

What can be understood, compared, and counted as context?

Studying lawmaking in world history

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Why laws?

The comparative study of law and its history has been on the research agenda for quite some centuries, or even millennia. Confucius, Grotius, Pufendorf, Locke, Montesquieu, Bentham, Maine, Marx, Spencer, Weber – all made important contributions to our understanding of law-making and the societal context in which it has always been immersed (Glenn 2010; Pospisil 1971; Maine 2012; Montesquieu 1989). Or consider the work of less well-known modern or contemporary scholars, such as Anners, Hart, Berman, Glenn, Pospisil, Luhman, Menski, Benton and many others – and one cannot but be impressed (Anners 1975; Anners 1980; Hart 1997; Berman 1983; Berman 2003; Pospisil 1971; Benton 2002; Luhmann 2004; Menski 2006).

However, bold as they were in generalizing and theorizing their findings, only rarely did scholars of the past take the pains to carry out the systematic empirical groundwork necessary to establish the validity of their ingenious thoughts. Some did, of course, but many did not (Maine 2012).

Max Weber, who indeed made heroic comparative efforts to come to grips with the history of lawmaking around the world, did not do so with sufficient rigor to allow his successors to actually assess the credibility of his findings. In his studies of laws in ancient China, for example, he was so imprecise that it is all too often impossible

to really tell which of the codes he was referring to (Weber [Rhein-stein] 1954: 54, 184–186, 236–237, 242, 264). Perhaps today’s legal scholars are more meticulous in carrying out their empirical work than Weber and others were. On the other hand, only a few seem to be engaging in the sort of large-scale global comparative work that some of their predecessors could not resist attempting. Consequently, to date, systematic, large-scale, empirically grounded, historical generalizations about lawmaking are still as needed as they are wanting (Duve 2013: 21).

Our ambition is to redress these shortcomings. To this end we are presently about to complete an empirically grounded, worldwide, long-term comparative history of lawmaking. By law we mean a set of officially authorized regulations of the social interaction among a certain agglomeration of humans who are subjected to the authorized rule of those in charge of setting the regulations up. Essentially, this empirical, long-term approach is nothing new to us. What is new is the global comparative approach.

On many occasions, when we have presented our ambition and our preliminary results, quite a few researchers have questioned whether it is really possible to trace trajectories of general changes in lawmaking – if not any aspect of long-term societal change (Jarrick 2003; Jarrick 2007). Methodologically, they base this criticism on questioning if we are in a position to properly understand the meaning and content, as well as the form, of laws from a distant past and from distant cultures. Accordingly, they have also expressed strong doubts as to whether such “entities” can be compared with one another in any meaningful way, a skepticism extended to our basic idea of how to carry out contextualizing work. Since doubts about intelligibility, comparability and contextualization are so often voiced among fellow scholars, such concerns have to be addressed, especially since we consider them highly unwarranted. This is precisely what we do in this chapter, which is a detailed advocacy of the possibility of understanding manifestations from seemingly alien cultures.

However, before presenting our argument in detail, we need to introduce the framework: our overarching aim, as well as the sources used and considered to be comprehensible. Having presented our

defense of the high potential of comparing laws from different cultures, we proceed to a concise presentation of our methodological design and of some of our major substantial results.

Our overarching aim is to improve our understanding of the dynamic forces behind the uniquely human evolution of culture. Human culture is the incessantly ongoing interplay between creativity, innovation and transmission, constituting itself as a seemingly never-ending transformation of society, despite the relatively stable genetic set-up of its human agents. The general process of cultural evolution is nothing but a series of mutually intertwined concrete processes, of which different layers and types of lawmaking in different periods and corners of the world in particular constitute a profound aspect. This is precisely why lawmaking is our specific scientific target. We could have picked other processes for scrutiny, but for various reasons laws serve us incredibly well. Why?

In order to follow processes as prolonged as possible in human history, we need extended time series covering as many different and dissimilar parts of the world as possible. Therefore, written laws are especially useful: they have existed and been partly or entirely preserved for a period of more than 4,000 years. Furthermore, the way they are composed enables us to compare them reasonably well. Laws are optimal also because they signify an *explicit* regulation of human interaction, and testify to a conscious attempt at a *lasting* regulation of this interaction. It is also of relevance that the legislators displayed an ability to handle the non-present, which is at the core of what makes humans unique in the world of living species.

What we do

Thus, what is set out here is a comparative, essentially global and long-term study, still in progress. Also, differences in the amount of legal material preserved from different areas have made certain prioritizations necessary. We are also mostly confined to the use of translations of the original languages. Taking all this into account, we have selected certain geographical core areas, whose legal development can be charted in detail and for long periods of time. Thus

far, these are West Asia, China, France and the Nordic countries of Denmark, Norway and Sweden.

Primarily we have sought to accomplish a global selection of legal cultures of different types, from societies with different political, social and religious features and organization. To achieve this, we have prioritized mutually independent legal cultures: that is, if a number of legal cultures were available for study in a specific geographic area, we have selected those which were most ancient or least dependent on previous neighboring legal cultures.

From the first of these core areas, the earliest legal codes and collections were produced in Sumerian city-states in the period around the millennium 2000 BCE. These codes – which are quite poorly preserved – were followed by codes produced in the dawning empires of the Old Babylonian period (from the eighteenth century BCE). Among these codes are the famous *Laws of Hammurabi*, the first code of this area to be preserved almost completely. Later, codes were also produced, for example, by the rulers of the Hittite Empire (1650–1180 BCE), and the Kingdom of Israel. To later periods in the history of this area belong the further development of Israelite law (in the form of, for example, the *Mishnah*, the *Talmud* and the *Mishneh Torah*) and the advent and development of Islamic law (among others Roth 1997; Westbrook & Beckman 2003; Neusner 1988; Maimonides 1949; Glenn 2010: 99–132, 181–236 and Twersky 1980).

In China, legislative activity was continuous and extensive from at least the third century BCE, although the first Chinese law codes are known either only by name (e.g. Head & Wang 2005), or preserved only in part (the codes of the Qin and Han dynasties). The first Chinese code of law that has come down to us in full is the *Tang Code* (of either 653 or 737). Promulgation of codes was often associated with the assumption of power by new dynasties and the earlier stages of their rule, although many revisions sometimes followed before a final version was established. Thus codes of law were promulgated early in the Song (960–1279), Yüan/Mongol (1279–1368), Ming (1368–1644) and Qing dynasties, with the final version of the *Qing Code* (of 1740) remaining in force until the collapse of the Empire in 1912. However, there were also other

types of legislation in ancient China than the law represented by these “national”, general codes, such as administrative rules (e.g. Head & Wang 2005; Jones 1994; Jiang 2005).

In the regions of present-day France, legal history can be said to begin with Roman law, which over time and in various ways, was built on the distinction between what was common and not common to people subjected to Roman rule. For the pre-imperial period this has been described either as a distinction between the principle of specific *rights* attributed to local peoples (*jus civile*), whether Roman or non-Roman, and different types of *legal actions* (*jus honorarium*), or as *jus civile* working alongside *jus gentium*, i.e. laws common to all – at least to all Italian communities, again, whether recognized as citizens of Rome or not (Ando 2011: 2–3).

