days later, the case was settled. The offended clan received a sum of money corresponding to the severity of the homicide and bulls were sacrificed. The whole story happened without any intervention from the state, be it the police or Public Prosecution. The second story happened in Upper-Egypt. On May 15 2003, the Criminal Court of Suhâg sentenced to death six people involved in a case of vendetta (*tha'r*), which had caused the death of twenty-two people one year before. The six men were all members of the family `Abd al-Halîm and were accused of having ambushed with automatic rifles members of Hanashât, a rival family. The ambush itself was a response to the murder by Hanashât people of a member of `Abd al-Halîm. In this case, the quantity of weapons as well as the number of victims justified the direct intervention of the Egyptian state, independent of any kind of "traditional" adjudication.

Two cases, two different types of solution

The first one is a case of legal pluralism, i.e. a case in which different laws might have applied to the same set of facts. The second one is a case of legal pluralism denial, i.e. a case in which State authorities denied customary rules and authorities to adjudicate in matters that could be dealt with through the provisions of the Egyptian Criminal Code. There are many stories of this kind. Sometimes, it seems that customary law functions parallel to state law. Sometimes, it seems that State law acknowledges the authority of customary law. Sometimes, it denies it. Indeed, in many parts of the Arab world, customary law is still enforced, possibly to the exclusion of any State influence. It holds true in Yemen, where entire areas live under the control of tribal authorities. It holds equally true in Egypt, where customary councils convene frequently and adjudicate in a whole range of matters. More and more, however, one can observe various degrees of influence of, on the one hand, the State and its law on customary law and justice, but also, on the other hand, of principles inspired by customary law on the law of the State. Any research focusing on customary law without taking into account the expanding role of State law and judiciary definitely risks missing the phenomenon of the law itself, as practiced and transformed in its daily use by people and groups whose living is seldom autarchic. Any research that focuses on State law without taking into account its practice and the ways in which it is oriented to the existence of usages and mores common among the people of this or that stratum of the society risks missing also an important part of the phenomenon.

Actually, it seems that the only thing that vanishes is tribal and customary law in its “pure form.” However, one can wonder whether such a law has ever existed. Very often, the problem of research in the field of customary law was that, despite its claim of concentrating on practice, it reproduced legal theory’s framework of analysis and looked for formal documents or accounts in order to describe the structures and rules of the so-called customary

legal system under scrutiny. By so doing, it mainly abstracted customary legal practices from their social environment, giving the factice impression that these practices were simply the instantiation of a frozen and non-historical system of law. When confronted to situations in which practices departed from the model to which they were supposed to belong, the answer was generally to argue that customary law disintegrates and will no more look like what it used to be. This claim is at best redundant, since human societies tend to be constantly evolving, although at different paces. At worst, this is simply wrong, as socio-legal practices are never the mere sample of a template whose existence seems to be restricted to scholars' mind.

It must also be stressed that stating the transformation and thus the subsistence of customary legal systems does not entail any claim about the desirable character of these laws. Generally with the best intentions, some legal pluralism scholars promoted concepts like “folk law,” “indigenous law,” “native law,” “imported law,” “transplanted law,” “state law,” “official law,” “unofficial law,” “primitive law,” etc. Besides the huge definitional problems associated with the term “law,” these theories mainly assume that there is something like a “true” law, which is the reflection of an “authentic” society whose main cultural characters are translated into rules of conduct. This kind of “nativist” interpretation offers a very naïve picture of law which is far from being supported by substantial empirical evidence. In this form, the so-called “indigenous” or “native” law has often never existed but in culturalist scholarship, although it is constituted as the yardstick to which the scope of legal “acculturation” is evaluated.

This chapter addresses the issue of tribal and customary law in their relationship with State law. It contends that this relationship can be observed at different levels, around which this analysis will be organized. At a first level, where one can observe an instance of legal pluralism, customary justice integrates in its structuring and functioning bits and pieces

of the State, its law and its staff. At a second level, the opposite holds true, i.e. the law of the State and its judiciary recognizes and integrates principles of customary law and rulings of customary authorities and gives them the force of State law. At a third level, which is the level of ordinary problems and informal adjudication, the practices of people are explicitly oriented to the State and its law and/or customary rules and proceedings for solving disputes.

This chapter also draws from two specific contexts: Yemen and Egypt. Yemen is usually presented as the archetype of a weak State compelled to cope with autonomous judicial institutions and equipped with a corpus of legal provisions that is only partly codified and not wholly coherent. This is, however, a very biased presentation of law in Yemen that does not consider the variety of mutual influences between customary law and State law that can be observed and traced down. With regard to Egypt, the Arabic terms *majâlis `urfîyya* or *majâlis al-`arab*, but also *sulh* and *tahkîm*, refer to a variety of conciliation phenomena, which are definitely not limited to supposedly more tribe-structured Upper Egypt. To the contrary, this is a widespread mode of adjudication, which has however little to do with the “pure,” State-free, and sophisticated models of customary law with which classical legal anthropology was mainly concerned.

Tribal law and customary law: an autonomous socio-legal field?

The issue of tribal and customary law has received some attention, even though the literature remains largely incomplete and scattered. With regard to Egypt, it has been studied in a very uneven way. There was a tendency to its folklorization (see, for example, Malim 2001). There is also some good scholarly work, among which Mohsen (1967; 1970; 1975), Stewart (1987; 1988-1990; 1994) and Nielsen (1998a; 1998b; 2000; 2005) deserve special mention. In the case of Yemen, the same holds true (see Chelhod 1971; 1985; Dresh 1987;

1989; Mundy 1995; Abû Ghânim 1990; Samadî 1993; al-`Âlîmî no date; Fusayl no date; Serjeant 1991).

