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## Law in Books and Law in Action: The Problem of Legal Change

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# LAW IN BOOKS AND LAW IN ACTION: THE PROBLEM OF LEGAL CHANGE

*Jean-Louis Halpérin*

- I. INTRODUCTION
- II. LAW IN BOOKS: WHAT ARE LEGAL PHENOMENA?
  - A. *Normativism as Ordinarily Perceived and Its Limits*
  - B. *The Impasse of Rule-skepticism and Legal Pluralism*
  - C. *Focusing on Legal Discourse and the Risk of Losing Contact with Empirical Facts*
  - D. *Accepting the Gap Between Law in Society and Law in Books*
- III. LAW IN ACTION: THE PROBLEM OF LEGAL CHANGE
  - A. *Identifying Legal Change*
  - B. *Measuring Legal Change*
  - C. *Following the Circulation of Legal Ideas*
  - D. *Understanding Legal Change*

## LAW IN BOOKS AND LAW IN ACTION: THE PROBLEM OF LEGAL CHANGE

*Jean-Louis Halpérin\**

### I. INTRODUCTION

One hundred years ago, Roscoe Pound wrote his famous article, “Law in Books and Law in Action.”<sup>1</sup> Considered an important step toward American legal realism,<sup>2</sup> today this article is invoked more for its title than its content. I would argue that in the article, Pound did not clearly distinguish between two separate situations: (1) the departure of decisions of courts from statements of statutory (or constitutional) law, and (2) the discrepancy between doctrine in books and empirical data about law. This second observation has fed various strands of jurisprudence, if often only through the repetition of the well-quoted formula.<sup>3</sup> It is not my purpose here to address all of the controversies concerning the relationship between legal science and facts. My target, more modestly, is to identify and analyze the connections between Pound’s dichotomy and the European legal theories that are influenced by the ideas of Hans Kelsen, H.L.A. Hart, and Alf Ross about law and facts. My point of departure is the distrust of American legal theorists, who, as a group, consider themselves to be “legal realists,”<sup>4</sup> of Kelsen’s normativism, which is too often presented by them as a simplistic and outdated theory without links to the modern practice of law.<sup>5</sup> American legal realism and its intellectual progeny, it can be claimed, are better suited to the empirical study of complex legal orders that comprise more than the law enacted by the state. Although I would argue that Kelsen was both “shocked” and inspired to update his arguments when he discovered American realism upon arriving in the United States, he failed to convince Americans of the correctness of his Pure Theory of Law.<sup>6</sup> In Europe, however, many positivists remain faithful to the theories of

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1. Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12 (1910).

2. See WILLIAM W. FISHER III ET. AL., AMERICAN LEGAL REALISM 3, 7 (1993).

3. See, e.g., Katherine R. Kruse, *The Jurisprudential Turn in Legal Ethics*, 53 ARIZ. L. REV. 493, 498 (2011); Margaret H. Lemos, *State Enforcement of Federal Law*, 86 N.Y.U. L. REV. 698, 699 (2011).

4. See, e.g., Brian Z. Tamanaha, *Understanding Legal Realism*, 87 TEX. L. REV. 731, 734 (2009) (reciting the familiar motto that “[w]e are all realists now.”).

5. See BRIAN LEITER, NATURALIZING JURISPRUDENCE: ESSAYS ON AMERICAN LEGAL REALISM AND NATURALISM IN LEGAL PHILOSOPHY 2 (2007); JOHN FINNIS, *Natural Law: The Classical Tradition*, in THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 1, 9 (Jules Coleman & Scott Shapiro eds., 2002).

6. For an early explanation of his pure theory of law to an American audience, see Hans Kelsen, *The Pure Theory of Law and Analytical Jurisprudence*, 55 HARV. L. REV. 22 (1941). For an American reaction to Kelsen’s pure theory of law, see KARL N. LLEWELLYN, JURISPRUDENCE: REALISM IN THEORY AND PRACTICE 356 n.5 (1962) (describing Kelsen’s pure theory of law as “utterly sterile.”). See also ROSCOE POUND, SOCIAL CONTROL THROUGH LAW 126 (1942) (describing the pure theory of

Kelsen and Hart. The conception of law as a set of norms and a “matter of social fact” is considered the core principle of legal positivism.<sup>7</sup>

As I will demonstrate, the problem raised by Pound in his 1910 paper is virtually identical to the one Kelsen tried to solve a few decades later: how to build a legal science without erecting a phantasmagoria of imagined law without connection to how law is actually used and actually works. Legal scholars continue to write law books and to describe legal orders, and they do so through making choices about what counts as law and is therefore worth presenting to readers. An analysis of these choices that legal scholars must make demonstrates the similarities between Kelsen’s arguments and Pound’s approach. To explore these similarities, I will focus on legal change; in particular, I will consider legal change in its historical context in order to give empirical content to the tension between black-letter law and rules “in action.” I will use legal history, in part, as a means of emphasizing the importance of the rule of change among Hart’s secondary rules,<sup>8</sup> and I will argue that all legal phenomena are in constant evolution. If I am correct, then we can only bring law and facts into closer relation to the extent that we are able to understand why law is continually changing.

## II. LAW IN BOOKS: WHAT ARE LEGAL PHENOMENA?

Legal writing, especially if it concerns teaching and scholarly research, is always a stylized construction, for the obvious reasons of space and practicability. In today’s world, it is clearly impossible to know or to theorize about any national legal order holistically, or even the important parts of any legal order. The genre of commentaries or institutes of national law is obsolete, although it still has advocates in comparative law.<sup>9</sup> At the same time, contemporary scholars largely eschew the practice of writing elaborate treatises on natural law,<sup>10</sup> although there are exceptions, arguably in part because they no longer feel comfortable presenting rules that are often completely out of touch with legal practice. Thus, positivists and the supporters of natural law both seek to identify, then to describe and classify, the phenomena that ought to count as law. Kelsen’s normativism is the result of a long historical commitment to the identification of law as legal rules, especially those rules stemming from the recognized sources of state law. Although it found its intellectual origins in the “classical” legal positivism of the nineteenth century—developed by Jeremy Bentham, John Austin, Friedrich Carl von Savigny, Rudolf von Jhering, Karl Bergbohm, and Georg Jellinek—the opposition that Kelsen asserted between legal norms and facts has been criticized

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law as a “jejune jurisprudence which has cast out all considerations of the precepts of what-ought-to-be.”).

7. JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 37 (1979).

8. H.L.A. HART, *THE CONCEPT OF LAW* 93 (1961). According to Hart, one must consider every legal system as a union between primary rules of obligations (which impose duties and may have similarities with moral or religious rules) and secondary rules conferring powers. *Id.* Hart distinguishes between three kinds of secondary rules: rule(s) of recognition for identifying which rules are considered as legal, rule(s) of change that authorize individuals or groups to make changes in primary rules, and rule(s) of adjudication for organizing judicial process when the law is broken. *Id.* at 92-94.

9. *See generally* PETER BIRKS, *ENGLISH PRIVATE LAW* (2004).

10. ALVARDO D’ORS, *DERECHO Y SENTIDO COMÚN* (2001).

on empirical grounds as being in effect inherently non-empirical.<sup>11</sup> As a consequence of such criticisms, scholars have attempted to define legal phenomena as social practices or as cultural discourses rather than as empirical facts.<sup>12</sup> It is doubtful that Pound would have supported these forms of sociological jurisprudence, and in my view, there exists a more appropriate way of reconciling Kelsen's positivism with Pound's sociological insights. My goal is neither to rescue Kelsen from his critics, nor to reconstruct his legal theory in light of how his thought evolved.<sup>13</sup> Instead, I will analyze the evolution of his thought in order to evaluate various Kelsenian responses to the divergence between "law in books" and "law in action." I will begin with the popular interpretation of the normative science of law, before turning to an analysis of practices and discourses. I will then assess the relationship between Kelsen's more empiricist conceptions and his conviction about the constructivist nature of legal science.

*A. Normativism as Ordinarily Perceived and Its Limits*

One of the leitmotifs of Kelsen, in place since the period when Pound's article first appeared, has been the fight against all forms of natural law, which is, of course, the link that makes him an heir of the legal positivism of the nineteenth century.<sup>14</sup> For Kelsen, positive law is the only true law: all other versions of the law are imagined and therefore either pure ideology or nonsense. Legal rules are not essential principles to be found by reasoning about a natural order, but are instead human artefacts imposed by human actions. At the same time, Kelsen considers the law to be a construction made of rules, and conceived as hypothetical norms.<sup>15</sup> Take the example of criminal law, where any legal rule can be analysed as a hypothetical judgment: if A is then B ought to be.<sup>16</sup> The limited role of legal writing (called "doctrine" in Europe), is to explain in simple statements (or legal propositions, *Rechtssätze*) a rule: e.g., where A is established by a judge, the judge is commanded to decide in accordance with B, as fixed in the rule. All constructions of doctrine which are not based upon these simple statements are fallacies and expressions of a crypto-natural law, for instance, similar to the concepts of subjective right or legal personality.<sup>17</sup> From this perspective, moral values, considered as facts, are completely eliminated from the legal sphere. These postulates are already present in the first major work of Kelsen, the *Hauptprobleme*

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11. DENIS LLOYD & M.D.A. FREEDMAN, INTRODUCTION TO JURISPRUDENCE 256 (7th ed. 2005).

12. See, e.g., JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY (William Rehg trans., 1998); ERIC A. POSNER, LAW AND SOCIAL NORMS (2000).

13. See, e.g., Stanley L. Paulson, *Four Phases in Hans Kelsen's Legal Theory? Reflections on a Periodization*, 18 OXFORD J.L. STUD. 153 (1998); MICHEL TROPER, POUR UNE THÉORIE JURIDIQUE DE L'ÉTAT 83 (1994) (making the fruitful distinction between Hans Kelsen's Theory and "Kelsenism," the latter meaning what we can rebuild from different elements that we pick up in Kelsen's works).

14. HANS KELSEN, HAUPTPROBLEME DER STAATSRICHTSLEHRE ENTWICKELT AUS DER LEHRE VOM RECHTSSATZE (2d ed. 1911).

15. HANS KELSEN, GENERAL THEORY OF LAW AND STATE 35-37 (Anders Wedberg trans., 1949).

16. KELSEN, *supra* note 14, at 258 (approving of Zitelmann for treating legal rules as judgments and not as imperative commands).

