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LAW AS A SOCIAL SYSTEM

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OXFORD
UNIVERSITY PRESS

legal system. The absence of any ontology does not make self-description and self-observation any less of a reality. They are operations within the legal system that manage, despite the absence of foundational values, to achieve socially productive stability. A theory that demonstrates how this can be achieved can claim to be scientifically superior to one that simply points to the gap between a system's operations and its espoused values. However, a theory that shows how jurisprudence performs operations within the legal system does not necessarily provide a better basis for the performance of those operations.

In his final chapter Luhmann tries to approach the future, through law and the contemporary society in which it currently performs. To do so he needed to address the question of what this contemporary society is, and how the future, or our perception of that future, permeates what it is. However, his theory shows us that there is no future beyond the self-referential selections made as communications within society and its various functioning sub-systems. The future is out there, but for society it can only be grasped through communications.

1 The Location of Legal Theory

I

Theoretical exercises are nothing unusual in the world of law. Legal theories of the most diverse kind have been developed in both the traditions of Roman civil law and the common law.[1] This has been due in part to the needs of legal education and in part to those of legal practice, with the latter ultimately becoming more important. Initially it was the arguments used by the parties in legal proceedings that were focused on, but later the major concern came to be the reasons for judicial decisions and, in this context, their consistent usage in courts. Experience of cases and concepts had to be processed and stored for further use. This need for processing and arranging has a double structure, as we shall analyse in detail below. On the one hand, concepts and theories have had to be condensed in such a way as to keep their identity while being processed. On the other hand, this processing happens in different situations and is occasioned by new cases. Nevertheless, the unvarying meaning structures have had to be confirmed. So, in one way, the outcome is a reduction and in another an enrichment of meaning. And the one necessitates the other.

Legal theories that are produced in response to legal practice do not, however, match up to the expectations raised by the notion of theory in the scientific field. Such theories are, rather, a by-product of the need to arrive at binding decisions. Without wanting to take this point too far, with legal theories one could rank methodological concerns higher than theoretical ones. Theories classify the subject matter, they organize the opaque material with which legal practice is faced and turn it into problem-related and case-related constellations, which from then on can restrict and guide the process of decision-making. For instance, when it is necessary to regulate a conflict of interests as a conflict of *legally* accepted interests (in areas of law such as the law of restitution, emergency powers, or product liability) it is sensible to develop rules for 'balancing interests' which do not in principle classify one party's interest as unlawful. And when an 'unjust enrichment' has to be transferred to the disadvantaged party, legal practice soon finds itself in troubled waters, unable to steer a course that conforms to its own principles; yet rules have to be developed which can be applied, and points of view have to be expressed which can be generalized.[2]

[1] As far as the common law is concerned, the relevant concepts are more likely to be found under the (perhaps more precise) category of 'rules'.

[2] See, in relation to this example, Charles Fried, '*The Artificial Reason of the Law, or: What Lawyers Know*', *Texas Law Review* 60 (1981), 35–58.

A second fundamental basis for organizing conceptual abstractions and the systematization of theories is legal education. The relevance of legal theory in legal education can be evaluated rather differently from its relevance to legal practice.[3] This is so even though it is the education system's training that prepares people to work as legal professionals. Legal education can afford to provide more abstraction, more generalization of decisions, and even more 'philosophy' than will ever be applied in practical work. Developing theory for educational purposes has often led to a failure to recognize fully the dependency of legal arguments on legal texts and cases, that is to an underestimation of the 'local' (intrinsic) character of legal rationality.[4] Nevertheless, to some extent, any kind of developing legal theory will be attentive to its acceptance in the operating system. The American Law Schools are closely associated with the American Bar Association. In Germany, law school examinations are 'state' examinations. What is produced in universities, be it people or texts, can have the effect of advising the practice of the legal system to make changes, but if the textbooks and monographs occasionally referred to in legal decisions suggest a change, it needs to be a change which can be applied within the system; and it must be a change of something which was already there. Obviously, scientific research has had to respect similar constraints—but in an entirely different context.

'Legal theories' which are produced by legal practice and legal education are, together with applied law texts, the form in which law presents itself as the result of its self-interpretation. They are, in this sense, products of the legal system observing itself. But this does not mean that they are fully reflexive theories that define the unity of the system, the meaning of law, the function of law, etc., in order to draw conclusions and arouse expectations.

Further than this, work on legal theories, legal doctrine, legal principles, and legal notions which goes on inside the legal system should not be seen as the work of a profession defending itself against criticism and justifying its own actions, or as a symbolic process of legitimizing functions.[5] Rather, it is an endeavour to establish a consistency of terms, a probing into how far

[3] In referring to England, Cotterrell even goes so far as to say: 'Jurisprudence derives such unity as it possesses, from its place within legal education' (R. Cotterrell, 'Jurisprudence and Sociology of Law', in William M. Evan (ed.), *The Sociology of Law: A Social-Structural Perspective* (New York, 1980), 21–9, at p. 23.

[4] A parallel example in economics would be the dependency of the rationality of economic decisions on accounts and budgets.

