


*Lena Fijałkowska\**

 <https://orcid.org/0000-0001-5674-703X>

## SOME REMARKS ON CHANGE AND INNOVATION IN ANCIENT NEAR EASTERN CUSTOMARY LAW

**Abstract.** The article presents the ways customary law could be gradually changed in the ancient Near East. They included working with existing institutions while modifying their consequences as well as their scope of application with tools such as legal fiction. However, the conservative nature of the ancient oriental culture, as well as that of the scribal education made any sudden, radical modification impossible, and even if a new contract type was created, it would keep the pretense of following a long-established practice.

**Keywords:** ancient Near East, ancient Near Eastern law, scribes, legal fiction, sham transaction.

## KILKA UWAG O SPOSOBACH ZMIANY PRAWA ZWYCZAJOWEGO NA STAROŻYTNYM BLISKIM WSCHODZIE

**Streszczenie.** Artykuł przedstawia sposoby stopniowej zmiany prawa zwyczajowego na starożytnym Bliskim Wschodzie. Dla osiągnięcia tego celu wykorzystywano istniejące instytucje prawne, modyfikując ich zakres zastosowania oraz skutki. Konserwatywny charakter zarówno bliskowschodniej kultury, jak i edukacji pisarskiej uniemożliwiał jednak jakiegokolwiek nagłe, radykalne zmiany. Nawet jeśli powstawał nowy typ umowy, zachowywano przynajmniej pozory dostosowania go do powszechnie stosowanej praktyki.

**Słowa kluczowe:** starożytny Bliski Wschód, prawo starożytnego Bliskiego Wschodu, pisarze, fikcja prawna, czynność pozorna.

### 1. INTRODUCTION

Due to the predominantly oral character of the ancient Near Eastern civilization, written law is hardly more than an accident in its history (Lafont 2000, 49). On the other hand, documents of legal practice such as contracts, testaments, or trial records, are numerous enough to become an important source of knowledge for a legal historian, however scattered and incomplete it might be.

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\* University of Lodz, Faculty of Law and Administration, lfijaalkowska@wpia.uni.lodz.pl

Some of them explicitly mention unwritten customary law, obviously known to the parties, using expressions such as “according to (the custom of) the city.”<sup>1</sup> Similar references may also be found, albeit rarely, in royal acts.<sup>2</sup>

## 2. CUSTOMARY LAW – DEFINITION AND GENERAL CHARACTERISTICS<sup>3</sup>

Customary law is usually defined as “consisting of customs that are accepted as legal requirements or obligatory rules of conduct” (Garner 2009, 443). In other words, it is a durable, abided-by practice, generally recognized as binding.<sup>4</sup> By definition, such law is not enacted in any way; on the contrary, it develops slowly through time, and both its author and its “date of birth” usually remain unknown (Fuller 1968, 71). Moreover, it tends to be transmitted orally rather than put into writing, which often makes it difficult to trace and study.

At some point, almost every aspect of customary law has been intensely debated. Relevant for the present study is especially the problem of its flexibility vs. stiffness. The proponents of the former argue that since it is a direct product of a specific community, it reflects accurately its values and convictions and can easily change as they do. Conversely, statutory law permanently plays catch-up with the economic and social reality, never being up to date (Opalek, Wróblewski 1971, 227). However, according to a second theory, the opposite is true. Statutory law is general enough to adapt to new circumstances, and may be quickly amended if needed, whereas customary legal rules are conservative by definition and very slow to alter, reinforcing in turn the most conservative characteristics of the society (Petrażycki 1938, 380–383).

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<sup>1</sup> *kīma (paraš) āli*. See examples in Yamada 2016, 111–116. For a general survey of the leading role of customary law in the ancient Near East see Cardascia 1990, 62–69.

<sup>2</sup> The best-known example is a fragment of an instruction of the Hittite king Arnuwanda I for the frontier post governors: “§ 37 Further, the governor of the post, the magistrate, (and) the elders shall judge law cases properly, and they shall resolve (them). And as the law regarding a sexual offense has been handled traditionally in the provinces, in a town in which they have executed, let them execute, while in a town in which they have banished, let them banish” (Miller 2013, 229).