17. KELSEN, *supra* note 15, at 8-11.

*der Staatslehre*.<sup>18</sup> Legal norms are opposed to causal rules in the natural sciences—which link facts and explanations—and the normative world of the “Ought” is separated from the empirical world of the “Is”: “no path leads from the one world to the other; the two are separated by an unbridgeable gap.”<sup>19</sup>

The next step for Kelsen was to identify the criteria according to which rules belong to positive law and not to natural law, though the latter is also (as are morality and religion) a system of norms. In his argumentative exchanges with Eugen Ehrlich (1915-1917), and then in a work on the philosophical foundations of natural and positive law doctrines (1928), Kelsen provided more guidance on how to identify positive rules.<sup>20</sup> As a set of imposed rules which are interpreted in a restrictive context, positive law takes place among real events, and appears (though this is rarely mentioned) as a mixture of “Is” (*Sein*) and “Ought” (*Sollen*). In this way the law consists of a rule with an “is-like” quality, containing reference to a determined human conduct, and implying that legal science can have an empirical relation to reality, as do the natural sciences.<sup>21</sup> In order to identify legal norms among other orders and factual events, Kelsen borrows from Adolf Merkl’s *Stufenbau* theory the idea that every legal act is authorized by a superior norm: the individual decision is authorized by a statutory law, which results from a constitutional empowering norm.<sup>22</sup> It is possible, in the same way, to go back to the first historical constitution of the state, but one eventually has to presuppose that this first constitution was binding as a fundamental norm. It is noteworthy that in 1928, Kelsen described this *Grundnorm* not as an idealistic value with a moral content, but as an epistemic hypothesis which allowed the legal theorist to claim that he or she did not need to rely on materials that exist beyond or behind the facts.<sup>23</sup>

Concerning the “living law,” which was defended by Ehrlich,<sup>24</sup> Kelsen insists that informal norms, even when used to structure human relations, are not legal facts, but social practices outside the sphere of the law.<sup>25</sup> Kelsen deems it necessary to fix a boundary between legal norms and social facts, given that the latter lack normative force as law. Legal history, a rarely considered and difficult subject for Kelsen, is interpreted by him as a succession of polities, which prefigure the modern state, within which legislators imposed constraining legal rules that are binding for courts.<sup>26</sup> The appearance of law—which every positivist postulates as a

18. See generally KELSEN, *supra* note 14.

19. *Id.* at 8. See also Stanley L. Paulson, *Hans Kelsen’s Earliest Legal Theory: Critical Constructivism*, 59 MOD. L. REV 802 (1996) (translating Kelsen’s earliest works).

20. HANS KELSEN, *DIE PHILOSOPHISCHEN GRUNDLAGEN DER NATURRECHTSLEHRE UND DES RECHTSPOSITIVISMUS* (1928).

21. See generally Hans Kelsen, *Eine Grundlegung des Rechtssoziologie (Archiv für Socialwissenschaft und Sozialpolitik)* (1915) in AGOSTINO CARRINO, *SCIENZA GIURIDICA E SOCIOLOGIA DEL DIRITTO* 68 (Agostino Carrino ed. and trans., 1992).

22. KELSEN, *supra* note 15, at 143-44.

23. See generally KELSEN, *supra* note 20.

24. See EUGEN EHRLICH, *FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW* 486-506 (Walter L. Moll trans., 1936).

25. KELSEN, *supra* note 15, at 20-21.

26. See generally Jean-Louis Halpérin, *Histoire du Droit et Théorie du Droit: Un Essai de Conciliation*, 51 ARCHIVES DE PHILOSOPHIE DU DROIT 281 (2008).

historical event according to the conception of law as a human convention—presupposes first the existence of courts, then the establishment of a power able to assure that the orders of the courts are respected. In the 1911 *Hauptprobleme*, Kelsen notes that in the age of customary law, legal norms were confused with moral rules, which justified their historical study as law.<sup>27</sup> But with the progress of statutory law in modern states, law acquired its formal independence and legal dogmatics had to be separated from legal history.<sup>28</sup> In the 1945 *General Theory of Law and State*, Kelsen went so far as to assimilate Babylonian law, the customs of an African tribe (the Ashantis), the Swiss constitution, and American law as legal orders that evidence “a specific social technique of a coercive order.”<sup>29</sup>

It is clear that Kelsen does not deny the reality of legal orders, but only insists that the proper objective of legal science is to describe legal rules through propositions of law. As he wrote in the first edition of the *Reine Rechtslehre*: “The norms as such, not to be confused with the acts by means of which the norm is issued, do not exist in space and time, for they are not a fact of nature.”<sup>30</sup> Can we say that in the first stages of Kelsen’s theory there exists a “confusion . . . between the norms created by legal authorities and the propositions which appear in legal textbooks[?]”<sup>31</sup> In fact, there was an evolution in how Kelsen theorized about the “reproduction” of legal norms through legal propositions postulated in law books. In Kelsen’s constructivist conception, legal science creates its own object and legal norms are necessarily formulated through legal propositions. From the 1920s to the beginning of the 1960s (and the second edition of the *Reine Rechtslehre*), Kelsen considered that “norms created and applied within the framework of a legal system have the character of legal norms only if legal science ascribes this character to them.”<sup>32</sup> In this way, legal norms are constructions of legal science and law can be captured only in books, though empirical verifiability is assumed. In *General Theory of Law and State*, Kelsen repeats that the contents of positive law “can be uniquely ascertained by an objective method. The existence of the value of law is conditioned by objectively verifiable facts.”<sup>33</sup> If legal propositions can be true or false, this presupposes comparison between legal norms and phenomena that are not legal norms.<sup>34</sup>

In many of his writings, Kelsen gives the impression that he subscribes to the German “copy theory” of knowledge, according to which legal propositions reproduce, and thereby formulate, legal norms.<sup>35</sup> The examples given by Kelsen himself, especially regarding “simple” penal rules, have reinforced the idea that normativism has reduced the role of doctrine to a rather naïve repetition of norms.

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27. KELSEN, *supra* note 14, at 31.

28. *Id.* at 33-42.

29. KELSEN, *supra* note 15, at 20.

30. HANS KELSEN, INTRODUCTION TO THE PROBLEMS OF LEGAL THEORY: A TRANSLATION OF THE FIRST EDITION OF RIENE RECHTSLEHRE OR PURE THEORY OF LAW 12 (Bonnie Litschewski Paulson & Stanley L. Paulson trans., 1992).

31. Michael Hartney, *Introduction* to HANS KELSEN, GENERAL THEORY OF NORMS, at xxiii (1991).

32. HANS KELSEN, THÉORIE PURE DU DROIT 53 (Henri Thévenaz trans., 1953) (containing Kelsen’s revisions of the text).

33. KELSEN, *supra* note 15, at 49.

34. *Id.*

35. See Paulson, *supra* note 13, at 158 & n.28.

We will see from the discussion below that Kelsen opens new windows to a freer conception of interpretation through doctrine, by comparing legal interpretation to musical interpretation.<sup>36</sup> But there is no doubt that a common, if not misleading, view of Kelsenian normativism sees it as “law in books,” thus ascribing Kelsenian method to hypothetical statements, which only reproduce legal norms.<sup>37</sup>

It is easy to understand the criticisms by formalist and reductionist schools of thought addressed to this form of “relaxed” normativism. Here, the contradiction begins with Pound’s move to take greater account of the more flexible practices of judge-made law. Kelsen tells us how to recognize law—with the “coercion” test (so as not to confuse the orders of the highway bandit with legal commands) supplemented by the “habilitation” test (proving that the rule has been created by a legal authority with the power to do so)—but he is silent about the method by which the rules may be extracted from the “raw materials.”<sup>38</sup> The implication is that legal science may freely construct legal norms, so long as it verifies *ex post* some correspondence with reality. This silence may explain Kelsen’s embarrassment concerning his analyses of customary law and the place of judge-made law. Concerning the former, Kelsen rejects Austin’s thesis on the exclusive competence of the state to recognize customary rules—arguing that the state is not the only power that creates law—and asserts that customary law is established by the subjects of law according to constitutional (which itself can be customary) authorization.<sup>39</sup> With this characterization of decentralized legal orders, Kelsen faces a problem: he cannot explain how to differentiate moral or social customs from legal norms. Relative to judge-made law, the distinction (which does not include a clear definition of the criteria used to discriminate between norms) between general and individual norms seems, at its origins, to give more attention to general norms as truly creative than to “individual” norms, which are adjudicated decisions and appear as the mere application of pre-determined rules. Discussing the thesis of John Chipman Gray in *General Theory of Law and State*, Kelsen admits that judicial precedents can create general norms, but he limits this possibility to common law systems only, where it would exist (by virtue of statute or in the customary constitution?) as an entitlement of courts to create legal rules.<sup>40</sup> Such an admission fails to explain the important place of judge-made law in civil law systems and to provide a criterion by which to discriminate between judicial legislation (we know that the identification of a legal rule in a precedent is not an easy task) and the “individual” norms present among the courts decisions.<sup>41</sup>

Finally, this common interpretation of Kelsen’s normativism, apparently well suited as a model for top down legal orders—that is, for a model moving from constitutional norms to the detailed examination of general norms—does not adequately capture or explain a perpetually moving legal practice. Not

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36. KELSEN, *supra* note 32, at 54.

37. See Gustav Bergmann & Lewis Zerby, *The Formalism in Kelsen’s Pure Theory of Law*, 55 ETHICS 110 (1945).

38. KELSEN, *supra* note 15, at 18-20.

39. *Id.* at 127-28.

40. *Id.* at 149-50.

41. TROPER, *supra* note 13, at 71-83; NEIL DUXBURY, THE NATURE AND AUTHORITY OF PRECEDENT 109 (2008) (noting the absence of a “satisfactory overarching theory of precedent.”).



surprisingly, critics of “law in books” will reject Kelsen’s well ordered description as flawed, as it is based on an outdated methodology that ignores too many empirical facts to be considered useful. Let us see if the proposed alternatives have been more successful.

*B. The Impasse of Rule-skepticism and Legal Pluralism*

It may appear surprising to combine aspects of American legal realism and legal pluralism, since the advocates of the latter movement do not make many references to the former. Yet the works of Karl Llewellyn provide a link between rule-skepticism and the recognition of the multiple ways to regulate groups as independent legal orders: this widens the gap between law in books, assimilated with the description of rules (especially rules issuing from the state), and law in action, identified with the multiplicity of legal disputes (including legal disputes outside the sphere of state). Here, rule-skepticism, as conceived by Llewellyn, is a denial of the importance and determinacy of rules in empirical legal situations (without a complete denial of all rules in law, including the rules of recognition that are necessary to legitimate court decisions)<sup>42</sup> with a correlative focus on judicial decisions or actions.<sup>43</sup>

In his 1930 work, *Bramble Bush*, Karl Llewellyn chooses as a point of departure the discovery, made during his teaching of law (as is pertinent to a discussion about law for scholars and students), that “rules alone, mere forms of words, are worthless.”<sup>44</sup> Rather, as a “set of rules of conduct,” law consists of official actions in resolving disputes or in other applications.<sup>45</sup> These actions, particularly court decisions, are characterized by some regularity because officials take account of the authoritative command of constitutional and legislative rules, but the raw materials of law consist of relatively indeterminate decisions. For this reason, case law studies and the identification of precedents are important, but they do not exhaust the empirical depth of the law.<sup>46</sup>

In the same year, 1930, Llewellyn’s famous paper, *A Realistic Jurisprudence—The Next Step*,<sup>47</sup> focused on critiques of Pound’s methodology.<sup>48</sup> The question

42. Hart has criticized this kind of rule-skepticism as inconsistent with the recognition of binding court decisions. See HART, *supra* note 8, at 133.

43. Leiter considers that realists have not been conceptual rule-skeptics because the concept of law as “just a prediction of what a court will do” concerns the job of practicing lawyers, not the one of legal academics. LEITER, *supra* note 5, at 68-73. It is one part of the thesis defended by Llewellyn himself in the foreword of the second edition of the *Bramble Bush* where he speaks about a theoretical tempest in a teapot and an erroneous interpretation of realism as a philosophy of unbelief towards legal rules. KARL N. LLEWELLYN, *THE BRAMBLE BUSH* 9-10 (2nd ed. 1951). But it seems to me that Llewellyn’s precedent presupposes a concept of law that denies the central place for state rules and gives to scholars the function to investigate other legal phenomena.