[5] The Critical Legal Studies movement in the United States was motivated by such conceptions for a long time. However, they are increasingly replaced by an interest in the social relevance of legal forms, which is not exclusively concerned with 'ideology critique', see e.g. Alan Hunt, 'The Ideology of Law: Advances and Problems in Recent Applications of the Concepts of Ideology to the Analysis of Law', *Law and Society Review* 19 (1985), 11–37; Stewart Field, 'Without the Law? Professor Arthurs and the Early Factory Inspectorate', *Journal of Law and Society* 17 (1990), 445–68.

principles, notions, and rules for decision-making can be generalized, that is, 'amplification'[6] and correction when generalizations have gone too far, especially when applying the operating scheme of rules and exceptions. Seen from inside the system, it is precisely this process that can be understood as doing work on justice and can thus be related to a value concept, which enables lawyers to see meaning in what they are doing. The problem of legitimation arises only from the indispensable need for selecting decisions (from the range of possible decisions); that is, it is a reflection of the visible contingency that results from this work.

It is only during the last three decades or so that there have been attempts to take things further. These theoretical enterprises have not wanted themselves to be restricted to either dogmatic theories or 'legal philosophy'. They have advertised their projects under the heading of 'legal theory' (note the singular),[7] in an attempt to combine logical and hermeneutical offerings with those of (late positivist) theories of institutions and systems theory, rhetoric, and theories of argumentation (or at least contributions based on such approaches). Up until now, a clear profile cannot be made out, even though the distinction between legal doctrinal theories and legal theory in a general sense has at least become fairly well established.[8] The lack of a clear profile does not, however, mean that relating legal theory to perspectives from within the legal system has been given up. In all respects, the legal theory concept of the norm is also seen in legal doctrine as an indispensable *basic concept*.[9] Basic concept here means a concept that is defined in itself, that is, as a short-circuited way to describe its self-reference. The norm prescribes what ought to be. That is why one needs a supplementary distinction, between norms and facts, as a main distinction, where a fact is considered as such (or assumed to be) that which is capable of conforming with or deviating from the norm. This assumption alone shows that legal theory subordinates itself to the legal system.[10] We are

[6] So, for example, Christian Atias, *Epistémologie juridique* (Paris, 1985), 86.

[7] See above all the journal *Rechtstheorie* (Legal Theory) and many publications by its chief editor, Werner Krawietz, which explore this ground, such as: *Juristische Entscheidung und wissenschaftliche Erkenntnis—eine Untersuchung zum Verhältnis von dogmatischer Rechtswissenschaft und rechtswissenschaftlicher Grundlagenforschung* (Vienna, 1978); id., *Recht als Regelsystem* (Wiesbaden, 1984). In France there was an earlier recognition of a *théorie générale du droit*, understood as a clarification of the basic concepts and terms of law, which was supposed to live up to the demands of positive science in Comte's terms.

[8] See only Krawietz, *Juristische Entscheidung*, 210.

[9] See especially on this point Werner Krawietz, 'Staatliches oder gesellschaftliches Recht: Systemabhängigkeiten normativer Strukturbildung im Funktionssystem Recht', in id. and Michael Welker (eds.), *Kritik der Theorie sozialer Systeme: Auseinandersetzungen mit Luhmanns Hauptwerk* (Frankfurt, 1992), 247–301. I shall revisit this issue when dealing with the concept of norm in Ch. 3.

[10] Even if this is vehemently denied by Krawietz, 'Staatliches des gesellschaftliches Recht'.

consistently faced with a reflexive theory of the legal system, and one that is driven toward abstractions. It is a theory which tries to make interdisciplinary contacts but which still follows the basic fundamental thesis that norms cannot be 'deduced' from facts or described by facts wherever one wants to understand their intrinsic value, their meaning as 'ought', their sense of obligation. Indeed that is always the case when one focuses on the meaning of normativity. However, the fact that this is done unveils legal theory as a reflexive attempt that seeks to find out what the law is all about, in its own terms.

Philosophers at all times have been concerned with questions which were so abstract that no one thought that lawyers, or lay people who were involved in legal questions, would be interested in them. There is, for example, the question of obedience to law.[11] This is definitely a question that one would expect the legal system to answer positively (that there is an obligation to obey law), because otherwise 'law' would collapse into itself. On the other hand, there are borderline cases and exceptions (the right of resistance!). In these situations, a theoretical clarification of the question of obligation may be helpful, even if legal practice will not address this issue unless triggered by a concrete case (which is, after all, an accurate response to any such issue).

This tendency towards abstraction within legal theory is pushed further by efforts to compare different legal orders or families of legal orders, as for instance those of common law compared with those legal orders where important sections of the law have been codified. As far as comparative law is concerned, it is important to gain a distance from the specific values itemized within given legal orders and yet to reinforce the general self-affirmation of law, for instance, by not questioning that law has to be enforced, that a statute has to be made concrete case by case, and that there are better and less good reasons for interpreting legal texts in particular ways.[12] In relation to comparative law one can observe a rudimentary

[11] 'Who cares?' asks, for instance, Philip Soper, *A Theory of Law* (Cambridge, Mass., 1984), in his introduction to research on this issue. His answer: philosophy is not very satisfying because it leads to the next question of how philosophy can know the relevance of this question, and why it cannot simply (as one would hope) answer the question in the negative.

