

The Concept of Law: A Western Transplant?

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The argument of this Article is based on positivist postulates (principally from Hart) defining law as the union of primary rules (social norms) and secondary rules (of recognition, change and adjudication). Taking the presence of rules of change to be decisive for the appearance of legal orders, the author first looks for their origins in the Western world. Romans were the first, in the Western world, to develop a legal system with a clear rule of change, the possibility of a new statute abrogating an old one. This Western concept of law has been exported by Western colonialism to America, Asia (especially India), and Africa, transforming social (and customary) rules into laws thanks to the use of a Roman frame.

While Jewish, Chinese and Islamic legal systems also fit this definition, their rules of change were not identical to the Roman ones (because of their stress on interpretation rather than direct change). However, these other systems were not as successful as Roman law, which was linked historically with imperialism and colonialism.

INTRODUCTION

Alan Watson's idea of legal transplants has many facets and, for this reason, has encountered both success and a host of critics.¹ This Article proposes that the globalization of law is an old phenomenon, born with the expansion of Roman law and centered upon what has become the Western concept of

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¹ Richard L. Abel, *Law as Lag: Inertia as a Social Theory of Law*, 80 MICH. L. REV. 785, 793 (1982); Pierre Legrand, *The Impossibility of 'Legal Transplants'*, 4 MAASTRICHT J. EUR. & COMP. L. 111 (1997).

law, as analyzed by Kelsen and Hart. Provoked by the recent progress of historical studies of legal colonialism, this theoretical hypothesis (which does not include a case study, but does rest on empirical data) runs against the well known conception of legal families, or legal traditions, which have developed separate patterns of law in the different areas of the world. It focuses on Roman law and Western legal ideology, but it does not imply any positive or negative value judgment about this "imperialism." As a radical hypothesis, it needs, of course, to be nuanced, and it recognizes exceptions.

I. THE ARGUMENTS FOR THE HYPOTHESIS

In order to discuss legal transplants, we need a definition of law that can itself be transplanted in space and time. Probably influenced by a Western bias, we suggest a minimal definition of law, look for its origins in Roman legal history, and study how this definition of law has been used to recognize customs as legal norms in Europe, Asia and Africa.

A. The Minimal Definition of Law

One might think that there is an essence or nature of law, and that the definition of this common idea can be reached — either by way of revelation or by means of reason — by all peoples and by all nations. Positivists reject this way of thinking. Advocates of natural law, however, indeed assert that positive law exists in a formal sense, because they think there are two sets of law (natural vs. positive); positive law is a common denominator that jus-naturalists and jus-positivists share. Secondly, we can look for a minimal platform that is shared only by positivists: the separation between law and legal science, law being defined as a set of binding rules of conduct. It is difficult, however, to go beyond this minimal consensus without contradiction. A third method is to choose a definition of law "stipulated" just for this specific research project.² Here the problem is that the arbitrary choice of definition carries the risk of disqualifying the research project itself, which is seeking to compare different societies in the past: a broader definition (asserting that every society has its law if there are means of coercion by courts

² DENNIS LLOYD & M.D.A. FREEMAN, *INTRODUCTION TO JURISPRUDENCE* 40-42 (7th ed. 2005), are opposed to a definition of law suited for a particular use, or to an "essentialist" definition, like Kelsen's normative one, valuable for all legal orders. We would prefer to qualify this second definition as "formalist," because it does not suppose an "essence" of the content of laws or of legal institutions.

or community sanctions) may underestimate the differential contents of law that are the basis of comparison, whereas a narrower one may constrain the research to very limited areas (culturally neighboring societies).

Without disregarding all of these methods, we prefer to look first at the contemporary empirical situation and try to ascertain what its historical origin is. Today the identification of a legal rule depends on its link with a legal order, thought of as a hierarchy of norms. Each rule can thus be recognized as having been created in a valid way according to the constitutional scheme. The fact that the norm is part of a legal order makes it a legal norm.³ Although contested by the advocates of pluralism, this definition of legal rules connects them to states. Notwithstanding the progress of international law, let alone global law, and the claims for recognizing infra-state legal orders, Kelsen's identification of the legal order with the state has triumphed during the 20th century. The whole world is now almost exclusively composed of about 190 states, members of the United Nations. With law being auto-produced and auto-authorized, any legal rule is defined in relation to a state legal order. Historically, there is no doubt that the scheme of the modern Western state has been extended, by imperialism, to the whole world, and this phenomenon is already a clue to a massive and successful legal transplant from Europe to the other continents.⁴

When we look back at European history, we agree with many historians that this modern state — including internal and external sovereignty, the direct power of rulers to raise armies, impose taxes and legislate for subjects, and the impersonality of authority beyond the succession of rulers — was created during the 16th and 17th centuries, together with other aspects of modernity.⁵ This idea of a progressive formation of modern states supposes that, for a long time, polities were not states (or complete ones) and seems at first to claim to handicap Kelsen's theory. But Kelsen has never rejected the idea of what he called "decentralized orders" preceding states, in which rulers let their subjects create and use their own legal rules. When positivists argue that only law can create legal rules, the problem for historians is to identify the first material constitution organizing the creation of legal rules.

3 HANS KELSEN, *GENERAL THEORY OF LAW AND STATE* 110-25 (Anders Wedberg trans., 1949).

4 We are not saying that there were only Western states in history, but that colonialism and imperialism have imposed the Western model of the state all over the world.

5 GIANFRANCO POGGI, *THE DEVELOPMENT OF THE MODERN STATE* 60 (1978); David Held, *The Development of the Modern State*, in *FORMATIONS OF MODERNITY* 78 (S. Hall & B. Gieben eds., 1992); CHRISTOPHER PIERSON, *THE MODERN STATE* 31 (2004).

This is why we prefer to refer to Hart's distinction between primary rules and secondary rules — of recognition, change and adjudication — that are decisive when speaking about the existence of "law."⁶ Law, and not prescriptive rules or practices, exists when rules can be identified as such and changed by a foreseen mechanism.