44. LLEWELLYN, *supra* note 43, at 12 (emphasis omitted).

45. *Id.*

46. See JOHN HENRY SCHLEGEL, *AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE* 226 (1995).

47. Karl N. Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431 (1930).

48. See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870-1960*, at 173 (1992) (describing Llewellyn’s piece as offering “a slight variation on Pound’s famous and important distinction between law in books and law in action” in fact to attack Pound).

posed by Llewellyn in this article was to determine the “focus” or “point of reference” of legal matters, which properly evokes the works of academics about the concept of law.<sup>49</sup> He contests Pound’s approach, claiming that it is limited to rules, precepts, and words.<sup>50</sup> Not only is the term “rule” ambiguous as it applies both to a “formula in authoritative books” and the regular proceedings of the courts, but Llewellyn argues that the “rules of substantive law are of far less importance than most legal theorists have assumed in most of their thinking and writing.”<sup>51</sup> According to Llewellyn, the most significant aspects of law lie in the field of behavior, and inquiry must be made into the decision “in each case.”<sup>52</sup> A very similar formula—“the law therefore consists of decisions, not of rules”—was used that same year by Jerome Frank in *Law and the Modern Mind*.<sup>53</sup> Thinking seriously about the distinction between “law-in-books and law-in-action” means refocusing the emphasis of legal research on observable behavior. Rule-skepticism is concerned here with “paper rules”—as well as precedent in statutes or administrative regulations—as opposed to a broader conception of legal life. Pound is accused of leaving “law in action” as a simple suggestion, while further discussions are centered on precepts.<sup>54</sup>

Probably recalling Ehrlich’s conception of “living law,” Llewellyn also makes footnoted reference to Bronislaw Malinowski’s analysis in *Crime and Custom in Savage Society*.<sup>55</sup> Prudently, Llewellyn presupposes the presence of “‘rules of law’ i.e., at least assuming law as a semi-specialized activity of control distinguished from other mechanisms of control.”<sup>56</sup> Trying to move the “point of reference” for legal matters towards the totality of court decisions (and not only certain selected precedents), he indicates that he would like to see some proof of the implicit norms and practices that could be, although with some hesitation, considered as law, incorporated into the procedures of those specialized formations (like courts, tribunals, etc.) that adjudicate disputes.<sup>57</sup> I would suggest that the “next step” towards a realistic jurisprudence would, at the same time, include more facets of sociology in empirical studies as well as more facets of anthropology in the definition of law.

For Llewellyn, this next step took the form of *The Cheyenne Way*, written with E. Adamson Hoebel, where he developed the idea, already present in *Bramble Bush*, that each society secretes a legal order (as a given phenomena) consisting of ways to resolve disputes.<sup>58</sup> In contrast to the “ideological” (and without a doubt misleading) path toward “rules,” the best avenues to understand the law are those dealing with practices, and even better, with “instances of hitch, dispute, grievance,

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49. Llewellyn, *supra* note 47, at 432.

50. *Id.* at 434-35.

51. *Id.* at 442.

52. *Id.* at 444.

53. JEROME FRANK, *LAW AND THE MODERN MIND* 128 (6th ed. 1949).

54. Llewellyn, *supra* note 47, at 435 n.3.

55. *Id.* at 436 n.4. See also WILLIAM TWining, *KARL LLEWELLYN AND THE REALIST MOVEMENT* 153 (1973) (discussing Llewellyn’s treatment of Malinowski).

56. Llewellyn, *supra* note 47, at 436 n.4.

57. *Id.*

58. KARL LLEWELLYN & E. ADAMSON HOEBEL, *THE CHEYENNE WAY* 20-21 (1941).

and trouble.”<sup>59</sup> The focus, for instance, for an empirical investigation of Cheyenne law, is on disputes and breaches “which [are] marked by authority—which is recognized as imperative.”<sup>60</sup> Llewellyn describes legal norms as being found in words, rituals, and “litigious custom,” thus adopting the words of the British legal historian Paul Vinogradoff.<sup>61</sup> Again quoting Malinowski, Llewellyn presupposes that each social group and subgroup has its own order and “norms for the Entirety which is in question.”<sup>62</sup> Llewellyn contends that if these norms give birth to disruptions which are submitted to any form of justice, “the handling of such disruptions . . . per se pertain[] to the law of the tribe.”<sup>63</sup> Might the axiomatic idea of legal pluralism identify law outside of state rules and take account of all decisions by organs empowered to regulate social disputes?

Appearing thirty years after Llewellyn’s *The Cheyenne Way*, in the 1970s and the 1980s, legal pluralism was basically rooted in anthropological works about Asian, African, and Oceanic societies.<sup>64</sup> Beginning with the study of personal status in colonial and post-colonial situations (for example in Asia, especially in India), which supposes the coexistence of two or more legal systems within the same social field (which is called “weak pluralism”),<sup>65</sup> this movement gave birth to a legal theory which challenged traditional positivism (including the ideas of Kelsen and Hart) as an “ideology of legal centralism” which was based on the myth of a sovereign rule of recognition, a kind of crypto natural law, or an ideal of law that “ought to be.”<sup>66</sup> On the contrary, legal pluralists believe that legal facts appear spontaneously (or in a completely decentralized way) in the social norms of every society and that the study of judicial decisions (or more generally, of any kind of dispute resolution) is the only way to describe the legal regulation of society.<sup>67</sup> This very broad concept of law has also been used by industrialized countries in order to bring together official and unofficial forms of ordering, or court decisions and “nonlegal forms of normative order.”<sup>68</sup> Through this conception of legal raw materials, pluralists rejoin (without always quoting their forerunners) the “*Freies Recht*” movement of the beginning of the twentieth century—particularly Ehrlich’s legal sociology which was criticized by Kelsen—and the rule-skepticism of some American realists—especially Llewellyn’s approach to legal decisions and “primitive” law. Any kind of rule-centered law in books and a fortiori description of a Kelsenian hierarchy of state norms are disqualified by pluralists, who propose, on the other hand, to look for law in action in all those social norms that are revealed by dispute resolution decisions.

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59. *Id.*

60. *Id.* at 23.

61. *Id.* at 26 (citing PAUL VINOGRADOFF, *OUTLINES OF HISTORICAL JURISPRUDENCE* 368 (1920)).

62. *Id.* at 27. In a posterior work Hoebel criticizes Malinowski for fusing law and social norms. See E. ADAMSON HOEBEL, *THE LAW OF PRIMITIVE MAN* 208-09 (3d ed. 1964).

63. LLEWELLYN & HOEBEL, *supra* note 58, at 27 (emphasis omitted).

64. See generally WERNER MENSKI, *COMPARATIVE LAW IN A GLOBAL CONTEXT: THE LEGAL SYSTEMS OF ASIA AND AFRICA* (2006).

65. See, e.g., M.B. HOOKER, *LEGAL PLURALISM: AN INTRODUCTION TO COLONIAL AND NEO-COLONIAL LAWS* (1975).

66. John Griffiths, *What is Legal Pluralism?*, 24 J. L. PLURALISM & UNOFFICIAL L. 3-4 (1986).

67. HOOKER, *supra* note 65, at 14-18.

68. See *id.* at 426-35.

As a creation of the law school, legal pluralism does not reject the writing of legal books: it actually pretends to use all the resources of the social sciences to reach the “real” empirical legal order by abandoning traditional legal doctrines, which are accused of imposing on the Western discourse of professional lawyers. Logically, this point is not acceptable to the legal theorists who think that law defines its own limits or to the positivists who consider law to be an invented technique which is not present in every society. The ambition of a “meta-narrative” of legal anthropology would seem to be too comprehensive (with the illusory goal of grasping the totality of social phenomena with which the law is related) and too ignorant of the constructive aspects (not to speak of the doctrinal traditions) of legal science. As Kelsen has argued against Ehrlich, legal science would thus be dissolved in to a general sociology which does not discriminate legal phenomena from social ones and does not take account of the auto-description of legal systems from the internal point of view of the lawyer. One of the most patent frailties of legal pluralism stems from a contradictory and vague definition of law that is conflated with all forms of social control.<sup>69</sup> Other responses to the arguments of pluralists take the following forms: (1) the claim that law is a technique which is absent in some societies, and even in some polities with “judges,” is not ethnocentrically imperialistic because it is not a value judgment (the invention of law is not considered as “progress”) and proof of the appearance of such technique can be found in the histories of non-Western civilizations;<sup>70</sup> (2) in many cases so-called “spontaneous” customs are actually the products (perhaps designated as “customary law”) of state recognition, or of the “invention of a tradition” by Western colonizers (as accepted by more nuanced pluralists like Sally Falk Moore);<sup>71</sup> (3) though legal pluralism rejects law as a particular technique of social control and looks for a general understanding of social regulation, it can also be suspected of essentialism in its search for what would be “beneath the law.”<sup>72</sup> For all these reasons, a legal pluralism which is based on a conceptual rule-skepticism seems to be an obstacle to understanding law in action as it is related to law in books.

*C. Focusing on Legal Discourse and the Risk of Losing Contact with Empirical Facts*

An alternative pattern to the rules-centered approach results from looking at “law” as a set of discourses. One such method is based on theories of interpretation and hermeneutics, and grew out of the philosophical works of Ludwig Wittgenstein, Hans-Georg Gadamer, and Paul Ricoeur. This current of thought posited that a text exists and acquires meaning through the interpretation of its readers, and has introduced into the legal field the theory of discursive modalities, which has been defended in the study of literary sources, particularly in the work of

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69. See Brian Z. Tamanaha, *The Folly of the ‘Social Scientific’ Concept of Legal Pluralism*, 20 J.L. & SOC’Y 192, 192-93 (1993).

70. *Id.* at 193.

71. SALLY FALK MOORE, *SOCIAL FACTS AND FABRICATION: “CUSTOMARY LAW” IN KILIMANJARO* (1981).

72. Tamanaha, *supra* note 69, at 201.

Stanley Fish.<sup>73</sup> Other authors have also contributed to this school of thought. Philip Bobbitt has analyzed the development of judicial review as a grammar of interpretative practices which use different forms of arguments that are not directly linked with realities in the world.<sup>74</sup> James Boyd White has compared law and literature to compositional activities which consist of texts and meanings that live through interpretation.<sup>75</sup> Dennis Patterson has used Fish's schemes of interpretative communities to say that the "truth" of legal claims is based on a textual, doctrinal, historical, and prudential backing and not in a "certain relation to some state of affairs," as argued by the realists.<sup>76</sup> Using a different point of departure, Ronald Dworkin has also defined law as an interpretive practice made up of a textual chain constructed by judicial opinions.<sup>77</sup> If law consists of principles and interpretations, and not of rules, the gap between law in action and law in books is easier to ascertain: law in action is created through legal discourses which are confused and conflated with discourse about law that we can find in books.

Yet another current of thought has insisted upon the authority of a legal discourse based on a mythology of law. Here the analyses of Michel Foucault about the knowledge-power dynamic,<sup>78</sup> as well as the works of Pierre Legendre,<sup>79</sup> assert that legal discourse can exercise a real power upon the human mind by means of the authority of jurisprudential writings and court decisions, and without reliance on the coercive power of the state.<sup>80</sup> The outcome of such influences, which is pertinent to our subject, lies in those cultural legal studies that insist on the discursive nature of law. If our belief in the rule of law and the benefits of legal order rests upon discourse, law and legal science are not separated as traditional positivists affirm, but are linked into a constructed world that can be identified with the empirical world of facts. Empiricism in the law is situated not in social facts but within legal discourse and its practice of self-reflection.

