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► **To cite this version:**

Baudouin Dupret. State Law and Legal Positivism: A Global Phenomenon. State Law and Legal Positivism: The Global Rise of a New Phenomenon, 2021. halshs-03483684

HAL Id: halshs-03483684

<https://shs.hal.science/halshs-03483684>

Submitted on 16 Dec 2021

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STATE LAW AND LEGAL POSITIVISM: A GLOBAL PHENOMENON

Introduction

Baudouin Dupret

While noticing a remarkable continuity in the human propensity to formalize and categorize the world, one must at the same time admit the existence of no less obvious ruptures in the ways of conceiving and implementing such efficient formalization and in the finalities attached to it. In this respect, one could speak of legal revolutions.

In this volume, we formulate the hypothesis of a truly global revolution that reflected a Great Divide between ancient and new legal regimes. We call this time of rupture the moment of the “positivization of the law”. The volume brings together several case studies of transition from an ancient to a new legal regime characterized by the positivization of the law. This was an effect of Western imperialism, but also of local elites’ conviction that positive law was an efficient instrument of governance. The contributors explore precisely this discontinuity between a “before” and an “after”. The first two chapters emphasize the depth and scale of the positivist legal revolution. Five specific country cases then explore the phenomenon from the viewpoint that the transplantation of the positive law model was the outcome of either direct colonialism (Morocco and India) or indigenous reformism (Ottoman empire, China, Japan).

In an introductory chapter Baudouin Dupret and Gianluca Parolin draw on the emergence and development of statutory law and language in nineteenth and twentieth century Egypt to flesh out the argument of the Great Divide and of a process of legal positivization. This expression refers to the progressive rise of “legal positivism”, so well embodied in the English jurist John Austin’s expression “law properly so-called”, which tended to assimilate law with the rules emanating from the state alone. It was a point of fracture where, under the effect of utilitarianism and modern systemism and their various tools, including codes and constitutions, the law was devised to completely square the world, societies and men with the virtuous goal of equality, as well as with the more suspect aim of social control. This revolutionary conception of normativity imposed itself at the global scale. Speaking of “Islamic law” as one speaks of “French law” is an instance of such discontinuity in relation to an Islamic normativity stemming from the Qur’an and the Prophetic Tradition, which had no clear relationship with the State, but rather had a primarily doctrinal, urban and sectoral character.

In Chapter 2, Jean-Louis Halpérin concentrates on legal teaching. He shows that, in the late eighteenth century, promoting the transmission of “positive laws” was in opposition to the tradition of law schools, which had been limited since the Middle Ages to “scholarly (Roman and canon) laws”. There was a desire to pass from a legal “ancient regime” based on scholarly laws to a “new regime” oriented toward the construction of state positive law with legislation open to change. The chapter offers a test case of the Great Divide hypothesis. As we all know, the law which is taught is not a simple reflection of the law in force. At the same time, the training given to lawyers is not without influence on the understanding that they have of the law and its application. Starting from the growing space accorded in law faculties to what contemporaries termed “positive law”, Halpérin shows how much the positivist revolution was reflected in the very conception of the law.

In Chapter 3, Léon Buskens explores the specific concept of “customary law” and how it has had quite an eventful life in Morocco since the beginning of the twentieth century. The French and Spanish protectorate authorities and related scholars created an opposition between two normative orders, customary and Islamic, which since at least the nineteenth century had been

functioning in close interaction in many areas. Scholars and administrators formalised the opposition in conceptual and legal ways by transforming customs into customary law, imposing a continental European positive law model on existing normative practices. Indignation over the division of the population into those ruled by Islamic law versus Berber tribesmen falling under customary law fueled the nascent nationalism among young urban men with Islamic reformist leanings. After independence, these nationalists created a new narrative of Moroccan culture that denied the existence of Berber law and language. At the beginning of the twenty-first century, the discourse started to change again, with a rediscovery of Berber culture and language. Urban intellectuals engaged in identity politics promote the new narrative, which recycles colonial material that had been taboo for four decades. Buskens demonstrates the extent to which legal positivization affected the concept of custom, which ironically transformed into the basis for normative authenticity.