<sup>3</sup> The problem of the definition and role of customary law in historical perspective as well as in modern legal systems has generated a scholarly discussion started in the 19<sup>th</sup> century and still ongoing. However, its analysis is far beyond the scope of this paper. For an overview see Studnicki 1949, 4–30; for a very useful survey by a legal historian specialized in old Polish law see Kowalski 2012, 33–68. For a general survey of issues regarding the role of customary law in modern times see Kojder 1993, 51–69, and Mayali and Mousseron 2018, *passim*.

<sup>4</sup> As pointed out by Studnicki, this definition consists of two elements – actual observance of the rules and the belief in their binding character (Studnicki 1949, 4–5).

### 3. CUSTOMARY LAW IN THE ANCIENT NEAR EAST – MODES OF CHANGE

The question arises, which of those two characteristics applies to the customary law of the ancient Near East. *Prima facie*, the answer may seem obvious, given the well-known conservatism of the ancient oriental culture (Leick 2010, *passim*)<sup>5</sup>, as well as the notorious continuity of the legal tradition combined with a centuries long lifespan of legal formularies. All of the above points heavily towards the prevalence of the second one, but a closer look at the changes occurring through time in the ancient oriental law proves it to be only partly the case.

Theoretically, to change an outdated or impractical customary legal rule, it would be necessary either to alter the established practice, or to create a new one, which is obviously a long and difficult process. A royal intervention could be an answer, but that would certainly be neither easy nor quick to obtain. In the ancient Near East, the king rarely interfered in matters of civil or penal law other than in his capacity as supreme judge. Such interventions were usually carried out by means of *mišaru*-edicts, i.e., decrees annulling debts incurred under duress and their consequences, or of rescripts, that is answers to queries from officials and magistrates regarding particularly difficult legal matters (Janssen 1991, 4–10; Lafont 1994, 22–27).<sup>6</sup> Examples of more extensive activity, in the form of the so-called law codes, are few and far between. Moreover, their provisions were probably subsidiary only, applied either in lack of a relevant customary norm or if directly asked for by one of the parties (Lafont 2000, 49).<sup>7</sup> Therefore, other solutions had to be sought.

#### 3.1. Modification of existing institutions: adding new elements to extend the scope (sale)

The economic development itself could be enough to render legal changes necessary. Sale is a case in point. It is generally agreed that it developed first as a cash transaction, that is a real contract, concluded at the moment of the

<sup>5</sup> The term conservatism is used here in its basic meaning, i.e. reluctance towards change.

<sup>6</sup> Unpaid debts could result in debt-slavery or debt-forced sale of real estate; both were invalidated by a restoration edict. The scholarship on those edicts is abundant; for an overview see Charpin 1989, *passim*, and Veenhof 1997–2000.

<sup>7</sup> Apart from the best-known Hammurabi Code, fragments of the following law collections are known today: Laws of Ur-Namma (in Sumerian, ca. 2100), Laws of Lipit-Ištar (in Sumerian, ca. 1900), Laws of Eshnunna (in Akkadian, ca. 1770), Middle Assyrian Laws (in Akkadian, XIV<sup>th</sup> century), Hittite Laws (in Hittite, from Anatolia, XVI<sup>th</sup>-XII<sup>th</sup> centuries), Neo-Babylonian Laws (in Akkadian, VII<sup>th</sup> century). Out of those, the first three were probably proclaimed by rulers. The last one contains only 15 paragraphs copied as a school exercise, whereas the Hittite and Middle Assyrian Laws may have originated in an official context, but their exact status is yet to be determined (Westbrook 2002, 8–9).

performance by one of the parties; the other one should follow immediately. However, already at the end of the third millennium such a construction was insufficient, since credited payment and delayed delivery of purchased goods became frequent. It was therefore necessary to find a way to register this kind of agreement while staying within the frame of a real contract. Of course, not all sales were put to writing, the default form of legal transactions being oral, in the presence of witnesses. Only the sales of more valuable items, such as boats, animals, slaves, and real property, would be documented on clay tablets and kept in house archives, mostly for evidentiary purposes. At the same time, precisely in the case of those costly goods a sale on credit could be needed, and in fact it did happen quite often. The main legal problem was how to reconcile a delayed payment with the idea of a cash transaction, and the answer entailed the drafting of two documents – a usual sale contract complete with a fictitious price receipt in its operative section, followed by a debt note for the unpaid part of the price. This combination proved so useful that it would be in use nearly till the end of the era of cuneiform laws in the second half of the first millennium.