Another current, which also has its origins in different intellectual conceptions, is represented by continental social systems theory, as developed in the legal field by Niklas Luhmann.<sup>81</sup> Here, the point of departure is a constructivist theory of science which assumes that law is an autonomous, "autopoietic" system: not only does legal science define its own object and its own boundaries, but law is a set of discourses which consist of a self-description of legal norms.<sup>82</sup> With a positivist approach like that of Dworkin, and a constructivism that can be reconciled with

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73. *See generally* STANLEY FISH, *IS THERE A TEXT IN THIS CLASS? THE AUTHORITY OF INTERPRETIVE COMMUNITIES* (1980); STANLEY FISH, *DOING WHAT COMES NATURALLY: CHANGE, RHETORIC AND THE PRACTICE OF LITERARY AND LEGAL STUDIES* (1989).

74. PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* (1982).

75. JAMES BOYD WHITE, *HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW* (1985).

76. DENNIS PATTERSON, *LAW AND TRUTH* 99-100, 171, 179 (1996).

77. RONALD DWORKIN, *LAW'S EMPIRE* 410, 413 (1986).

78. MICHEL FOUCAULT, *POWER/KNOWLEDGE: SELECTED INTERVIEWS & OTHER WRITINGS, 1972-1977* (Colin Gordon ed., Pantheon Books 1980).

79. PIERRE LEGENDRE, *L'AMOUR DU CENSEUR* (1974).

80. *See* PETER FITZPATRICK, *THE MYTHOLOGY OF MODERN LAW* 11, 122 (1992).

81. *See generally* NIKLAS LUHMANN, *LAW AS A SOCIAL SYSTEM* (Klaus A. Ziegert trans., 2004).

82. *Id.* at 57.

Kelsen's Kantian convictions, Luhmann has compared law to language and other networks of communication.<sup>83</sup> Every social system operates through communication and law is "in action" through a self-description of the legal discourse of judges, officials, or professors. "Law has no binding force. It consists purely of communication and of structural deposits of communication, which convey such meanings."<sup>84</sup> For these reasons, law does not need any extra-legal idea beyond that of a fundamental norm in order to sustain the legal system. It is no longer necessary to have a correspondence between norms and empirical facts. The distinction between norms and facts is situated inside the legal system, and legal facts are, as legal norms, artifacts of legal discourse. The lawyer, as well as the scholar, the judge, or the practicing attorney, has no choice but to participate in this system, through this self-description. By this logic, only the sociologist with an external point of view could study legal science, but it is still quite impossible to reach an empirical legal order that does not exist as a sub-system, or as some form of a factual "reality." A "traditional" legal sociology is in some ways discredited because it studies those differences in "legal" practices, which do not count as "law" for the participants in the system.

All of these currents, based on hermeneutics, and sometimes qualified as "post-modern" or "post-positivist" (which seems inconsistent with Dworkin's thesis), indeed converge in their placement of the essence of law in discourse, i.e., in contemporary books (or texts likely to be published in books). One can say that law in action is in essence communication, including communication through books, and that there is no possibility of disjunction between an empirical reality, which is of no crucial importance for law, and the legal discourses developed by interpretive communities of lawyers (especially those with official functions). Apparently Pound's problem was at least partially resolved by a serious scholarly effort which became aware of the "unreality" of a law that exists in its own linguistic and cultural sphere.

The goals of legal scholarship, which is only one form among other legal discourses and often linked with legal education, arguably are not agreed upon by the advocates of these different currents. Some may seek to denounce the credulity of lawyers, thinking that they believe in a mythological discourse that supposes the possible verification of legal "truth" through empirical tests. This fundamental criticism is directed at legal positivists and undermines any attempt to construct a science of law. I would suggest that for these critics, it follows that law in books would always be a fallacy, except for in those books which show legal mythology in action. This was not Pound's purpose, and it is not acceptable to positivists who observe law in action with all its coercive force and "teeth." Luhmann's conception of law in action is not destructive of the idea of a legal science, as he insists on the autonomy and the historical evolution of the legal system.<sup>85</sup> Luhmann also made a clear distinction between judicial and scholarly discourses. The former, intended to settle disputes, he described as a self-observation of what is legal and what is illegal and as the co-ordination of legal elements used to justify

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83. *Id.* at 423.

84. *Id.* at 72.

85. *Id.* at 26.

a decision.<sup>86</sup> The latter he considered as a presentation of the unity of the legal system through books, in other words, academic works destined to give homogeneity to norms but not to order human conduct.<sup>87</sup> Luhmann's distinction between a "second-level" observation and a "third-level" observation recalls the opposition between law and legal science postulated by classical positivists. In Luhmann's theory, there seems to be room for a legal science that depends on the internal point of view of lawyers and tries to understand how law progresses in action, especially in a historical sense, and how legal discourses develop over time. Luhmann had a real interest in legal history and in the observation of change in the application of rules (the second level) and evolution in legal thought (the third level).<sup>88</sup> Although there is no clear indication of it at this point in Luhmann's work, which relates more to a sociologist studying social systems and to not trying to build a legal science, one can imagine a fourth level of a meta-legal science which analyzes "law in action" through "law in books."

Despite the different nuances in the thought of these scholars who advocate the study of a legal discourse that is disconnected from empirical reality, there are some common flaws in their approaches. First, as has already been noted, these analyses underestimate the law's grip on reality. Law can bite, and often bites with a violence that is not purely symbolic.<sup>89</sup> This impact of "law in action" does not identify with legal discourse, which can hide or soften these legal manifestations of violence. It is well known that legal scholarship is often reluctant to take account of certain normative evolutions and that there are many examples of a time-lag between a change in rules or judicial decisions and the recognition of that change by legal writing. The dialectic of scientific revolutions or paradigm shifts is based upon the long duration of conceptual evolutions compared to factual ones.<sup>90</sup> Studying legal phenomena as discourse, without making clear-cut distinctions between norms and legal science, increases the risk of losing contact with the legal mechanisms that are working in empirical reality.

Even in a conception of legal phenomena that insists upon the symbolic structure of law and its "power of naming" (which means classifying and thus instituting social realities), like Pierre Bourdieu's analysis of the "force of law," it is still necessary for a sociologist to distinguish legal discourse and social action (or conflict) within the legal field.<sup>91</sup> This distinction is, a fortiori, indispensable for the positivist legal theorist who does not want to be a victim of the "indigenous discourse" of lawyers about the supposed autonomy of law. Thus, theories which reduce law to the discourse of lawyers provide support for a closed off area for legal scholarship that is far too large and comfortable for lawyers themselves (who are always flattered by highlighting their own internal point of view and the idea of a restricted legal sphere). The risk here is in believing that law exists only through scholarly discourse and being too credulous toward the power of legal education to

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86. *Id.* at 424-26.

87. *Id.* at 454.

88. *Id.* at 423.

89. HOEBEL, *supra* note 62, at 26.

90. THOMAS KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (1962).

91. Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Legal Field*, 38 *HASTINGS L.J.* 805, 807-53 (Richard Tendiman trans., 1987).

create a virtual world. This might lead to a return to the jurisprudence of concepts (*Begriffsjurisprudenz*) as practiced by German Pandectists in the nineteenth century, as well as to the legal formalism criticized by American realists!<sup>92</sup>

Such risks are known and assumed by some of the advocates of a radical constructivism like Luhmann. Yet the system approach, attacked by those legal sociologists inspired by Bourdieu, does not assign a precise task to legal science. If legal sociology can be developed as an external point of view about legal science as object, it is not clear how positivist lawyers can defend a semi-external point of view about law, or how they can select among legal phenomena (for instance, judicial decisions) to identify those which are pertinent for creating or changing norms.

#### D. *Accepting the Gap Between Law in Society and Law in Books*

The three examined approaches—classical normativism supposing that legal science reproduces legal norms, realism considering that legal facts are revealed by judicial decisions, and discursive analysis which amalgamates all legal statements—all deny the importance of the gap between “law in books” and “law in action.” Scandinavian realists have proposed the elimination of this dichotomy by treating all legal phenomena as facts which address an “Ought to be”<sup>93</sup>: on one hand, there are “patterns of behavior,” especially those prescribed by law courts, and on the other hand, there are “words printed in the law books,” or prophecies made by lawyers regarding court decisions.<sup>94</sup>

Acute critics of Hart have shown how difficult it is to say that judges or legislators make prophecies about their own actions.<sup>95</sup> Even if we accept a discourse of “normative facts,”<sup>96</sup> a discrepancy remains between prescriptive facts inserted in a political reality and the imagined constructions of legal science. Positivists consider that legal science is different from its object, even if this object is an intellectual construction based on experience. I would suggest that the facts that we can study empirically are social phenomena and are not pre-qualified as normative phenomena. There is some consensus on the idea that “normative facts” are inserted into a social reality that contains many other non-legal phenomena.<sup>97</sup> It is not so easy to isolate legal phenomena (linked in one way or another to the legal sphere) from non-legal phenomena. I would contend that the empirical legal order, defined by Max Weber as a representation of the rules supposed to govern human

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92. The classic critique of *Begriffsjurisprudenz* (the jurisprudence of concepts) is RUDOLF VON JHERING, *LAW AS A MEANS TO AN END* (Isaac Husik, transl., 1968). For an early critique of legal formalism from an American realist perspective, see, for example, Oliver Wendall Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457 (1910). See also MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1780-1860*, at 253-266 (1977); HORWITZ, *supra* note 48, at 9-31; DUNCAN KENNEDY, *THE RISE AND FALL OF CLASSICAL LEGAL THOUGHT* (2006).

93. KARL OLIVECRONA, *LAW AS FACT* 28 (1939); ÉRIC MILLARD, *THÉORIE GÉNÉRALE DU DROIT* 44-46 (2004).

94. OLIVECRONA, *supra* note 93, at 20; ALF ROSS, *ON LAW AND JUSTICE* 19-34 (1958).

95. MICHEL TROPER, *The Fact and the Law*, in *LAW, INTERPRETATION, REALITY: ESSAYS IN EPISTEMOLOGY, HERMENEUTICS AND JURISPRUDENCE* 22, 22-37 (P. Nerhot ed., 1990).

96. *Id.*

97. See, e.g., DWORKIN, *supra* note 77, at 410-13.



behavior,<sup>98</sup> is not “given” to the observer. One can even doubt that it exists as an identifiable reality with precise limits which prevent integration of misconceptions about legal significance.<sup>99</sup> For this reason, legal science cannot be a naïve reproduction of “normative facts” and needs the definition of a concept of law by which to isolate legal phenomena.

It is here that the link to reconcile empiricism and constructivism is situated. The observer constructs a legal order by recognizing the legal character of some facts and analyzing these norms as pieces in a normative system. As Joseph Raz has shown, using *our* concept of law, dependent on the observer and not necessarily shared by other lawyers, including those working in the observed legal system, does not prevent this concept in the study of past or foreign societies from having a universal hermeneutic impact.<sup>100</sup> As a positivist, I can adhere to Hart’s concept of law and use it as a tool to construct legal orders.