We do not underestimate the importance of a rule of recognition, but we think that the means of identification of law are subjective and circular: all that judges and jurists deem to be law is seen as legal. From a historical perspective, we think that the rule of change is the most decisive, because it supposes an auto-production of law and the beginnings of a separation from other prescriptive systems (religious, moral, or even political) which can also be used by judges in processes of adjudication. The positivist principles, which see law as a human artifact or a technology that was invented in the past, lead us to reject the common adage "*ubi societas, ibi jus*" (if there is a society, law will be there). We think there were societies or polities without law, because in many situations in antiquity prescriptive rules (or primary rules) were not accompanied by rules of recognition, change and adjudication.

Our hypothesis is based upon the importance of the rule of change for distinguishing law from other social rules. Social rules, for example regarding the formation of families by marriage, can of course change. But a legal rule about marriage is something else, because it can be recognized, adjudicated and replaced by another rule, the possibility of which was already foreseen during the creation of the first norm. Law permits the change and can organize or channel it. In some way, legal rules are interchangeable. When discussing rules of change, which turn law into something essentially dynamic, Hart considered only explicit rules empowering some authority or entity to create new legal rules (for example, a legislative process to create new rules). We think that there can also be implicit rules of change, and this is proved by the more or less quick succession of different legal rules applying to the same object. Positivist analysis might view the interpretation of a legal rule (if such an interpretation is authentic, that is, it is likely to be recognized and adjudicated) as another means of change. If interpretation is strictly delimited and cannot lead to overturning the legal rule, the rule of change is weaker than in the case where interpretation permits a true abrogation of the interpreted rule. There is therefore a possibility that different tracks of change can coexist and change can be of variable intensity: the explicit track can consist of a legislative process, or of the power given to judges

6 HERBERT LIONEL ADOLPHUS HART, THE CONCEPT OF LAW 92-94 (1961).

to overturn the rule declared in a previous case. The implicit track can be proved by the appearance of new rules derogating the previous ones; a strong rule of change permits a complete abrogation of all existing norms, a weaker rule of change sees some norms as immutable.

If we go back to the most antique sources of modernity, Jewish, Greek, Roman and Christian origins are seen as decisive factors in the emergence of Western civilization. The question is, then: when for the first time do we find a legal order with explicit rules of change?

While it can be said that Jewish law knew rules of change, we doubt that these rules had an influence upon the formation of the concept of law in Europe of antiquity. The Greeks seem better placed as inventors of the Western concept of law, with their legislators (Lycurgus, Draco or Solon), their epigraphic laws (for example, the law of Gortyn), and their concept of *Nomos*. But we know that Greek laws were incomplete, not only because we lack information, but also by their very nature. The intervention of legislators was used as a revolutionary means to resolve social and political crises, notably concerning the land problem. When the *Nomos* was first written down (this was not the case in Sparta), it was accompanied by prohibitions against change. We agree with Giorgio Camassa, who says that the question of a rule of change could not be resolved with unwritten customs: these customs could change, but change was not identified and dated and, because of this absence of a rule of change, these customs were not legal rules.⁷ The writing of customs is a step towards the invention of legal technology. But, in archaic Greece, this first step was taken hesitantly: the first legislators tried to prevent the change of law. As Camassa has written, such a situation (open to change, but reluctant to permit it) was paradoxical: the rule of change had to be fully admitted. Even in democratic regimes like Athens, where the people's assembly had the power to vote on laws, changes do not seem to have been very frequent.⁸ The field of law was also limited to a number of specific matters, and many subjects were left without a precise legal frame: property rights were ascertained, but not defined or granted with a particular right to obtain justice; family rules were largely governed by social norms of conduct. For the most part we do not know which rules the Athenian courts applied or recognized as legal. Add to this the fact that the Greeks did not have a special class of jurists, and we could say that although they made decisive progress on

7 Giorgio Camassa, *Verschriftung und Veränderung der Gesetze, in RECHTSKODIFIZIERUNG UND SOZIALE NORMEN IM INTERKULTURELLEN VERGLEICH 97* (Hans-Joachim Gehrke ed., 1994).

8 STEPHEN C. TODD, *THE SHAPE OF ATHENIAN LAW 294-95* (1993) discusses the process of *Nomothesia* in the 4th century BC.

the path from a pre-law⁹ to law, they did not reach the stage of law's separation from other prescriptive rules.

B. The Roman Invention of the Western Concept of Law

Rome was different. Not only is there common agreement on the fact that the Romans were the first to create and develop a science of law by giving birth to a specialized class of jurists, with origins in the college of pontiffs, but we also agree with Aldo Schiavone that the Romans were the true inventors of the Western concept of law.¹⁰ That there was, very early in Roman history, the idea of *Jus* as something special known to the pontiffs, and that the Law of the Twelve Tables (450 BC) represented a conjunction of the Greek influence of *Nomos* (the law voted by an assembly) with this jurisprudence model, were decisive factors in endowing this law with some features that cannot be found in Greek precedents. First, the Law of the Twelve Tables is of exceptional length (more than one hundred dispositions, according to most of the analysts) and scope (not only penal law, succession rights, and relations with neighbors, but also contracts, family rules, procedure and public law involving assemblies). It opens the way to changing the law through new interventions by the people, because it is the first "*lex rogata*" voted,¹¹ with two new tables (the eleventh and the twelfth) added subsequently and abrogated very soon in 455 BC by the "*lex Canuleia*," which abrogated the prohibition of mixed marriages between patricians and plebeians.¹² While it is neither a complete code of private law, nor a written constitution for the city, the Law of the Twelve Tables contained perhaps an explicit rule of legislative change; one article said that what all the assembled people of Rome had decided was considered to be "*jus*."¹³ In many ways, the text supposes an implicit rule of change, because it was accompanied by the 449 BC "*Valeriae Horatiae*" laws permitting plebeians to vote in plebiscites likely to create

9 We use the expression of LOUIS GERNET, *DROIT ET INSTITUTIONS EN GRECE ANTIQUE* 9 (1982).

10 ALDO SCHIAVONE, *IUS. L'INVENZIONE DEL DIRITTO IN OCCIDENTE* 5 (2005), alludes to the false extension of the Roman paradigm of law to the Egyptian or Mesopotamian codes of rules. Contrary to Schiavone, we do not argue that the Romans were the only inventors of law, but only that their concept of law was transplanted to most of the rest of the world.