A different solution was found for fungibles. Due to the very character of such goods, no need arose for an evidentiary document except in case of delayed payment or delivery. Then, there was no written sale contract at all, but a debt note for the purchase price or for the sold commodities was issued instead.<sup>8</sup>

### 3.2. Modification of existing institutions: broadening the purpose (adoption)

Adoption<sup>9</sup> created a legitimate filiation, and therefore it was a means for childless people to acquire an heir, all the easier to resort to as no constraints like the modern ones applied. It was possible to adopt an adult as well as a child, and adoption being a purely private act, the child's welfare was a consideration only for its parents, if at all. However, other uses of this institution may also be distinguished in legal texts from various periods, some of them becoming equally or even more widespread.

#### 3.2.1. *Gaining a carer for old age*

First, it was applied to gain a carer for one's old age, even if the adopter already had children. The adoptee would in turn gain the right to inherit the adopter's estate. A care contract, even combined with a testamentary provision, would not be enough, as it was impossible to effectively bequeath one's estate to a stranger.

<sup>8</sup> For numerous examples of both see for instance the documents regarding the trade in various fungibles conducted by the Eanna temple in Uruk in the first millennium (Kleber 2017). For a study of the sale on credit in the ancient laws, as well as of the means used to reconcile it with the concept of a cash transaction, see most recently Pfeifer 83–122.

<sup>9</sup> In Akkadian expressed by the formula *ana marūti/martūti leqū* – “to take into sonship/daughtership”, and variants thereof.

Adoption solved that problem, turning the potential caregiver into the owner's son or daughter (Westbrook 2002, 52–53), and thus circumventing the restrictions on the disposition of property and allowing the adopter to give them property either immediately or *mortis causa*. The oldest example of such a practice comes from the end of the third millennium (Ur III time).<sup>10</sup> Later, the Old Babylonian (first half of the second mill.) priestesses of Šamaš, the *nadītus*, who were prohibited from both marrying and having children, often adopted a younger *nadītu* to care for them in their old age in exchange for inheritance (Harris 1975, 309). Similar contracts were concluded also by lay persons, but in those, the inheritance was often transmitted to the adoptee immediately, whereas the adopter was entitled to specified rations of food and other commodities.<sup>11</sup> In the next period, people from Assyria, Emar, or Nuzi, either childless or distrustful of their own children for some reason, would adopt someone (usually a man) to support them, naming the adoptee one of their heirs in return. Should the latter fail to fulfill his obligation, fines were imposed and/or the adoption was to be annulled.<sup>12</sup> Finally, a few similar documents may

<sup>10</sup> Owen 1982, no. 43 (translation after Wilcke 1998, 54–55): *Starting month VI, day 4 [+?], Lu-Nin-šubur has adopted Mumu. Urmeme, the janitor of the (god) [Enlil] is the guarantor [for it]. Monthly he will give him [...as oil?] ration, 100 liters as barley ration. If [he does not...]. Witnesses, date. The text is quite concise in comparison to later examples, as well as partly damaged, but its basic meaning is clear enough.*

<sup>11</sup> As in PBS 8/2 153 (translation after Stone and Owen 1992, 42): *Ilabrat-tayyar has taken Patiya as his son. House, field, orchard – all that there is Ilabrat-tayyar has given to Patiya his son. If Patiya says to Ilabrat-tayyar: You are not my father, he will pay 1/3 mina of silver, and if Ilabrat-tayyar says to Patiya his son: You are not my son, he will pay [1/3 + ?] mina of silver and he will forfeit his house and his property. Patiya will provide to Ilabrat-tayyar, paid monthly, an annual ration of 1 gur 1 pi of barley, [...] mina of wool, and 6 sila of oil.*

<sup>12</sup> See for instance KAJ 1 (from Assyria): *Aniya son of Šamaš-āmerī gave of his own accord Gimillu his son to Azukiya son of Šamaš-āmerī his brother into sonship. Azukiya his father and his mother, as long as they live, he will honour (palāhu) and support (wabālu) them. In the countryside and in the city he will fulfill their obligations [...]. The oldest son will take two shares from the house. Gimillu is equal with the younger brothers. Whoever among them breaches the agreement, will weigh out 5 minas of silver (transliteration used: <http://oracc.museum.upenn.edu/tcma/corpus>, Accessed: 23.10.2021). For the analysis of the meaning of the verbs *palāhu* and *wabālu* regarding filial duties see Greenfield 1982, *passim*; Belotto 2009, 27–33.*

Contracts with a sustenance obligation (specified or not) in exchange for inheritance as well as adoptions where the “inheritance share” is given immediately to the adoptee in exchange for specific contributions may be found in Nuzi, as exemplified by HSS V 60 (for the former) and JEN 59 (for the latter). In Emar, only the former version was known, and the sustenance obligation is never specified.