The so-called “rule of change” has been emphasized by Hart as one of the secondary rules (along with the recognition and adjudication rules) that are necessary to transform social (or primary) rules into legal norms.<sup>101</sup> If we think that one of the main features of law is the possibility to change norms, it must be admitted that local techniques for doing this have been invented in different places throughout history. The history of Roman law, as well as that of Chinese law, shows that the “invention” of law occurs when a legislative authority both foresees and permits the future alteration of existing law.<sup>102</sup> With this in mind, Hart’s rule of change can be understood as a sociological rule that links social and legal change. This second interpretation is a question for legal sociology rather than for legal theory.

I argue that there is a third use of the rule of change, even if not intended by Hart, in analyzing the construction of legal science. As we have said, a legal order does not exist empirically and is undetermined, because it is impossible, even in a limited space and time, to describe the totality of meanings and representations linked to legal statements. Even if we do not share a complete rule-skepticism and follow the positivist principle, according to which the validity (or the binding force) of legal norms can be tested empirically (with the use of secondary rules), we cannot make a verification of a legal order, which is a hypothetical construction. We have to use schemas, or ideal-types, which order and simplify, often for didactic reasons, the legal norms inserted in the social reality.

Following Max Weber’s warning, ideal-types have to be changed to take account of historical evolution, as well as to develop new research programs. With the point of departure provided by Pound’s formula, legal scholars must be particularly sensitive to changes in legal norms in order to avoid an excessive gap between obsolete law in books and empirically ascertained law in action. Even

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98. MAX WEBER, *CRITIQUE OF STAMMLER* 98, 109 (Guy Oakes trans., 1977).

99. *See id.* at 109.

100. JOSEPH RAZ, *BETWEEN AUTHORITY AND INTERPRETATION: ON THE THEORY OF LAW AND PRACTICAL REASON* 17-46 (2009).

101. HART, *supra* note 8, at 93-94.

102. ALDO SCHIAVONE, *IUS. L’INVENZIONE DEL DIRITTO IN OCCIDENTE* 5 (2005); YONPING LIU, *ORIGINS OF CHINESE LAW: PENAL AND ADMINISTRATIVE LAW IN ITS EARLY DEVELOPMENT* 202-32 (1998).

with the quick circulation of information prevalent in modern times, there is always delay in constructing and making the public aware of new legal arrangements, so that “law in books” is almost always a historical statement of former legal norms. In some ways, every legal scholar is a legal historian. For this reason, one of the tasks (but not the only task) of legal science is to study change in law, which includes a determination of whether new norms are changing the constructed legal order (or not). Even a positivist who is reluctant to look to history cannot deny this dynamic of legal orders. As Luhmann has written, “law is also a historical machine in the sense that each autopoietic operation changes the system.”<sup>103</sup> Here, sociologists and legal scholars can diverge in their respective fields of research: the former are prone to choose a micro-level for studying every new legal norm—even the routine decisions which do not affect the structure of the legal order, but are indications about social practices linked with law—whereas the latter often prefer (especially for didactic reasons) to adopt a macro-level for trying to understand national, international, or global law. In the construction of these macro-level legal orders, it is necessary to make a selection of general norms (rather than individual norms) and to determine if a new norm makes a significant change in the constructed scheme.

Law in action is “law in change”: a legal science aware of the relativity of its constructed object but anxious to be closely linked to empirical data supposes a study of these changes in norms. Constructing a legal order through the analysis of legal change can also help to resolve some of the problems posed by the advocates of oral or plural law. If we can prove that a legal change has been provoked by an oral tradition—and generally this kind of proof depends upon written material—there is room to explore the contribution of oral consensus to the construction of a legal order, as John Baker has shown regarding the role of common learning within the Inns of Court in the development of common law.<sup>104</sup> With this method, we can also analyze the impact of social practices—or the absence of such impact—upon legal change.<sup>105</sup> With the recent growth of international law, the focus on legal change is decisive in fostering an appreciation of the construction of new legal orders. All the recent debates about “global law,” including the supposed outdatedness of state legal orders and the “deconstruction” of the hierarchy of norms, are based upon the question of the necessity (or the absence of necessity) of a paradigm shift that takes account of new legal norms and tests them empirically.<sup>106</sup>

Gadamer has proposed a comparison of the hermeneutics of judges and legal historians, as both try to isolate and interpret legal phenomena.<sup>107</sup> The judge must first isolate the legal questions in a case by identifying what is legal and what is not

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103. LUHMANN, *supra* note 81, at 91.

104. JOHN H. BAKER, THE LAW’S TWO BODIES: SOME EVIDENTIAL PROBLEMS IN ENGLISH LEGAL HISTORY 5-6 (2001).

105. *See, e. g.*, ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 9-11 (1991) (theorizing that people often apply informal social norms to resolve disputes).

106. Gunther Teubner, *Global Bukowina: Legal Pluralism in the World Society*, in GLOBAL LAW WITHOUT A STATE 3, 3-28 (Gunther Teubner ed., 1997); FRANÇOIS OST & MICHEL VAN DE KERCHOVE, DE LA PRYAMIDE AU RÉSEAU? POUR UNE THÉORIE DIALECTIQUE DU DROIT 15-20 (2002).

107. *See* HANS-GEORG GADAMER, TRUTH AND METHOD 325 (Joel Weinsheimer & Donald G. Marshall trans., 1975).

legal according to a binary categorization. To resolve disputes, the judge rarely considers one rule in isolation; there is thus a coordination of different meanings to arrive at a decision. For each of the rules mobilized to resolve the case, the judge has to decide which meaning is pertinent. The reasoning of legal historians diverges from that of judges, as do their goals. Whereas the latter have to settle an empirical lawsuit (inserted in the social reality) and to create a new (individual, sometimes with a general impact) norm, the former must identify legal norms in the abstract, and study all the interpretations given to them in the past.<sup>108</sup> As the legal historian does not have direct access to empirical reality, she has to study all the successive meanings given to a legal statement and in the cases where this legal statement has always been in force, to extend the examination up to the present day.<sup>109</sup> The legal historian has to isolate and organize normative facts according to the changes brought about by different meanings in the construction of the legal order.<sup>110</sup> This “historical” method brings us halfway in our analysis of Pound’s formula: considering that one of the tasks of legal science is to continually update our understanding of the legal order so that we may take account of change, we must now examine the methodological questions linked with the problem of grasping law in action.

### III. LAW IN ACTION: THE PROBLEM OF LEGAL CHANGE

As Rudolf von Jhering has said, the law is like “Saturn devouring his own children,” as law is perpetually renewed by contradictory changes.<sup>111</sup> Though some legal historians might readily admit that one of the main characteristics of legal norms is that they make possible and organize their own change, it would seem that many lawyers would resist the idea that legal norms are interchangeable and that changes in the law are evaluated for their desirability during the construction of new legal arrangements. Consciously or not, the selection of legal norms made in the creation of law in books consists of an intellectual manipulation of empirical data. The enormous and ever increasing mass of legal norms appears to us through successive “archaeological” excavations. We first have to identify legal norms among layers of social practices where law is implicated. Then there is a need to select those legal norms which impact changes in the legal order, because they are likely to have structural consequences upon other (past or future) legal norms. It would not be a useless exercise, even if it were rarely undertaken, to attempt to measure this change with objective indicators. In most cases, legal changes are likely to affect a plurality of legal orders and legal scholars have to consider the questions—well debated in comparative law—regarding the implementation or transplantation of legal changes in more than one legal order. An awareness of the conventional nature of legal construction should not prevent us from trying to “understand” legal change, in Weberian terms, and to link our imagined “descriptions” of law with reflections about the factors of this perpetual dynamic.

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108. *Id.* at 325.

109. *Id.*

110. *See id.* at 325-26.

111. RUDOLF VON JHERING, *THE STRUGGLE FOR LAW* 13 (John H. Lalor trans., 2d ed. 1915).

*A. Identifying Legal Change*

By identifying the reluctance of lawyers to accept legal change, we highlight the conservative bias of jurists (who are the enemies of revolution), because they, according to Tocqueville, do not like to see changes in the law they have learned.<sup>112</sup> It is also important to think about the persistent binding force of the rules that were promulgated in a remote past, and the insistence of legal scholars (not only legal historians) on the phenomena of inertia in legal orders. It may be argued that certain past or present legal systems are not open to change (or to substantial change), in contrast with modern democratic legal orders, where legal change is easy and numerous changes are occasioned by changes in political leadership. The idea that secondary rules of change are linked with the realist conception of legal interpretation is largely accepted today, as the following brief discussion will demonstrate.

Arguably, legal norms are historically linked with religious norms and legal systems, much like Jewish or Islamic Law, which are based on a core dogma that is not open to change, because it supposedly contains a divine and revealed truth. It would appear, however, that there is room for change in religious law, especially if we take account of its applicability in the legal orders of social communities (where there are courts and the possibility to test the validity of norms). Concerning Jewish law, not only can the divine lawgiver change laws (the Ten Commandments were given twice to Moses in different versions<sup>113</sup>), but the Talmud is largely based on the idea that different interpretations are possible and can evolve over time. One Talmudic master wrote:

If the Torah had been given in fixed and inimitable formulations, it would not have endured. Thus Moses pleaded with the Lord, Master of the universe, reveal to me the final truth in each question of doctrine and law. To which the Lord replied: There are no pre-existent final truths in doctrine or law; the truth is the considered judgment of the majority of authoritative interpreters in every generation.<sup>114</sup>

Is there a better explanation of the fabric of norms? Islamic law also contains a doctrine concerning the “abrogation” of a given text within the Koran by another, which is manifested by the disagreement of the principal schools (*Madhhabs*) about the words and acts of the Prophet.<sup>115</sup> There is also a large expanse of religious doctrine that is open to legal reflection (*Fiqh*), and in some fields, to the legislative power of Islamic rulers.<sup>116</sup> Whether the rule of abrogation is admitted expressly or tacitly, it is no problem to recognize that authoritative interpretations of core statements can also change.

Returning to secular law, the problem of identifying legal change overlaps to a great extent with the classical topic of “sources of law.” Lawyers have worked continually to identify the authoritative foundations of statements which give the

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112. For Tocqueville’s discussion of the conservative bias of lawyers, see ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 302-11 (Arthur Goldhammer trans., 2004).

113. See 20 *Exodus* 2:14; 5 *Deuteronomy* 6:18.

114. Ben Zion Bokser & Baruch M. Bokser, *Introduction to THE TALAMUD: SELECTED WRITINGS* 11 (Ben Zion Bokser trans., 1989).

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

116. JEAN-LOUIS HALPÉRIN, *PROFILS DES MONDIALISATIONS DU DROIT* 296-302 (2009).

statements validity as law. Today, this problem seems easily resolved through the recognition of constitutions, statutes, precedents, regulations, or customary rules as legal statements (or statements which are supposedly “legal” by virtue of their form), whereas legal writing (or doctrine) is no longer considered, as in Roman law or past legal orders that recognized the authoritative force of *doctorum communis opinio*.<sup>117</sup> In most cases, this recognition is made through judicial interpretation, and the validity of the norm is verified through its “application” by courts. One must remember, however, that in many countries, it was impossible until recent times to consider the constitution as a source of binding norms, when there was neither a constitutional court nor ordinary courts that were empowered to use constitutional texts in litigation. European lawyers have long been accustomed to recognizing the authoritative force of statutory law and administrative regulations or decisions, while it is plausible that common law lawyers would be more reluctant to admit the growing importance of statutory law and more prone to develop softer forms of legislation (like experimental laws or sunset laws). The French Constitutional Council struck down a 2005 statute on school programs, considering that it was a “paper law” without normative effects.<sup>118</sup> The formal presumption of the validity of rules has to be questioned in some cases in order to determine whether an authentic legal norm exists.