11 FRANCESCO DE MARTINO, *STORIA DELLA COSTITUZIONE ROMANA* 307-08 (1972).

12 CIC. DE REP. 2.63; LIV. 4.1, 4.6; DIG. 1.2.2.4.

13 "*in XII tabulis, legem esse ut quodcumque postremum populus iussisset id ius ratumque esset.*" LIV. 7.17.

new legal rules binding on all the people with the accordance of the Senate,¹⁴ followed by a series of legislative changes attesting to the union of primary and secondary rules of what was now a legal order. The Roman lawyers could begin to think about the "sources" of law, which entails the assumption that legal rules can be created or changed.

While legal historians tend to minimize the role of statute law in the development of Roman private law during the republican era, it should be noted that the approximately 800 laws enacted during this period testify that this rule of change was henceforth integrated as never before in Greek cities. Add to this the extension of the field of private law, the strong ascertainment of property rights — the rules about "*mancipatio*" and "*usucapio*" being clues to a more advanced stage of reflection about ownership than in the past — and the importance of recourse to the judiciary (in fact reserved to a very limited number of persons), and one can justify the argument about the invention of the Western concept of law, that is, the predetermined possibility of a new rule abrogating the old one. Of course, this openness to change developed with imperial centralization and the development of the legislative power of emperors. When, at the beginning of the 3rd century CE, Ulpian wrote the maxim "*Quod principi placuit legis habet vigorem*" (what the emperor has decided has the force of law),¹⁵ one could say that the Roman legal order had come to recognize a broad possibility of legislative change, without underestimating the power of legal interpreters (the "*Prudentes*") in creating new norms.¹⁶

Furthermore, the foundation of a vast territorial empire by the Romans, which included cities of the Greek and Oriental worlds at the same time, as well as peoples organized in tribes in Western Europe and Africa, provoked new developments. Accustomed to recognizing the rules of the other Latin cities of Italy — by a system of "*isopoliteia*" inside the Latin League — the Romans continued to apply the rules of Greek or Hellenistic cities to their subjects, who were considered foreigners ("*peregrini*"). In Egypt, Roman papyri allude to a "law of Egyptians" that seems based on Greek rules rather than on customs from Pharaonic times.¹⁷ Romans also conceded to Jews the right to follow their own rules and to have special courts until the

14 MICHEL HUMBERT, *INSTITUTIONS POLITIQUES ET SOCIALES DE L'ANTIQUITE* 262 (1989).

15 DIG. 1.4.1.

16 G. INST. 1.1-1.7.

17 JOSEPH MELEZE MODRZEJEWSKI, *DROIT IMPERIAL ET TRADITIONS LOCALES DANS L'EGYPTE ROMAINE* 384 (1990).

end of the 4th century CE.¹⁸ Even when all the free inhabitants of the Empire became Roman citizens, by an edict of Caracalla in 212 CE, the application of Roman law was limited by local rules, including tribal ones in North Africa, as proved by the Table of Banasa.¹⁹ Roman law had thus supplied a rule of recognition designed to integrate local rules (analyzed as laws, even when they were actually customs of peoples not organized in cities) into the Roman legal order. Roman law therefore provided the model for the creation of Canon law by the Christian Church.²⁰ It was also late Roman law, as compiled in the Justinian Code and Digest, that built a theory of customary rules, a theory likely to be used in other times and circumstances.

C. Roman Law as a Frame of Reference for Medieval Customs

For a long time, European legal historians used to distinguish Roman and German components in the formation of legal orders in medieval polities. It is less often noticed that we know practically nothing, lacking any written proof, of the Germanic customs before the great invasions. What we call "barbarian laws" were ordered to be written by Visigothic, Burgundian or Frankish leaders willing to imitate the Roman legislators. They were written down, in Latin, in the 5th and 6th centuries CE, probably by clerks who knew something of Roman texts, especially of the Theodosian Code. We do not dispute that the content of these laws is not Roman — particularly the penal dispositions of the Salic Law with its tariff of compositions — but the entire legal frame is influenced by the Roman model. It is the Roman standard and its rule of recognition that served to transform some social norms of conduct — a relatively very small set of rules concerning the rights of persons and things, in comparison with the law of wrongs — into legal rules. We doubt that Germanic customs were really legal norms before this recognition

18 ALFREDO MORDECHAI RABELLO, *THE JEWS IN THE ROMAN EMPIRE: LEGAL PROBLEMS FROM HEROD TO JUSTINIAN* 144 (2000).

19 William Seston & Maurice Euzennat, *La citoyenneté romaine au temps de Marc Aurèle et de Commode d'après la Tabula Banasitana, étude de diplomatique*, in *COMPTE RENDU DE L'ACADEMIE DES INSCRIPTIONS ET BELLES LETTRES* 317 (1961).

20 Canon law is, of course, a religious law linked to immutable Christian dogmas. But this law is limited to some matters and relatively open to change, with the recognition of the legislative power of the pope and the admission of possible contradictions between the texts, which canonists have to resolve. For example, procedural rules of ecclesiastical courts have changed over time.

through the Roman concept of law.²¹ The very controversial application of the "personality of laws" system (every person judged according to the law of his father) supposes a kind of primitive legal order with a combination of Roman law, Canon law and these "*leges barbarorum*." Comparable phenomena have been observed in the writing of the Anglo-Saxon laws from the 7th to the 9th centuries, with the particular feature that these texts were written in a vulgar language.²²

We could further discuss medieval customs that developed in the center and north of France. Contrary to a mythology learnedly built by French legal historians since the 19th century, there is no written proof of the content of customs before the end of the 12th century. The word "*consuetudo*" (a Latin word from Roman legal literature) was first used for the taxes imposed by landlords, exactions often denounced as arbitrary, that are better qualified as orders than legal rules. Then custom (with a very vague meaning not always related to a determined territory) became a matter to be ascertained by royal courts, and the first books about local customs were written: *Très ancien coutumier de Normandie* (in Latin, between 1199 and 1223), *Conseil à un ami* by Pierre de Fontaines (between 1253 and 1259), *Livres de Jostice et de Plet* (between 1259 and 1270), and the well-known *Customs of Beauvaisis* by Beaumanoir (1283). All these books were written by judges or clerks familiar with Roman and Canon law as used after the Bologna renaissance of legal studies. Roman law, sometimes quoted at length, is the common horizon of these jurists, who created a customary law with the vocabulary and tools of Roman law. We agree with James Whitman that lawyers, city men, have imposed their conception of rights on the rural population.²³ Here again, we could say that there were only social practices inside the manors and the principalities before the validation by the Roman frame of reference with the accordance of royal power.²⁴ Lacking rules of recognition and change, oral customs cannot provide a legal order without the support of a relational law. In England, the common law took the place of this relational law,²⁵ known as "*jus commune*" in continental Europe. As a legal order built by the royal