HSS V 60 (translation after Stohlman 1972, 127–130): *Tablet of adoption (litt. tablet of sonship – ṭuppi marūti) of Ehel-Tešup son of Puhīya. He adopted Zigi son of Akkuia. All my fields, my buildings, my earnings, my servants, my išten.nig I have given to Zigi. If Ehel-Tešup has a son, he will receive the double share and Zigi will be the secondary heir. If Ehel-Tešup does not have sons, then Zigi will be the heir. Another strange son beside Zigi, Ehel-Tešup may not adopt. As long as Ehel-Tešup lives, Zigi will honour him (palāhu). He will clothe him with clothes. Whoever among them breaks the contract will pay one mina of silver and one mina of gold [...].*

be found in the Neo-Babylonian period. In VS 5 47, dating from the third year of Cambyses (527 B.C.E.) from Babylon, one Gimillu adopted (*ana mārūti leqû*) Iddin-Nabu and gave him a part (?) of his possessions in the form of various debt notes, while retaining for life the right to the interest. In exchange, he was to receive yearly rations of specified foodstuffs. Another tablet, unfortunately very damaged and conjecturally restored by Wunsch, records the adoption of Suqaja by Nabu-šuma-ukīn and his wife Zunnaja. The adoptee pays them 20 shekels of silver and is supposed to care for them till their death (*akalu kurummāti [inamdaššunu]* – [he will give them] their bread and subsistence; Wunsch 2003, no. 43). In exchange, he will take part in the division of the inheritance as a younger son (*tardēnnu*).

### 3.2.2. *Escaping a difficult financial situation*

For a real estate owner without enough income to maintain his family, adoption could also be a way out in a difficult financial situation. A property sale would provide some money, but it would not last forever, and the same was true for a mortgage secured loan. On the other hand, it was possible to adopt either the original creditor or another person who agreed to pay off the owner's debt, in exchange for future inheritance. Even if the estate were transferred to the adoptee in advance as his inheritance share, the adoption obligated him to take care of the adopter. In case of non-performance, it could be cancelled. Examples come, among others, from Ur III and Old Babylonian Mesopotamia (e.g., Owen 1982, no. 131 and BE 6/2 28 respectively) as well as from the second millennium Syria. In the Ur III text, the adoptee repays the adopter's debt and swears to give him specified yearly rations of foodstuffs and wool. In exchange, he receives the

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JEN 59 (translation after Stohlman 1972, 117–118): *Tablet of adoption of Hanatu son of Kuššiya. He adopted Hutiya his companion. Thus says Hanatu: All the fields and buildings, everything of my inheritance share which Kušiya my father gave to me, I now remove my foot and give them to Hutiya. As long as Hanatu lives, Hutiya will honour him (palāhu). Year by year Hutiya will provide Hanatu with one šubātu-garment for his clothing, five imeru of barley and two imeru of wheat for his food. When Hanatu dies, Hutiya will mourn for him and bury him. Thus says Hanatu: The tablet of my will I have given to Hutiya. Whoever among them breaks the contract will pay two mina of silver and two mina of gold [...].*

For the meaning of the expression “remove one's feet” as concerning the transfer of ownership see Malul 1988, 381–391.

PdA 67 (Emar): *Imut-hamadi son of Abdi said as follows: Now I made [Ibni-Dagan], a man from the land of Hatti, into my son (ana marūti epēšu). As long as Imut-hamadi [his father] and Te'e his mother are alive, Ibni-Dagan our son will honour us (palāhu). If he honours us, when our fate takes us away, all my sons will divide [my house]. The gods belong to the main house. And if in future Ibni-Dagan says to Imut-hamadi, his father, and Te'e, his mother: You are not my father and my mother, he will give 60 shekels of silver to Imut-hamadi and he will go wherever he wishes. And if Imut-hamadi says to Ibni-Dagan his son: You are not our son, they will give him 60 shekels of silver. (Ibni-Dagan) will go wherever he wishes [...].*

adopter's house as a gift, whereas the latter's daughter and her husband give up claims thereto. In BE 6/2 28, the adoptee also pays off the adopter's debt, and is to receive an inheritance share equal to the one of the biological son of the adopter. Moreover, both sons will support the latter with specified food and commodities rations.