The preliminary identification of the legal changes that are used to construct legal orders in law books restates the questions of “legal pluralism” regarding the creation of legal norms by non-state authorities. Our positivist point of view focuses on judicial decisions, which depend in any case upon recognition by the state that customary rules or social practices can give birth to legal norms. The need to distinguish legal norms from other prescriptive systems conflicts with the idea of a completely spontaneous law. Only the “law” can say what is legal. This does not mean that a rigid conception of law denies force to norms that are initiated by social (non-official) actors and rejects “soft” law (*droit soluble*) as compared to the traditional “hard” law (*droit solide*).<sup>119</sup> The well-known debates about the so-called *lex mercatoria* illustrate different ways to identify legal change. The arguments of the advocates of a new legal order based on the *lex mercatoria* can be summarized as follows: large firms have developed contracts which do not refer to national legal rules and which contain arbitration clauses; in case of a dispute the matter is referred to private arbitrators (who are not linked to any national legal order), to make decisions according to mandatory rules that emanate from these commercial practices; thus, a new transnational legal order has arisen with different rules created by these contracts and recognized by the arbitrators.<sup>120</sup> The opponents of this conception reply that: (1) the freedom of the contracting parties is based upon national rules that are operative in the territories of the formation or the

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117. See, e.g., JOHN P. DAWSON, *THE ORACLES OF THE LAW* 196-213, 450-61 (1968) (describing the role of legal scholars in Germany).

118. Decision of the French Constitutional Council, 21th of April 2005, 2005-512 DC.

119. JEAN-GUY BELLEY, *LE DROIT SOLUBLE* (Jean-Guy Belley ed., 1995).

120. In a vast literature, we select for theoretical implications: Gunther Teubner, *Breaking Frames: Economic Globalization and the Emergence of Lex Mercatoria*, 5 *EUR. J. SOC. THEORY* 199 (2002); Alec Stone Sweet, *The New Lex Mercatoria and Transnational Governance*, 13 *J. EUR. PUB. POL’Y* 627 (2006).

execution of the contract, which give a private autonomy to the contracting parties within the limits permitted by public policy; (2) it is necessary, in executing the arbitrators' decisions, to ask national judges for an *exequatur*; (3) even if arbitrators' decisions are almost all recognized as valid, this recognition is based upon international agreements (for instance, the 1965 Washington Convention) that have been voluntarily subscribed to by states.<sup>121</sup> A preliminary question, not always considered in the debate, regards the existence of legal changes that are implied by the *lex mercatoria* phenomenon. The importance of these transnational contracts and arbitrations is undeniable. Still, these contracts and arbitrations use (by a selection made after careful consideration) pre-existent rules (for example, the good faith rule, the *clausula rebus sic stantibus*). If this is the case, there is no creation of new norms or alteration of existing legal orders. It is another question, however, to determine whether legal scholars are interested in constructing a new legal order based on the principles of the *lex mercatoria*.

Doing research on the legal changes which affect the construction of legal orders does not prevent us from taking account of the action of non-governmental authorities or from thinking about the possible decline of national legal orders. This does not mean that legal scholars must study *all* legal practices and norms inside one legal order, which is clearly impossible. We are accustomed to selecting significant norms and to attaching value to the distinction between individual and general norms. Citing Austin, Kelsen has contrasted individual norms, like court decisions, which concern only one case and a limited number of persons, and general norms that are addressed to a large group of non-denominated persons.<sup>122</sup> Beyond this formal criterion we must determine which norms are likely to change the representation of a legal order and which norms are routine decisions without any proven impact on the construction of the legal order. In most cases, general rules, for example those contained in statutory law, are considered to affect legal orders, while individual rules established in routine decisions by courts or administrators appear to "repeat" a well-established rule and to apply it to determined persons. A realist theory of interpretation will assert, of course, that any norm, even a routine decision, contains an interpretation of a legal statement and creates law. This is precisely the reason why Kelsen wanted to use the word "norm" for every act that concerns the creation of law. There is no doubt, however, that the effects of individual norms (even some of those contained in statutory form, for example the so-called "private bills" in English law), as they are limited to certain persons, are less likely to affect our understanding of a legal order. This distinction is important whenever analyzing precedents and judicial legislation. One decision of a court (often a supreme court, but in some cases one or more decisions of subordinate courts) is presumed to be an individual norm, but it can be recognized (by the same judges or by other courts) as a general norm and legal scholars may admit (in making a selection of cases) that a precedent has been created. It is in fact a persuasive argument, and not an automatic application of the

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121. Emmanuel Gaillard, *Souveraineté et autonomie: réflexions sur les représentations de l'arbitrage international*, 4 J. DE DROIT INTERNATIONAL PRIVE 1163-73 (2007).

122. KELSEN, *supra* note 15, at 38.

rule of recognition, that allows for the identification of precedents.<sup>123</sup> Thus, we qualify norms as “general” when we think that they affect a constructed legal order. There is an unavoidable subjective judgment that links the identification and impact of the norm.

### *B. Measuring Legal Change*

In law books and law courses, it is customary to evaluate whether a legal change is significant or only a point of detail. Conclusions may differ between European scholars, who are looking first at the hierarchy of norms, and consider a constitutional amendment to be more important than a legislative modification or a new judge-made rule, let alone an administrative regulation, and common law lawyers, who are acculturated to a selection of precedents. Yet, in all countries, one must take into consideration the legal impact of a constantly increasing number of constitutional amendments, judicial review decisions, statutory enactments, and international agreements which blur the traditional and static view of legal orders as pyramidal hierarchies.

The issue seems *prima facie* easier to resolve regarding constitutional and statutory enactments that are, in most cases (with the exception of private bills voted in favor of determined persons), general statements which are presented by constitutional or legislative authorities as amendments to the pre-existing normative corpus. We should be careful, however, with the mythology of “law reform,” and distinguish between the political discourse that sees every new statute as a major reform and those reforms that are truly significant.<sup>124</sup> Just as a statutory norm that is never applied by the courts can remain binding for officials and non-officials alike, legal scholars may consider that it remains an important piece in a constructed legal order. For example, a criminal statute calling for the death penalty may be retained in a legal order, even if there are no longer any capital condemnations or executions. In India, the fact that section 377 of the Indian Penal Code, which criminalizes homosexual intercourse, has not been applied by the courts to consensual male-to-male sex since 1935, does not mean that this norm has been abrogated, and many Indian scholars consider that it remains an important piece of the national legal order, and impacts police practices and the stigmatization of homosexual persons.<sup>125</sup> Is it not a limit on a realist theory of interpretation to make the observation that a norm could continue to be valid without continuing application by the courts?

Concerning statutory law, the construction of legal orders can take account of the number of statutes and the range of their rules—but it is absurd to consider that every line of text and every paragraph or article has the same value in affecting

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123. DUXBURY, *supra* note 41, at 12-13.

124. See PAUL W. KAHN, *THE CULTURAL STUDY OF LAW: RECONSTRUCTING LEGAL SCHOLARSHIP* 12-15 (1999) (“The rule of law is not just the sum total of the statutory and regulatory output at any given moment; it is also understood as a process of evaluating and creating new laws that corrects the deficiencies of what came before.”).

125. OISHIK SIRCAR, *The Fallacy of Equality “Anti-Citizens”, Sexual Justice and the Law in India*, in *JUSTICE AND LAW: THE LIMITS OF THE DELIVERABLES OF LAW* 210, 230 (Ashok Agrawal, Bharat Bhushan eds., 2009). In 2009, the High Court of New Delhi declared this section of the Indian Penal Code inconsistent with the constitution.

change in a legal order. Still, the counting of the number of statutes which are enacted each year or the changes that are made in a code or body of law is not without value. A legal order with a few rules that regulate a limited number of subjects is the criterion of a “primitive” law: for example, the Roman Law of the XII Tables at the beginning of the republic, which left to custom or to social practice conduct that was not regulated by law.<sup>126</sup> On the contrary, the quantitative development of statutory law since the nineteenth century is an indication of a great transformation of legal orders through a growing interventionism that annexed new territories to the legal field. The French Council of State has estimated that, in recent years, about ten percent of the articles of French codes have changed each year.<sup>127</sup> Beyond the politically motivated criticism of legislative “inflation,” we now have a means to measure the rhythm of legislative change. It should be said, however, that these new laws often have a length that is disproportionate to their importance. Especially with respect to codified laws, this renewing of the legal corpus needs to be clearly evaluated by scholars in their consideration of the reconstruction of legal orders.

Regarding case law, the problem is more acute because there is a more subjective and complicated task in the selection of new norms and the repeated application of existing norms that occurs without any change in the attribution of legal meaning to the normative statement. Clearly, empirical studies and statistics, which are more and more sophisticated in our modern age of electronic databases, can help us distinguish between judicial legislation and routine litigation. We have new means, in comparison with prior generations, to know how a supreme court’s decision is received and applied as a new norm by subordinate courts, or how the repeated changes that occur in the resolution of cases by inferior judges can impact a legal order, even if there is no apparent reaction by that legal system’s supreme court. Litigation rates should be examined very carefully to avoid stereotypes about legal cultures, such as the allegedly high litigation rate in the United States and the allegedly low rate of litigation traditionally attributed to Japan.<sup>128</sup> To the sociologist, the absence of a substantial amount of litigation about a particular question can be interpreted either as proof of an effective and well-accepted rule or as a clue to the weak impact of legal statements. For the legal scholar trying to construct a legal order that takes account of law in action, statistics can be used in different ways. If capital judgments are numerous, the decision to inflict the death penalty can be considered as a kind of “routine” justice, and one capital decision is not likely to change the legal order. On the contrary, if these decisions are very few, every one could be interpreted as an act of judicial legislation that has the effect of clarifying in which specific instances the death penalty can be used in that legal order. The growing rate of settlements, linked with the decline of civil trials, also has an impact on the legal order, if we are able to measure the legal fields

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126. See generally H. F. JOLOWICZ & BARRY NICHOLAS, *HISTORICAL INTRODUCTION TO THE STUDY OF ROMAN LAW* 108-18 (3d ed. 1972); ALAN WATSON, *ROME OF THE XII TABLES: PERSONS AND PROPERTY* 3-8 (1975); PETER STEIN, *REGULAE IURIS: FROM JURISTIC RULERS TO LEGAL MAXIMS* 3-25 (1966).

127. CONSEIL D’ÉTAT, *RAPPORT PUBLIC ANNUEL* 273 (2006).

128. ERHARD BLANKENBURG, *Civil Litigation Rates as Indication for Legal Cultures*, in *COMPARING LEGAL CULTURES* 41, 46-47 (David Nelken ed., 1997).



(characterized by the use of determined legal statements) in which settlements are drying up the stream of case law.<sup>129</sup> Studying legal change through a historical perspective, even if this study focuses on recent times, still involves taking account of the flows of norms and the paths (based on the different sources of law) that such changes are taking. The structure of a legal order can thus be affected by the advancement of case law to the detriment of statutory law, or by a contrary trend.