Stewart (1987) contributed a detailed and very well informed review of the literature, in which he concluded that, in its historical forms, tribal and customary law nearly belongs to the past: "In a few decades, it will almost all be gone" (p.484). This blunt statement refers to tribal law as it used to exist before it was subject to the influence of state law. It does not mean, however, that there is no tribal and customary law that still exists parallel to other systems of justice and functions autonomously. We can refer to the following case by way of illustration:

At the market of Sharas, in the province of Hija, in Yemen, riots broke out in February 1986. This place is considered, according to tribal customs, as a protected zone. During the riots, a man called Muhsin Nâsir al-Faqîh wounded another man, Ahmad al-Kashîh. Following this incident, the two clans fought and two men were arrested and put into custody during the time necessary for conducting the investigation and before the transfer of the case to the Public Prosecution. However, parallel to this procedure, the case was submitted to sheikh Huzâm al-Sa`r's arbitration, who issued the following sentence: each party must slaughter cattle, compensate the other party for its wounds and pay a fine for the breach caused to public good, i.e. the safety and sanctity of this market place. Both parties applied the sentence and withdrew their complaints. Consequently, the police stopped the official procedure (al-Muwadda` 2005).

As short as it may be, this case clearly shows the coexistence of parallel legal systems. There is, on the one hand, the State justice system, represented by the police and the Public Prosecution, whose functioning necessitates the opening of a file and a procedure as soon as some criminal act comes forward. Technically speaking, this system cannot enter into any negotiation with alternative justice systems without jeopardizing its claim to the

monopole of legitimate authority. Practically, it is often confronted to certain types of crimes which are known by its professionals as falling outside the scope of its jurisdiction. Policemen as well as prosecutors are very much aware of the existence of arbitration and conciliation authorities issuing rulings and covering what appears to state law as criminal liability beyond a collectively enforced solidarity (which results mainly in the unavailability of witnesses testifying to, and evidences substantiating, the crime and its individual author). On the other hand, there is a “customary” legal system (*`urf*) which people identify as such, to which they orient and which issues rulings of its own on a large number of matters. This justice system, which runs parallel to the official system, can borrow many of its features to the latter (form of the procedures, explicit references to substantial provisions of positive law, written rulings, etc.) However, it clearly stands on its own feet and does neither depend nor is centered on the existence of State law. In other words, it constitutes an instance of a plural legal order.

In this case, *`urf* constitutes an autonomous system of law and adjudication. This notwithstanding, the respective paths of this system and that of the State can possibly come across each other at a certain point or at different levels. Very often, State officials (heads of administration departments, governors, even ministers) and professionals of its legal system (attorneys, former judges, but rarely active members of the judiciary) are on the bench of conciliation assemblies. For instance, in a case dating from 1986, in which a vendetta that lasted for four years and had made more than a dozen victims, the Egyptian Minister of Interior considered that the situation had gone beyond control and ordered the imprisonment of the men who were the leaders of the two families involved. After a couple of days of seclusion, the two families began a negotiation process that was facilitated by policemen and members of the State judiciary. They agreed upon the convening of a customary court. The day before the first session of this court, weapons were delivered by both parties to the police as a token of good faith. At the opening of the session, they also made a deposit of 40,000

Egyptian pounds each. Since the governor of Gîza was member of one of the families, the case received special attention and the court was headed by the sheikh al-Azhar and made of twelve people, among whom the Minister of Culture, representatives of the Minister of Interior, Members of the People Assembly and the Consultative Council, and representatives of important families of Sinai, Fayyûm and Gîza. The ruling was issued after two days of deliberation and was accepted by the two parties (Botiveau 1993, pp.262-263).

Another case of such independent yet influenced functioning of customary justice was studied by Ben Nefissa (1999, p.146). The dispute began with a man who allegedly proffered an insult to a woman in a village of Upper Egypt. One member of the woman's family sat at the village council, while the village *`umda* (mayor) belonged to the man's family. The woman's family protested at the insult and the quarrel quickly escalated. Knives and rifles were unsheathed and the police intervened, taking twenty two people to the police station and confiscating the weapons. At this point, a conciliatory assembly made of eight people who were not related to either family convened in an attempt to resolve the dispute. Among the members of this court, there were two attorneys-at-law, one journalist, one official from the Ministry of Waqfs, one member of the Governorate Council and the Regional Secretary of the ruling National Democratic Party. They negotiated with the head of the local police the release of the prisoners and the suspension of the legal procedures that were initiated in return for the holding of a conciliation procedure. Once the protagonists had been released, they jointly proceeded to one of the village notables' house. The members of the conciliatory council questioned all the people who had been active in the conflict and, five hours later, they publicly delivered their decision and the conflict was declared closed.

In Yemen, it is not rare that State officials be involved in tribal conflict resolution. According to al-`Âlîmî (no date, pp.95-97; pp.108-109), the relationship between official courts and tribal courts depends on the local strength of the central State. When the latter is in

a weak position, official judges tend to refer most cases to customary sheikhs. Moreover, members of the state apparatus and local officials personally participate, in such remote areas, in assemblies convened for settling conflicts, and they deal with the cases in a way that partly or totally contradicts or simply ignores the rules which they are supposed to implement. Often also, the arbitral sentence is issued on the basis of official documents produced by State authorities, in front of State officials or at their request, and the verdict of arbitration is acknowledged and even implemented by the Police and Public Prosecution.

