



HAL
open science

The Great Divide in Legal Discourse: Towards a Global Historical Ontology of the Concept of Positive Law

Baudouin Dupret, Gianluca Parolin

► **To cite this version:**

Baudouin Dupret, Gianluca Parolin. The Great Divide in Legal Discourse: Towards a Global Historical Ontology of the Concept of Positive Law. *State Law and Legal Positivism: The Global Rise of a New Paradigm*, 2021. halshs-03483675

HAL Id: halshs-03483675

<https://shs.hal.science/halshs-03483675>

Submitted on 16 Dec 2021

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.

CHAPTER 2

THE GREAT DIVIDE IN LEGAL DISCOURSE Towards a global historical ontology of the concept of positive law¹

Baudouin Dupret
Gianluca Parolin

Introduction

Yann Thomas (2002), tells us that a history of law is not of interest for its exposure of the social relationships that the law regulates, but for its description of what the law does to those relationships, mediated by categories, rules and procedures, and, consequently, of the transformations that it produces. In this sense, the law represents a very specific manner of systematically organizing reality, producing effects *outside the mere legal field*. What one could call the “efficacious formalism” of the law distinguishes it from other descriptive undertakings such as science or history. Again, as Yann Thomas puts it, the logic of the law cannot be reduced to the duality of facts/rules but requires that the law’s norms should reshape the facts that are referred to legal instances. According to Ian Hacking’s view of historical ontology, concepts, such as that of law, have a historicity, but that does not prevent them, in this historical context, meeting formal criteria and having specific characteristics. The rules of law are not only a discourse about reality: they have a formal logic, they represent a system, they have an efficacy.

The question then arises of how, at different times and in different places, the categories of what, for want of a better term, we call law have been formulated so as to grasp reality and act upon it. This task has been undertaken by a series of three recent books on legalism that link history and anthropology (Dresch and Skoda, 2012; Pirie and Scheele, 2014; Dresch and Scheele, 2015). These works explore the various traditions of formalism and the different uses of rules and categories to show both the irreducible contingency of normative phenomena and the fact that they share a family resemblance. If one accepts that there is a remarkable continuity in the human propensity to formalize and categorize the world, it is necessary at the same time to note the no less obvious differences in the methods of conceiving and implementing this process of efficacious formalization, but also in the finalities associated with it. In this respect one could speak of legal revolutions just as one speaks of scientific revolutions, to quote the title of a recent book by Jean-Louis Halpérin (2014). The idea of legal revolution suggests two things: one, substantial, is that there have been break points in how the world has been categorized in the legal sense; the other, of a more methodological nature, is that it would no doubt be useful to make good use, in the history of law, of what the philosophy and history of science and technology have continued to accumulate over several decades.

While there is no reason to exclude the idea that there have been many legal revolutions, we nevertheless put forward the hypothesis of a specific revolution between the eighteenth and twentieth centuries that affected the whole world and which – within the timescale proper to each place but also linked by dissemination effects – was characteristic of a Great Divide, *sensu* Foucault (e.g. Foucault, 1994), between an Ancient and a New legal Regime. This break point could be referred to as that of “positivization of the law”, referring to the gradual rise in importance of “legal positivism”, so well described by English jurist John Austin, who tended to equate the “law properly so called” with the rules emanating from the sovereign command of the state. This is a break point where, under the influence of modern utilitarianism and systemism,

¹ This chapter was written with the collaboration of Gianluca Parolin, from the Institute for the Study of Muslim Civilisations, London.

and their different tools, including codes and constitutions, the law has tried to completely and systematically organize the world, societies and men, with the virtuous objective of equality but also the less honorable objective of controlling bodies and souls. The modern state, itself a product of these legal constructions (and compared by Hans Kelsen, 1945: 189, to a national legal order), has become, thanks to this Great Divide, a global model consecrated in 1945 by the United Nations, whose 193 member states cover practically the whole world. With the positivization of the law, a whole new discourse formed, a new episteme, fashioning previously unseen categories as much as recycling old ones. The motivations that governed this positivization of the law are manifold and sometimes limited to mimicry and fashion, but today the phenomenon has left practically no part of the world untouched.

Something occurred during the “very long nineteenth century” (Raj and Sibum, 2015), between the Seven Years’ War (1756-1763) and the First World War (1914-1918), which led to a conception of normativity, linked to the nation state and its legal structuring, imposing itself all over a world in the process of globalization. This conception is directly inherited from the rationality of the Age of Enlightenment and translates a phenomenon of “positivization of the law”. Under the influence of all forms of pressure (political, economic, intellectual) exercised by the West over the rest of the world, this conception spread and imposed itself. One can speak of colonization, but it is a colonization relating as much to the external imposition of a model as to its local adoption. A pollination, in a way, or, to use Alan Watson’s (1974) metaphor, a “transplantation”. For example, the early nineteenth century Ottoman Empire was convinced that codified positive law represented an efficient instrument of governance technology. The same is true of Meiji era Japan (Souyri, 2016). This dissemination led to a series of normative ruptures with what one can call the “Ancient Regimes” (normativities more or less remote from the western model of positivization, more or less close to the ancient laws applied in Europe before the eighteenth century). It is precisely this discontinuity between a “before” and an “after” that we intend to explore. The fact, imported from the west, that people speak *of* Islamic law, as we speak *of* French law, is one of these discontinuities, with respect to a Muslim normativity stemming from Mohammedan predication that did not have a clear relationship with the state, but had rather a doctrinal, urban and sectoral character (Kuran, 2011).

Considering both the breadth and the speed of “positivization of the law” sheds new light on the dynamics of this revolution and the response mechanisms of the “ancient (legal) regimes”. The case of Egypt, far from unique, provides a particularly good example of these changes, drawing attention to comparable, although less pronounced, developments elsewhere. The “positivization of the law” in Egypt can be said to have been crowned with success, although it also encountered lasting resistance. There was no question of brutally overthrowing the ancient legal regime (see Baldwin, 2017), which itself displayed a high degree of sophistication and was endowed with a revered institution for teaching legal doctrine, the Queen of Islamic sciences. Not by chance did the “positivization of the law” initially concern legal fields that were outside the orbit of ancient legal regime scholars. Moreover, these fields were not part of the doctrine *sensu stricto* but referred to the sovereign domain of the ruler (*siyâsa*, see Fahmy, 2018). The encroachment of positivization into the territory of Islamic legal doctrine was only observed later. At its apogee, a century later, the “new” system, then endowed with a well-organized vocabulary, a newly founded university and a new elite, could thus claim to have become *the* point of reference of everything legal, of *the* law in general. The ancient legal regime did not, however, capitulate; resistance can still be seen today.

Historical ontology of the concept of law

As emphasized by Michael Stolleis (2014), the history of law, in Germany but also elsewhere, has for a long time sought to establish a universal ontology – “eternal legal forms” – based on an

ahistorical conceptual core. It was a question of “adding to linguistic denominations an ontological substance and a durability that could not be ascribed to them”. This ontological approach to the concepts was nevertheless demolished, by the “second” Wittgenstein among others, who underlines the fact that “The meaning of a word is its use in the language” (1963: §43), an aphorism rephrased by Hacking (2002: 17): “a concept is nothing other than a word in its sites”.