21 MAURIZIO LUPOI, THE ORIGINS OF EUROPEAN LEGAL ORDER 25 (A. Belton trans., 2000).

22 PETER WORMALD, THE MAKING OF ENGLISH LAW: KING ALFRED TO THE TWELFTH CENTURY (1999).

23 James Q. Whitman, *Western Legal Imperialism: Thinking About the Deep Historical Roots*, 10 THEORETICAL INQUIRIES L. 305 (2009).

24 Jacques Krynen, *Voluntas domini Regis in suo regno facit ius. Le Roi de France et la coutume*, in EL DRET COMU I CATALUNYA 59 (A. Iglesia Ferreios ed., 1998).

25 HENRY PATRICK GLENN, ON COMMON LAWS 8-29 (2005).

courts and amenable to change, it was not dissimilar to Roman law. With the help of Canon law, the Western concept of law was thus transformed and interpreted, in different ways, during the Middle Ages: at the beginning of modern times, the frame was concurrently ready for the exportation of these laws to colonies and the rise of modern states.

D. The Western Concept of Law Exported to Asia

In the history of legal colonialism, there is a great difference between America and Asia. Western settlers considered the American continent to be barely inhabited, populated by Indians weakly organized in polities without proper rules and likely to be Christianized. While there was a discussion about Indians as persons with rights — the famous Valladolid debate — there was no debate over the recognition of personal laws of the colonized people. The *Derecho Indiano* is a Spanish creation with a few special rules for Indians that are not the social customs of the indigenous population. In Asia, the situation was quite different: Settlers were confronted by organized polities with religious and cultural rules, which in some places were influenced by Islamic law, a legal order with a rule of recognition. They understood rather quickly that they could not evangelize all these people. The invention of personal status, preceded at times by the Islamic treatment of the "People of the Book" (*dhimmi*), was adopted as policy by the Portuguese²⁶ and Dutch colonizers in their Asian factories. The most spectacular case is that of Ceylon, where the Dutch at the beginning of the 18th century ordered the Tamil custom, called "*Tesawalamai*," to be set down in writing by the local chiefs. This text was first written in Dutch before it was translated into Tamil, then into English to be used by the British colonizers.²⁷ Add to this the fact that the Dutch introduced, especially in the law of things, their own laws, the so called "Roman-Dutch law," we could argue that they transformed social norms, which were not binding rules before the local courts, into law, with the assistance of the Roman concept of law. In Indonesia, the Dutch also fabricated a legal tradition by recognizing different

26 In Goa, since the beginning of the 16th century, Hindus could be judged by the High Court according to their customs written in a "*foral*." LAUREN BENTON, *LAW AND COLONIAL CULTURES, LEGAL REGIMES IN WORLD HISTORY 1400-1900*, at 116-19 (2002).

27 L.J.M. COORAY, *AN INTRODUCTION TO THE LEGAL SYSTEM OF SRI LANKA* 141-42 (2003).

local customs integrated in the concept of "*adat law*" and artificially separated from Islamic law.²⁸

It was the same story with British domination in Bengal. In 1772 Governor Warren Hastings decided to create British courts (with English-speaking judges) in India, and also to use the *Koran* for Muslims and Hindu law for Gentoos. Regarding Hindu people, many legal historians today think that this Hindu law never existed in ancient times,²⁹ especially before the arrival of foreign conquerors, first the Great Moguls, then the British. It is not clear whether the so-called "laws of Manu" were truly binding rules, and it has been shown that courts used local customs in the Indian polities of the Middle Ages and the modern era. By translating the Indian and Muhammadan texts, the British jurist William Jones transferred a Western concept of law — a common law concept, with many borrowings from Roman law, like the title of "Digest of Hindu Law" — into a pre-legal system whose "canonical" texts were not conceived as binding laws. The works of Henry Sumner Maine, the development of the Anglo-Hindu Law, and the writing of local customs (the Customary Law Series of Punjab initiated in 1865) were the logical consequences of this massive legal transplant.

E. The Western Concept of Law Imposed in Africa

A comparable process seems to have occurred in the French, Belgian and British colonies in Africa, despite the arguments by many specialists in favor of a true customary law, even an unexpressed (or mute) one. On the contrary, other legal anthropologists concede that the writing of books about local customs by the French colonizers — a rather late endeavor ordered by the Governor of Occidental French Africa in 1931, giving birth to the publication of 28 customs — yielded rather middling results.³⁰ Etienne Le Roy writes that the French jurists formulated rules in cases where there was no rule, imagining it using Roman legal frames. Is it not possible that social norms — far from being binding legal norms in the absence of customary courts organized before French colonization — were metamorphosed into laws with the transplant of the Roman concept of law? And the same might be true of the British colonies, where there were no proper laws before the

28 ROBERT W. HEFFNER, CIVIL ISLAM, MUSLIMS AND DEMOCRACY IN INDONESIA 33 (2000); JOHN R. BROWN, ISLAM, LAW AND EQUALITY IN INDONESIA 13 (2003).

29 WERNER F. MENSKI, HINDU LAW: BEYOND TRADITION AND MODERNITY 81-82 (2003).

30 Etienne Le Roy, *La coutume et la réception des droits romanistes en Afrique Noire*, in LA COUTUME, RECUEIL DE LA SOCIÉTÉS JEAN BODIN 117 (1990).

introduction of the common law, and where the few restatements of customs were only written in the 1960s and 1970s.³¹

II. OBJECTIONS AND NUANCES

We do not underestimate the risks of an exaggerated hypothesis and want to forestall some objections. Critics might say that we are transplanting our own Western and positivist conception of law instead of explaining the historical transplant of the concept of law, with problematic consequences: the denial of oral law, confusion between legal phenomena and state law, a Eurocentric vision, distortion of religious laws, complete indifference towards legal cultures, and (the worst reproach for an historian) a static, a-historical conception. Let us try to give some answers.