The weaker economic position of the adopter notwithstanding, the cancellation was a real sanction, as shown by two documents from Emar, RE 10 and 13. In the first one, Hemiya adopts a man who paid off his debts, and bequeaths him all his estate, provided the adoptee takes care of him and his wife till their deaths. In the second text, Hemiya explains that the adoptee failed to take care of him, and the adoption is annulled. Obviously, some documents from this group, as well as from the previous one, combine both purposes, providing a carer and solving financial difficulties of the protagonist.

### 3.2.3. *Concealing another transaction*

This use of adoption partly falls under the previous category, though developed further. It could become a sham transaction pure and simple, concealing a real estate sale if a straightforward one was forbidden or if its durability could be endangered. A case in point are the so-called sale-adoptions from Nuzi<sup>13</sup>, a large group of tablets from the second half of the second millennium, with the heading *tuppi marūti* – “tablet of adoption” (lit. sonship). However, those “adoptions” fail to mention any obligation typical of this contract type, such as the duty of care,<sup>14</sup> emphasizing instead that the adopter gives away his property to the adoptee as the latter's inheritance share and receives a substantial gift (*qištu*) in exchange.<sup>15</sup> One of the prominent inhabitants of Nuzi, Tehip-tilla, was adopted more than a hundred times, thus assembling a significant real estate portfolio. The reason for this subterfuge is not entirely clear. According to the widest accepted hypothesis, it was a manner of circumventing a prohibition on real estate sales, introduced sometime before the beginning of Nuzi archives. Recently, however, another explanation was offered, linking sale-adoptions to *mīšaru*-edicts. The former would be a way to escape the effects of the latter, since a *mīšaru* annulled property alienations concluded under economic duress while restoring familial rights. Therefore, an adoption with an inheritance advance would not be questioned, whereas an outright sale had all the chances to be declared void

<sup>13</sup> A town situated in northern Mesopotamia, to the east of the Tigris river.

<sup>14</sup> In the ancient Near East, adoption was a private contract rather than a unilateral act.

<sup>15</sup> As in JEN 705: *Tablet of adoption of Šehala, son of Artešup. He has made into his son Tehip-tilla, son of Puhi-šenni. 8 awiharu of field, bordering the street to the town of Dur-ubla he gave to Tehip-tilla as his inheritance share. Tehip-tilla gave him 6 imeru and 4 seah of barley as gift (qištu). The corvée (ilku) of this those fields he (Šehala) will bear. If there is a claimant for the field, Šehala will bear it. If Šehala breaches the contract, he will pay 2 mina of gold [...].*

after the edict was issued.<sup>16</sup> The Nuzi material is also noteworthy in that it allows for a reconstruction of the evolution of the sale-adoption formulary, the earliest examples being barely concealed sales. One such tablet, IM 70764 (Fadhil 1981) could be easily taken for a normal sale document, if not for the heading *ṭuppi marūti*. Moreover, as noted by Fincke, the few extant mentions of a price (*šīmu*) and other elements of a typical sale formulary may be found only in the oldest documents (Fincke 2010). Therefore, it seems that the legal construction of sale-adoption developed gradually, thus allowing, as hypothesized by von Dassow, to escape the disadvantageous (for the buyer/creditor) consequences of *mīšaru* edicts (von Dassow 2018).

### 3.2.4. *Luring a desirable son-in-law*

If a girl's father was unable to give her a dowry valuable enough, a desirable but reluctant groom (or his family) could be encouraged by the perspective of a substantial inheritance. However, marriage itself did not create a legal bond strong enough for a stranger to be able to inherit patrimonial estate, hence the adoption.<sup>17</sup>

<sup>16</sup> For a detailed overview of the scholarship on the matter as well as for the *mīšaru* theory see von Dassow 2018, 238–248.