This is exemplified in two recent cases that happened in `Umrân, North of San`â` (al-Muwadda` 2004). In the first one, dating from 1992, a hot discussion transformed into a brawl, one of the parties was arrested by the police for having inflicted blows to the other and the General Prosecution opened an investigation and asked the local hospital to make a report that made it possible to evaluate the compensation. Meanwhile, the sheikh of `Umrân was seized and issued his ruling in front of the Director of Public Security, asking both the parties to withdraw their action in the official court. In the second case, dating from 2001, an argument between two boys transformed into a brawl between their respective fathers and both parties were eventually wounded. An investigation was conducted and a local sheikh was asked to arbitrate the case. Each party contested the other's version of the facts and the arbitrator, after he received a copy of the police and the hospital records, issued his sentence which both the parties and the police accepted.

Beside the presence of officials in customary assemblies, the influence of the State manifests itself at a formal level: procedural organization, style in the writing of the ruling, submitting of convincing evidence, or even emergence of a rhetoric on the protection of the defense's rights and human rights. In itself, the writing indicates a recent evolution related to the growing number of literate people and the influence of positive law and its insistence on written documents. For instance, in Siwa, a Berber-speaking oasis area in the Egyptian

Western desert, I witnessed in 1999 a meeting in which an illiterate man, whose conversation was conducted in Berber, dictated to a literate friend, in a very technical legal Arabic, the precise terms of a contract he intended to conclude on a piece of land. This was not done within the premises of the cadastre office, no lawyer was directly involved, and yet this document was written according to the style of officially sanctioned real estate contracts.

In Edfu, Upper Egypt, Nielsen (2005) witnessed many reconciliation meetings. He describes the procedures that were followed and insists on the importance of writing:

“When the disputing parties have agreed to suggested members of the council, it is often then authorized by the parties. This latter part is central to the argument and shows a development which seems to have taken place within the last decades. An authorization is either granted by issuing a specific document which is completed before the case is taken up by the council called a *mahdar tafwîd* (statement of authorizations), sometimes a specific meeting is held where this document is written and signed.”

Nielsen gives the following example:

In the name of God the clement the merciful

Statement of authorizations

It is today Friday, the date is 26/2/1988 in the residence and house of al-Hajj Sayyid Na`îm `Abbâs, Edfu Qiblî, Edfu District, Governorate of Aswan and present is the first party Yâsîn Hamîd Yâsîn, second party Mahmûd Husayn Mahmûd Ahmad Razzâq who are authorizing the council consisting of al-Hajj Sa`îd `Abd al-Basît `Awad Allâh and al-Hajj Ahmad Muhammad al-Samân and al-Hajj Yâsîn Sa`ad Muhammad and Ahmad `Abd Allâh Muhammad al-Sadîq and Muhammad `Alî

Amîn and Ahmad Mustafâ Hasan and Muhammad Ahmad Yâsîn and al-Hajj `Awad Allâh Bakrî `Uthmân and Ibrâhîm Yûsuf `Amr and Ahmad Muhammad Nayl to settle the existing dispute between us concerning a piece of land measuring 8 *qirât* and 5 *sahm*, situated in the *hûd* [basin] al-Nakhl number 9, in section 48. We have authorized the council mentioned above to find what is proper to solve this dispute. And this is an executive obligation. And he who breaks the decisions of the council by not following the obligations must pay an economical fine of the amount of 10.000 Egyptian pounds. And this is hereby the authorization. And Allah is Master of fortune.

First party	Second party
Yâsîn Hamîd	Yâsîn Mahmûd
	Husayn Mahmûd

As for the ruling itself, i.e. the statement of reconciliation or arbitration (*mahdar al-sulh* or *mahdar al-tahkîm*), it contains:

“paragraphs describing the case – as seen by the council and based on an inspection of the site of dispute, documents pertaining to the case, statements made by the parties and other people involved and also the questioning of the parties and witnesses which takes place on the day of the final meeting the *majlis al-sulh*” (Nielsen 2005)

It may also contain clauses specifying that the solution reached by the council holds valid *vis-à-vis* the authorities and that, if a party breaks with the decision taken by the council, the other party keeps its right to raise the case before a State court.

This influence of State law on customary practices is also visible in the Yemeni case, although to a lesser extent, unless we consider that the enframing of arbitration within the bounds of codified provisions constitutes in itself an evidence of such a transformation. In

1976, Law No 90 stipulated that arbitration was an alternative procedural course within the framework of positive law. In 1981, Law No 33 allowed a separate jurisdiction for tribal law and procedure in cases of homicide and tribal dispute. Law No 22 of 1992, however, severely limits the scope of arbitration, submitting it to the State's jurisdiction and excluding it in a huge list of cases. In 1997, the law was amended and it made arbitration conditional upon its non-contradiction with the rules of Islamic law. In case a plaintiff or the court suspects a deviation from *sharî'a* (Islamic Law), State courts are competent to review the decision in an appeal procedure. These attempts to put customary arbitration in a State-law framework proved however contradictory:

“the successive Laws of Arbitration have granted, withdrawn, and restored varying scopes of jurisdiction to tribal arbitration. This tells us that the state has much difficulty even at the prescriptive level to confine tribal arbitration under its own framework. In practice, even less control is achieved. From the case-examples, we learned that homicides were settled by arbitration, instead of prosecuted by the state, and that tribal norms were applied that contradicted official norms and *sharî'a*, such as the extremely high amounts paid as blood money. Officially, these are deviations from *qânûn* (positive law), but we have also seen that it is not always possible to enforce the Law, if other powers simply have stronger means to impose their own norms and procedures. In such “overruling” situations, the closest the state can come to adhering to its own rules, is to cooperate with a societal organization which adapts to its set framework, even if only nominally.”

(al-Zwaini 2005)

When the State acknowledges or even integrates customary law and justice

Actually, the last example of the Yemeni laws concerning arbitration reflects, not only the parallel existence of customary and positive laws and justices, but also (and perhaps much more) the capacity of the latter to permeate the legal system of the state and to impose its reality in the most positive form, i.e. legislation itself.