Following Wittgenstein, Foucault, Davidson and Hacking, it is appropriate to underline the fact that, on the contrary, concepts have a life and a history within which our naming practices, and the things that we name using them, interact. With the concept of “law”, this leads us to examine how the policies, attitudes and practices relating to naming something as being “law” interact closely with the material and immaterial objects thus named. This question calls for a historicized response once one observes that the appearance of certain objects is itself entirely historical. The term “historical ontology” is applied to the description of the very being of the concept and its history. The very fact that it is historically situated means that any discourse exhibits a grammar of which concepts are made, in certain cases of a categorical nature. Concepts and categories are historical objects that do not exist until they are created. Homosexuality is a case in point: although it is possible that there have always been sexual relations between individuals of the same sex, the specific category “homosexual” only appeared when it was invented (Davidson, 2001; Hacking, 2002: 82). Historically and etymologically, the words used to express the modern concept of law have existed for a long time. They were not, however, used with their current meaning. The eighteenth century was a pivotal period from this point of view, the term “law” being refocused to designate the generic law applicable to a population or a state entity. Between the idea of laws emanating from a sovereign, customs proper to a community or fields of legal thought on the one hand, and that of a systemic, hierarchized legislative ensemble applicable to everyone within a given geographical area on the other, there is a radical and often incommensurable gap.²

Here again, the process of legal transformation in Egypt is instructive, particularly if one examines the linguistic preparation that opened the way to positivization. The development of a concept of the law suitable for the shift to positivization occupies a central place in this process. The concept did not exist and thus had to be developed. Nineteenth century texts contain various

² We can usefully give perspective to this discussion with the definitions given by the Académie Française to the terms ‘droit’ and ‘loi’, in its 1773 edition:

‘DROIT, s.m. Ce qui est juste. En ce sens on dit, qu’*Une chose est contre tout droit & raison*, pour dire, qu’Elle est injuste & déraisonnable.

Il signifie aussi justice (faire droit à chacun. Conserver le droit des Parties.)

On dit proverbialement, *Bon droit a besoin d’aide*, pour dire, que Les meilleures affaires ont besoin d’être sollicitées, d’être appuyées de quelque crédit.

Il se prend aussi pour La Loi écrite, ou non écrite. (Cela est de droit divin, de droit humain, de droit positif, de droit commun. Le droit naturel. Le droit des gens. Le droit civil. Le droit canon. Le droit coutumier. Le droit écrit. Le droit Romain. Le droit François. Droit civil, Droit canonique. Maxime de droit. Poinz de droit. Question de droit. Il faut distinguer le droit & le fait.) [...]

Il se prend aussi pour Jurisprudence. (Etudier le Droit. Savoir le Droit. Enseigner le Droit. Docteur en Droit. Docteur en Droit Canon.)

DROIT, se prend encore pour Autorité, pouvoir. (De droit. De plein droit. Les Romains avoient droit de vie & de mort sur leurs esclaves. Il a droit, il est en droit de dire ce qu’il lui plaira.)

Il signifie encore, Présentation fondée sur quelque titre, ce qui appartient à quelqu’un en vertu d’un titre légitime.

(J’ai droit là-dessus. J’ai droit sur cette Terre. Droit litigieux. Renoncer à son droit. Céder, transporter ses droits.

Poursuivre son droit. Exercer ses droits. Faire valoir ses droits. Négliger ses droits. Se relâcher de ses droits.

Relâcher de son droit. Accumulation de droit. User de son droit. Cela lui appartient de droit. Droits seigneuriaux,

féodaux, honorifiques. Droits curiaux, Droits du Roi. Droit de péage, de chauffage, de patronage, &c. Droit de

représailles. Droit de réversion. Droit de bienséance. Droit d’ancrage. Droit de pêche. Droit de chasse, de colombier, &c.) [...]

experiments that governed this development. Various techniques were used to this end. An initial attempt consisted of establishing an equivalence between the word “*sharī‘a*” and “positive law”. This was part of Rifa‘a al-Tahtawi’s plan, which aimed to persuade traditional intellectuals that the “new law” was quite simply equivalent to their “ancient legal regime” and that it was wholly in their interest to adopt it (Parolin, 2018). The equivalence did not work in its substantive form but the adjectival form, “*shar‘ī*” is still used today to mean, among other things, conformity with positive law. Another attempt involved modeling the semantic development of the term “*droit*” or “*ius*” – which had made enabled the shift from referring to individual rights (*droit subjectif*) to referring to a legal system (*droit objectif*) – on the Arabic term “*haqq*”. We also have Tahtawi to thank for this experiment, which had the advantage of being based on a word of illustrious pedigree and imposing stature in the ancient legal regime. Once again, the model did not work in the substantive, except to designate, in the plural, the name of an institution where “law” is taught (*kulliyyat al-huqûq* meaning “faculty of law”). The third attempt consisted of a metonymy based on the word used to identify the typical legislative instrument of political authority, the “*qânûn*”. This time the word became established. This attests to the fact that the positivization of the law was initially situated on the margin of the ancient legal regime, represented by the *siyâsa*, rather than at its heart. This metonymic usage is found in the book by Tahtawi (1834), which makes us think that it was widespread from the first quarter of the nineteenth century, however, more than a century elapsed before it came to designate the generic concept of law.

There are many legal terms whose history considerably predates the concept of the law, but the modern meaning of it only appeared with the advent of positivism and its idea of a systematic organization of reality, a legal geometry of the world. New categories of things and people appeared in the wake of this new description of the law, representing new realities (Hacking, 2002: 103). This is an instance of “dynamic nominalism”, to use Ian Hacking’s expression, in which “our spheres of possibility (...) are to some extent made up by our naming and what that entails” (*ibid.*: 113). Both the discourse of the law and the discourse about the law have been rendered equally possible by the emergence of a conceptual space articulated with a style of reasoning (Davidson, 2001: xii). This is not the place to go into detail about the complex history of the concept and of the discourse of which it forms part. It will suffice to underline the fact that it works like an “operator of meaning” (Tornatore, 2010: 108) relating to emergent nation-states, their identity, their sovereignty, their governance and the control of their populations. From this basis, the concept has naturally evolved, spread and transformed.³

Numerous concepts describe human behavior at the same time as evaluating it, thus mixing facts and values (Hacking, 2002: 69). Taking the example of “law”, one remarks that it deals with both an historic reality and an ideal of justice. Conceptual analysis of law provides an understanding of how we think about it and why we are led to think of it in a certain fashion. This analysis can be performed *à la Foucault*, making parallels between snapshots drawn from both sides of the Grand Divide at the moment when one tradition is transformed into another. It can also be carried out synchronistically, with snapshots drawn from competing repertoires and appearing to deal with the same concept. In both cases, the discourses must be analyzed in the circumstances and conditions in which their constitutive statements have acquired their value of truth and thus their ability to be formulated. The discourses correspond to the knowledge available at a given time and place, of a community of speakers, and this knowledge determines what can be said at that time and in that place. Different words may express the same concept; the same word may express different concepts. Concepts may therefore be enigmas that can only be resolved by describing their historical ontology. The term “law”, in its many contemporary linguistic variants, refers to a legal system centered on the nation-state, based on a constitution, formulated through codified laws and case-law precedents, administered by the legislative

³ For a nuanced conception of social evolutionism, see Testart, 2012.

authorities for its adoption and the legal authorities for its application. It has spread throughout the world with that meaning in the wake of European imperialism and has become established in contexts to which it was foreign. In many cases this transplantation (Watson, 1974) was successful, which is not a judgement of the virtue of the transplanted model but an observation of how effectively it was established.