In the imperial period the actions system was pushed aside, and by the Dominate the Emperors had definitively taken over both legislation and the execution of justice. In the later Empire, Roman law consisted primarily of the legal codes of the Emperors Theodosius (r. 379–395) and Justinian (r. 527–565), containing the laws of the Roman Emperors from the year 312 in revised form, and more informal Roman provincial law. Laws appointed for humankind as a whole were called *jus naturale* (Ankarloo 1994: 15–18, 54–61; Maine 2012: 44–53; Watson 1985; Fisher Drew 1991; Tellegen-Couperus 2012).

The rulers of the Germanic confederations that assumed power after the fall of Roman Gaul quickly took up the legislative activity of the Roman Emperors. Under the Merovingian and Carolingian rulers a large number of nations and provinces in the former Roman West received their own legal codes. These codes were supplemented by so-called *capitularies*, short collections of legal provisions divided into *capitula*: headings or chapters (Wormald 1999: 1–43; Wormald 2003; Wood 1994: 102–119; Wood 1993; Fisher Drew 1991; Rivers 1986). However, with the decline of the Carolingian dynasty in the ninth century, the production of legislation in the form of both codes and capitularies ceased. Under the Capetian dynasty (987–1328), France was ruled through unwritten provincial law, more or less influenced by “rediscovered” Roman law. The next spurt of written legislation in France came when these

legal traditions were given written form in the so-called *coutumiers* (recordings of customary law) from the thirteenth century and into early modern times (Akehurst 1992: xiii–xxxii; Akehurst 1996: xxi–xliv; Friedland 2012: 46–52; Cohen 1993; Berman 1983). From early modern times, national legislation emerged and grew in scope, for example in the form of a substantial ordinance governing civil and criminal procedure in 1670. Finally, in the late eighteenth and early nineteenth centuries, extensive legal codes were created, first by the revolutionary government and, only a little over a decade later, under Napoleon (Anners 1980; Friedland 2012: 47).

In the Nordic countries of Denmark, Norway and Sweden, written legislation first appears in the Middle Ages. The oldest texts of this kind are probably the remnants of the early twelfth century Norwegian laws of the Eidsivating and Borgarting (Sigurdsson, Pedersen & Berge 2008; Tamm 2011: 15; Hoff 1997). In Denmark and Sweden, codifications of the same kind are preserved from the decades following the year 1200 (Brink 1996; Hoff 1997; Ekholst 2009).

About twenty provincial codes were compiled in total in these three countries. However, from the latter part of the thirteenth century in Norway and the middle of the fourteenth century in Sweden, national codes were introduced. The four Danish provincial codes, however, continued to apply until the 1680s. In Sweden, the first national code was promulgated by King Magnus Eriksson, sometime in the period 1347–1352. About a hundred years later, the code of King Magnus was revised and reissued, although the earlier version continued to be used well into the sixteenth century. In Norway and Denmark, new national codes were issued during the 1680s, while it took until 1736 until the Medieval codes were finally replaced in Sweden by a new code in 1743: *1734 års lag* (Tamm 2011: 15–18; Gelting 2011: 92–94; Andersen 2011: 121; Collin & Schlyter 1869: LXXXIV; Hoff 1997; Ekholst 2009).

The study of the legal development of these “core areas” is supplemented with analyses of material from other areas, primarily the British Isles, from which there exists a comprehensive series of legal codes, from, about 600 (Attenborough 1922; Robertson 1925);

Russia (from *Russkaia Pravda* to the *Ulozhenie of 1649*, see Kaiser 1992; Hellie 1988); and India, primarily the *Dharmasutras* and the *Laws of Manu* (Olivelle 2000; Olivelle 2004).

Why some say that we cannot do it and we insist that we can

Below we will demonstrate that it is indeed practicable to make intelligible, and thereby to compare and contextualize, law codes from cultures separated from each other by huge temporal and geographical distances. For the sake of analytical clarity, we will address the intelligibility, comparability and contextualization as three separate problems, despite being fully aware of the fact that they are intimately intertwined.

Intelligibility

First, can we truly claim that we are in a position to discern what is really meant in thousands of different regulations from such dissimilar laws as the ones that we have studied?

Here the importance of the translations of critical editions of the codes, with their often very comprehensive commentaries, must be emphasized. In fact, it is the appearance of a great number of legal codes in modern translations during the last thirty years or so that has made truly global comparisons of this type possible at all. To return to the issue of comparability proper, a theoretical approach to the issue is not as helpful as a discussion of concrete cases. Below we will share our reflections on some illustrative cases – from the most easily decoded, through those that need some decoding, to the very few that really puzzle us.

Almost all law codes, wherever and whenever they have been laid down, include regulations on non-lethal violence (as well as on lethal violence, of course). For example, in *Pactus legis Salicae*, a Frankish law from about 500 CE, it is stated that if

anyone mutilates another's hand or foot, or knocks out an eye, or cuts off an ear or cuts off a nose ... let him be held liable for 4,000 denarii (*Pactus Legis Salicae*: 29.1, Rivers 1986).

It is crystal clear that the above regulation deals with injuries caused by someone's physical violence against someone else; that the body parts affected cannot be anything other than precisely foot, eye, ear and nose; and that these are body parts on human beings and no other species. The sanction is also explicitly described, so as to leave no doubt either about the type of punishment or the amount of money prescribed as compensation for the injury suffered. Furthermore, the regulation also makes sense also from the vantage point of our contemporary world, where similar regulations are commonplace, except that in our time of volatile prices the amount of money would not be cast in stone.

One might consider it too easy to show that we are capable of decoding a law that is hardly in need of interpretation at all, a law, what is more, from our own cultural sphere, albeit at some temporal distance from the present. However, many regulations from cultures more distant in time and space are as easily understood as the above example. Let us illustrate this with the 2,000-year-old *Code of Manu* from India, laid down in a culture profoundly different from the Western World (Maisels 1999: ch. 4). This example is about stealing and other deeds, which the lawmaker in a typically casuistic way associates with other kinds of misbehavior:

A man who steals a rope or a bucket from a well or tears down a place for distributing water should pay a fine of 1 Masa and restore that article (*Law Code of Manu*: 8.319, Olivelle 2004).

What might be concealed here we cannot tell. We cannot even see a cultural gap to bridge in this example, and, indeed, the *Code of Manu* abounds in such regulations, although quite a few are also far less intelligible than this (see below). Such cases are by far the most common ones. Our point is that in such cases we can dispense with knowledge about the local context and still reach an understanding of what was intended with a certain regulation.

Of course, this is not always the case. Frequently, we come across less easily decoded laws. A first illustration of this can be taken from Salian law. As with the previous quotation from the *Pactus*, the following rule is quite clear in regard to *what* is meant, i.e. the mean-

ing of what is outlawed and the sanction that follows transgression, whereas the *why* of it is far from obvious without knowledge of the local cultural context:

if anyone shears the long hair of a free-born boy without his parents' consent ... and it can be proven that he did this, let him be held liable for 1800 denarii (*Pactus legis Salicae*: 24.2, Rivers 1986).

Still, whatever might have been the normative rationale behind this restriction, there is no ambiguity in the message as such. The same applies to the following example, from *Leviticus* of the Biblical Law:

If any of the Israelites slaughters a bull, a lamb or a goat within or outside the camp, without in advance bringing the animal to the entrance of the tent of revelation, in order to give it as a sacrifice to the Lord at his abiding place, this he will be held accounted for as a blood sin. He has shed blood; that man shall be expelled from his people (*Leviticus*: 17.3–4, *Bibeln* 2000, our transl.).