Let us take the example of honor crimes. We know that sexual honor allows for someone (generally a man, the protector of the family name) to be seriously affected in his dignity or even to be stained by the sexual situation of another person (generally a woman). In other words, sexual honor is the process through which what A does to the body of B has an incidence on C because of his kinship with B (Ferrié 1998, p.133; Douglas 1981). By contrast, sexual morality is the situation where someone bears an individual responsibility for his/her own willful sexual behavior by virtue of external obligations (Ferrié 1998, p.135). The difference is mainly located in the fact that stain is quite independent from human agency and therefore from the action of the will, while morality depends on what someone does with regard to the norms, be it an active (i.e. fault) or a passive (i.e. omission) behavior. It means that stain is impervious to the intention of people.¹ This is particularly evident in criminal law. Customary justice (for example, blood feuds or crimes of honor) has little interest in the intention of people: it mainly ratifies that a certain fact has affected the status of a group and of its members. In statute law, to the contrary, it is the will of the one who commits an action that determines its legal characterization and the evidences documenting this will have to be found in the intention of the latter. Customary justice does not make anyone individually responsible, be it for claiming or for paying a right. Statute law, to the contrary, is based on the principle of the personality of penalties. Here we find the emergence of a certain concept of responsibility, which develops out of the articulation of the notions of causality, individual intention and ascription.²

Obviously, customary and statutory systems can co-exist. In Syria, for instance, the Criminal Code makes crimes of honor a distinct category, the punishment of which is weaker. Moreover, legal practices show a very deep understanding of the judiciary towards this kind of behavior (Ghazzal 1996). However, one must also consider the fact that Syrian law, though being lenient, punishes it as a crime that has its grounds of excuse, while to a certain extent customary law can consider it a duty for people to kill those relatives who stain their kinship, although they may bear no responsibility in what happened to them. In Egypt, Mohsen (1990, p.22) gives the example of a young girl who was raped by her uncle and then killed by her brother who maintained before the court that he was defending the honor of the family and of his sister. Here, it is worth pointing out the fact that customary law and statute law - or, with regard to our main concern, stain-centered systems and systems centered on the intentional individual - are partly reflecting and influencing each other. In Egypt, as in Syria, the law explicitly or implicitly recognizes the category of "crimes of honour" and gives a different treatment according to whether the offender is a man or a woman. Article 237 of the Egyptian Penal Code stipulates that a man who surprises his wife in the act of adultery and kills her and/or her partner is punishable with a maximum sentence of six months in prison instead of being sentenced to the legal punishment for willful homicide. However, if it is the wife who surprises her husband in the act of adultery and kills him and/or his partner, there is no ground of excuse allowing reducing the sentence. It must be added that the provision of Article 237 does not apply if the husband himself has been convicted of adultery or if he has not acted in circumstances of surprise. These provisions clearly reflect the incidence of customary law on statute law. Adultery itself has an ambiguous meaning. It is mainly considered a crime against privacy and not against society. Hence, the victim can stop the sentence against his/her spouse at anytime. Moreover, privacy has a different meaning for men and women. As to the former, it means the husband's exclusive right to his wife's sexual activities (as a consequence, she can

be punished up to two years in prison no matter where she has committed the crime), whereas, as to the latter, it means the wife's right to privacy and dignity within her domestic domain. In this field too, a stained-centered normative system seems to exert an influence on a criminal legal system based on the intentional individual (Mohsen 1990).³

Parallel to the incorporation of principles linked to mores and customary practices into the legal system of the State, there is also what P. Haenni calls the authorities' "strategy of cooptation of customary law" (Ben Nefissa et al. 2000; Haenni 2005). He gives the example of customary assemblies held in Bulâq Abû al-Îla, in Cairo, in which the presence of a judge, the head of the local police station or representatives of the administration was made compulsory. Records are made on a systematic basis and are transferred when necessary to the judiciary, through the police station, while the judiciary informally refers to the notabilities' arbitration cases that are deemed manageable. In other words, the justice of the State not only acknowledges the existence of customary law, but also directly integrates it within its own functioning. This is what happened when, in 1996, the stores of an important Coptic merchant were looted. A couple of months later, almost all the looted merchandises were found by a State Security officer in the warehouse of a small Coptic merchant of Bulâq. The State Security was not concerned with ordinary cases and transferred it to the Public Prosecution who suggested to the parties that they find their own way to solve their dispute. Eventually, the victim withdrew his complaint against the merchant in whose warehouse the goods were found, but maintained his complaint against the broker who was judged and condemned for receiving looted goods (Ben Nefissa et al. 2000).

In Yemen, State courts have different types of attitude toward tribal rulings. In personal status matters, they evaluate the conformity of tribal rulings *vis-à-vis* the rules of Islamic law (in its codified version or not). Accordingly, they often cooperate in the implementation of tribal rulings. However, they tend to overrule these judgments when these

are considered as violating the *sharî'a*, and they oppose their implementation when this is not beyond their material capacity. In other matters, State courts sustain tribal rulings, even in cases in which these rulings violate statutory rules, and cooperate to their implementation (al-`Âlîmî no date) In his study of intersecting justices in Yemen al-Muwadda` (2005) identifies five different types of situations.

First, there are these crimes that are not referred by the parties to State authorities. In the region of `Ayn, in the province of Shabwa, a dispute opposed two families concerning a stream that formed following a heavy rainfall. One of the second tribe's members was eventually killed by a member of the first one. Sheikhs from other tribes intervened in the conflict and the case was submitted to arbitration, without any notification to the police and the Prosecution.