Two other examples also illustrate the need to measure legal change through law in books. In many countries, judicial review that is performed by a supreme court or a constitutional court has become a growing phenomenon in recent decades. There is no doubt that striking down a statute is the equivalent of enacting a new statute that is contrary to the one quashed or judged unconstitutional: it is “negative legislation,” according to Kelsen’s expression.<sup>130</sup> However, the situation of a given legal order may vary if such changes happen very rarely (as in Japan, where only six statutes were struck down by its supreme court from 1973 to 2005), or if they are relatively frequent as in the United States, India, or Germany.<sup>131</sup> This form of accounting is a clue, among others (such as the importance of judged cases, the impact of each law that was struck down, and the judicial review that later leads to constitutional amendments), as to how to qualify a judicial review system as a meaningful or not meaningful (as a “weak” or a “strong”) part of the larger legal system.<sup>132</sup> The concept of “judicial supremacy,” if it even makes sense, depends on a holistic evaluation of the impact of court decisions on the legal order to see whether new judgments are consistently recognized as law in action.

If we consider the impact of the European Convention on Human Rights (ECHR), as interpreted by the Strasburg Court, there is a clear need, which has been taken into account by recent studies, to use statistics in order to measure the rate of condemnations of each European state, and the changes in statutory or case law that are induced by the impact of the Court’s decisions on each nation, as well as trends pertaining to the application of the ECHR by national judges to change their national law.<sup>133</sup> The lack of statistics about the number of national laws that are not applied by national judges because they are contrary to the ECHR makes it more difficult to appreciate the legal changes that stem from the ECHR. More generally, we would study the manner (including frequency of application and the case law of subordinate courts) in which judicial review has been used by the different courts, and should not be satisfied by studying only a selection of leading cases.

Measuring the impact of legal change also means taking account of the “density” of the legal order that is under construction. Usually, we consider national legal orders to be comparable in their structures, and perhaps unconsciously, we transpose the principle of equality among states into a

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129. See Kevin M. Clermont, *Litigation Realities Redux*, 84 NOTRE DAME L. REV. 1919, 1951-52 (2009).

130. KELSEN, *supra* note 15, at 268.

131. HALPÉRIN, *supra* note 116, at 278-81.

132. See Mark Tushnet, *Judicial Review of Legislation*, in THE OXFORD HANDBOOK OF LEGAL STUDIES 164, 164-65 (Peter Cane & Mark Tushnet eds., 2003).

133. ALEC STONE SWEET ET AL., A EUROPE OF RIGHTS: THE IMPACT OF THE ECHR ON NATIONAL LEGAL SYSTEMS (Hellen Keller & Alec Stone Sweet eds., 2008).

presumption of the equal density of national legal orders: each legal system is imagined to have developed the legal categories with which we are familiar and to have adapted its rules through a relatively constant ebb and flow of statutory and case law. I would suggest that legal history and comparative law should show us that the stratification and complexity of a legal order depends on its age (a state that recently gained its independence has at its disposal a smaller “stock” of rules than an older and powerful polity, even if in the case of a decolonized entity the laws of the colonial period have been generally maintained for a transitory period) and on its propensity to develop legal changes through statutory or judicial legislation. For example, the legal order of Saudi Arabia, which has left the personal status of all Muslims citizens subject to *sharia* law (which is based on rules that come from interpretations of the Koran and the *sunna*, but is also somewhat open to significant evolution over time), has a lower density than that of neighboring states (like Kuwait or Oman) which have adopted national legislation (which is more subject to change) regarding personal status.<sup>134</sup>

The conception of international law has changed in recent times. When there were a few multilateral treaties with peremptory norms (the majority of treaties were bilateral agreements pertaining to friendly relations and commerce, with weak legal impacts), there was sporadic case law originating from international courts and a limited use of international rules by national courts. But in recent decades, with the intensification of uniform rules which are contained in treaties ratified by a great number of states, there has been a development of an important corpus of decisions and awards from international tribunals and more frequent recourse to principles of international law in national case law. The significance of international law has increased considerably, and has made obsolete the prior contempt of some lawyers for what they regarded as a “primitive” or “anarchic” legal order (if they did not flatly deny the legal character of international rules).

In legal orders with a lower density, we can suppose that each change (every “law in action”) could have a deep impact on the structure which scholars construct in books. However, I would argue that these legal orders demonstrate a lesser openness to change (often linked to non-democratic polities), and perhaps tied to the respect of tradition, which can give the feeling of a kind of immutability. This is a false impression, because every legal order experiences some change through time, since a secondary rule of change is necessary for its initial characterization as a legal system. But we also have to take account of the difficulties of measuring the impact of every limited change (limited because it concerns only a small sector within a much larger legal system) in the more complex legal orders which are accustomed to frequent legal change, because we can lose sight of (or on the contrary, cling to) components that are not affected by the broader rhythm of change. The challenge here is to identify the modification (or the disappearance) of what might appear to be “fundamental,” but may in fact be subject to change.

We should differentiate between the construction of “thick” and “thin” legal orders without any value judgment as to their respective desirability. This evaluation of legal density can, of course, be combined with the use of different

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134. HALPÉRIN, *supra* note 116, at 296.

lenses in a methodical approach, in particular, with a “thick” description as defined by Clifford Geertz.<sup>135</sup>

*C. Following the Circulation of Legal Ideas*

Law in action, defined as legal change, takes place in time and space: it is one of the characteristics of the reality of normative facts. When we construct legal orders in books, we think about change that occurs through time; in this way, every legal scholar is a legal historian, and conducts studies within a determined space, such as a specific state or a sub-state structure, or in an international framework, which is not always subject to closed territorial limits (for example, the canon law of the Catholic Church). If the concept of legal transplants has become, especially since the work of Alan Watson,<sup>136</sup> a specific and central subject for comparative law, the general problem of legal “circulation” is inherent in the study of all legal change. In many cases, legal change might begin with a legal statement, which might come from the central authorities of a state (the seat of legislative power or the supreme court) and spread throughout the subordinate courts and the officialdom of the whole country. This movement seems automatic, so much so that we are accustomed to “centralized legal orders,” to use Kelsen’s term.<sup>137</sup> But in many historical situations and in some contemporary structures (federal or non-unitary), a rule of law (with its particular meaning) has to be “received” in specific territories according to a specified process before it can be implemented.<sup>138</sup>

Moreover, the process of the implementation of international conventional rules in national legal orders, either in a monist or a dualist system, is based upon the circulation of legal statements (which are contained in treaties or international case law) and how they are received as new meanings (through “domestic” interpretation) within national legal orders. As there may be different interpretations linked to the insertion of an international statement into a national order, there is also a trend towards uniform solutions, especially if there is a supra-national court which is empowered to guarantee an “authentic” interpretation, as in the case of the European Court of Justice. Of course, even in the context of the European Union, we can presume that the same regulations or guidelines that emanate from European authorities are interpreted (and linked to other norms) in a different way in the United Kingdom, in Germany, and in France. Thus, there is now a common corpus of rules (that did not exist before the EU) that is applicable in these different legal orders. The Europeanization of the law means the circulation and reception of rules, both the primary treaties and the secondary regulations.

This openness to uniform rules is less present, if not completely absent, in the case of the transplant of legal statements from one country to another. There is, of course, no obligation of an independent state to follow the interpretation of law given by the exporting legal system, and it is very probable that a transplanted

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135. See CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES* 5-6, 9-10 (1973).

136. See, e.g., ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* (2d ed., U. Ga. Press 1993).

137. See KELSEN, *supra* note 15, at 303-27 (discussing centralized and decentralized legal orders).

138. *Id.* at 363.

statement will acquire new meaning(s) upon its application in the importing legal system. There is no room today (as was the case with the Privy Council for the British dominions, even after their independence) for a transnational court to impose the same authentic interpretation in two different states.

I do not, however, share Pierre Legrand's opinion about the "impossibility" of legal transplants.<sup>139</sup> His attacks on Alan Watson's theory are based on the necessary "metamorphosis" of the allegedly transplanted rule into a new meaning which would be consistent with the legal culture of the importing state.<sup>140</sup> Beyond a kind of quarrel over words, what Pierre Legrand denies (but without rejecting Watson's thesis) is that the "transplant" of the same rule from one state to another can be called a "legal transplant" and that in the circulation of a legal statement which gives birth to a new meaning in the receiving state, there is an overestimation of cultural factors that act as points of resistance to foreign influences upon legal change.<sup>141</sup> It appears, to the contrary, that cultural elements (such as the use of the same language, the same patterns of legal education, even the wearing of wigs by judges) circulate at the same time as legal statements and establish favorable conditions for the legal statements to acquire a similar meaning to the one they had in the exporting state (for example, look at the common law system in Great Britain, the United States, or India). It so happens that in some cases the same meaning can be given to the legal statement which is shared by the exporting and the importing state, as is probably the case for the many rules of European law which are interpreted identically in different states.

To deny the possibility of legal transplants is to close off explanations of the great movements of legal circulation in history, such as the globalization of Roman law, of common law, of legislative codifications, or of Islamic law. Even if we try to consider these circulations as the elements of developing indigenous legal cultures (according to which Roman law or Muslim law would not be considered as "foreign" in European or Islamic countries) or to limit these massive transplants only to the colonial period, we would have great difficulty in explaining why some rules from abroad are received and maintained with the same meaning as the "original" in the exporting system.<sup>142</sup> Thus, the proliferation of common law in the first decades of the American republic would become incomprehensible if we denied the existence of legal transplants.

As these massive transplants are obvious in the history of legal change, they engender complex effects at two levels: in construing new rules through the interpretation and co-ordination of different statements (some of foreign origin, others of indigenous "production"), the judges and legislators of the "importing" country (sometimes completely) transform the legal materials that came from

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139. See Pierre Legrand, *The Impossibility of Legal Transplants*, 4 MAASTRICHT J. EUR. & COMP. L. 111, 120 (1997).

140. *Id.* at 113-14, 120.

141. *Id.* at 120-22.

142. See, e.g., LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 110-12 (2d ed. 1985) (noting the adoption of English common law by the original states upon the founding of the United States); HUGH C. MACGILL & R. KENT NEWMYER, *Legal Education and Legal Thought 1790 - 1920*, in *THE CAMBRIDGE HISTORY OF LAW IN AMERICA*, 36, 37 (Michael Grossberg & Christopher Tomlins eds., 2008) (same).

abroad; and in a parallel way (which cannot be dismissed, even from a positivist perspective), the legal transplants are reconstructed by legal scientists (often from a national perspective, for example the “common law” as understood through Holmes’ famous studies) to create a new artifact which “naturalizes” (or nationalizes) the foreign input. The results of these transplants, especially the most extensive transplants, are thus unpredictable and undeterminable. As Gunther Teubner has proposed, it is like a “legal irritant,” which provokes a series of reactions that are not easy to comprehend in all their details,<sup>143</sup> while legal science tries to simplify and to use, according to Michele Graziadei, “a generalization denoting a collage of legal artefacts.”<sup>144</sup> I would suggest that because they have such comprehensive outcomes, legal transplants (or, if one prefers, legal irritants which are provoked by legal transplants) have been, incontestably, one of the more important ways to track legal change. In many cases, colonial domination or the reception of foreign legal blocks (such as whole sections of Roman law or common law) had effects comparable to political revolution. Are not legal revolutions merely the submission of a territory to the transferred legal order of a colonial power, or the declaration of independence of an ex-colony, simply another form of maintaining a large part of colonial law? Are we not accustomed to say, in our law books, that new legal orders are established through colonization (and at the same time are distinguished from the legal order of the pre-existing polity before the arrival of the colonizers as well as from the “domestic” order of the colonizing power, with the possibility that no “legal order” existed before the arrival of the colonizers) and then through decolonization?