When considering the “linguistic revolution” that made possible the “positivization of the law”, one is suddenly confronted with the status of the ancient legal regime and its terminology. Once again, the Egyptian case is enlightening. Positivization began on the margins of the *siyâsa* but immediately tried to adopt and recycle the prestigious terminology of Islamic doctrine (*fiqh*). This operation had surprising effects not only on the new law, but also on the old. In the context of colonized Arab societies, such as post-1882 Egypt, the concept of law was grafted onto a complex, structured legal system, the *fiqh*. It was, however, only on contact with the colonizer that the latter began to be thought of in terms of law: “Islamic law”. As Leonard Wood points out, “the coinage ‘Islamic law’ reflects the particular impact of European ideas and institutions on a pre-modern Arabic-Islamic concept that was arguably broader than common Western notions of law, in particular of law as a tool of control employed and managed, above all, by states” (Wood, 2016: 5). In a double movement, the new, transplanted law initially borrowed from the lexicon of the *fiqh* to equip itself with its own vocabulary. Thus, the term “*tashrî’*”, which means “legislation”, is derived from the term “*sharî’a*”, which refers to the Divine Teaching. Later, this borrowed vocabulary became so standardized that it became necessary to add a religious predicate to it in order to give it a quality that had originally been consubstantial with it. It is no longer enough to speak of *sharî’a* in order to refer to Islamic normativity, it must now be qualified as “Islamic”: “*sharî’a islâmiyya*”. The inversion is all the more accentuated when, wishing to speak of “Islamic law”, people no longer turn to the term *sharî’a*, but to the lexicon of secularly inspired law. Islamic law is thus described as “*qânûn islâmî*” (Parolin, 2015: 22). Thus, in current usage, the predicate “Islamic” can serve the purpose of requalifying something that was “traditionally” Islamic before the positivization of the law, such as the *fiqh* or the *sharî’a*, or of qualifying an element of positive law so that it falls into line with religious normativity. In other words, one either requalifies the *fiqh* or the *sharî’a* as Islamic (as in the expressions *al-fiqh al-islâmî* or *al-sharî’a al-islâmiyya*), because it is no longer obvious today that they are only Islamic (in the law faculty, *fiqh* means “doctrine” and sometimes even “case-law”), or one wishes to qualify as Islamic something that formerly referred to the *siyâsa* but today refers to positive law. The same phenomenon appears in proposals to “Islamize” the law, i.e. give it back its original Islamic authenticity. Thus, people speak of “Islamic penal code” or “Islamic constitution”, with the stated objective of producing legislation that provides an alternative to the reviled secular model, but in a form that only has any sense with this same secular model in the background (Dupret, 2000). This movement of Islamization has spread to the particular genre of the general theory of law: behind the desire to formalize the ancient legal regime hides, in reality, the revolutionary impact of a change in paradigm, in the Kuhnian sense of the term (Wood, 2016; Kuhn, 1996).⁴

There is no doubt that norms are consubstantial with life in society. Articulated between themselves, these norms can make a system and certain of these systems may be qualified as legal. In this case, legal, as underlined by Yann Thomas (2002), refers to a manner of thinking

⁴ This history of triumphant positive law would not be complete without recalling the resistance that it had to face at the margins of the legal revolution. In his book *Yawmiyyât Nâ’ib fî’l-Aryâf* (literally: *Diary of a Public Prosecutor in the Countryside*), eloquently translated into English with the title *Maze of Justice*, Tawfiq al-Hakim describes the idiosyncrasies of the new law and seems to indicate nostalgia for the ancien legal regime, the majority of the decisions taken by the two young prosecutors relating to cases where the new law differentiates itself from the old.

about social relationships, categorizing them and establishing procedures to judge them. But for all that, can one use the term “law”, in its singular, determinate form (French law, Ottoman law, Chinese law), to account for norms and normative systems without committing an anachronism, without underestimating the completely contingent nature of the experience of modern law, wholly assimilated with the state? If words are misleading and if using contemporary terms to deal with past experiences can be problematical, no doubt it must be admitted that the use of the term “law” to describe the normative systems in force in other contexts than that, very specific, of positivism is injudicious and is more confusing than helpful in the analysis of normative phenomena. If legal order corresponds, as Michael Stolleis (2014) affirms, to a plan to organize society, it is clear that it is a historically situated plan that corresponds to the convergence of a political structure (the nation-state), a manner of thinking (positivist rationality) and an ambition (the control of a population). It is not one legal culture among others – that would suppose the existence of a universal concept of law of which all legal cultures were variants – but a particular legal configuration, “the law”, as it has been conceived, in Europe, from the middle of the eighteenth century, and as it has developed, spread across the world and transformed itself, and the meeting with which has led other normative and legal ensembles and systems, which so not think in the same terms, to radically transform themselves and possibly acculturate, i.e. metamorphose into this specific system called “*the law*”.

When using historical ontology, the natural tendency would be to retrace the semantics of the concepts by making past terms into linguistic equivalents of present-day terms, i.e. by making instinctive use of one’s own experience of the law, which presupposes a certain “anthropological similarity between men” enabling them to think of norms in comparable ways (Stolleis, 2014). Since it is impossible to access the legal past other than through the language, we use today’s meanings to try to “reenact” the meaning of yesterday’s words (Collingwood, 2005). In doing this, we distinguish “only that which we believe we already know” (Stolleis, 2014). Misinterpretation and anachronism lie in wait for us at every step (Atias, 1999: 40). *A priori*, however, it is wrong to think that we understand the legal language of past times and distant places; the words used do not mean the same things, despite certain lexical similarities that are often misleading and have been established through retrospective translation operations and equivalences. Rather than assuming the equivalence of legal expressions, it would be more appropriate to recognize their incongruity while trying to render them capable of expression in our language.