A. Only Written Law or Only State Law?

We do not contest that it is difficult to align pure oral law with a definition based upon the rules of recognition and change. While these secondary rules — like primary rules — can be formulated, known and transmitted by oral methods, historians need written proofs to assert that these rules are recognized as legal ones and that an old rule has been substituted by another. Conceivably, judges could recognize and change rules without a clerk writing down the judgments. John Baker has written that "there was a common law before there were any law reports at all."³² In other, especially more remote, periods we can conceive of an informal law functioning with oral sources. But we need written clues to know this for a fact and to be sure there were binding rules recognized as law. If we have only literary sources — as is the case for some periods and places of Archaic Greek history — that have evoked the recognition and the change of such binding rules, we can say we see oral law.³³ But if we have a completely oral civilization we can

31 SALLY FALK MOORE, SOCIAL FACTS AND FABRICATIONS: "CUSTOMARY" LAW IN KILIMANJARO 90 (1981); MARTIN CHANOCK, LAW, CUSTOM AND SOCIAL ORDER: THE COLONIAL EXPERIENCE IN MALAWI AND ZAMBIA 140 (1985); Terence Ranger, *The Invention of Tradition in Colonial Africa*, in THE INVENTION OF TRADITION 254 (Eric Hobsbawm & Terence Ranger eds., 1983).

32 JOHN HAMILTON BAKER, THE LAW'S TWO BODIES: SOME EVIDENTIAL PROBLEMS IN ENGLISH LEGAL HISTORY 3 (2001).

33 For example, the oral law of Lycurgus in Sparta, known through literary sources, was recognized by the city courts and perhaps changed.

only imagine this oral law and, for a positivist, imagined law is not law. If an historical fact can be proved by testimony, we cannot infer from the absence of testimony the probability of a fact.

What about the legal anthropology of "primitive" peoples? We are not the first to discover the debate between anthropologists and lawyers about the definition of law.³⁴ If we read Malinowski, and before him an advocate of legal sociology, Ehrlich,³⁵ primitive people have socially binding rules without writing, without judges, or even without a centralized power. If we adopt Hart's criteria of secondary rules, we cannot say that what they have is law. All sanctions or penalties are not legal ones (they can be legitimized by other kinds of social acceptance), just as all forms of ownership are not what lawyers call "property" (land cultivation does not necessarily require the ascertainment of rights). There is a hiatus between a broad conception of (informal and informed) "custom" and a vision of law as a delimited and identified phenomenon. Of course, we can use some expressions like a "minimum of law"³⁶ to qualify socially binding rules with a content comparable to legal institutions (like marriage, succession, property, crime or debt), but we cannot establish a formal link between two different prescriptive orders. As we have already said, legal anthropology can help us understand the "pre-legal" phenomena or the prehistory of social rules, the content of primary rules — in that sense, it is not "lawless" — but not "law" without the invention of legal technology, that is, the secondary rules. Custom, as a social norm which does not require courts and documents, is not the same as customary law, which requires a legal order (including judges and statute laws that recognize the content of customs as legal).³⁷ Recently, the courts of Papua New Guinea have experienced great difficulties in defining and proving

34 Brian Tamanaha, *An Analytical Map of Social Scientific Approaches to the Concept of Law*, 15 O.J.L.S. 501 (1995).

35 EUGEN EHRLICH, *FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW* 10 (W.L. Moll trans., 2002): legal institutions like marriage, family or ownership did exist outside rules applied by the courts (but are they not examples of social norms rather than legal phenomena?).

36 BRONIOSLAW MALINOWSKI, *CRIME AND CUSTOM IN SAVAGE SOCIETY* 14-15 (1970). *But see* E. ADAMSON HOEBEL, *THE LAW OF PRIMITIVE MAN* 208-09 (1954) (criticizing Malinowski for fusing law and social norm).

37 We disagree with the description of a so-called primitive law consisting only of customs — "including customary law," writes RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* 178 (1981) — and defined as a "complex, slowly changing, highly decentralized system of exact rules," *id.* at 146-78.

the "widespread applicability" of customs and, in many cases, have preferred to "return" to Westernized common law.³⁸

We also do not think that such a conception is the fruit of confusion between law and state,³⁹ or between the discovery of writing and the discovery of law. Here we rely on many specialists in ancient Near Eastern law and Greek law. Are we sure that the so-called Code of Hammurabi, including a final command not to change the rules forever, was a real law and not a rhetorical (or a "platonian") program?⁴⁰ Can we speak of laws when discussing oral orders (or decrees) of the pharaohs, when there was no legal code before the Demotic period?⁴¹ Is it not arguable that the Cretan laws of Gortyn were not enforceable statutes, let alone accessible law created for everyone in a society where only the aristocrats could read such a document, but an immovable monument symbolizing the power of a few rulers?⁴² We cannot answer these questions definitely, only refer to the opinions of the specialists quoted, but these debates show that the invention of law is not a logical consequence of literacy (there were historical polities without law), nor a question of ethnocentrism. We see also that law may have appeared in small polities that in general are not considered states, whereas it may have been absent from great empires. Of course, legal rules do not need to be codified to pass the test as secondary rules. Codification consists of not only writing down legal rules, but bringing them together in a consistent corpus. Although never codified, the common law was written down (for example, in law reports) and consisted mainly of judge-made rules that were likely to be changed.

B. Only a European-Centered Form of Law?

To rebut any accusation of ethnocentrism, we find further support in recent works about the history of Chinese law. Contrary to the literary and late

38 GRAHAM HASSALL & CHERYLL SAUNDER, *ASIA-PACIFIC CONSTITUTIONAL SYSTEMS* 173 (2002).

39 Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law*, 39 *AM. J. COMP. L.* 1, 8 (1991); Rodolfo Sacco, *Mute Law*, 42 *AM. J. COMP. L.* 455 (1995).

