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# **Droit contemporain des pays arabes, written by Nathalie Bernard-Maugiron**

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HAL Authorization

**Nathalie Bernard-Maugiron, *Droit contemporain des pays arabes*. Paris, France : Sirey, 2023. 450 pages, ISBN : 978-2247199594.**

Nathalie Bernard-Maugiron's work on the contemporary law of Arab countries is precise in the extreme, encyclopedic, extremely well-informed, systematic and internally consistent. It shows great legal and linguistic skill, and reflects the dream of completeness, systematicity and clarity that inhabits every contemporary legislator, including Arab ones. I shall therefore seek to inform readers of what they can expect to find in the book, which provides a wealth of factual information rather than making an explicit argument. After praising the book's merits, I will raise a few questions and limitations that are bound to arise from the underlying conception of the law that emerges.

The Introduction to the book clearly sets out the analytical and methodological framework of the undertaking: to study the law of Arab countries using the tools of the (positivist) science of (positive) law, taking it to be a law like any other, not built around the Islamic norm, but rather around sovereign states, which legislate in all fields, including the *sharī'a*. Bernard-Maugiron traces how this "etatization of law," which follows from the tradition of *siyāsa shar'īyya* and the Ottoman *Tanzīmāt*, lead to the establishment of regimes formally organized around three separate powers, endowed with a constitution and legislating in all fields, including those more specifically covered by the book, namely family law and criminal law. The author emphasizes the structures of the administration of justice, which has tended towards unification and centralization, and the reduction of the jurisdiction of religious courts. Lastly, she focuses on three important phenomena: the influence of French law, the emergence of "state Islam," and the loss of flexibility of legal norms, which is induced by their codification.

The book is organized in two parts, one dealing with historical depth, the other with the contemporary period. The historical perspective does not consist in placing each legal system

in context, but in identifying the various legislative milestones concerning judicial organization, family law and criminal law, on the one hand, and constitutional developments, on the other. In the first chapter, the author feels the need to shed light on legal developments in the Ottoman Empire and Egypt in the 19th century by outlining, in some fifty pages, a history of *sharī'a* and *fiqh*. Then, the book proceeds to provide an anthology of the constitutional and legislative texts that have marked the history of Arab countries since the 19th century. It contains a wealth of references and excerpts from texts relating to the construction and reform of the legal system, as well as constitutional developments, in the Ottoman Empire, Egypt and the Arab world. Specifically, it discusses the Ottoman penal codes of 1840, 1851 and 1858, the *Majalla* and the Family Law of 1917, as well as the reform of the judicial system, with the emergence of civil jurisdictions, and the *nizāmiyye* courts. It also explores the Egyptian codification enterprise (criminal law, family law, the mixed and indigenous codes, the 1948 civil code), as well as the reform of the Egyptian judicial system until Independence. For the other countries of the Arab world, the author follows the same structure, proceeding from the codification of civil law, to that of family law, and then along to criminal law, and finally to the reform of the judicial system through the evolution of the religious courts and the emergence of new jurisdictions. The author also traces the evolution of constitutions, demarcating three phases that lead up to the current period: a first wave from 1861 to the First World War, a second wave from the First World War to 2011, and a third wave beginning with the reforms following the 2011 uprisings.

The second part of the book is devoted to contemporary legal systems in the Arab world. It is a continuation of the previous section on constitutional reforms, this time with specific attention paid to the place of religion in constitutions. Its emphasis here is on Islam as the religion of the State and the references to the *sharī'a* in constitutions, the organization of public powers (and particularly the balance between powers, the means of control, and the delicate question of the value of Arab constitutions), and fundamental rights (their enhanced protection,

their implementation, the interpretative work of judges). This is the heart of Arab constitutionalism, the author's speciality. Finally, the book deals with recent legislative reforms in both family and criminal law. In the case of family law, the author emphasizes the scope of the reforms with regard to the formation, effects and dissolution of marriage, and points out the limits of the process. For the second, she concentrates on the question of *ḥudūd*, blood crimes and retaliation. Faithful to the model of a French-style *précis de droit*, the work does not include a conclusion.

The book also poses a number of questions, all of which have to do with its conception of law. I fully agree with the author's implicit assertion that the positive law established in Arab countries from the early 19th century onwards must be understood, in the long term, as a paradigmatic break with what preceded it, including in areas still governed by norms inherited from Islam or drawn from it.<sup>1</sup> My question, then, is whether framing the history of the *sharī'a* through the legal positivist grid of contemporary state law, as the author does, is analytically helpful in understanding this rupture. Specifically, this depiction is a simplistic rendering of the history of Islamic law, reminiscent of Orientalist scholarship on this topic, and will likely draw significant critique from historians of Islam and law.

I was also concerned by the almost total absence of any socio-historical contextualization of the laws under study. I fully understand the volume constraints that make this difficult, if not impossible. I also understand that the author, as she says in her introduction, is conducting a legal analysis. In this sense, she lays down the rules of the game, which she then scrupulously respects. I even think it is a great virtue to adopt a principle of symmetry in the study of Muslim societies: to apply the same methods of analysis we adopt for Western societies. Nonetheless, on reading *Droit contemporain des pays arabes*, one is left with the impression of a legal

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<sup>1</sup> I make this argument in greater detail in B. Dupret, *Positive Law from the Muslim World: Jurisprudence, History, Practices* (Cambridge, UK: Cambridge University Press, 2021).

technique whose adoption and use are devoid of historicity and of disembodied legal systems, disconnected from the societies they are supposed to normatively organize. This may well be the case from an anthropological point of view, but then it would have to be documented. And if this was not the author's conviction, it would have been necessary to systematically place legal developments in their social, political and religious context.

The choice to depict law in isolation from the society in which it was practiced is both reflected in and reinforced by the limited use of case law. The author explains this quite convincingly, arguing essentially that access to sources is difficult, if not impossible. Nevertheless, the impression remains of a dogmatic law applied in a quasi-mechanical fashion by magistrates who are, to use Montesquieu's expression, no more than the mouth of the law, to passive and totally subjugated agents. In my previous research, by contrast, I have argued that we must understand law in the Arab world as a social, practical and contingent achievement and performance that is fundamentally contingent.<sup>2</sup> Can legal norms be separated from their practice?

In conclusion, this book represents a considerable undertaking, and will prove of major use to scholars interested in law, even if only law on the books, in Arab societies. It is my hope that it will be translated into English.

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<sup>2</sup> Baudouin Dupret, *Adjudication in Action: An Ethnomethodology of Law, Morality and Justice* (London: Routledge, 2006).

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