Take, for example, the doctrine of *maqâsid*. This is a case of bringing the ancient legal regime up to date, using one of the characteristic methods of legal positivism, on the pretext of using a term from the vocabulary of the *fiqh*. At the end of the nineteenth century, the ancient legal regime found itself challenged by the new system, which presented itself as all-encompassing, rational, dynamic and teleological. In contrast with the casuistic approach traditionally attributed to the *fiqh*, Ben Achour in Tunisia and ‘Abdoh in Egypt discovered in the sources of the *fiqh* references to the “objectives of the *sharî‘a*” (*maqâsid al-sharî‘a*). They then undertook to read the rules of the *fiqh* in accordance with these objectives, thus applying a strongly teleological approach to the latter. Several authors have shown how this new attempt to rehabilitate the doctrine of the *maqâsid* has little in common with the function of the *maqâsid* in the ancient *fiqh* (Opwis, 2017; Emon, 2018). Whereas, in the ancient doctrine of *maqâsid*, the objectives of the *sharî‘a* were used by jurisconsults to choose between different options that were equally justifiable, under the new doctrine, they correspond to the positivist idea of “objectives of the law” and provide justification for moving away from the rules and developing a teleological system. The *maqâsid* thus find themselves in a way inverted, while conserving the political capital that traditionally accompanied them.

This is also true for “*droit*”, “*recht*” and “*ius*”. Thomas Aquinas opposed the natural law (*ius, droit naturel*), primary and immutable, to natural laws (*lex, lois naturelles*), secondary and relative according to the variety of human things (Aquinas: Q. 100, a.3., a.11.; Murphy, 2005). Laws (*lex*) are positive, in the sense that they emanate from a divine or human authority. The law (*ius*) emerges from the natural order and refers to what is ethically just (Murphy, 2005: 63). This also holds true for Hobbes, who opposes the law of nature and human law. But whereas, for Aquinas, the laws-lois are an instance of the law-droit, Hobbes denies the latter any legal character (Goyard-Fabre, 1975: 119). The positivist separation of the law and morals has begun, finding confirmation with Leibniz for whom a law cannot be moral (1994: 98-101). The concept of law thus undergoes an inversion: whereas initially it designated the natural immutable law-droit, conceptualized by Aquinas, in opposition to laws-lois, contingent, alone endowed with a legal character, it ends up designating all the contingent laws-lois, by opposition to the Law-droit of nature. As Christian Atias (1999: 23) states, while profoundly regretting the fact, a conceptual cesura occurred during the Age of Enlightenment: “before the resulting rationalist revolution, the law-droit could not have been what it has become”.

This is substantially the position adopted by Reinhart Koselleck (1997: 116) who, taking the example of marriage, shows us that only a misleading meaning of a single word can lead us to consider that it is one and the same concept: “Things changed under the influence of the *Aufklärung* which, in the Prussian Civil Code (*Allgemeines Landrecht*), gave marriage a new contractual foundation. The financial conditions were relaxed and the individual freedom of the spouses was extended to allow divorce, nevertheless forbidden by theology. It is true that the Code did not abolish the theological and feudal provisions, but – and only the history of concepts is able to show this – it decisively inflected the concept of marriage in the direction of greater freedom and greater autonomy for the partners. Finally, the beginning of the nineteenth century saw the arrival of a completely new concept of marriage. The theological justification was replaced by an anthropological autojustification, the institution of marriage was detached from its legal framework instead providing the opportunity for the ethical self-realization of two beings who love each other”. Thus, not only did the concept of marriage change after its codification, but the very assertion of this change makes us blind to the existence of any possible lines of continuity. And what is true for the example of the Prussian Civil Code studied by Koselleck can easily be extended to, among others, predominantly Muslim countries.

The positivism of the science of law: a paradigmatic revolution

It is noteworthy that contrary to the inflation of the “social inventions of” (Hacking, 1999), few authors argue for an “invention” of the law. On the contrary, it must be noted that the law is the subject of a discourse about its permanence that refers to an atemporal concept. It is nevertheless clear that the history and the philosophy of law are the history and philosophy of something: the law. Is it possible that they refer to something other than that which is given as their subject? No! What is covered by this thing can no doubt vary from one point of view to another but is definitely by being conditional on having the law as their object that they can claim to be the history and philosophy of the law.

Something definitely occurred which, around the eighteenth century, distinguished a before and an after the Great Divide and meant that the word “law” gave birth to a new concept. This new concept dates from the time of its objectification in disciplines such as the philosophy of law, the history of law, the science of law, the science of comparative law, and later the sociology or even the anthropology of law: the law appears as part of the general movement of sciences that develop within the definition of their object. The fact that the idea of social “science”, cast in the mold of natural sciences, is a chimera (Winch, 1990) changes nothing. The aspiration to a scientific conception of the law, both in its art and its study, emerges from the same movement

that intends to distance its subject in order to be able to philosophize about it. Niklas Luhmann said later that positive law, “originally new phenomenon and revolutionary acquisition” (Clam, 1995: 358), is a product of the modernity that corresponds to a specific use of normativity (Luhmann, 1986: 81). The appearance of positive law and the importance that it has acquired can be explained historically.

In Egypt, the shift in meaning is particularly obvious, because it required the creation of new centers of knowledge within which other “modern” and “positive” sciences could be taught. Al-Azhar, the venerable institution of knowledge where the ancient juristic regime had been taught, was isolated until the mid-twentieth century. When it was nationalized, in 1961, a new faculty was created, which paired the teaching of “new” and “ancient” law. Called the Faculty of Shari‘a and Law (*kulliyat al-shari‘a wa’l-qânûn*), it embodies the duality of its mission, at the same time bearing witness to the ancient legal regime’s resistance to complete absorption.

Law and state proceed in concert. For Kelsen (1945), the concept of state embodies the whole of the legal order. The state is thus a kind of hypostasis comparable with a monotheistic religion: where God epitomizes a system of natural laws, the state epitomizes a legal system (Troper, 1994: 148-9). From this point of view, the state is a collective social object constituted and structured by a normative order from which it cannot be distinguished (Troper, 1994: 150). In other words, the (modern) concept of the law cannot be dissociated from the concept of the state. The two concepts appeared in the same movement, which corresponded to the appearance of new political configurations and ways of thinking about them. And legal positivism, including its variant that considers the legal theory of the state, has best accounted for this. Moreover this is not a surprise, given that, rather than claiming to expound the law as it should be, legal positivism means to describe the law as it is. This descriptive ambition, which is at the very heart of the positivist approach, confirms the argument in favour of an historical ontology of the concept of law. For a long time, the law remained an art and escaped the objective abstraction of the sciences: “having received its object from a little-discussed tradition, it was able to avoid the rational *a priori* definition and the resulting reduction” (Atias, 1999: 5). What legal positivism describes as “the law” corresponds to a contingent concept expressing the empirical and scientific plan to found a “moral arithmetic” reforming legal thinking, like a “Luther of Jurisprudence” (Bentham, quoted by Hart, 1982: 29). The positivist conception of law understood as a rational normative system responds to the positivist production of law conceived as a sort of social engineering. The scientific description of the architecture and operating methods of legal norms responds to the undertaking of the rationalist creation of a geometrical law.