40 Martha T. Roth, *The Law Collection of King Hammurabi*, in *LA CODIFICATION DES LOIS DANS L'ANTIQUITE* 31 (Edmond Levy ed., 2000) writes that "it is finally a text not a codified body of laws."

41 1 RAYMOND WESTBROOK, *A HISTORY OF ANCIENT NEAR EASTERN LAW* 93, 181, 255, 821 (2003).

42 James Whitley, *Cretan Laws and Cretan Literacy*, 101 *AM. J. ARCHAEOLOGY* 635 (1997); MICHAEL GAGARIN & DAVID COHEN, *THE CAMBRIDGE COMPANION TO ANCIENT AND GREEK LAW* 309 (2005).

tradition asserting that there had been laws since the Shang dynasty (1766-1112 BC) and the appearance of the first little polities of China, legal historians today think that only social norms of the family clans (called "zu") existed, even under the Zhou dynasty (1111-249 BC). Though there were forms of literacy, there were no secondary rules of recognition (in the absence of any specialized clerks or a professional class of jurists, but also of courts outside the domestic justice of the "zu") and no rules of change (social customs were considered eternal and perpetual). The situation changed between the 6th and 3rd centuries BC: literary sources mention more precisely the writing of codes inside polities (there are allusions in Confucius to the resistance of the "zu" towards this new expression of royal power), and archaeological excavations carried out since the 1970s have found bamboo slips with precise rules addressed to royal officers. These written sources, especially in Hubei tombs (area of Yunmeng, 4th and 3rd centuries BC), prove the existence of processes, of judges, and — last but not least — of old and new rules, which assumes the existence of rules of recognition and rules of change.⁴³

Is the Chinese example not proof that literacy can precede the invention of law by many centuries and, furthermore, that this legal technology could be known outside Europe, without any link to Roman law and with very different features? While Chinese law is a real legal order, sustained by a centralized power, and in some regards a "learned law," with the so-called School of Legists, but without the development of a class of professional jurists, nevertheless it is primarily a penal law, without rights (especially property rights) for subjects, and very different in its structure from Roman law.⁴⁴ Furthermore, Chinese law did not undergo a period of colonial extension comparable to that of Roman law.⁴⁵ Traditional Chinese law appears to be a legal system with explicit rules of change (by the legislative power of the emperor), but inclined to a rather cautious use of these rules (with the confirmation of many articles of the penal code during the successive dynasties).⁴⁶

Can we say, then, that we have come full circle and returned to the

43 YONPING LIU, *ORIGINS OF CHINESE LAW: PENAL AND ADMINISTRATIVE LAW IN ITS EARLY DEVELOPMENT* 202-32 (1998).

44 GEOFFREY MACCORMACK, *TRADITIONAL CHINESE PENAL LAW* 12-13 (1990).

45 MICHAEL BARRY HOOKER, *A CONCISE LEGAL HISTORY OF SOUTH-EAST ASIA* 72 (1978): "In South-East Asia the impact of classical Chinese law was almost wholly confined to what is now Vietnam."

46 BRIAN E. MCKNIGHT, *LAW AND ORDER IN SUNG CHINA* 334 (1992).

classical conception of different "legal traditions" in the world?⁴⁷ We do not think so. First, because we do not conceive of primitive rules in "chthonic" systems as being legal orders: they lack judges and secondary rules, let alone written sources. Second, we see noticeable differences between the legal history of China and India, ordinarily presented as two old legal traditions. As mentioned above, many specialists today question whether the *Dharmasastras*, especially the so-called laws of Manu (probably written in a more recent period than the historical period in which laws appeared in China), were really binding legal norms, or only rules of conduct proposed by the Brahmin elite in a rhetorical form, perhaps comparable to Babylonian or Cretan texts.⁴⁸ There were no great and stable powers in antique and medieval India, likely to develop a system of courts applying general and written rules, as was the case in China. In smaller polities, judges decided apparently with great liberty, referring to local customs (and never to the *sastra*⁴⁹); they were using binding social norms, orally transmitted, but these norms were not formalized as laws with means of recognition and change (we have no evidence of a formalized process of change in the texts and we cannot suppose it in absence of any testimony). The link between religious norms and social norms was also more important than in China, even if what has been called Hindu law was not, as Islamic law later became, the personal status law solely of "orthodox" Hindus. The same is true of "Buddhist law," which did not exist in India, but developed in southeast Asian kingdoms in the Middle Ages. The links with the laws of Manu have long been noted, and some specialists speak about a "reception of Indian law" in Pagan or Angkor kingdoms. But the borrowing refers to the passages of *Manusmṛti* concerning the king, rather than to technical legal institutions. It might be said that there was a reception of legal ideas, mixing religion, social

47 HENRY PATRICK GLENN, *LEGAL TRADITIONS OF THE WORLD: SUSTAINABLE DIVERSITY IN LAW* (2000).

48 Ludo Rocher, *Law Books in an Oral Culture: The Indian Dharmasastras*, 137 *PROC. AM. PHIL. SOC'Y* 254 (1993), insists on the contradictions between different rules on the same subject in the so-called laws of Manu, without criteria to choose between these rules by way of recognition or change (there is no explicit or implicit track of change); Richard W. Lariviere, *Dharmasastra, Custom, "Real Law" and Aprocryphal Smṛtis*, in *RECHT, STAAT UND VERWALTUNG IM KLASSISCHEN INDIEN* 109 (Bernard Kölver ed., 1997); WERNER F. MENSKI, *HINDU LAW, BEYOND TRADITION AND MODERNITY* 131 (2003); *THE LAW CODE OF MANU*, at xxxviii-xli (Patrick Olivelle ed., 2004).

49 HOOKER, *supra* note 45, at 110-11; DONALD RICHARD DAVIS, *THE BOUNDARIES OF LAW: TRADITION, "CUSTOMS" AND POLITICS IN LATE MEDIEVAL KERALA* 83, 119, 149, 204 (2002).

norms and politics, but not of an "Indian law" which was not formalized.⁵⁰ We prefer to talk about pre-legal elements (doctrinal ideas about crimes, torts, debts, or acquisition of property) in the *Dharmasastras* that were transformed in law by misinterpretation, first by Muslims, then by British rulers. That leads us to the place of systems combining law and religion and to the role of empires in the creation of legal pluralism.