However, being rather familiar with the local Biblical context, we find it even less strange than the previous example. On the other hand, since the sacralization of places is common in almost all confessional systems, it is perhaps not that local after all, and therefore likely to be properly understood by almost anyone coming across it whether familiar with the Old Testament tradition or not.

The next extract from *Leviticus* may, however, seem somewhat more puzzling, although even here one would have no trouble understanding how properly to comply with the law, if one imagines being placed in a cultural setting where one is supposed to do so:

You must not let two animals of different species mate. You must not let two kinds of grain grow in your field. You must not wear clothes that are woven of two different kinds of yarn (*Leviticus*: 19.19, *Bibeln* 2000, our transl.).

However, even though it might be beyond our reach to truly grasp the specific linkages between these three pairs, with mutually excluding

species (animals, grains) and artefacts (yarn), never to intermix, on the meta-level this way of thinking resembles mindsets that we are already familiar with. It is not too far from the exogamy law and the incest taboo in mating that we recognize in most cultures from different periods of history, although here it has been extended in a rather unintelligible way.

We close this series of cases along the gradient of intelligibility with one example that from our vantage point seems even more difficult to grasp than the cases above, from the Indian *Code of Manu*. It is about rules of conduct for what is here called the Bath-Graduate (religious graduate), and particularly about the relation between telling the truth and saying what is pleasant:

He [the Bath-Graduate] should say what is true, and he should say what is pleasant; he should not say what is true but unpleasant, and he should not say what is pleasant but untrue—that is the eternal Law (*Law Code of Manu*: 4.138, Olivelle 2004).

The logical implication of this rule of conduct seems to be that the Bath-Graduate should only tell pleasant truths and otherwise stay silent. However, what mystifies us greatly in this message is what is said in the following sentence, namely that he “should call a lucky thing ‘Lucky’; or rather he should call everything ‘Lucky’” (*Law Code of Manu*: 4:139, Olivelle 2004). Everything – whether true or not? Pleasantness overriding the truth, being the basic norm? How should the poor individual sort this out: stay silent about unpleasant truths or convert them into something pleasant? Or should we rather interpret the request for silence as actually conveying a meaning: silence as a way to communicate disapproval? This we cannot tell.

The following passage from the same code – still concerning rules of conduct for the Bath-Graduate – is also obscure, but in another way: we have not managed to grasp what they have in common:

He must never blow on a fire with his mouth; look at a woman when she is naked; throw anything filthy into a fire; warm his feet over it; place it under his bed; step over it; place it by his feet; hurt

living creatures; eat, travel, or sleep during the time of twilight; scribble on the ground; take off his own garland; deposit urine, excrement, sputum, blood, poison, or anything smeared with filth in water; sleep alone in an abandoned house; awaken a sleeping superior; speak with a menstruating woman; or go to a sacrifice uninvited (*Law Code of Manu*: 4:53–57, Olivelle 2004).

Obviously, much in this passage shows an urge to avoid everything filthy, but not all of it. Why all these things have been linked is not apparent to us. Certainly, some of this law might make sense if we became familiar with the local context. In this case we do feel somewhat lost.

The last example is exceptional. It is unusually unintelligible – although not completely so. So in settling the issue of the intelligibility of laws, aided by the translators' commentaries, we maintain that we are able to understand the intended meaning of the bulk of the regulations in the laws at issue here.

Given that this conclusion drawn here could be generalized, why should this be the case? Why does it seem that the basic meaning of legal regulations can be properly communicated over huge cultural and temporal distances? In general, it is so because humankind is a communicative species whose members normally want to make themselves understood, and on the whole are not waging Machiavellian tug-of-wars of mystification against each other (Gärdenfors 2000: 102 ff.; Laland & Brown 2002: 166). This is particularly the case with lawmakers, who have had very good reasons to make their laws as clearly understandable as possible in order to instill obedience among their subjects.

Comparability

Here, our intention is to argue that ours is a worthwhile undertaking. Therefore, let us briefly discuss two pairs of examples where it is possible to interrelate otherwise unrelated laws.

The first example concerns a case where the same type of action is treated in radically different ways. It is about marriage between a male slave and a free woman. According to the 3,500-year-old *Hittite*

Laws, such a relationship was considered legal, although obviously in need of regulation:

If a male slave [takes] a [free] woman in marriage, [and they make a home and children, when they divide their house], they shall divide their possessions [equally, and the free woman shall take] most of [the children,] with [the male slave taking] one child (*The Hittite Laws*: 32, Roth 1997).

In a Medieval Frankish capitulary, the case was quite the contrary, and a misalliance of this sort was harshly punished:

If a woman unites in marriage with her slave, let the public treasury acquire all her property and let her be outlawed ... Let that slave endure the worst death by torture, that is, let him be broken on the wheel (Merovingian capitulary, *Capitulary III*: 98, Rivers 1986).

In our view, the above example would demonstrate the comparability of the two cases, provided that slaves were socially distinguished in roughly the same way in the Hittite culture as in Frankish culture 2,000 years later. If so, they would commonly have been treated as property, i.e. been subject to purchasing and selling. This was certainly the case in both these cultures, though in passing we would add that this far from exhausts their role. To the degree that they could be held responsible for their misdeeds, put to trial, convicted, and suffer punishment, they were also treated as humans, unlike other items sold at the market (Darnton 1984: ch. 1; Friedman 1985: 218–229).

As with the examples above, in terms of type of action and of sanction, the examples below concern two rather similar cases, also 2,000 years apart. They concern theft, in Old Babylonia of a plough and in Medieval France of vegetables:

If a man steals a plow from the common irrigated area, he shall give 5 shekels of silver to the owner of the plow (*Laws of Hammurabi*: 259, Roth 1997).

If anyone thievishly enters another's garden, or turnip-, bean-, pea-, or lentil-patch, or steals [something there], and it can be proven that he did this, let him be held liable for 600 denarii ... in addition to its value and a fine for the loss of its use (*Pactus legis Salicae*: 27.7, Rivers 1986).

These cases are not as perfectly analogous as the marriage cases discussed above. However, both can be considered economic crimes, both concern stealing, and in both cases the sanction stipulated is compensation to be paid to the owner. Thus, it is valid to subsume both of them under rather general categories without becoming conceptually distorted.

In conclusion, we would say that the comparative part of our work is as possible to carry out as the decoding part, although we know perfectly well that in some instances neither really works.

Contextualization

It might be claimed that the intertextual comparison of clauses, i.e. disconnecting them from the intratextual environment of other clauses, is an assault on their intended meaning. Is it not indispensable to see them as integrative parts of a whole? Yes and no. As we will see, it is necessary to apply different arts of reading – both the holistic and the analytical. Among other things, a holistic approach requires validation of the intratextual representativity of a certain passage, meaning that one tries to make sure that the interpretation of this passage is not violated by the meanings of other parts – unless intended so by the (assumed) author. Once validated, it is equally legitimate to try to establish the meaning and significance of the passage in question by also applying intertextual contextualization (Jarrick 2002: 133–146). Moreover, having studied a series of law codes from the very first to the very last ordinance, we have found that it is not always true that a text is a genuinely integrative whole. Actually, the history of lawmaking may even be perceived as a secular striving towards textual coherence and integration.