Legal positivism found its first solid articulation with Jeremy Bentham. But we must still distinguish the two levels covered by the notion, the art of law and the science of law (Troper, 2003). The first level is that of the production of law. In this case, legal positivism corresponds to “the contention that laws are commands of human beings” (Hart, 1983: 57, n.25), distinct from any form of natural or divine law, and together forming a system. The second level is that of the study of law. Here, legal positivism presents itself as the science of a law whose descriptive analysis can be successfully carried out by combining, to various degrees, formalism and realism on the one hand, and internal and external perspectives on the other. Although they must be distinguished, the positivism of the law and the positivism of the science of the law have developed together. The development of rational legal engineering by which “the precision and clearness and incontestableness of mathematical calculations are introduced for the first time into the field of morals” (Bentham, quoted by Hart, 1982: 40) has been accompanied by that of an objectifying and descriptive study of that engineering. In this sense, the positivism governing the study of the law is the reflection of the positivism overseeing its production. The fact remains that the two perspectives are separate, as highlighted by Bentham (quoted by Hart, 1982: 41) when he distinguishes prescriptive juristic doctrine (*ensorial jurisprudence*) and the descriptive theory of

law (*expository jurisprudence*). There is an echo of Hume's law, which resonates through every positivist project.

The idea of a prescriptive doctrine led Bentham both to radically criticise the Common Law and its most illustrious representative, Blackstone, demanding "to draw aside that curtain of mystery which fiction and formality have spread so extensively over the Law" (Bentham, quoted by Hart, 1982: 23), and to wish for the development of a law composed of the legislator's acts, which should be both complete (one could say 'totalizing') and clear, which supposes the reduction of the judge's role to that of "faithful mouth-piece of the legislator", to use Montesquieu's famous expression (quoted by Hart, 1982: 48). Faithful to his utilitarian philosophy, Bentham thus considers that the law should serve as an instrument for the realization of human happiness (Hart, 1982: 125). The second perspective, that of a descriptive theory of the law, corresponds to the idea of a science of the law in the sense of a science of nature. As underlined by Eric Millard (2011), Bentham's philosophy does not stem from an *a priori* concept of the law but considers it to be the result of an expression of will whose vector is the word.

Just like historical science, "legal science is the child of rationalism"; it is "the wish to persuade by the force of arguments" (Stolleis, 2014). Like all sciences, the science of the law has its origins in the determination of its subject, the law. It is "constituted on the definition of its object" (Atias, 1999: 36). The same may be said for legal positivism, which "relates to an object that it gives itself and constructs" (Atias, 1999: 44): positive law. From this objectification of the law ensues the possibility of submitting it to a scientific examination of formalization, explanation and comparison. This "translation into science" has creative effects. First it creates its own object. It then constitutes new objects, such as "Islamic law" whose existence is clearly the fruit of applying positivist legal cognition to the Islamic normativity issuing from the prophetic revelation. The idea of a science of the law continuously affirmed itself throughout the nineteenth century. Three features characterize this emergence. First feature: the recourse to the term "science", linked as we have said to the positivism of the period. John Austin speaks of "jurisprudence" (Austin, 1832). For his part, Hans Kelsen distinguishes his "pure theory of law" from "the science of traditional law" whose development he places during the nineteenth and twentieth centuries (Kelsen, 1967: 80). And after Kelsen, it is widely accepted that the science of the law is a normative science, not inasmuch as it conflates the order of what is and the order of what ought to be, but inasmuch as its subject is norms (Bobbio, 2015: 148). Second feature: the "objectification" of that to which the science applies, i.e. "the law". Objectification of the law, thus, and, at the same time, the appearance of a discourse which, in the guise of an ancient term, leads to the production of a new entity that one can call, to say the least, "modern law". The objectification of the law in effect implies giving it a definition claiming to describe what it is, but, in fact, performatively creating its own reality. For Austin (1832: 49), the science of the law assigns itself the subject of "positive law", whereas, for Kelsen (1967: 5), it is a science relating to norms, a norm being "the meaning of an act by which a certain behavior is commanded, permitted, or authorized". For Troper (1994: 44), the science of the law is a science based "on the model of empirical sciences" relating to "legal discourse and reasoning". Third feature: the exporting of this concept of "modern law" away from its point of origin, with the perception of the world's innumerable normativities seen through the frame of reference of the law as it has thus been objectified. Here again, one must distinguish the art and the science of the law.

Concerning the art of law, i.e. the law understood as legislative and legal production and practice, the positivist model has been exported all over the world. We will return to this phenomenon in the following section. Regarding the science of the law, the comparative discipline has tried to put into perspective different specific instances of the generic concept of positive law. We find the early manifestations of the comparative science of the law with Montesquieu, whose idea of the "spirit of laws" targets the principle common to the variety of

types of law configured by the specific features of their natural, political and social environments (Montesquieu, 1874: L.I, ch.3). It developed into a discipline, thanks to specialist teachings, books and reviews, throughout the nineteenth century, its apogee being the International Congress of Comparative Law in Paris in 1900.

As highlighted by Jean-Louis Halpérin, “in order to compare, one needs a minimum of two objects of comparison and a standard (the *tertium comparationis*) that allows one to consider that these objects, despite their differences, are both species from the same genus”, which requires a minimal definition of the law, most often established on the basis on the national law of each comparatist (Halpérin, 2017: 238). Although “the comparison appears to be facilitated by the structuring of the whole world into states which leads to the identification of national legal orders associated (and even identified, in line with Kelsen’s thinking) with these states” (*ibid.*), it is nonetheless extended to normative orders foreign to this structure, whether they pre-existed it or whether they remained external to it. Thus Friedrich Karl von Savigny (quoted in Reimann, 1990) considered that the task of legal experts is to extract the rules and principles proper to their temperament and society from the history of each people. Savigny’s heirs, Georg Friedrich Puchta and Rudolph von Jhering, consider that the casuistry proper to each legal tradition can be organised, hierarchised and compared so as to identify the primordial rules of living from which subordinate rules are derived (Mattila, 2006: 171). For his part, Edouard Lambert, who was a great admirer of Jhering, suggested a comparative method that he applied specifically to Islam, founded on six basic principles: Islamic law is endowed with an authentic kernel that must be found and restored; Islamic law is a subset of the set of superior values shared by humanity; Islamic law has its origins in Roman and Jewish law and takes its methods from Greek logic; Islamic law has always been conceived and practiced in a flexible manner; the task of interpretation (*ijtihad*) is a form of legal reasoning that aims to respond to the demands of social reform; the methodology of Islamic law (*usûl al-fiqh*) must be reformed, thus facilitating a return to the faith and authentic practices (Lambert, 1903, 1934; Wood, 2016: 139-140).

Each time, an idea relating to the law is extracted from a model – German or French – and then extended to other countries adapted in such a way that it can flow into the pre-established conceptual mould. However, as Thomas Duve (2007: 3) notes, “there might (...) never have been something like ‘Hindu law’”. One should understand by this that a specific, historically situated operation led to Hindu-inspired norms being devised and potentially systemically articulated in terms of positive law. Just as the science of the law creates its object, the law, comparative science renders commensurable objects that are not necessarily so, thus creating law where there was not necessarily any before. By naming these sets of normative objects, comparative science has rendered them “living and cognizable” (Stolleis, 2014), but in the form of the law and not of the internal logic proper to those sets.