C. Only Secular Law?

Just as it is possible to talk about the invention of law by the Romans or by the Chinese in antiquity, without taking into account a Roman or Chinese state (in the modern sense of the word), there is no reason to link the secondary rules only with secular systems of law. Of course, the rule of change may encounter the desire for perpetuity common to many religious dogmas. But religious norms can admit evolutions and even abrogation clauses: in order to endure, the religious authorities are likely to concede adaptations of "living" dogmas to changing times. Furthermore, some religious systems try to impose on their believers (especially with the hereditary transmission of religious character) a personal status that mixes ritual and social norms, the latter very comparable to secular laws including sanctions and judges.

There are two well-known and evidently linked examples of systems that combine religious and legal norms in this way: Jewish and Islamic law. The case of Christianity is different: Canon law combines religious prescriptions and legal norms, but it is limited to specific aspects of life (marriage, sacraments, clerical status); for the day-to-day legal rules, Roman law became the source of reference for Christians at the end of antiquity (in the barbaric kingdoms, the Church "*vivit lege Romana*," "lived with Roman Law").⁵¹ The Jewish and Islamic examples show us that the concept of law, based on secondary rules, is not limited to the Roman or European legal orders, even if the success of "transplants" was not the same in the different cases.

Regarding Jewish law, ritual and "civil" sections are admittedly mixed

50 Andrew Huxley, *The Reception of Buddhist Law in S. E. Asia 200 BCE-1860 CE*, in *LA RECEPTION DES SYSTEMES JURIDIQUES: IMPLANTATION ET DESTIN* 139 (Michelyu Doucet & Jacques Vandelinden eds., 1994). This thoroughly documented study is founded upon the (unproved) proposition that no rice plain society could survive without legal rules.

51 *JEWISH LAW IN LEGAL HISTORY AND THE MODERN WORLD* 79-85 (Bernard S. Jackson ed., 1980) (opposing Canon law with this Roman referent and Jewish law in an "ivory tower").

in the *Halakha*. As Biblical law crystallized over centuries, the *Mishna* contained a narrative of change, and the Talmudic and Post-Talmudic literature was often analyzed as a "living body of law." We can therefore say that Jewish law was familiar with rules of change, or at least new interpretations of prior texts (note that this is not exactly the same thing as a legislative rule of change of the type present in Roman law, especially if there was no possibility of abrogating an old rule).⁵² The fact that Moses broke the Tables of Law and God had to remake them (and even change them a little) can also be analyzed as a relative openness to change. These characteristics of Jewish law permit it to maintain relations with other legal systems, especially recognition of Jewish courts applying personal status during the Middle Ages, or recognition by the Jewish written law of local (oral) customs. Of course, the lack of a Jewish "empire" prevented this concept of law (probably the oldest one outside Europe, and stateless during most of history) from triumphing as a legal transplant all over the world.

What Islamic law has in common with Jewish law is the double nature of the *Koran* as a religious and legal code. The two prescriptive spheres are present in this "sacred law," but they are not completely confused. Many religious duties or moral sins are not sanctioned by legal rules; the latter consist of a maximum of 600 verses out of a total of more than 6,000. While the *Koran* is God's laws and the *Hadīth* (forming the *Sunna*, the second source of Islamic law) is purported to be a faithful transcription of the speech and acts of Muhammad, many Islamic scholars admit that *Hadīth* were written down by the first Muslim jurists.⁵³ Generally speaking, Islamic law is considered a "jurists' law," a formative role having been played by the great schools (*Madhhabs*) that developed outside the organs of government during the first three centuries of the Islamic era. It was not a law "immutable in all its details," it "was not lacking of flexibility."⁵⁴ The idea of the "closure of the gates" of legal interpretation ("*Ijtihād*") is probably a very controversial simplification. For all these reasons, we do not see any difficulty in considering Islamic law as a legal order (at the same time one legal order for all the believers, and different legal orders corresponding to the diversity of Muslim polities) with secondary rules of recognition (especially by Qadi courts, which were not Weber's ideal type of arbitrators deciding freely, but judges reasoning with rigor) and

52 Menachem Elon, *The Legal System of Jewish Law*, 17 N.Y.U. J. INT'L L. & POL. 221 (1985); RELIGION, LAW AND TRADITION 152 (Andrew Huxley ed., 2002).

53 NOEL J. COULSON, A HISTORY OF ISLAMIC LAW (1964); YASIN DUTTON, THE ORIGINS OF ISLAMIC LAW, THE QUR'AN, THE MUWATTA' AND MADINIYAN AMAL (1999).

54 HAIM GERBER, ISLAMIC LAW AND CULTURE 1600-1840, at 8, 71, 123 (1999).

change (partly by the work of jurists to fill the gaps in God's law with the doctrine of "abrogation" of a given passage by another text,⁵⁵ partly by the intervention of political power, especially through the legislation or *qanun* of Ottoman sultans).

Not only is Islamic law additional proof that some legal orders were not Western ones (there are similarities between Western law, Chinese law and Islamic law, but also great differences), but with the Muslim conquests Islamic law also became a binding common law (especially in criminal matters, the penalties of the *Koran* being applied to all subjects of the Muslim rulers) and a "relational law" (to use Glenn's term), which recognized the personal status of conquered people. It is well-known that the status of *dhimmis* ("People of the Book") permitted Jews and Christians to keep their laws and courts (called "*Millet* courts") under Muslim rulers. In this case, there was no real problem of recognizing other legal orders. The question was more complex in regard to other peoples, whom Muslims considered to be infidel enemies ("*harbis*"), and who did not require a former legal order. This is why the Muslim sultans of India, then the Great Moguls, were so important in recognizing Indian *dharmasastras* as legal rules for the Hindus. In that case it was the Islamic concept of law that was transplanted and prompted, before the British intervention, the metamorphosis of Indian social norms into law. As a religious and legal system, Islamic law was less open to change than Romanized Western systems: that does not mean that it was less legal, but that the paths of change were different from Roman ones. Resistance, even today, was greater, for fear of changing what was considered immutable.