Some scholars have been concerned about the absence of considerations of the local cultural context in the societies where the laws

under scrutiny were laid down. These are completely reasonable concerns. In addition, it should be pointed out that variation is a profound feature of all phenomena in the world. Without diversity, neither cultural nor natural evolution would take place. So this is simply something that has to be taken into account, in order to serve as a critical test of the explanatory power of causal reasoning.

The *Tang Code* could serve as case in point. In order to determine the degree of harshness in the many seemingly draconic sentences in this code, it is essential to know that if conviction was not obtained, false accusation rendered the complainant as harsh a punishment as was meant for the originally accused (Johnson 1997: 6). Thus draconian sentences were not only intended to deter potential criminals from transgressing the law, but also to discourage accusation abuse among law-abiding people, thus implying a subtext of a lower degree of harshness than one might be inclined to conclude at first sight. It seems to have been only slightly less dangerous to frivolously voice suspicions of other people's transgressions, than to be a perpetrator oneself. Applying our terminology, one could say that this is part of the intratextual context.

This should, however, not be interpreted as if the lawmaking authorities in ancient China did not consider certain transgressions serious misdeeds deserving tough sanctions. Taking the extratextual local (= Chinese) context into account, one would be inclined to explain this by pointing to the fact that "the *Code* was regarded as the last means by which to protect society when all other attempts ... had failed" (Johnson 1997: 5). The basic philosophical pillar upon which laws were erected was the profound need to preserve the harmony between man and nature, which could be disrupted by overly heavy punishments or by sentencing people at the wrong season (Johnson 1979: 10, 15). Knowledge of such peculiarly Chinese circumstances is crucial for understanding and explaining other, similarly unique features of Chinese law. And yet, the explanatory value of this rests with a comparative contextualization making it plausible that similar conditions in other societies did have similar effects (or that dissimilar conditions did not).

Yet, in this project, although they are analyzed, local cultures are not at the core of our contextualizing efforts. Rather, the major

context of each of the laws studied *is the other laws* studied. The justification for this is that our overarching aim has been to identify and explain general trajectories of lawmaking, making it indispensable to compare laws from clearly distinct cultural and historical contexts. This has enabled us to establish the overall presence or evolution of certain general processes or attitudes, but it has also forced us to rule out some hypothetical generalizations. And this is also contextualization! Again, by this measure we can test, modify, or even falsify, explanations built only on local context – explanations that too often have ignored the fact that the same phenomena emerged in very different cultural settings (for example Berman 1983).

Below, we will illustrate this point with two pairs of simple examples. The first case concerns a husband's responsibilities towards his wife and what she would be entitled to if he were away on business. Here the *The Code of Manu* states that a

man should provide for his wife before he goes away on business, for even a steadfast woman will go astray when starved for a livelihood. If he provides for her before going away, she should live a life of restraint; but if he leaves without providing for her, she may maintain herself by engaging in respectable crafts (*Law Code of Manu*: 9:74–75, Olivelle 2004).

In the *Laws of Hammurabi*, compiled about 1,500 years before the *Code of Manu* appeared, in a culture quite distinct from it, the same topic is treated in the following way:

If a man should be captured and there are sufficient provisions in his house, his wife [she will not] enter [another's house] ... If a man should be captured and there are not sufficient provisions in his house, his wife may enter another's house (*Laws of Hammurabi*: 133a, 134, Roth 1997).

In both these cultural settings, a man is above all supposed to provide for his wife. If he fails to do so while being away for some reason, his wife has to restrain herself from taking any steps towards independence, but given that she is not provided for, as a last resort she

may maintain herself either by respectable work or by entering into another marriage. This applied equally in India and in Babylonia, and, we can tell, in many other cultures as well, although they may have been culturally alien to each other in many other respects.

The second case is about the illegal cutting down of trees in someone's field or orchard. "If a man cuts down a tree in another man's orchard, he shall weigh and deliver 20 shekels of silver", states the 4,000-year-old Sumerian *Laws of Lipit Ishtar* (§ 10, Roth 1997). 2,500 years later, the Salian law almost identically stipulates that if "anyone cuts down a planted tree in another's field ... let him be held liable for 1,200 denarii" (*Pactus legis Salicae*: 27:15, Rivers 1986). This mirrors the fact that property and the violation of property rights are among the most frequently regulated aspects of human action in most legal systems.

Of course, no conclusions about the universal characteristics of laws can be drawn from the examples given here. They have been chosen simply to illustrate the potential of global intertextual contextualization.

This is how we do it

In order to address the issues raised above, we have developed a number of specific methods for long-term analysis of legal development, which are presented below. On an overall level, the study comprises two main subsurveys: first, analysis of the long-term development of the content of legal codes, and second, analysis of the long-term development of their form, although the latter is not treated in this article. The former subsurvey is comprised of two parts: quantitative analyses of the entire contents of codes, and analyses of specific aspects of the codes.

The contents of the codes: quantitative analyses and selected themes¹

Here, the aim is to provide an overall picture of the contents of the codes, so as to form a basis for comparisons over time and between cultures, and to analyze a number of aspects of the codes in depth.

The former is done above all through collection of two types of basic information: the *types of human (inter)action* regulated in the provisions of the various codes, and the *consequences prescribed* in those same provisions.

A systematic comparison of this kind clearly requires quantification and classification. How can we create categories that will work in all the historical contexts of the survey? How can we make sure that our analyses are intersubjectively verifiable? And how can we create a system that will work from the outset, but still can be revised as the work proceeds? In other words, how can a system be established, which is at the same time stable and flexible, and readily comprehensible and transparent?

To achieve this, we have developed a classification system with three main features: the use of explicit definitions of categories, a concentration on basic human interaction, and classification at different levels of abstraction.

The insistence on an explicit definition of the categories used is intended to stabilize the system, and to cater to the need for transparency and clarity. We want to avoid the pitfall of a too assumptive use of certain terms and categories – for example, by only defining key terms, and not creating a system of categories.

The second feature is based on the awareness that global comparisons of this kind call for the primary focus to be on a more general level (see also Reynolds 2013: 16). Understandably also, we cannot go into the smallest of details. However, this in no way precludes in-depth analyses or attention to detail per se. In fact, such analyses are necessary in order not to risk only seeing what is similar in the societies and legal systems we are studying and thus lose out on variation. Indeed, in order not to lose sight of the comparative context, it is essential for such analyses to always be connected to basic traits and processes found in most, or all, human cultures. In other words, there is a general level on which a connection can be made.

We have solved this problem of the need to be both general and attentive to variation by the creation of an analytical system where the legal material is classified at different levels of abstraction. In practical terms, this involves each rule in the codes in question being 1) summarized, 2) classified in a specific way, for example,

as concerning theft, and 3) classified in a more general mode, for example, as concerning property crime. The same principle is used to classify the consequences prescribed in the codes. This solution is also intended to ensure that the system is not too rigid and that it can be revised as and when new insights are gained. This is so because when changes are required it is always possible to go back to a more concrete level. It allows us to move a certain category at one level of abstraction without thereby (necessarily) ruining the classificatory order at another. For example, theft committed by a “slave” could be classified as a transgression either by a piece of “property” or by a human being, neither enforcing a change of the division between property and people at one level, nor the division between “theft” and other crimes at a more concrete level.