This double positivization of the art and science of the law no doubt represented a legal revolution. Articulated on the hypostasized paradigm of the “Code”, abstract, general, simple and systematic, this revolution led to the modification of the rules constituting the existing legal orders. New regulatory systems appeared, based on alternative ideas of normativity, new concepts and methods and on the appearance of a meta-reflection about the law (Duve, 2007). As Jean-Louis Halpérin shows, this modification is such that it often leads to a change to a completely new system (Halpérin, 2014: x). Drawing on Herbert Hart, who characterizes the law, by opposition to other normative systems, as a constructed set of norms combining primary rules defining obligations and secondary rules relating to devolution of powers (Hart, 1961), Halpérin observes the possibility of special moments in law, marking the birth of new legal orders (Halpérin, 2014: xi). These may consist of the passage from a pre-order, made up only of primary rules, to a legal order, made up of a combination of the two, or of the substitution of one order for another. With the revolution of Codes, the conception of the law became established as a system

based – unlike “Roman law” for example – on a static and dynamic hierarchy of norms (Troper, 1994).

In Egypt, positivization of the law preceded that of its science by a good half-century. Throughout the nineteenth century, the new law was experimented upon and practiced as an “art”, in parallel with the perpetuation of whole sections of the ancient legal regime, until its production and constitution were regulated. The end of the nineteenth century, however, saw the appearance and the development of a movement theorizing “Islamic law” in Egypt. The particular feature of this movement was to anchor a genuinely modern and positivist conception of the law in the Islamic normative tradition of the *fiqh* (Wood, 2016: 2). In this transplantation operation, new ideas were grafted onto old, with what Alan Watson calls a “block effect” (Watson, 1981), i.e. the understanding of substantive ancient rules through a new conceptual framework. The *fiqh* thus came to be conceived of as a complete corpus of laws, all-encompassing and applicable at all times and in every place, i.e. like a system of positive laws. This involved combining an essentialist conception of Islamic legal authenticity and a positivist conception of the law into which that authenticity could mold itself. The techniques of the legal code and of academic doctrine were considered to be the most appropriate to carrying out this Islamization of the law, at the same time as a new genre appeared, seeking in the *fiqh* the origin of concepts encountered in the practice of western law (Wood, 2016: 88). The comparativist ideas of Lyon-based jurist Edouard Lambert, already mentioned above, were taken up by his students, at the same time as the substantial rules of Islamic law were reorganized in accordance with the categories of French law. It was thus that the expression “personal status” (*al-ahwâl al-shakhsiyya*), which is an idea from civil law used in opposition to that of “real status”, came to impose itself in designating Islamic family law, whereas it is completely foreign to classical Islamic legal doctrine (the *fiqh*). The vocabulary of this new law stabilized and its general theory (*al-nazariyya al-‘amma*), a genre directly inspired by that in vogue in the traditional civil law doctrine, was established. Applied to Islamic legal thinking, this genre had one main consequence: “By reorganizing the categorical and conceptual premises of a field of Islamic legal doctrine, the *nazariyah* [viz. general theory] model made it easier for comparative scholars to place Islamic and European laws side by side and to compare their premises and rules (... , leading) Egyptian scholars to continually revise substantive legal doctrine from the top down, that is, by proceeding from higher-order principles, to middle-level, and finally, to substantive minutiae of legal rules” (Wood, 2016: 231). In this great movement, the *fiqh* found itself completely reconstructed, in its manner of being written in accordance with new genres, in its concepts and categories borrowed from the civil law model, in its reform-oriented substance, in its methodology and its theorization of sources, also western, in its sources combining classical Islamic doctrine and European legal traditions, and even in its philosophy, its religious founding principles being to a large extent blurred (Wood, 2016: 251-252).

The positivization of the law: global positive law and its local variants

In advance of any scientific positivism, the positivization of the law consisted of the global dissemination of a model conceiving the law as an autonomous system of positive rules. The notion of positive law refers to the idea of a law established by an authority and distinct from the principles of justice and morality. In this sense, positive means two things. It is, on the one hand, an empirical, descriptive assertion of the authority that is the source of the law: contrary to custom, positive law finds its source in one form or another of promulgation representing authority. On the other hand, it is a normative assertion about the contents of the norm inasmuch as it is stripped of intrinsic moral necessity: unlike the natural law, the positive law is in itself stripped of moral force. In short, positive law can be distinguished from natural and customary law inasmuch as it is deliberately – and not divinely/naturally or tacitly/conventionally – enacted (Murphy, 2005: 18). Within this meaning, the idea of positive law has its roots in the Greek

philosophy of language and the question as to whether the language is natural or positive. Finally, with Thomas Aquinas, it acquired a “profoundly legislative” conception (*ibid.*: 50) according to which it is the content (regulatory and contingent, as opposed to metaphysical and necessary) and not the source (divine or human) that distinguishes positive law from natural law (*ibid.*: 50-57).

Although the idea that positive laws-*lex* are laws-*lex* imposed by humans is thus practically immemorial, the systemic conception of positive laws-*lex* forming an articulated whole covered by the term law-*ius*, understood in the singular and generically, is much more recent. As we saw above, this systemic conception of a *ius* applied rather to natural law, whereas positive laws in the sense of *lex* were referred to contingency. The inversion came with Hobbes for whom words acquired their meaning and laws their validity through the effect of the will of the person who names or legislates (*ibid.*: 118). This was when the signs appeared of a concept of positive law developed from the association of two types of rules, primary rules prescribing or proscribing an action and secondary rules accrediting an authority to formulate or apply the primary rules (Hart, 1961:79). The absence of such rules of accreditation leads Hart to speak of “primitive law”, i.e. cases to which one hesitates to attribute “legal quality” (*ibid.*: 3). In a slightly different manner, Troper, commenting upon Kelsen, states that “The law and thus the state [are] a specific form of the exercise of political power [...] in the form of norms organized in statically [i.e. the conformity of the contents of inferior norms to that of superior norms] and dynamically [i.e. the formal and procedural conformity of inferior norms to superior norms]” (Troper, 2003: 194). This configuration, which makes the state an expression of the legal system appeared in the seventeenth and eighteenth centuries in Europe, thence tending to propagate itself throughout the world.

We owe the term “codification” to Bentham. This can be understood in parallel with other concepts associated with modernity, such as systematization, simplification, social engineering and the unity of practice and rationality. In this sense, codification should not be confused with compilation.⁵ Whereas the objective of the latter was the organized collection of existing laws and customs, the former aimed to introduce new law or a new legal framework. In other words, where compilation sought to conserve an older order, codification was part of “the logics of the modern state, whose elites’ unprecedented appetite for regularization and large-scale social engineering was nourished by and at the same time pushed forward by the revolutionary communication and transportation technologies that rendered the nineteenth century what Kosselleck defined as ‘an epochal threshold’” (Rubin, 2016: 831). Codification corresponded to a new conception of how the law should appear: perfect coherence based on logical classification, systematic organization of provisions, completeness and general intelligibility, with, as a corollary, the idea of the rule of law organized around the concepts of generality and predictability. Brian Tamanaha speaks of “formal legality” (Tamanaha, 2004: 119-20), Judith Shklar of “legalism” (Shklar, 1964: 1).