Second, the State may intervene in certain cases even though it was not informed by the parties. The police arrest some of the tribes' sheikhs or leaders and put them in custody in administrative buildings from which they can still keep in touch with other people. This procedure mainly aims at calming down explosive situations. However, the authorities prompt the parties to negotiate instead of referring the case to the judiciary.

In a third type of situation, when at least one of the parties belongs to a tribe, the victim or his family turns to the judiciary because of the other party's lack of response and it becomes a legal case. If the offender does not surrender to the police - hiding amongst his tribe or fleeing to a remote tribal area - State authorities often use methods that have nothing to do with the Code of Criminal Procedure and mainly consist of taking hostages within the offender's kin.

Fourthly, there are situations in which, although the State judiciary plays a bigger role, the solution remains customary. In this type of case, criminals are arrested by the police force that, together with the prosecution, then conduct the investigation according to

procedural rules. Parallel to the State, the offender's family seeks some customary settling of the case. If this is accepted by the victim's family, the legal case is frozen until a solution is reached, but the offender usually remains in custody. When the customary ruling is issued, the victim's family desists from action and State authorities ratify the ruling. When a court has already issued a ruling, judges often prove very lenient regarding its implementation.

Finally, there are situations in which the case follows normal procedures, while the offender's family seeks conciliation with the victim's family. Seeking conciliation can even continue after the judge has issued a ruling that condemns the offender to the death penalty. The penalty issued by the judge is often used as a means to exert pressure on the offender's family (blood money, amounted sometimes to ten times its legal value, may be offered in order to prevent the death penalty from being carried out) or to strengthen its position - when the court ruling proves favorable, the offender's family may seek a conciliation through which, (by paying more than that decided by the judge), guarantees itself against subsequent acts of retaliation.

Orienting to state law and customary law: legal practices at a daily level

I begin this section by drawing a distinction between plural legal spheres and social practices oriented to law. By way of illustration, I shall compare three cases (see Dupret 2005).

In Egypt, there is a type of marriage not fulfilling the official registration requirement but still legitimate that is commonly called *zawâg `urfi* (customary marriage). According to the theory of legal pluralism, the mere use of this word testifies to the existence of a multitude of legal orders among which people navigate and engage in forum shopping. However, it must be stressed that this "customary marriage" is explicitly recognized by the law (even though restrictively) and regarded as legal by the people. In no way does it constitute an alternative or parallel legal order. It is used in order to preclude some of the

consequences of officially registered marriages but it is also explicitly practiced in order to extend a legal status to sexual intercourse and to some of the practices associated with it that are otherwise illegitimate. In this case, the theories of legal pluralism, far from providing us with the means to properly describe the situation, contribute to the prevailing confusion, through laying the groundwork for a pluralistic situation to which people do not orient themselves.

Also in Egypt, the Public Prosecution investigated a case that involved two men who had contracted a customary marriage. The investigation transcripts show that it was the case of a computer store-owner who had induced a young man working in his store to have homosexual intercourse under threat of divulging marriage-like documents that had been signed by the latter. The young man eventually complained at the police station and the police, and later the Prosecutor, investigated the facts, which were subsequently characterized as indecent assault under duress. The press, the parties, the Public Prosecutor, all involved refer to the “contract of declaration and mutual engagement.” It is implicitly or explicitly argued that the two men had contracted a kind of “customary marriage.” According to the theories of legal pluralism, this would testify to the existence of a plurality of social fields (e.g., homosexual people, the police, the state, the press, etc.), each one being endowed with and generating its own normative values and rules, i.e., producing its own law and having a law mirroring its social norms. However, this is particularly confusing, since it is obvious from the case that there is no legal plurality but only legal practices, i.e., practices oriented toward an object of reference identified by the people as law, be it for interpreting it, implementing it, bypassing it, emptying it of its substance, contesting it, or whatever else. In other words, it is not only the state legal system that “digests” the social situation so as to give to the facts that are brought to its attention a characterization that makes them legally relevant and open to the

ascription of legal consequences, but it is also the many so-called “social fields” that take state law as their focal point.

The third case concerns two young men who were found dead in the countryside near the town of Aswân, in Upper Egypt, in April 2000. Their bodies showed that they had been executed. In accordance with the law and their own professional procedures, the police opened a file and transferred the case to the Public Prosecution, which had to conduct the investigation. However, for lack of evidence on which to build the case, the case was soon considered closed. Parallel to the official story of the case, the press reported that the boys had in fact had a sexual relationship and had entered into a kind of customary marriage. Because their families found the situation unacceptable, they asked that a customary assembly (*majlis al-`arab, majlis `urfî*), be convened, which was required to adjudicate the case. It is said that the assembly convened and issued a ruling condemning the two boys to death. Short as it is, this little story explicitly reflects the existence of parallel systems of justice that function autonomously, independent of each other, despite the possibility that their respective paths may cross at a certain point. There is, on the one hand, the state justice system, represented by the police and the Public Prosecution, whose functioning necessitates the opening of a file and a procedure as soon as some criminal act comes to their attention. Technically speaking, this system cannot enter into any negotiation with an alternative justice system without jeopardizing its claim to the monopoly of legitimate authority. Practically, it is often confronted by certain types of crimes that are known by its professionals to fall outside the scope of its jurisdiction. Both policemen and prosecutors are very much aware of the existence of so-called Arab councils and local traditions, which issue rulings and cover what appears to state law as criminal liability beyond a collectively enforced solidarity (which results mainly in the unavailability of witnesses testifying to, or evidence substantiating, the crime and its individual author). On the other hand, there is a “customary” legal system which

is identified as such, and oriented to, by the people and issues its own rulings on a large number of matters. This justice system, which runs parallel to the official system, may borrow many of its features from the latter, but it clearly stands on its own feet and neither depends upon nor is centered on the existence of state law. In other words, it constitutes an example of a legal plural order. In this case, *`urf* (custom) does constitute law, in so far as social actors attribute such a quality to it. It can therefore be called customary law and can become the object of customary legal practices.