This broad analysis of the content of the codes is connected to a number of in-depth analyses concerning matters closely related to our overall objectives: the issues of equality or inequality before the law, legitimization of law, obligations versus rights, and of penal principles. In a forthcoming study our analysis of content will be paralleled by a detailed analysis of the form of law codes and of the intricate interplay between form and content.

These are our major results

We have spoken in defense of the possibility to understand, compare and contextualize laws from very different times and cultures, and we have also gone into some detail about the methods applied to make this possibility come true. Below, we will expand somewhat on the knowledge advanced by applying the methods presented above.

General themes and trends

Above, we claimed that one of the bases of intelligibility is that lawmakers to a substantial degree have tackled similar problems of human conduct and misconduct, despite huge cultural and temporal distances between them. The likelihood that this applies to the overall themes of laws in general is indicated in the figure below. Here we have collated evidence of the themes in four laws spanning more

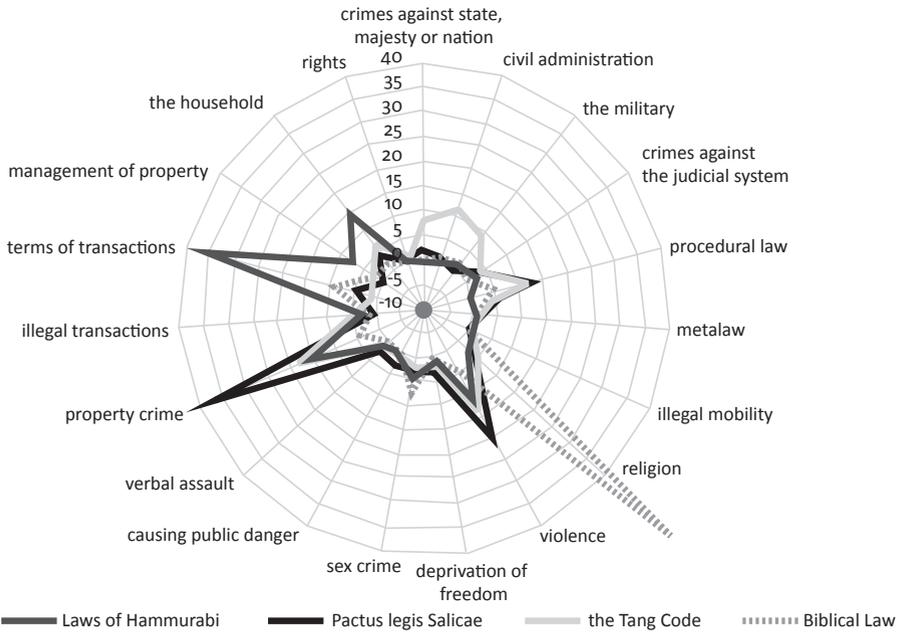


Figure 1. Themes in different laws. Per cent.

Sources: *Laws of Hammurabi* (Roth 1997); *Pactus legis Salicae* (Rivers 1986); *Tang Code* (Johnson 1979; Johnson 1997); *Biblical Law* (*Bibeln* 2000).

than 1,500 years. They represent substantially different societal and cultural contexts, from Babylonia in the eighteenth century BCE, through the Middle East and Early Medieval Europe (Frankish law) to the Chinese Tang dynasty of the sixth century CE.

It is obvious that these very diverse laws are all extensively pre-occupied with property crime and illegal violence, as are almost all other laws that we have examined. And it is highly probable that the presence of these themes in the laws reflects major concerns in all the sedentary societies or civilizations in which the legislators lived. This means that the similarities are not primarily due to some internal logic of legislation, even if this might play a role, since a simple statistical analysis reveals that the more comprehensive the law studied, the more even the distribution of subjects addressed in it, and vice versa.

It is equally clear that important resemblances between different

laws can be discerned also on lower levels of abstraction, although this is invisible in the figure above because of its low level of resolution. One such topic, recurrently targeted for regulation, is the matter of slaves, and another one prominent in its ubiquity is the handling of stolen property (e.g. *Laws of Hammurabi*: 9–13; *Pactus legis Salicae*: 10.1–7, 37.1–3, 47.2, Rivers 1986; *Tang Code*: 296, Johnson 1997; *Russkaia Pravda* (Short Version): 11, 13, 16, Kaiser 1992).

All these similarities can serve as a case in point for the fruitfulness of using comparisons between laws from profoundly different societies as an essential basis of contextualization.

It is just as clear that the laws presented in the figure above display great variation in their main focus. In Biblical Law it is religion (of course); in the *Laws of Hammurabi* what might be called “proto-civil” terms of transaction; in Frankish Salian law it is property crime; and, as expected, in the *Tang Code* it is civil administration. This variation reflects the profound cultural differences between the societies where the laws were promulgated. Variation is, of course, no less an intrinsic aspect of culture than of nature, and is as much a precondition for evolutionary change in the former as in the latter area of life, the one also often being indistinguishable from the other. And yet, through the course of time, certain general trends seem to evolve whatever the particular cultural point of departure, and wherever the multi-generational learning process of lawmaking took off. By taking a bird’s eye view on this process, we will here point to important long-term trends, while for the time being to a large extent disregarding variation.

Some of the trends have previously been identified by other legal historians. However, this has been done without being based on a broad and firm systematic analysis. Through our comparative enquiry, we are able to corroborate what others have suggested, qualifying and relating it to long-term structural or formal changes in lawmaking. Furthermore, our findings will serve as a basis for a set of hypotheses about how these trends might be causally connected to other major historical processes. This will be touched upon at the end of this section.

From inequality to equality before the law

One trend that we have identified is a general and gradual change from outright inequality to equality before the law. Some legal historians claim that laws generally originated in order to codify inequality and social differentiation, but eventually were recoded to emphasize equality (Glenn 2010). Be this as it may, and whatever the driving forces behind the process of codification might be, inequality was undoubtedly the rule in the beginning, and most often deliberately and explicitly so. The example below, from the *Laws of Hammurabi*, may serve as a case in point. It is about physical violence within and across the social classes. In one clause, concerning socially horizontal violence between people of the highest class of Old Babylonia, it states the following:

If a member of the *awilu*-class should strike the cheek of another member of the *awilu*-class who is his equal, he shall weigh and deliver 60 shekels of silver (*Laws of Hammurabi*: 203, Roth 1997).

Quite the opposite applies if the same transgression is committed by a slave against a socially superior victim:

If an *awilu*'s slave should strike the cheek of a member of the *awilu*-class, they shall cut off his ear (*Laws of Hammurabi*: 205, Roth 1997).

The same ideology is repeated over and over again in most laws in most of the history of human legislation. One example of that is the provincial law of Gotland (*Gutalagen*), which was launched 3,000 years later in a remote part of the gradually evolving Swedish state, in a cultural context very different from that of Old Babylonia. Since inequality is one of the constitutive principles of the *Gutalagen*, it is explicated in many of its regulations. For instance, concerning rape, it states that if a man commits rape,

then he shall pay twelve marker of silver to a Gotlandic woman, but to a non-Gotlandic woman five marker of silver and to an un-

free woman six örar. If rape is committed together with a legally married woman, whether Gotlandic or not, then he has forfeited his life (*Gutalagen*: 224, Holmbäck & Wessén 1979, our transl.).

The principle of inequality applies fairly often to procedural law too, as is illustrated by two curious passages in the *Code of Manu*, concerning the validity of testimonies in court. The first clause exhorts people to tell the truth, and for the individual witness to base his or her testimony on “what [he or she] has seen or heard” otherwise [he or she] will end up in hell in the afterlife (*Law Code of Manu*: 8.74–75, Olivelle 2004).