The centrality of legislation and of the code is particularly obvious in Arabic, where positivization has led to a profound alteration of the semantic field of normativity. Of the three previously mentioned attempts to render the new concept of law, the metonymy “*qânûn*” has worked best. Whereas the first occurrences of the term refer to a tax register, by the start of the nineteenth century *qânûn* came to identify the regulations adopted by the rulers – mainly financial, administrative and penal, i.e. the typical domain of the *siyâsa* (Inalcik, EI²). At the end of the nineteenth century, *qânûn*, understood as *lex* came to designate the legal code. The term *qânûn* thus contains ambiguity, depending on whether it is used to mean law or code. Some authors, such as ‘Abd al-Razzaq al-Sanhuri, have tried to resolve the problem by using the term

⁵ Contrary to what is stated by Ahmed Fekry Ibrahim (2015), who speaks of a “codifying ethos” in Islamic doctrine after the thirteenth century, to describe the tendency to fix rules in a more unequivocal and predictable manner.

taqnîn to refer to the code, but without success, inasmuch as this word expresses the process of codification rather than its end result (Parolin, 2015). Today “*al-qânûn al-madani*” is used to speak of the Civil Code. The polysemic nature of the term *qânûn*, covering legislation, code and law, thus perfectly describes the idea of positivization that we advance.

The common feature of modern codes is that they have eliminated the pluralism of sources, played a role in national unification movements and tried to limit the arbitrary power of judges (Halpérin, 2014: 36). In other words, codification aimed to establish a completely new legal order based on human reason and coherence (Rubin, 2016: 833). As highlighted by Max Weber, “the code possesses, or at least gives the impression of possessing, an extraordinary measure of lucidity as well as a precise intelligibility in its provisions” (Weber, 1978: 865), providing the “bourgeoisie” with the predictability necessary to commercial transactions, the ruling elites with the unity and cohesion of their dominions and the bureaucracy with a determined, demarcated body of rules to apply. It is not surprising, from this point of view, that Weber saw, in the great codes of the nineteenth century, starting with the French Civil Code of 1804, the paradigmatic example of formal rationalization (*ibid.*: 856-866).

In Egypt, the absorption of the ancient legal regime corresponded to a large extent to the wish to unify the system and to eliminate the plurality of its sources. Using an explicitly positivist approach (Bechor, 2007), al-Sanhuri insists on the importance of including the principles of the Islamic sharī‘a (*mabâdi’ al-sharī‘a al-islâmiyya*) among the sources that the judge should use if the law is silent (Article 1 of the 1948 Civil Code). The emphasis placed on this reference to the Islamic sharī‘a testifies to the intensity of the debates that surrounded the adoption of the Civil Code (Hill, 1987), but also to the process of positivization, which describes the ancient normativity through the prism of the new legal cognition (Dupret et al., in press).

“The concept of casting the existing *corpus juris* into succinct and general formulations, organized along rational classifications and aimed at the wholesale design of the law, was an astonishing, mind-boggling, unprecedented idea equally enchanted and intimidated statesmen and legal scholars worldwide” (Rubin, 2016: 829). The transplantation of the Napoleonic codes to other European countries as well as to Latin America, Africa and Asia is a “success story” (Halpérin, 2014: 47) whose reasons we can seek to understand. Halpérin identifies several, some relating to the unifying capacity of the code, others to its flexibility and adaptability, yet others to the symbolic strength of the “talisman of modernity” that it represents (*ibid.*: 49). These three characteristics refer to the capacity of the code, but also of systematised jurisprudence, to serve as instruments par excellence of social engineering accompanying national projects. The combined action of codification and case commentaries were such vectors of change in the nineteenth century that people spoke of revolution (*ibid.*: 70). If legal codes translate one fundamental characteristic of modernity, it is their desire for generalization and even for transcendence of local forms into general ways of doing things. This leads Avi Rubin (2016: 840) to say, with respect to the Ottoman codes, that they manifest a different logic to that which prevailed for the adoption of earlier compilations (*qânûnnâmeh*): “the exclusive authority of the law was legislation by the central government, and each of the numbered clauses in every single code was meant to be applied across the imperial territories in the same manner, reflecting a deductive approach to legal situations”. With the instrument of the code, “society”, itself a conceptual novelty, is transformed into an object which can be deliberately acted upon.

The reform of Egyptian law is presented as the reformulation of the ancient legal regime in terms of a new technique, codification. A simple modification of form in reality covered a veritable revolution, one of the disruptions that characterize the Great Divide. Nevertheless, this reformulation bears witness to the resistance of the ancient regime, whose abandon pure and simple seemed neither desirable nor feasible. The idea of reformulation expresses great

ambiguity, as seen in al-Sanhuri (1996), who, while insisting on his desire for reform, systematically emphasizes the fact that the undertaking involves continuity rather than rupture.

The positivization of the law has become global, inasmuch as today no country any longer escapes from the model of positive law, completely or partially codified, administered by courts formally bound by the principle of legality forming part of a constitutional order, itself judicialized. This globalization of positive law has at the same time been accompanied by a local restatement of the universal model. This should not be seen as a return to the normative pluralism proper to complex premodern methods of organizing justice (Duve, 2007). It is not so much a question of the coexistence of multiple normative orders than of development, at the local level, of specific practices articulated on globally inspired rules and institutions. At this level one can observe the appropriations of universal models on the basis of local normative suppositions, which may depend on the political, social, economic and possibly legal circumstances of each particular place. Thus, if acculturation does take place, it is most often accompanied by “re-enculturation”, with the gradual elimination of the historical circumstances of the importation of a foreign legal culture and the allogenic nature of the newly-established legal system: “codification no longer requires primary reasons: once it comes to life, the code is sufficient and viable by virtue of its own values” (Varga, 2010: 118).