Through the examination of these 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-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. 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-analyzed 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 (and that can be State law, tribal law, customary law or folk law, or any 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.

People, in their daily life, orient to customary and tribal law outside any formal and constraining system of adjudication. In other words, they have customary and tribal legal practices, but these practices are not in themselves constitutive of any other specific and distinct legal field or order.

Drieskens (2004; 2005) reports the following story. In Bashtil, a Cairo neighborhood, a man called Ahmad owned a shop, while his eldest brother, Muhsin, took care of it and was

assisted by his brother-in-law. There was an argument between the latter and a man from the Banî Muhammad, an influential family of Upper Egypt. While Muhsin tried to calm down the parties, a man from the other family hit him on the head with a stick. Following the incident, he went to the hospital where he had stitches for his wound. Many versions of the case were told in the first days the fight. This incident triggered off negotiations within Muhsin's family in order to decide whether revenge or reconciliation was more appropriate. Many factors were taken into consideration when the appropriate attitude was discussed, among which was the respect that each family can compel from the other (according to their respective descent, presence in the city, numerical superiority, wealth, relations with the authorities, etc.) It was important that, despite the Banî Muhammad's wealth and power, Muhsin's family appeared as equal and concerned with origin, honor and tradition. Reference to Arab origin not only emphasized the necessity to resolve the conflict honorably, but it also determined the yardstick against which they could choose between State law, customary law, and revenge. These negotiations within Muhsin's family lasted for several days and reconciliation was eventually elected as the appropriate solution. A relative played the role of mediator on the basis of his knowledge of customary law and his aspiration to be head of the family. At last, someone was sent to the Banî Muhammad with the message that Muhsin's family was ready to accept reconciliation on certain conditions. A time and a place were set for the reconciliation, for the occasion of which men came from Muhsin's village of origin to stand by his side and face the other party. The street was blocked, the man who attacked Muhsin announced loudly that he had done wrong and that he apologized, he walked towards Muhsin, kissed his head and slipped some money into his hands. The story does not really end here, but it is enough to say, for the purposes of this chapter, that it reveals the many forms the practice of customary law can take in the course of daily life. Clearly and intentionally, State law was excluded as a solution to the conflict. Revenge, conciliation, customs, honor, family

constituted the lexicon of the case. However, it was not conducted in a very formal way, according to well-established procedures, and with a reference to precise customary rules. It was much more like a practice of conflict resolution oriented to the resources offered by the legal idiom of reference, i.e. the *haqq al-`arab* (the law of the Arabs).

This orientation of practices toward customary rules is best exemplified by the following family case (Ben Nefissa et al. 2000). This is an ordinary case of strained relationships between two spouses in the populous neighborhood of Munîra al-Gharbiyya, in 1997. The dispute could not be restricted to the very limited space of their home and everybody became involved so as to put an end to an affair that prevented them from sleeping. It threatened to turn into a collective conflict when the wife's brothers insulted the husband's sisters. Consequently, the wife went to her father's home together with their daughter. Later, she came back to her husband's flat, but things got worse, she threatened to turn to State justice, and asked publicly for her divorce. A civil servant working with the Egyptian television tried to intervene, on the basis of his belonging to the *tablîgh* society (Muslim proselyte group) and his reputation of being pious, learned and well-educated. Despite all his efforts and numerous shuttles between the two families, it was in vain. Three weeks later, the wife's husband and the *tablîghî* payed a visit to the strong man of the neighborhood, a costermonger who was familiar with this kind of case. He agreed to head an arbitration committee consisting of himself, his wife and his two sons. In the following conciliation process, the spouses agreed to live under the same roof, but diverged on the way the wife should return to her husband's flat. For the husband, she had to come back alone, while, for the wife's father, she had been insulted and her honor threatened, and the husband must henceforth prove his goodwill and come himself to her father's flat to take her back home. The husband refused. The arbitrator's wife then proposed to herself bring the woman to her husband, a solution that preserved the husband's honor and satisfied the demands of the

wife's father. One of the husband's relatives proposed to accompany the arbitrator's wife in order to represent the husband's family and the case was settled. The point is that the costermonger's success is mainly due to the power of the family of which he is the patriarch and to his capacity to directly intervene into the daily life of the neighborhood. Here again, there was no recourse to State law, even though it was used as a direct threat. On the other side, reference to custom was omnipresent but not very consistent and technical. As a whole, customary law functioned in this case as a point of reference towards which people verbally oriented in the course of some mainly informal conflict resolution processes.

Conclusion

In this chapter, I have documented the many ways in which State law and customary law influence each other in times where the autonomous functioning of legal systems belongs to vanished histories. It neither means that State law became the sole mode of legal regulation nor that it goes only from the State towards the customary system, in a one-way manner. To the contrary, I illustrated how customary law can stand on its own feet, albeit that it often bears the marks of the influence of the State and its legal systems in its procedures, vocabulary, and adjudicating personnel. I have also shown how it made its influence felt on the crafting of statutory laws that attempted to mirror some structures of the very society it was supposed to organize. Finally, I have given examples of practices that orient toward the existence of customary law without constituting in themselves instances of original or autonomous legal systems.