Except for the consequence of trespassing not being a stipulated sentence but a predicted otherworldly fate, so far this makes sense also from the vantage point of modern legislation. But then follows a strange regulation that encourages false testimony, given that this might rescue criminals of certain classes from execution:

when a man, even though he knows the truth, gives evidence in lawsuits contrary to the facts for a reason relating to the Law, he does not fall from the heavenly world; that, they say, is divine speech. When telling the truth will result in the execution of a Śūdra, Vaiśya, Ksatriya, or a Brahmin, a man may tell a lie; for that is far better than the truth (*Law Code of Manu*: 8.103–104, Olivelle 2004).

Yet, even in the midst of an outright ideology of inequality, rudiments of equality can be found. For example, in early times it was already often stipulated that the sovereign was supposed to obey the law in the same way as his subjects (e.g. Canning 1996: 23. See also Hart 1997: 58). This even applies to the *Code of Manu*, despite its incessantly repeated emphasis on the legal significance of differences in social status. For example, it states concerning theft that the “king must restore to individuals of all classes any property of theirs stolen by thieves; if the king retains it for himself, he incurs the sin of its thief” (*Law Code of Manu*: 8.40, Olivelle 2004); and in “a case where an ordinary person is fined 1 Kārsāpana, the king should be fined 1,000” (*Law Code of Manu*: 8.336, Olivelle 2004). Correspondingly, even in old codes such as that from legalist China,

there are traces of the principle of *equal treatment* regarding certain *crimes*, although for a long time this occurs simultaneously with the principle of *unequal treatment of people* of different status.

In the very long run, however, the idea gained ground that all humans should be treated as equals before the law, by which they also were transformed into citizens instead of mere subjects of the sovereign. In many codes, age-old specific references to the differing status of people were now replaced with references to “any person” (or just “the person”), as in the Ottoman civil law of the 1870s (*Mejelle*: f.i. 8. 902, or almost anywhere in the law); or “every individual” as for instance in the French criminal code of 1810, *Code Pénal*:

Every individual, who shall have given any wounds or blows, shall be punished with solitary imprisonment, if there shall have resulted from such acts of violence, a sickness or inability to work, for more than twenty days (*Penal Code*: 309).

In modern law this is not just visible in the specific regulations, but also anchored in statements of principle, such as in the following passage in the *Swedish Constitution* of 1809:

Public power shall be exercised with respect for the equal worth of all and the liberty and dignity of the private person (*The Constitution of Sweden: The Fundamental Laws and the Riksdag Act* 2003: 63).

Once formulated however, there were no guarantees that this celebrated idea would really become the guiding principle of the entire legal system. It took time before it genuinely permeated the minds of the lawmakers. This is obvious in many instances. For example, it is clearly stated in the introduction to the famous Napoleonic *Code Civil* that “[e]very Frenchman shall enjoy civil rights” (*Code Napoleon*: 8). However, this does not prevent it from containing gender-biased regulations, among other things stipulating that the “husband owes protection to his wife, the wife obedience to her husband” (*Code Napoleon*: 213); that the “wife cannot plead in her own name” (*Code Napoleon*: 215); and that the “husband may demand a divorce on the ground of his wife’s adultery,” whereas the “wife

may demand divorce on the ground of adultery in her husband”, only “when he shall have brought his concubine into their common residence” (*Code Napoleon*: 229–230).

So, after all, everyone was still not as equal as everyone else. But in due course everyone was declared to be equal, whatever the degree to which it was implemented in judicial practice. Yet, alongside this development a kind of re-differentiation has evolved where the social conditions of suspected criminals have gained increasing significance in law as well as in court practice. Certainly, rudiments of such considerations can be seen very early on in the history of lawmaking, but they did not proliferate until the equality principle began to become established, rather as its corollary than as its precondition, and rather as an integrative part of its spirit than its negation. This is so since such considerations serve as an equalizing corrective to inequalities between the suspects in terms of social and psychological conditions.

Towards secularized legitimization of law

Intrinsically linked to this development, the legitimization of law has been subject to substantial change over the millennia. It is not that legitimization as such emerged at some point in the history of lawmaking: as far as we have been able to survey the trajectories of written legislation, it is an ever-present ingredient in law.

It is of course possible to think of power simply as brute force, implemented by power-holders having no incentive to justify themselves, and thus in no need of making laws. However, in practice this is almost never the case. Quite the contrary, history abounds in rulers, brutal or not, who have attempted to make their rule reasonably agreeable to their subjects through various legitimizing measures. Although this does not necessarily mean law initially, it does in due course (f.i. Glenn 2010; Newman 1983). And simply by its existence, law signifies a quest for legitimization, regardless of whether this aim is explicitly stated or not. Yet, in most cases laws do include metastatements of this kind.

In most of these cases, reference is made either to impersonal forces, such as magic, tradition and heaven, if not nature itself; or

to heavenly personae (Friedman 1985: 236; Weber [Rheinstein] 1954: 8 ff., 106); or to “innerworldly” agents, such as the rulers and legal scholars responsible for putting the rules together; or to the consent of larger groups, most commonly elite collectivities such as councils of elders or nobles (e.g. Bjarne Larsson 1994: 18, 37, 216–218; Canning 1996: 59–64; *Laws of Wihfred*: Prologue, Attenborough 1922); but in more recent times also to the people as a whole. References of the former types are inserted in order to anchor what may seem like regulations too contingently human or temporal in something more solidly extra-human or eternal.

Simplifying somewhat, we would say that the legitimization of law started as a mixture of references to magic, tradition and the worldly authorities themselves (Newman 1983: 10).² Subsequently, it turned to heavenly powers (Glenn 2010: 93; Newman 1983: 10), although some of the earlier figures of legitimization lingered on. Eventually, it gravitated all the way back to the mortal beings generally referred to as “the people”, let alone that the people in their turn have often been resacralized into the common will and human law has been elevated to natural law (Friedman 1985: 204; Weber [Rheinstein] 1954; Newman 1983: 28; Guchet 1993: 48).

How this is reflected in early law in different cultural areas depends very much on the particular context or stage of socio-political development where written law was first introduced. More specifically, there seems to be a connection between state building or state expansion and increasing resort to “otherworldly” legitimization, such as reference to personal gods. Thus, in the earliest laws preserved, the codes of the early state societies of Sumer and Babylonia, religious references loom large. In order to appease his subjects and potential challengers to his position, King Hammurabi of Babylon opened his code by asserting that he was “selected by the god Enlil”, that the god Marduk had “commanded [him] to provide just ways for the people of the land (in order to attain) appropriate behaviour”, and that the god Shamash had “granted [him] (insight into) the truth” (*Laws of Hammurabi*: Prologue, Epilogue, Roth 1997). By this Hammurabi copied and elaborated the legitimizing rhetoric already present in older Mesopotamian codes, such as the *Laws of Ur-Namma* and the *Laws of Lipit-Ishtar*

(from the twenty-second and twentieth centuries BCE respectively) (Roth 1997).

As important as religious reference was to these rulers in their efforts to legitimize their laws, it should also be noted that this was supplemented with more “innerworldly” references to their own suitability for the task: their might, wisdom and benevolence towards the people (Jarrick 2008: 205–207; *Laws of Ur-Namma*: Prologue; *Laws of Hammurabi*: Prologue, Roth 1997).