The Muslim example is again enlightening from this point of view. To choose a single phrase to underline how Islamic normativity (*shari‘a* and *fiqh*) flowed into the mold of positive law, one would speak of the invention of Islamic law (Buskens and Dupret, 2015). This is true of both the rhetoric and the vocabulary. Thus, in the very interpretation of the Koranic verses with a political scope, it is noteworthy that the modern concepts and institutions of positive law are called upon to achieve religious reform in the field of Islamic law (Parolin, 2015: 8; Dupret, 1995, 1999). Zouhair Ghazzal speaks of the wake of a desire for modernity (Ghazzal, 2015: 11). In parallel, the new positive legal language was established on the basis of *fiqh* terminology, in a lexical extension and transposition operation that eliminated “*fiqhi*” references once the translation operation was complete (Parolin, 2015). This was also true in terms of states’ legal architecture, where the inclusion of the referentiality of the *shari‘a* may be noted in the constitution. If a reference to the Islamic norm finds itself thus preserved, it is no less subject to the authority of the constituent and the constitutional judge (Dupret, 1997; Bernard-Maugiron, 2004; Lombardi, 2006). In a comparable manner, “Islamic constitution projects” flourish periodically, aiming to format substantially Islamic norms in formally positive terms (Dupret, 2000). This is also true at the level of legislation where the ideal of the code, admired for its capacity to found a rational, systematic legal system that is a symbol of modernity, could absorb the substantial rules of Islamic doctrine. The relatively recent codification of Islamic penal law in Sudan testifies to the ability to put a doctrinal heritage into a codified form, with the paradoxical ambition of reestablishing the legal “authenticity” of a country by recourse to the applicable modern terminology (Köndgen, 2018). Finally, it is true in relation to the general theory of the *fiqh* which, as it is taught today, is “completely integrated into the semiotics of legal positivism” (Parolin, 2015: 3). The process is ancient, as attested by d’Ohsson’s translation of Halabi, who converts the contents of the *Multaqâ* into positive law propositions (Wood, 2016: 102), Gatteschi’s *Manuale*, a book of concordance, which reifies “Islamic law” via comparative law and the history of law with the idea of providing ideas, signs and agendas for legal reform in the colonies (*ibid.*: 107) and Gillotte’s book, which organizes the rules of Sidi Khalil’s *Mukhtasar* into three books (people, property, contracts) in accordance with the categorical model of the Civil Code (*ibid.*: 110).

For a historical and pragmatic ontology of law

As highlighted by Thomas Duve (2007), “the academic institutions as well as the intellectual and analytical traditions of legal historiography originate from the nation-state era”. The same goes for the form that has imposed itself at the global scale: the positive legal system and its institutions. These systems, institutions and traditions are historically situated and reciprocally constituted. The theory of law describes the positive legal system that is in place, just as the latter infers the positivist conception that aims to theorize the law. In this sense, it may not be very heuristic to seek to describe the normativities anterior to the positive legal system and to the nation-state using the tools proper to their description. “Western” conceptions of the law are so significant today largely because, on the one hand, the “western” positive legal system has imposed itself globally, but also, on the other hand, because the local normativities that preceded the hegemonic dissemination of this system have been completely rethought through the analytical framework of this positive legal system and the science that has made it its object.

Theories of legal pluralism are fashionable. They aim to criticize the hegemonic nature of the positive legal model in two ways: either by challenging the state’s legal monopoly, or by challenging the positivist definition of the law. First designed to deal with the coexistence of indigenous rights and transplanted western law, they have also finished up by designating the variety of normative orders in western societies themselves. Broadly speaking, one could say that they seek to show that the law is something other than what is claimed by positive legal systems and the sciences thereof. This is not the place to detail the conceptual problems posed by these theories (see, for example, Pfersmann, 2010), but we can nevertheless underline the fact that they vainly lay to rest what Joseph Raz calls the “social thesis” of the law, according to which “knowing what is law is a matter of social fact” (Raz, 1979: 38), i.e. a question of identification and recognition by its users and practitioners (Tamanaha, 2004). Rather than seeking to see the law where ordinary members of society do not see it, it is no doubt more fruitful to describe what they have in mind and what they do in concrete terms when they “orient themselves” towards the object that they call “law”. Consequently, rather than speaking of legal pluralism, it would be more appropriate to speak of plurality of legal practices, which designate the many ways in which the said members of society understand their law, which may have been historically transplanted, and adapt it to local conditions (Dupret, 2007). It is not therefore so much a question of saying that one should seek the law outside the law as of “taking the law seriously” (to paraphrase Dworkin’s 1977 emblematic title “taking rights seriously”) and analyzing how users and practitioners “live within” their law, deal with its consequential dimension (rather than its genealogical pedigree), investing it with a meaning or diverting it from its meaning, applying and interpreting the provisions, using it as reference point to configure their actions, even if this means breaking it.

In the same way that the normativity of the *shari‘a* manifested itself before it was transformed into Islamic law, one could say that there existed, before the Great Legal Divide of the positivist revolution, forms of normativity that aimed to give a legal configuration to social relationships (Thomas, 2002). These normative configurations can perfectly well be studied from the viewpoint of a “pragmatic history” of the phenomena of legal order (Cerutti, 2008). The error would be to confuse the object of these descriptions with what legal sciences today call “the law”. Atias underlines, with regret, that “Cartesianism has made it impossible to draw on antique and medieval sources, without taking many precautions; misinterpretations and anachronisms lie in wait for us at every step” (Atias, 1999: 40). Without necessarily going back to Descartes, we have demonstrated the impossibility of the “ahistorical use of concepts” (Davidson, 2001: 41). The concept of law is not universal. What we understand by law today is contingent. As Carlo Ginzburg remarks, until the mid-eighteenth century it described a different reality (Ginzburg, 1997). Between the mid-eighteenth century and the early twentieth century, a global break point

– one can speak of a revolution – definitely occurred, at different speeds, with contagion effects and in local configurations in the conception of norms, in their institutionalization, in their systematization, in their logical articulation, in the teleology of their conception, in their symbiotic association with the state, in their uniformization exclusive of any competition, in their disciplinary ambition, in their relationships with other normative orders (religion, moral, customary), and in their effective capacity to reconfigure the social world.⁶

By combining conceptual philosophy, general theory of law, history of law and legal praxeology, we have been able to show that the law, as the word is usually understood, corresponds to a particular historical configuration that it would be vain to extend *urbi et orbi*. By extending the term to the extreme, we push into the background the characteristic properties of the central model and reduce the features common to the different specific cases to simple “family resemblances”. Great confusion results but disappears as soon as the problem is reformulated in other terms. In a somewhat surprising manner, it is possible to link the names of Wittgenstein and Foucault, as Arnold Davidson (Davidson 2001: 182 et seq.) did, to show that, in order to understand a concept, one must “understand the style of reasoning of which it is part”. By displacing the Wittgensteinian idea of a “language game” towards a historical viewpoint and thus bringing it closer to the Foucauldian idea of “field of stabilization and usage” of discourses (Foucault, 1969: 136-137), one can bring out the fact that conceptual propositions “only have their full meaning within the limits of a given ‘discourse’, and should not be separated from the general intention of this ‘discourse’” (Hadot, 1962: 342). Davidson concludes: “Some of the most remarkable moments in the history of thought are precisely those in which an old phrase or word is stabilized in a new way, resulting in the production of a new set of concepts and a new realm of statements” (Davidson, 2001: 186). This was the destiny of the law at the turn of the nineteenth century: thanks to its inclusion in the positivist dynamic, in its many meanings, it has become something new, specific, different, only linked to other legal experiences by a vague family resemblance.

⁶ This remark is valid in both directions: the concepts of the ancient legal regime no doubt acquired a different meaning under the effect of positivist legal cognition, but they have also managed to conserve a significant proportion of their semantic force within bounds that, although outside the contemporary legal system *sensu stricto*, nevertheless conserve a significant political capital.