A few examples of a sale concealed under an adoption appear in texts from other sites, such as RS 16.200 from Ugarit and perhaps AT 16 from Alalach, as surmised by Rowe (Rowe 2003, 711; see arguments to the contrary in Niedorf 2008, 227–228), but it never became a widespread practice outside Nuzi. Yet another example of concealing sale under a different transaction may be found among the prebendaries of Ezida, the Nabu temple in Borsippa, in the first millennium. The priestly archives contain numerous deeds phrased as prebend donations “forever”, in exchange for a gift (*qištu*), whose value corresponds with the value of the prebend (i.e., of the right to a part of temple's income). Sometimes, the illusory character of the outer conveyance is not even fully disguised, since the donation formula is followed immediately by the price receipt statement (see e.g., Waerzeggers 2010, 540; the relevant expressions are *kanāku-ma ana ūmu šātu ana PN šudgulu* and *qištam qiāšu* – “to seal and give forever to PN” and “to give a gift”). Once again, it is not certain what brought about such a practice. It could have been an attempt to avoid the registration and taxation of the sales, though it is impossible to know how successful that would be (Jursa 2008, 608–610).

<sup>17</sup> See for instance G 51 from Nuzi (translation after Stohlman 1972, 115–117):

*Tablet of adoption of Našwa son of Aršenni. He adopted Wullu son of Puhišenni. As long as Našwa lives, Wullu will give him food and clothing. When Našwa dies, Wullu will inherit. If Našwa has a son, he will share equally with Wullu. Našwa's son will take the gods of Našwa. If Našwa has no son, Wullu will take the gods of Našwa. He has given his daughter Nuhuia for a wife to Wullu. If Wullu takes another wife, he will forfeit the fields and buildings of Našwa. Whoever breaks the contract will pay one mina of silver and one mina of gold.*

RE 25 (Emar): *Išme-Dagan, son of Gubba, made Iya, son of Himaši-Dagan [...] to his son. I gave him my daughter Hepat-ili, in marriage. As long as his father Išme-Dagan lives and his mother Dagan-simati lives, our son Iya will honour us. If he honours us, when our fate takes us away, he will divide my house and everything of mine with my other sons. There is no elder or younger brother among them. If in future Išme-Dagan says to his son Iya „you are not my son”,*



### 3.2.5. *Protecting hereditary rights*

Yet another possibility was to use adoption to reorganize the family, especially succession-wise, and to protect one's children from legal claims by relatives. The most extreme example may be found in a document from the Syrian city of Emar, where after the death of his father, a man adopts his stepmother as his mother and his brothers as sons.<sup>18</sup>

### 3.3. A versatile tool – legal fiction

Another tool utilized in attempts to first circumvent and then gradually change a problematic legal custom was legal fiction. Apart from adoption, which is in itself based on legal fiction, it seems to have been favored especially by inhabitants of northern Mesopotamia and Syria. Documents of practice, mostly coming from Emar and Nuzi, two towns situated on the opposite ends of the ancient oriental world, show a widespread use thereof in a private context, without any interference from the authorities (Fijałkowska 2017, 119–122).

#### 3.3.1. *Mother as father*

Usually, after the death of the head of the household the estate would be divided among his heirs, most often his sons, who should also take care of the surviving widow and of the daughters of the *de cuius*. This could, however, prove problematic for various reasons. If the widow was the stepmother rather than mother of the successors, they could try to avoid the maintenance duty. The latter could also become difficult to fulfill due to the fragmentation of the property. In Emar, the testator could prevent the estate division by installing his wife as

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*Išme-Dagan will pay 60 shekels of silver to his son Iya. He will take his wife and his children and go wherever he wishes. If Iya says to his father (...) "you are not my father" [...], he will pay 60 shekels of silver to his father [...] and he will lose any right to his wife and children. He will put his clothes on a stool and go wherever he wishes. If Iya says to his father [...] „you are not my father” [...], he will pay 60 shekels of silver to his father [...] and he will lose any right to his wife and children. He will put his clothes on a stool and go wherever he wishes.*

In both cases, the son-in-law is also bound to care for the adopter. It is noteworthy that although the adopted son-in-law should technically be deemed a brother of his own wife, it did not appear to bother anybody or to be considered an obstacle. It seems therefore possible that the parties had a lot of freedom in shaping the consequences of such adoption, without the necessity to spell them all out in the contract (Fijałkowska 2017, 123).