Also in the laws of the European Middle Ages and the early modern period, we find a mixture of frequent references to God and innerworldly concerns (*Burgundian Code*: Preface, Fisher Drew 1976; *Pactus legis Salicae*: 1–2: Rivers 1986; Bjarne Larsson 1994). However, God is mostly no longer presented as the one who had explicitly appointed the king to his task as a legitimate lawmaker. No doubt, the Medieval “code wrights” spoke “in the name of God” (*Burgundian Code*: Preface: Fisher Drew 1991; *Pactus pro tenore pacis*: 92, Rivers 1986; *I Aethelstan*: Prologue), and pretended to act in “accordance with God’s intent” (*Pactus pro tenore pacis*: 92: Rivers 1986). One may also speak of a certain distance between the kings and God here, since Medieval kings sometimes refer to the representatives of God rather than to God himself. Thus, several of the English kings who from the seventh to the eleventh centuries promulgated laws carefully noted that they had done so with the counsel and consent of their bishops and ecclesiastical advisors (e.g. *Laws of Ine*: Prologue; *I Aethelstan*: Prologue, Attenborough 1922; *I Edmund*: Prologue; *V Aethelred*: Prologue, Robertson 1925). In this sense, the grand He was out of fashion as the ultimate taskmaster as early as the European Middle Ages, at least when it came to lawmaking. Whether this change of ways of referring to God could be seen as a rudimentary step towards the secularization of lawmaking cannot be settled, although this is exactly what happened in the very long run. It might also be added that Ashutosh Dayal Mathur has claimed a similar development for Medieval Indian law. He refers to a “secularization of dharma sastra” in Medieval Hindu law (Mathur 2007: 5).

However, occasionally references to God are more direct, which to a large part seems to coincide with state expansion and the cen-

tralizing ambitions of rulers (Bjarne Larsson 1994: 7–8; Canning 1996: 47–64). Thus Charlemagne describes many of his specific legal rules as being in accordance with the “Lord’s law”, situating his own judicial duties in a truly otherworldly context (e.g. *General admonition*, 789 (Boretius 22); *Programmatic capitulary*, 802 (Boretius 33), King 1987), and the English King Alfred the Great included Biblical provisions more or less unchanged in state law (*Laws of Alfred*: 1–48, Griffiths 1995).

The emphasis on otherworldly legitimization of law and the judicial activities of rulers, and the inclusion of religious law in secular codes, appear also in early modern times (Konung Karl IX: s stad-fästelsebrev till KrLL, Collin & Schlyter 1869: 4–6; *The Muscovite Law Code (Ulozhenie)* of 1649: Prologue, 1–9, Hellie 1988). However, a profoundly new element did appear in this field in the late eighteenth century. In the preamble of the *American Constitution* from 1789, it was declared that “[w]e the People of the United States ... do ordain and establish this Constitution for the United States of America” (*American Constitution*, preamble). As is well known, what happened in America was synchronous with the great turmoil in France, which led to a secularization of lawmaking there too. As already stated, in 1788 a “nation means the community formed by the association of individuals who decide to live freely under a common law, forged by their representatives” (Furet 1992: 50). Within this mental framework, reaching its apex after the downfall of the monarchy, the only authority or “sovereign” recognized was the people. This was repeated in the many constitutions that appeared during the different phases of the French Revolution (Furet 1992: 87; Guchet 1993: 54, 61–62, 86).

Above, we claimed that the long-term trend towards equality before the law was intrinsically linked to the secularization of lawmaking. This is probable in the sense that the waning of legitimizing references to powers beyond emerged alongside the evolving general idea that no one should be considered above anyone else anyway. Thus the dismantling of extraterrestrial powers was just one aspect of the disapproval of inequality altogether.

However, beautiful as it might seem, reference to the people as the sole legitimizing basis of law was sometimes little more than lip

service paid by an elite that more and more often tended to speak in the name of the people and less and less through the people. This is at least what some scholars have claimed was the fate of the French Revolution, where gradually ordinary women and men were being marginalized by the very process that also “sacralized” them as the “the People” or even “the General Will” (Furet 1992; Guchet 1993).

*From emphasis on obligations
and particularistic rights to general individual rights*

However, in due course the two long-term processes discussed here were accompanied by a third process: the change from a general emphasis on obligations and group privileges to general individual rights, eventually dissolving the lofty references to the General Will.

All the way up to the eighteenth century CE, there was a general emphasis on obligations, whether we look at laws from Mesopotamia, Europe or China. Obligations are ubiquitous, like the collectivistic distinguishing and lumping together of people of differing social status, as illustrated by the following example from the *Tang Code*:

All cases in which officials of the seventh rank and above, [and relatives] of those officials and nobles permitted petition, commit a crime punishable by life exile or less shall follow this principle allowing reduction of punishment by one degree (*The Tang Code*: 10; Johnson 1979).

This legal culture lasted for a very long time, and we will not go into any detail here about the process that eventually caused it to fade away. Suffice it to say that this fading away finally occurred in the eighteenth century. Implied in the secularized and democratic perspective on the legitimization of law was the notion of general individual rights, which now for the first time accompanied obligations as an essential ingredient of law codes (Guchet 1993: 59). Thus, in Article 4–5 of the famous *French Declaration of Rights* from 1789 the following is stated:

Article 4. Liberty consists in being able to do anything that does not harm others: thus, the exercise of the natural rights of every man has no bounds other than those that ensure to the other members of society the enjoyment of these same rights. These bounds may be determined only by Law.

Article 5. The Law has the right to forbid only those actions that are injurious to society. Nothing that is not forbidden by Law may be hindered, and no one may be compelled to do what the Law does not ordain.

Although Napoleon's civil code was far more despotic than the proud declaration of rights cited above, civil rights also appear here, in fact already on the first page of Book One, where it is stated that every Frenchman "shall enjoy civil rights" (*Code Napoleon*: I.I.I.7–8).

Certainly, to the degree that older laws contain such obligations where people's responsibilities towards each other were stipulated (and not only towards the authorities), what one person owed another could namely be understood as what the other had the right to claim from that individual. One may also be inclined to label as rights certain privileges frequently given by the sovereigns of premodern societies. In that sense rights were not altogether absent in ancient law.

However, when present, as, for example, was frequently the case in the *Institutes of the Justinian Code*, rights were most often stated in positive terms for certain activities, such as the wife's rights in marriage (*Institutes of the Justinian Code*, 535 CE), or as group privileges, instead of being indiscriminately offered the "generic" citizen at her or his discretion (e.g. Berman 1983: 395–396; Lev: 2–5, *Bibeln* 2000; *The Etablissements de St Louis*: 76, 113, Akehurst 1996; Guchet 1993: 113; Friedman 1985: 195). And it never happened that people were offered freedom of expression, although, admittedly, the Justinian recognition of everyone's right to use public resources belonging to no one (such as rivers and ports) borders on a modern perspective on rights (*Institutes of the Justinian Code*: Book II.I.2), while outright repression of heresy certainly does not (*Annotated Justinian Code*: Book I:I, 5–11). Furthermore, "rights"

implied through someone's obligations towards someone else are not the same as the explicit recognition of the individual rights offered each and every individual considered a citizen. Whereas obligations are specific, normally individual rights are deliberately unspecific. And where collective privileges are granted to one group at the expense of all the unprivileged, the opposite is the case with individual civil rights, being collective utilities in the sense that their use by one citizen does not to any degree reduce their accessibility to any other. Thus, not only did secularized law originate with the people, from now on it also guaranteed certain rights to the people, who by this reform were differentiated into individuals (Guchet 1993: 47; Glenn 2010: 142).