The laws that used to regulate tribal and customary societies tend to quickly transform. Entering the 21st century, these societies are subject to the influence of centralized authorities and laws that generally aim at reducing the jurisdiction of these competing legal systems. Consequently, customary legal systems are sometimes weakened, sometimes re-

shaped, sometimes influenced. Customary systems that remain “intact” (but intact *vis-à-vis* what?) constitute a tiny exception. As I said in the introduction, following Stewart, there is the threat that customary law in its “classical” form will be gone in a few decades. It is thus urgent to collect information and conduct research before it is too late. However, customary law transforms more than it vanishes. There is nothing like a “pure” system of law. Law is constantly changing, as a result of both internal and external demands and pressures. While these transformations and the ways in which they take place in tribal and popular contexts are very little studied, they represent a major phenomenon in the field of contemporary law.

Bibliography

Abû Ghânim, Fâdil. 1990. *al-Qabaliyya wa'l-dawla fi'l-Yaman* [Tribalism and the State in Yemen]. Cairo: Dâr al-Manâr.

Abû Zayd, Ahmad., 1965. *al-Tha'r* [Blood Feud]. Cairo: Dâr al-Ma`ârif.

al-`Âlîmî, Rashâd., (n.d.) *al-Qadâ' al-qabalî fi'l-mujtama` al-yamanî* [Tribal Justice in Yemeni Society]. San`â': Dâr al-wâdî li'l-nashr wa'l-tawzî`.

al-Muwadda`, `Abdel Nasser. 2005. ‘*Carrefours de justices yéménites,*’ in Baudouin Dupret and François Burgat (eds.), *Le cheikh et le procureur: Systèmes coutumiers, centralisme étatique et pratiques juridiques au Yémen et en Egypte*. Cairo: CEDEJ (series Egypte – Monde arabe).

Alrabaa, Sami., 1986. 'Arbitration Discourse in Folk-Urban Egypt,' *Peuples méditerranéens* 34: 65-87.

al-Samadî , Muhammad bin Yahyâ `Alî. 1993. *Nazariyya al-`uqûba fî'l-sharî`a wa'l-a`râf al-qabaliyya fî ahkâm al-qabâ'il al-yamaniyya wa mafhûm al-niqâ' wa'l-`ayb* [Theory of Penalty in Islamic Law and Tribal Customs in Yemeni Tribal Rulings and the Concept of Purity and Shame]. no editor

al-Zwaini, Laila. 2005. 'Mediating between Custom and Code: the Assalam Arbitration House in San`a,' in Baudouin Dupret and François Burgat (eds.), *Le cheikh et le procureur: Systèmes coutumiers, centralisme étatique et pratiques juridiques au Yémen et en Egypte*. Cairo: CEDEJ (series Egypte – Monde arabe).

`Awad, al-Sayyid Sâlih., 1979. *Athr al-`urf fî'l-tashrî`* [The Influence of Custom on Legislation]. Cairo: Dâr al-kitâb al-jâmi`î.

Ben Nefissa, Sarah. 1999. 'The *Haqq al-'Arab*: Conflict Resolution and Distinctive Features of Legal Pluralism in Contemporary Egypt,' in Baudouin Dupret, Maurits Berger and Laila al-Zwaini (eds.), *Legal Pluralism in the Arab World*. The Hague-London-Boston: Kluwer Law International.

_____. 2005. 'Les majalis `urfiyya en Egypte, entre domination politique et domination sociale,' in Baudouin Dupret and François Burgat (eds.), *Le cheikh et le procureur: Systèmes coutumiers, centralisme étatique et pratiques juridiques au Yémen et en Egypte*. Cairo: CEDEJ (series Egypte – Monde arabe).

Ben Nefissa, Sarah, Sameh Eid and Patrick Haenni. 2000. 'Pluralisme juridique et ordre politique urbain au Caire: les faux semblants des Majaliss Orfia,' in Étienne Le Roy and Jacqueline Le Roy (eds.), *Un passeur entre les mondes: Le livre des anthropologues du droit en hommage au recteur Michel ALLIOT*. Paris: L'Harmattan.

Botiveau, Bernard. 1993. *Loi islamique et droit dans les sociétés arabes*. Paris: Karthala-IREMAM.

Chelhod, Joseph. 1971. *Le droit dans la société bédouine: recherches ethnologiques sur le `orf ou droit coutumier des Bédouins*. Paris: Marcel Rizière and Cie.

_____. 1985. 'L'Arabie du Sud: histoire et civilization,' in *Culture et institutions du Yémen*, vol. 3. Paris: Maisonneuve and Larose.

Douglas, Mary, 1981. *De la souillure, essai sur les notions de pollution et de tabous*. Paris: Maspéro.

Dresh, Paul. 1987. 'Episodes in a Dispute between Yemeni Tribes: Text and Translation of a Colloquial Arabic Document,' *Der Islam* 64 (1): 68-86.

_____. 1989. *Tribes, Government and History in Yemen*. Oxford, N.Y.: Oxford University Press.

Drieskens, Barbara. 2005. 'What Happened? Stories, Judgments and Reconciliation,' in Baudouin Dupret and François Burgat (eds.), *Le cheikh et le procureur: Systèmes coutumiers, centralisme étatique et pratiques juridiques au Yémen et en Egypte*. Cairo: CEDEJ (series Egypte – Monde arabe).

_____. (forthcoming) 'A Cairene Way of Reconciling,' *Islamic Law and Society* 12.

Dupret, Baudouin. 2001. 'Normality, Responsibility, Morality: Virginité and Rape in an Egyptian legal context,' in Armando Salvatore (ed.), '*Muslim Traditions and Modern Techniques of Power*,' *Yearbook of the Sociology of Islam* 3: 165-183.