<sup>18</sup> Texts TBR 41 and 42. The motives of the adopter are not entirely clear. After his father's death he found himself head of two families – his own and the one consisting of his stepmother and his half-brothers, and it seems likely that he was trying to ascertain the inheritance rights of his own children against potential claims of his brothers as well as to bring some order into familial relationships (Bellotto 2009, 89–90). It is the only known example of adoption “into motherhood” in Emar. The adoption “into fatherhood” is attested once in Alalah, where the aim is clearly care (AT 16, see Niedorf 2008, 224).

“father and mother of the house” (*ana abi u ummi ša bīti šakānu*), thus creating a fiction of his still living by her agency. The widow would take over her husband’s prerogatives, which in turn would force the grown-up children to obey her and would prohibit them from requiring their inheritance shares. A counterpart to this provision may be found in Nuzi texts in the form of bestowing *abbūtu*, the fatherhood of the estate, upon the widow (Paradise 1972, 198–220), as well as in an Old Assyrian testament (i.e., from the first half of the second millennium; see Michel 2000).<sup>19</sup>

### 3.3.2. *Daughter as son*

Another common problem was the lack of male offspring, potentially resulting in the end of the family line, and, by the same token, of the cult of familial gods and ancestors. In Emar, in order to avoid such a disastrous outcome, a father could legally broaden the gender of his daughter or granddaughter, declaring her “male and female” (*ana sinništi u zikri šakānu/epēšu*). It did not affect her capacity to marry and have legitimate children; on the contrary, it seems to have made it possible for her children to belong to her father’s family rather than to her husband’s.<sup>20</sup> At the same time, it enabled her to perform the worship and secured her inheritance rights, probably competing with the rights of her paternal uncles.<sup>21</sup>

### 3.3.3. *Changing the order of inheritance*

According to Emarite customary law, the eldest son was entitled to a bigger (probably double) inheritance share. Apparently, the head of the family was not allowed to change it outright, but once again legal fiction came to the rescue, making it possible to declare all sons of the same age or to alter the order of seniority.<sup>22</sup> Finally, to disinherit a son, the testator had to declare him “no longer his son.”<sup>23</sup>

<sup>19</sup> In the latter case, the widow is to become “the father and mother of the silver, her inheritance share.” The differences in the formula are easily explained by its origin in a community of merchants (Michel 2000, 3, 6).

<sup>20</sup> This could be achieved by means of a testator’s declaration “Her children are my children.” See for instance *mārū ša ulladu mārū-ia šunu* – “The children she will bear are my children” in AO 13.

<sup>21</sup> An alternative route, although attested only once in Emar, was to use adoption, and adopt one’s daughter “into sonship”, as in the text TBR 72. Three such cases are known from Nuzi (Lion 2009, 10–11). In one text from Emar the testator simply states that his daughter is his second son, clearly for inheritance purposes (Emar 181).

<sup>22</sup> The relevant expressions are: “There is no senior or junior between them” (*rabū u šehru ina libbīšunu iānu*); “PN is the senior son/brother, PN<sub>1</sub> is the junior son/brother” (PN *mārī rabū u PN<sub>1</sub> mārī šehru*).

<sup>23</sup> All those expressions are not merely technical terms (Fijałkowska 2021, 83).

#### 4. CONCLUSION

In most cases, it is impossible to follow the evolution of the practices described above due to insufficient sources. With the notable exception of the sale-adoptions from Nuzi, usually only the results of the process may be observed. However, the basic *modus operandi* seems to be always the same, starting with the need to achieve a purpose forbidden or at least not recognized by the law. Then, an appropriate legal tool had to be chosen, one that would result in a transaction at least outwardly in accordance with the rules in force. The possibilities were quite various, but usually entailed working with an already existing institution, either broadening its scope by adding new elements or using it for purposes other than the original one. It can only be surmised that the subsequent popularity or lack thereof of a particular solution depended on many factors, such as a persistent need for it due to economic and/or social circumstances on the one hand, and its acceptability in the legal system on the other hand.<sup>24</sup> One that fared very well was definitely sale on credit, widespread all over the Near East through two millennia in the aforementioned form; although the formularies would change, the principle of combining a sale document with a debt note did not. The same is true for adoption used for economic motives, allowing the adopter to avoid financial difficulties, and enabling the adoptee to acquire real estate or temple prebends he would not be able to buy or otherwise obtain outright for various reasons. Meanwhile, the practice of concealing a real estate sale under the guise of adoption apparently remained limited to only one town for ca. 5 generations, and then mostly vanished, never becoming widespread anywhere else. It is also noteworthy that as far as the geographical distribution of tools used to circumvent and then change the law is concerned, a clear pattern may be distinguished. Whereas the modifications of sale or adoption were common to nearly all ancient oriental legal systems, the use of more extravagant solutions, such as legally changing one's gender by means of legal fiction, seems to have been limited to the north, and especially to the more peripheral parts thereof, such as Emar, Nuzi, or the merchants' colonies in Anatolia. However, the reasons for such a development remain unclear.