It could be argued that the origins of new legal rules are, as pure facts that precede the creation of norms, indifferent to a legal science, which tries to describe normative systems. But the legal tracks of change—those used to introduce or maintain these “foreign” elements—are part of the legal sphere, and cannot be ignored in the construction of legal orders; we cannot reject the concept of “legal revolution” (or a new legal order replacing an old one) merely by asserting that political revolution is a non-legal fact. There are two main reasons why the circulation of legal change has to be taken seriously by “law in books.” First, these processes of “borrowing,” the historical role of which has been underlined, are always active and productive. The implementation of more and more uniform rules that result from international treaties, the development of transnational rules (as well as rules from European authorities which apply to all the member-states but have different possible meanings in each national order, much like a “global law” spread by multinational companies) and the rapid circulation of judicial precedents (especially those concerning fundamental rights and judicial review) throughout the world create new transplants, and their effects cannot be studied without taking account of their origins. Second, comparative law is one field of legal science that is obviously interested in the study of the circulation of legal change. Comparative law is clearly “law in books,” and not the description of an empirically organized

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143. Gunther Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences*, 61 MOD. L. REV. 11, 12 (1998).

144. Michele Graziadei, *Comparative Law as the Study of Transplants and Receptions*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW 441, 471 (Mathias Reimann & Reinhard Zimmermann eds., 2006).

and settled system of law (no dispute is adjudicated according to a “compared law”), but the construction, by legal science, of an intellectual artifact by which to analyze the similarities and differences between national legal systems which are formally closed (which means that they reject foreign law, except to resolve isolated problems of conflicts of laws) but substantially open (which means that they readily accept legal content with a foreign origin). Comparative lawyers are forced to take account of legal circulation (even if it is to deny the existence of legal transplants), and they shed light on how a decision about old concepts, such as the traditional opposition between common law and civil law, offers suggestive ideas about how to replace them with new constructions.

#### *D. Understanding Legal Change*

It may be surprising, at first glance, that the goal of law in books to “understand” legal change could be consistent with a positivist point a view. It is well known that legal positivism is based upon the so-called “Hume’s law,” according to which it is impossible to infer moral (or, more generally, normative) conclusions from non-moral (or factual) premises. As Hume has written, “vice and virtue are not matters of fact, whose existence we can infer by reason.”<sup>145</sup> With different words and divergent conceptions of the separateness of “Is” and “Ought” (we have already noted that it is possible to use the expression “normative facts” without contesting this separation), legal positivists agree that it is impossible to comprehend the causal relations between (social, political, economical, cultural) facts and legal norms.<sup>146</sup> For this reason, Kelsen rejected the idea that legal science must inquire about the “causes and effects of those natural events that, interpreted by way of legal norms, are represented as legal acts.”<sup>147</sup> Such studies are left to (legal) sociology, political science, and possibly legal history (as a category of historical study and not as a part of legal science), but they are not the target of legal science.

Hume’s law is an obvious and serious obstacle to the “understanding” of legal change by legal science. I would like to show, in the last section of this article, which attempts to interpret Roscoe Pound’s ideas, that there is a way to combine the positivist (or analytical) approach with a legal analysis of the rule of change, and that it can be distinguished from sociological perspectives. Our point of departure will be Max Weber’s work on legal sociology, which contains many points of comparison with Kelsen’s methodology, especially regarding the paradox of scientific objectivity when confronted with the problem of making value judgments.<sup>148</sup> Considering that a value judgment is a matter of faith and not empirical science, Weber thought that the task of the historian was not to “construct[] ‘laws’ in the rigorous sense through the mere juxtaposition of

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145. See DAVID HUME, A TREATISE OF HUMAN NATURE 3.1.1, ¶ 26 (David Fate Norton & Mary J. Norton eds., 2002).

146. See Giorgio Pino, *The Place of Legal Positivism in Contemporary Constitutional States*, 18 LAW & PHIL. 513, 523 (1999).

147. See KELSEN, *supra* note 30, at 13.

148. See MAX WEBER, “Objectivity” in *Social Science and Social Policy*, in THE METHODOLOGY OF THE SOCIAL SCIENCES 49, 54-55 (Edward A. Shils & Henry A. Finch ed. & trans., 1949).

historical observations,” but to understand individual action through the use of ideal-types.<sup>149</sup> I would argue that an understanding of human behavior is not found in the mechanical relationship between cause and effect, but through the interpretation of human actions and the treatment of single individuals as basic units. Max Weber wrote that:

Insofar as it looks at the law, sociology deals not with determining the logically correct “objective” meaning of legal propositions but with action, for which, naturally among other things, the ideas of men about the “meaning” and the “validity” of certain legal propositions play a significant role both as determinants and consequences.<sup>150</sup>

As these words indicate, Max Weber separates legal sociology from legal science. Legal sociologists undertake enquiries about human action as it relates to law or is influenced by ideas (or representations) concerning law. Studies which address the political processes that create legal norms—the mobilization of parties (the “haves” and the “have-nots,” using Marc Galanter’s words<sup>151</sup>), activists<sup>152</sup> and lawyers who engage in “cause lawyering,”<sup>153</sup> or the impact (or absence of impact) of legal ideas about the informal rules that operate within social groups<sup>154</sup>—are familiar subjects for sociology and political science, and are often undertaken in conjunction with questions related to legal change. These studies can be considered as an analysis of “law in action” and represent a sociological jurisprudence, which could be seen as consistent with Roscoe Pound’s project. At the same time, even if we accept that legal sociology can help legal scientists to understand human behavior as it relates to law (especially to measure the scope of law’s empire and to keep in mind that the whole world is not ruled by law), we must also realize that legal rules cannot be explained by factual causes, and that legal systems are producing new rules in an “autopoietic” way (that is to say, that only law produces law; it is not produced by external factors). A sociological approach to legal change and to an understanding of the attitudes or mentalities of legal professionals does not prevent an analysis of the impact of ideas that have been developed by legal writers within the legal sphere. Legal writing is not only a representation of legal rules as they influence human behavior (for instance, the actions of legislators or the expectations of businessmen), it can also assist in tracking changes in legal rules brought about by new conceptualizations. In the same way, the study of the social impact of routine case law should not be confused with the legal recognition of precedents as binding rules, just as an analysis of parliamentary debates does not have the same purpose as the interpretation of

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149. *Id.* at 88-90.

150. Max Weber, *Some Categories of Interpretive Sociology*, 22 SOC. Q. 151, 158 (Edith E. Graber, trans., 1981) (emphasis omitted).

151. Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95 (1974).

152. See CHARLES R. EPP, *THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE* (1998).

153. See Austin Serat & Stuart Scheingold, *Introduction to CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES* 3, 3 (Austin Serat & Stuart Scheingold eds., 1998).

154. See ELLICKSON, *supra* note 105, at 8-11.

statutory law in a legal system. Kelsen's attempt to maintain a separate (and "pure") legal science, which cannot be integrated into a comprehensive sociology, is not contrary to the Weberian distinction between interpretive sociology and what Weber called "legal dogmatics."

Max Weber's methodology has left space, even though it is not clearly formulated in his works on social epistemology,<sup>155</sup> for a legal science that would not be reduced to a description of legal meanings or to the normative content of legal propositions. Weber recognized that legal science needs conceptual tools. These conceptual tools are a variety of ideal-types, which we use in law books to construct legal orders and to understand legal change. Some of these concepts (for instance, the idea of the state, of contract, of trial, of offense) seem like "natural" parts of the legal landscape, although they are human conventions, and "utopian" (a word applied to ideal-types by Max Weber<sup>156</sup>), like all legal concepts. Other concepts (like democracy, economic exchange, patriarchal organization of family, social deviance), when considered outside the context of legal texts, can also be useful for understanding legal change. As ideal-types, these concepts are formed by the one-sided accentuation of one or more normative facts. Legal research, which is necessary to construct legal orders in law books, much like historical research as described by Max Weber, "faces the task of determining in each individual case, the extent to which [the] ideal-construct approximates to or diverges from reality."<sup>157</sup> As Weber wrote in *The Meaning of Ethical Neutrality*, the function of ideal-types is to allow "comparison with empirical reality in order to establish its divergences or similarities, to describe them with the most unambiguously intelligible concepts, and to understand and explain them causally. Rational juridical concepts supply this need for the empirical history of law."<sup>158</sup> If we consider that every study of legal change in law books is a kind of "empirical history of law" (and that every legal scientist is a legal historian who examines changes in the law including very recent changes), the construction of legal orders depends on ideal-types, and in consequence, cannot be reduced to a simple (and objective) description of legal meaning.

Max Weber's epistemology offers one final benefit to the legal scientist. He has insisted upon the need to continuously construct "new ideal-typical concepts" in order "to discover ever new aspects of significance."<sup>159</sup> Paradigm shifts are not only observable changes in prior legal writing that give account of normative facts, but are useful tools with which to imagine new constructions and to confront them with the empirical reality of contemporary normative facts. As some phenomena are likely to be interpreted as a retreat of state power or a decline of the opposition between common law and civil law countries, it is fruitful to construct legal orders without taking the state into consideration (as do the supporters of an ideal-type of "global law") or to compare different legal orders by means of other criteria (for

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155. Probably, Max Weber thought that there was only one (or a limited number) of "logically objective meaning(s)" fixed for every legal statement by what he called the "legal dogmatics."

156. WEBER, *supra* note 148, at 90.

157. *Id.*

158. MAX WEBER, *The Meaning of "Ethical Neutrality,"* in *THE METHODOLOGY OF THE SOCIAL SCIENCES*, *supra* note 148, at 1, 43 (emphasis omitted).

159. WEBER, *supra* note 148, at 97 (emphasis omitted).



example, the distinction between democratic and non-democratic states, or between a family law based on religious norms and one based on uniform national law) not linked to a colonial legacy. If we challenge the proposition that the opposition between “concrete” and “abstract” judicial review corresponds with empirical normative facts, we need to propose new ideal-types for distinguishing patterns of legal change through judicial review.<sup>160</sup>

The modern study of legal change requires the analysis, with the help of new ideal-types, of the legal avenues (statutory law, codified law, case law, international agreements, judicial review, new kinds of contracts and litigation, rules of conduct decided by multinational companies or recognized through collective bargaining with international trade unions, international awards, new meanings given to traditional sources of law, etc.) through which legal change is likely to justify the construction of new legal orders or the empirically verifiable metamorphosis of old legal orders. Every lawyer who tries to write the “law in books” must be innovative in proposing new ideal-types and attentive to the possibility of checking these constructions by confronting them with empirical reality and the inevitable criticism from other legal writers. In summary of our understanding of Pound’s formula, “law in books” is useful (if not necessary), as it is based on some minimal definition of what counts as law, and is dependent on the respective roles that are assigned to constructed legal orders and empirically recognizable norms. As one of the main characteristics of law is its perpetual change, law in books should not remain motionless and faithful to traditional ideal-types, but should continuously strive to identify, measure, track (as law circulates), and “understand” (as in Max Weber’s meaning) changes in normative facts (and of course how these changes impact the legal sphere).

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160. See generally ALEC STONE SWEET & MARTIN SHAPIRO, *Abstract Review and Judicial Lawmaking*, in ON LAW, POLITICS AND JUDICIALIZATION 343, 343-346 (Alec Stone Sweet & Martin Shapiro eds., 2002).