However, it must be added that the idea of rights has rather often been violated in modern law despite being formulated as a basic principle there. For example, not all adult inhabitants were included in eighteenth- and nineteenth-century French legislation on civil rights. Women were not considered citizens in the full sense of the word (*Code Napoleon*: 7, 19, 214–226).

Summary and discussion

Focusing on methodological issues, we have tried to demonstrate the scientific fruitfulness of a global and systematic comparative approach to historical studies of law. The motivation is that we want to improve our understanding of the cultural dynamics of human society, an objective compelling us to also improve our methods of enquiry. For such an objective, laws and lawmaking suit us extraordinarily well, partly because they testify to profound aspects of human interaction, and partly because they can be followed over a considerable time span of at least 4,000 years. Although most parts of the world will soon be covered by our study, only a few out of all the innumerable laws will be analyzed. They have however not been chosen at random. Rather, certain core areas have been picked, particularly those where the content and form of lawmaking can be followed over long periods of time.

As a response to concerns as to whether it is at all possible to make large-scale comparisons, we started out by showing that laws

even from distant and dissimilar times and cultures are more easily decoded and compared than many researchers believe. Furthermore, we also showed that the corpus of laws studied can serve as a means by which each of them could be contextualized. What is present or absent in a law code from a certain culture throws light on corresponding absences and presences in law codes from other cultures and thereby on the significance of local conditions for recurring or unique traits in laws. However, to truly make the possibility of comparisons of legal regulations come true, we have equipped ourselves with clear and stable definitions, and we have applied a three-level system of categorization in order to bring flexibility as well as stability to our analyses.

Thematically common to most laws is their preoccupation with property crime and illegal violence, and this applies to laws as dissimilar as the *Tang Code* and the *Laws of Hammurabi*, despite huge cultural differences between the societies in which they were promulgated. While laws in their earlier phases were biased as to their thematic orientation, later on the themes became more evenly distributed, the more so the more extensive and the more encompassing the laws became.

Reducing the development of the substance/content of lawmaking to the major long-term trends, we have identified the following changes:

- From deliberate inequality to equality before the law
- Towards secularized legitimization of the law
- From an emphasis on obligations, particularistic rights and group privileges to general individual rights

Another trend that we have identified concerns the long-term course of development of the death penalty. Over a very long timespan we have identified a curvilinear track from leniency, through harshness and back to leniency. Since we will deal with this subject elsewhere, here we will make do with just pointing it out.

We are fully aware of the fact that these changes have evolved neither in a unidirectional nor in a uniform way, and we cannot claim that the tide can never turn and undo what has happened to

date. In some respects it is even now about to happen. Nevertheless, a certain direction in the gradual development of lawmaking can be still be discerned.

We assume that the dynamics of a cultural system have a certain direction, simply meaning that a system never really returns to its “point of departure”, despite all kinds of feedback mechanisms at work in the course of history. Yet this should neither be understood as if the system has to be unilinear, nor that if it in itself shows anything like an intention, although it is peculiar to such a system that its basic components, the human agents, do have intentions. Implied in our assumption is that culture is a process, where societal change unfolds according to specific causes. In other words, the history of culture is deterministic in the sense that certain processes seem to be the necessary precondition for other processes to occur.

The general cumulative directionality of history, be it unilinear or not, can be established as nothing but the unfolding of a number of specific processes. Without the concrete flesh of history, there can be no history at all – naturally. However, history luckily abounds in examples of this simple but surprisingly oft challenged fact (Jarrick 2013). For example, once in the distant past sedentary life grew out of nomadic life, in its turn being the precondition for the emergence of urban clusters. Furthermore, it is unlikely that regular wars could be fought unless people had settled down, let alone that homicide has been immanent in human culture throughout history. The opposite trajectory is hardly thinkable: a history departing from sedentary societies in a sparsely populated prehistoric world gradually giving way to an overcrowded world of wandering people. Moreover, the exchange of utilities necessarily developed before money was introduced in order to facilitate exchange, little by little being transformed into commodity trade. A parallel development is how religious ideas had to appear before religious associations did, before churches and other devotional buildings were erected, a long time before some people in the modern age began to distance themselves from the whole otherworldly package altogether.

Being a crucial example in our specific context, the history of laws also testifies to the directionality of human affairs as much as other fields of human interaction do. This has been shown above.

In addition, two other aspects of the directionality of the history of lawmaking processes are worth mentioning.

First, as has frequently been shown, in most if not all societies, unwritten behavioral rules anteceded written law. Since human interaction sooner or later becomes regulated in one way or another, and humans have lived together long before they acquired literacy, this is almost self-evident. Furthermore, this order of institutional change should be understood not only in the chronological, but also in the causal-intentional sense, meaning that once they learned the art of reading and writing, people could intentionally draw on experiences from the former when developing written law. It has been claimed that this development could be linked to the emergence of the concept of transcendent powers, and gods, stipulating laws for humankind (Elkana 1986: 47). Traces of unwritten regulations everywhere in the oldest written law codes clearly testify to this.

Secondly, not only rules of behavior but also how to handle the violation of the rules – the administration of justice – was developed long before official courts or the use of written records and other such instruments were introduced. Correspondingly, it took some time until conflict settlement with the aid of third parties emerged, and still more time before this procedural component was made mandatory (Newman 1983: 51–52). As expressed by Catherine Newman: “self-redress systems relying upon retaliation [which] entail clearly defined notions of right and wrong”, were developed “despite the absence of third-party authority figures” (Newman 1983: 61).

More could be added, but the above examples suffice to make it obvious that the history of legislation and jurisdiction fits well into the picture of history as a cumulative process with a certain discernible direction. Furthermore, an inverted process could hardly be imagined, dawning with written law that over centuries gradually dissolves into the oral regulation of human behavior.

We have demonstrated that the cultural dynamics of the human society, as studied through the history of lawmaking, have a certain direction, and that they constitute a process of cumulative change. We are inclined to add that our “story” also indicates that the significance of culture increases with the development of culture, in the sense that laws neutralize or diminish the effects of natural

selection, among other things through the protection of the weak. In the long run this is amplified to the principle of equality before the law (supplemented, among other factors, by consideration of social background).

It is likely that the long-term evolutionary implications unearthed through our law study apply to other processes of cultural change too, though this is still to be demonstrated. Also, we believe that the methods used here could open up for studies of other aspects of the cultural dynamics of the human society. They could for example, serve as a model for quantification of other material so far not considered in such a context. We will ourselves actually be using this study as a point of departure for further studies of the connection between law and other profound aspects of long-term cultural change.

Notes

- 1 We have described this method in close detail in a previous article (see Jarrick & Wallenberg Bondesson 2011).
- 2 According to Yehuda Elkana 1986: 47, in the very beginning the authority of laws rested with worldly authorities before they were made transcendental through the emergence of the old, axial world religions. This may be partly true, but in the *Laws of Hammurabi*, written before the breakthrough of axial religions, Hammurabi referred to God as the ultimate authority.

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