Once the intended purpose was achieved, the process was complete, and no need was felt for further changes. Therefore, another question arises. Why stop halfway at the stage when it became obvious that a woman could, in fact, inherit, as well as perform the familial cult, or that sale on credit was an essential part of the economic and legal turnover? Why not drop the pretense and simply draft a sale document stating that the price was credited, thus acknowledging the new legal reality? The answer, as I see it, arises from the very nature of the Mesopotamian culture and society, one of its main characteristics being conservatism. It was also a trait of the scribes who wrote legal documents, their education relying

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<sup>24</sup> i.e., whether it repeatedly stood up in court if disputed.

on carefully constructed curricula, drawing on texts sometimes a thousand or more years old (Gesche 2001, 213–218). Moreover, too obvious an innovation could put in danger the contract it concerned, since nobody would be able to predict the course of events in case of a litigation questioning its validity. So why change something that worked? A partial alteration shaped upon the practice to date and seemingly respecting all the traditional prohibitions was the safest way to proceed, and what is more, the most comfortable one for the scribes due to their background (Fijałkowska 2017, 121–125). This in turn resulted in creating the impression of very conservative legal systems, ones with contract formularies and transaction principles easily traced hundreds of years back. However, this impression is only partly correct. The innovations and changes had to occur, necessary as they were to adapt the legal practices to a changing reality, but at the same time, an appearance of immutability would be maintained as much as possible, for both practical and cultural reasons. Furthermore, this apparent conservatism seems to have been stronger in Mesopotamia proper, whereas more peripheral regions yielded testimonies of ingenious and rather bold legal reasoning, often going far beyond the safest method of cautiously reshaping existing institutions. The use of legal fiction in Emar and Nuzi is a case in point. Finally, if one can judge by the situation in Nuzi, it did not have to take very long for a new legal practice to emerge; a few decades could be enough.

Therefore, the tentative answer to the question asked at the beginning of this paper is ambiguous. The ancient oriental legal systems reflected the culture and society that created them, and since this culture was conservative and reluctant towards change, the law displayed similar characteristics. At the same time, both the culture and the society did change over time, and so did customary law, sometimes rather quickly for a premodern society, proving to be quite flexible when needed, even if change was neither straightforward nor obvious or even openly recognized.

#### ABBREVIATIONS

- AO      Arnaud, Daniel. 1987. “La Syrie du moyen-Euphrate sous le protectorat hittite. Contrats de droit privé.” *Aula Orientalis* 5: 211–240.
- AT      Wiseman, Donald J. 1953. *The Alalakh Tablets*. New York: AMS Press.
- BE      The Babylonian Expedition of the University of Pennsylvania.
- Emar    Arnaud, Daniel. 1986. *Recherches au pays d’Aštata: Textes sumériens et accadiens*. Paris: Editions Recherche sur les Civilisations.

- G Gadd, Cyrus J. 1926. "Tablets from Kirkuk." *Revue d'assyriologie et d'archéologie orientale* 23: 49–161.
- HSS Harvard Semitic Studies.
- JEN Joint Expedition with the Iraq Museum at Nuzi.
- PBS University of Pennsylvania, Publications of the Babylonian Section.
- PdA Fales, Frederic M. 1989. *Prima dell'alfabeto: la storia della scrittura attraverso testi cuneiformi inedita*. Venezia: Erizzo.
- RE Beckman, Gary. 1996. *Texts from the Vicinity of Emar in the Collection of Jonathan Rosen*. Padova: S.A.R.G.O.N. Editrice e Libreria.
- RS Schaeffer, Claude A. 1956 ff. *Le palais royal d'Ugarit*. Paris: Imprimerie Nationale.
- TBR Arnaud, Daniel. 1991. *Textes syriens de l'âge du Bronze Récent*. Barcelona: Editorial Ausa.
- VS Vorderasiatische Schriftdenkmäler.

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