_____. 2005. 'Legal Pluralism, Plurality of Laws, and Legal Practices: Theories, Critiques, and Praxiological Re-specification.' in Baudouin Dupret and François Burgat (eds.), *Le cheikh et le procureur: Systèmes coutumiers, centralisme étatique et pratiques juridiques au Yémen et en Egypte*. Cairo: CEDEJ (series Egypte – Monde arabe)

Ferrié, Jean-Nöel. 1998. '*Figures de la moralité en Egypte: typifications, conventions et publicité*,' in Jocelyne Dakhli (ed.), *Urbanité arabe. Hommage à Bernard Lepetit*. Arles: Actes Sud / Sindbad.

Fusayl (al-), `Abd Allâh. (n.d.) *Dawr al-`urf fi'l-qânûn al-yamanî* [The Role of Custom in Yemeni Law].

Ghazzal, Zouhair, 1996. 'Honor Crimes in Syrian Courts: The Art of Finding Good Reasons to Kill Your Wife,' *Paper presented at the Middle East Studies Association, 30th Annual Meeting, November 21-24, Providence, Rhode Island.*

Haenni, Patrick. 2005. *L'Ordre des caïds. Conjurant la dissidence urbaine au Caire*. Paris: Karthala (series Kalam).

Lajnat jam` al-turâth bi-muhâfaza shimâl Sînâ' [The Committee for the Preservation of North Sinai Cultural Heritage] 1989. *al-Qadâ' al-`urfî fi shimâl Sînâ'* [Customary Justice in Northern Sinai].

Malim, Fathi. 2001. *Oasis Siwa from the Inside: Traditions, Customs and Magic*. no editor.

Mohsen, Safia K., 1967. 'Aspects of the Legal Status of Women among Awlad `Ali,' *Anthropological Quarterly* 40: 153-166.

_____. 1970. *The Quest for Order among Awlad Ali of the Western Desert of Egypt*. Ph.D. dissertation. Michigan State University.

_____. 1975. *Conflict and Law among Awlad `Ali of the Western Desert*. Cairo: National Center for Social and Criminological Research.

_____. 1990. 'Women and Criminal Justice in Egypt,' in Daisy Hilse Dwyer (ed.), *Law and Islam in the Middle East*. New York, Westport, London: Bergin and Garvey Publishers.

Mundy, Martha. 1995. *Domestic Government. Kinship, Community and Polity in North Yemen*. London, New York: Tauris.

Nielsen, Hans Christian Korsholm. 1998a. 'Men of Authority - Documents of Authority: Notes on Customary Law in Upper Egypt,' in Nicholas Hopkins and Kirsten Westergaard (eds.), *Directions of Change in Rural Egypt*. Cairo: The American University in Cairo Press.

_____. 1998b. 'Négociation et écriture: à propos du droit coutumier en Haute Égypte,' *Égypte-Monde arabe* 34: 155-165.

_____. 2000. *Law, Tribes and Tradition. Norms and Authority in a District in Upper Egypt*. Ph.D. dissertation. University of Aarhus, Denmark.

_____. 2005. 'Authority, Arbitration Councils and Civic Society,' in Baudouin Dupret and François Burgat (eds.), *Le cheikh et le procureur: Systèmes coutumiers, centralisme étatique et pratiques juridiques au Yémen et en Égypte*. Cairo: CEDEJ (series Égypte – Monde arabe).

_____. (forthcoming) 'State Law and Customary Law in Upper Egypt,' *Islamic Law and Society*.

Serjeant, Robert Bertram. 1991. *Cutomary and Shari`ah Law in Arabian Society*. Gower House: Variorum.

Stewart, Frank H., 1987. 'Tribal Law in the Arab World: A Review of the Literature,' *International Journal of Middle East Studies* 19: 473-490.

_____. 1988-1990. *Texts in Sinai Bedouin Law. Two vols.* Wiesbaden: Otto Harrassowitz.

_____. 1991. 'The Woman, Her Guardian, and Her Husband in the Law of the Sinai Bedouin,' *Arabica* 38: 102-129.

_____. 1994. *Honor.* Chicago: University of Chicago Press.

Williams, Bernard. 1993. *Shame and Necessity.* Berkeley: University of California Press
[French tr. 1997, Paris: Presses Universitaires de France].

¹ Stain is the effect of something, for example a homicide. Its occurrence is independent of any intention, such as the intention to kill, and it demands reparation (Williams 1993).

² According to Bernard Williams (1993), any conception of responsibility is grounded in the organization of four fundamental elements: the cause, the intention, the mental state, and the reparation. However, there is a whole range of conceptions of responsibility, which result from the different interpretations given to the many elements and from the relative weight they receive respectively.

³ It must be stressed that there is a paradox in the fact that provisions currently presented as directly inspired by customary practices were originally inspired by French and Ottoman law. It is nevertheless because of their alleged capacity to reflect the mores and customs of the society that they were included within the Egyptian Criminal Code. This is the case, for instance, of article 291 of the Code of Criminal Procedure that stipulated that: "If this who has abducted a woman legally marries her, he cannot be condemned to any penalty." This article allowed a rapist not to be sanctioned if he had subsequently married his victim. Although it

was inspired by statute law, this provision was considered as the reflection of customs.

According to the Preparatory memorandum to the law suppressing article 291 of the Code of Criminal Procedure: “The decision impeding any condemnation, as it follows from article 291, dates from the decree of the Sublime Porte of 13 November 1883 promulgated in the shape of a Code of Penal Procedure, from which article 253 of the national Code of Penal Procedure promulgated in 1903 is inspired, which in its turn is reproduced in the current Code of Penal Procedure. This decree (...) must be read in light of the conditions, customs and peculiar social uses in which it took place, among other means of social control. The crime of abducting a woman was generally committed by a lonely man who was driven to kidnap the one he desired as his wife whereas circumstances prevented him from it. This is no more the case today, with transformation of life conditions” (Dupret 2001).