D. Only a Formal Frame Without Cultural Substance?

Legal transplants theory has also been accused — and this is easily applicable to our hypothesis as well — of focusing on rules written in statutes and denying the fundamental cultural character of legal interpretation. According to Pierre Legrand, legal transplants are actually impossible because norms are the meanings of the rules, the products of an interpretative community that is professionally immersed in a specific culture. On this approach, the transplantation of the Western concept of law, if proved, would be of no matter, because each culture would interpret its own law independently of other legal orders.

We are not convinced by this counterargument. Even if we concede the

55 BERNARD G. WEISS, *THE SPIRIT OF ISLAMIC LAW* 90 (2006).

fundamental role of interpreters in creating law (on the assumption that the textual statement of a statute law has no predetermined signification), we have to consider written rules as formulated by judges or other interpreters. Why can't these written rules, if imposed on a foreign country or imitated "verbatim" by a "donee" state (the two traditional methods of legal reception), be transplanted? The history of the exportation of the Napoleonic Code shows that it was not only the text of its articles that was integrated in other legal orders, but also the legal interpretations given by French judges and scholars. Of course, these transplanted rules were transformed by the indigenous interpreters, but inside a legal order the same statement can also be interpreted differently by different authorities or diverse cultural "*milieux*."

While law "does not exist in isolation" from society and culture,⁵⁶ legal phenomena are also exportable tools, and the concept of law is a technology that can travel from one area to another. We do not think that the transplantation of the Western concept of law — the most successful, but not the only one, as we have seen — was immune to cultural transfers and various acculturation processes. It was not a formal and empty concept transported as a vacuum tank. With the rules of recognition and change of the Roman model came a set of legal ideas embedded in all Western legal orders, at home and abroad: legal reasoning, conflicts of laws in time and space, use of statute law as a political tool, openness towards secularization . . . and to transplant these legal ideas there were professional jurists, judges and scholars, transporting their habits (and often their books, gowns and wigs) into the colonies. The transplantation of the Western concept of law is also a transfer of culture (imposed and sometimes chosen). As the Western world invented the features of Oriental culture (not by producing objective knowledge, but by transplanting a secularized and modernized intellectual structure onto Oriental phenomena),⁵⁷ it also created and codified a customary law that did not previously exist as law.

If culture is important in law, it is also an artificial product likely to be imported or exported, and it is a controversial argument to link the professional practices of lawyers with some pretended "national spirit." It is the same argument as Savigny's scheme, which sees custom as the mark of youthful law and law as a product of the people's consciousness. Cultures are not insuperable barriers between nations (some professional cultures are

56 LAWRENCE ROSEN, *LAW AS CULTURE* 5 (2006).

57 EDWARD W. SAID, *ORIENTALISM* 121 (1978).

transnational), and cultural arguments can be a pretext for refusing to see the impact of positive law upon jurists.

E. Only One Fundamental Event for Legal History?

Watson's theories have also been accused of overestimating inertia in law and separating legal phenomena from social, political and economic changes. This is a matter of *society and legal change* rather than one of *legal transplants*⁵⁸: admitting the existence of legal transplants means taking seriously legal changes decided by the political power or by the authorities qualified to create law. It does not encounter Max Weber's postulates about differences between legal ordinance and economic ordinance,⁵⁹ and can even be consistent with the economic history of institutional change.⁶⁰ On the contrary, the hypothesis is that there is no law without a rule of change, which reinforces the role of political powers rather than learned jurists. The hypothesis cannot be said to be the story of only one event, the massive transplantation of the Western concept of law linked with colonialism. Imposition of rules by colonial conquest is fundamental to the history of legal globalization, but we agree with Whitman on the idea of "deep roots" of imperialism, especially with the example of French written customs, a set of social norms drawn within the ambit of law through the double action of municipal, then royal authorities.⁶¹ Legal transplants of the concept of law form a history of pluralism, and we consider there to be, to use Patrick Glenn's term, a plurality of "common laws" transplanted abroad. These common laws, conceived as binding models with their specific rules of change (in religious laws more place was granted to interpretation and less to abrogative legislation than in the Roman model), were not exclusively Western, as is shown by the Islamic and Chinese cases. The legal technology was invented in different places, but the tracks of change (explicit or implicit, by way of abrogating legislation and case law or, in a milder form, by new interpretations deviating from the traditional) were not the same and, overall, the imperialism of Western rulers finally got the upper hand over their Chinese and Islamic

58 ALAN WATSON, *SOCIETY AND LEGAL CHANGE* 7-8 (2001). ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* 128-29 (1993) affirms, to the contrary, that the rule transplanted is often changed.

59 1 MAX WEBER, *ECONOMY AND SOCIETY* 311-12 (G. Roth & C. Wittich eds. & trans., Univ. of Cal. Press 1978) (1922).

60 DOUGLASS NORTH, *INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE* 103 (1980).

61 Whitman, *supra* note 23.

counterparts. The reason for the success of the Western model was not a stronger (let alone "better") rule of change, but the fact that Western powers imposed particular rules of change on the world with the construction of modern states. The story told here is not a simple one at all, nor is it a one-sided heroic narrative of the glory of Roman law. Not only were there other models of legal orders (with primary and secondary rules) outside Europe, but the Roman invention itself was transformed by national legal orders (English common law being the first, perhaps), then by the globalization of codifications (especially the Napoleonic Code) and British law (including common law and equity), and today probably by American hegemony (the third globalization of law, according to many analysts, following the Roman and the Napoleonic). This complex history is also not irreversible: the reign of Roman concepts is declining (as the component of Roman-originated rules in each legal system and the place of private vs. public law), despite the claims of the Neo-Pandectists, and the rise of a global soft law or the re-Islamization of some Muslim countries could perhaps pose a challenge to the Western concept of law.

We think finally that the hypothesis might be deemed too formal, but cannot be accused of essentialism; that it might be judged exaggerated, but not unworkable with the proposed nuances. Defining law as the encapsulated union of primary and secondary rules, an artifact invented in some places (perhaps without contacts, like coinage) at some moments of history, then transplanted abroad (particularly inside Europe, and subsequently by European colonialism), does not mean that law is a universal Roman grammar (as Savigny thought), or a Latin alphabet (a softer theory defended by Jhering about the permanence of Roman elements), but a technology of change: what has been transplanted today all over the world is (to paraphrase Jhering) a legal Saturn devouring its own children.