In Chapter 4, Jean-Philippe Dequen addresses the development of law in India and, specifically, the interdependent relationship between legal positivization and Islamic law in the colonial era. He shows that Anglo-Indian positivism was an integral part of Anglo-Saxon transnational legal thought, which affected the Sub-Continent, the North American colonies and ex-colonies, as well as the British Isles themselves. It originated at the end of the Seven Years' War (1756-1763), from which the definition of subject, and thereby that of legal personality, was extended, constituting the origin of a new reflection on the science of law. Although one can see setbacks in the positivization of law in India in the nineteenth century, this failure appears to be due to irreconcilable differences between two versions of Anglo-Saxon positivism: utilitarian-inspired and coming from the common law tradition, perfectly exemplified by the Indian “experience”.

In Chapter 5, Avi Rubin explores the case of the Ottoman Empire. He shows that the positivization of the Ottoman legal sphere was a gradual and heuristic process that took place throughout the long nineteenth century. Gradual as it was, once completed at the end of that period, a clear divide from earlier arrangements of Ottoman-Islamic normativity was apparent. As in other parts of the world, changes brought about by the positivization process were more than the emergence of new genres and new technicalities of normative law, most of which were deeply affected by French codification. The positivization of the law signified the rise of a distinctive legal imagination, a new legal culture – positivist legalism – that was evident in institutional and discursive forms. The best way of representing the passage of Ottoman legal architecture to modernity is the metaphor of building a new structure by using a mixture of new and used building blocks, an architectural practice that was quite common in premodern times. Old terms, while preserving something of their old meanings, constituted a new legal structure, and their changing meanings reflected the distinctive circumstances of Ottoman modernity, with the new sort of state that came with it.

In Chapter 6, Tzung-Mou Wu shows that, if “positivization” of the law refers to arrays of phenomena related to the rise of statutory law along with the modern state, China’s case is interesting, because of the difficult transition to that modern state. Before the 1949 revolution, China had spent nearly half a century learning to enact laws that looked like Western ones. For a good quarter of a century, China did so with an institutional design borrowed from Japan. Then for another two decades or so, China tried its own design. Wu highlights what he calls “government lawyering”, i.e. the making and systematizing of rules which is essential to a polity if there is government by written rules. Given the increase in power available to government jurists as law becomes “positivized”, one of the top priorities for a regime that needs them is to decide where to put them in the edifice of the government. Wu argues that China’s government jurists did more to bring about “positivization” of the law between the 1900s and 1928 than afterwards.

In Chapter 7, Béatrice Jaluzot explains that the example of the Meiji era in Japan is characteristic of the movement of legal positivization which accompanied the creation of the Nation-States; there, the success of the new conception of law was exemplary. Legal technology, imported from the West from the second half of the nineteenth century, was the vector of a “positivization of the law” in that it was really integrated into the country’s intangible and fundamental structures. Even if the Meiji government intended to modernize Japan only to the extent that was deemed necessary to compete with the world’s great powers, the Meiji reformers’ initial intention became completely overtaken by the reality: it metamorphosed the country and configured the Japan of today.

Using the comparative historical approach, which studies contemporary legal systems from the perspective of their historical evolution, the various contributions to this volume make it possible to observe a radical break in the conception of law, operated in the vast majority of contemporary countries, between the nineteenth and twentieth centuries. The choice of making a radical break with the legalistic conceptions characteristic of an ancient regime leaves room for legal positivism by virtue of which the State holds the monopoly of the Law, both in its production and in its implementation. Global history studies confirm the universality of the phenomenon, although it appeared in different forms from one country to another. The hypothesis of a Great Divide can be applied to the conception of the Law; it places the positivization of the law which accompanied the creation of the Nation-States in the context of a larger movement.