[12] See for such a commitment to residual values in law (as compared to ideological or merely personal views) the section 'Rational Reconstruction' (as a concern of methodology) in D. Neil McCormick and Robert Summers (eds.), *Interpreting Statutes: A Comparative Study* (Aldershot, 1992), 18. For example, there is no doubt here that 'justifications' are necessary and that they can be judged as to their use of arguments: 'for rational reconstruction has also a normative element in so far as the rationally reconstructed underlying structure presupposes a model of good or acceptable justification for the decisions of rational beings' (p. 22); and a statement such as 'interpretation is through and through a matter implicating fundamental values of the law' (at 538) is obviously also approved by those who conclude their research with such a finding (and who would find otherwise when such formulations are used).

development of a global legal culture that allows for a wide range of differences but which is nevertheless committed to its own (legal) standards and which rejects any interference from outside.

Here, and in so many different ways, the term 'legal theory' is used. However, a strictly scientific analysis provides this term with a vastly different function, namely the function of constituting its object. Any scientific endeavour needs to be confident, from the outset, about its object. It has to define, and that means to distinguish, its object. Whenever one is operating with questions of epistemology, that is, whether one is more committed to a realist, an idealist, or a constructivist theory, the rule about definitions (and distinctions) will apply. Defining the object in the pluralist context of science involves the possibility, in fact the very real probability, that different theories and to an even greater extent different disciplines will define their objects differently and so fail to communicate with each other. They talk about different things even if they use the same terms, as in our case the term 'law'. This makes it easy to fill page upon page with 'debates', but these debates have no resolution, or at best only serve to sharpen the weaponry of each side. In effect, each side misses the other's point.

This problem is particularly acute in the case of the relationship between legal knowledge and sociology. Legal knowledge is concerned with a normative order. Sociology is concerned with, depending on its theoretical orientation, social behaviour, institutions, social systems—that is, with something that is what it is, and which, at best, calls for a prognosis or an explanation. One can leave it at that, simply stating this difference, but then in so doing one would have to concede that disciplines, and the different theoretical strands within disciplines, have nothing to say to each other. A general theory of law, or rather what is taught in introductory courses, has to be restricted to listing what theories are around: legal realism in its American and Scandinavian variants, analytical jurisprudence, sociological jurisprudence, sociology of law, rationalist and positivist strands of legal theory with their varying mellowings in later phases, law and economics, systems theory. A common denominator cannot be found, or can it be?

Perhaps one can agree, at least, on the point that there is nothing to be gained from arguing over a 'nature' or 'essence' of law,[13] and that the worthwhile question that should be asked is: what are the boundaries of law?[14] This question points to the well-known issue as to whether these boundaries are analytical or concrete, that is, whether they are defined by the observer or by the object itself. If the answer is 'analytical' (and there

[13] For a recent overview of such attempts with the finding that their results were ambiguous see Manuel Atienza, *Introducción al Derecho* (Barcelona, 1985), 5.

[14] See André-Jean Arnaud, 'Droit et société: Un carrefour interdisciplinaire', *Revue interdisciplinaire d'études juridiques* 10 (1988), 7–32 (at p. 8). See also id., 'Essai d'une définition stipulative du droit', *Droits* 10 (1989), 11–14.

are some who feel, wrongly, that they are bound by the theory of science to answer in this way), one allows each observer to decide his own objectivity and so ends up where one started from, that is, stating that interdisciplinary communication is impossible. It is for these reasons that our answer is 'the boundaries are defined by the object'. This means, in fact, that the law itself defines what the boundaries of law are, and what belongs to law and what does not. Answering the controversy this way shifts to the question: *how* does the law proceed in determining its boundaries?

If efforts to arrive at a common starting point of interdisciplinary and international approaches to legal theory can be pushed this far, then theories that have anything meaningful to say become rare. This position can be summarized through stating the following four points:

1. The theory that describes how something creates its own boundaries in relation to its environment is, currently, systems theory. There may be other theories on offer; however, if they exist they have kept themselves well hidden.[15] As such, it is not possible to decide (at this time) whether one should search for a variation on the repertory of systems theory or a competing alternative.

2. Even if a 'purely analytical' definition of the boundaries of law is rejected, this does not invalidate the statement that everything that is said is said by an observer.[16] Moreover, a theory that leaves the definition of the boundaries of the object to the object itself is, nevertheless, a theory advanced by an observer. This observer, however, has to organize their own observations on a second-order level if she/he wants to do justice to an object that defines its own boundaries; and even if she/he only wants to raise the object as a topic for discussion. The observer must observe its own objects as an observer, and that means, observe them as objects that are oriented in this observation around the distinction between system and environment.

[15] Nonetheless, Ranulph Glanville attempts a cybernetic theory of second-order observations, which exceeds the claims of systems theory by far (*Objekte* (Berlin, 1988)). There are quite a number of theoretical approaches under this heading of 'the observer' which seem to be independent of systems theory formulations. See e.g. Niklas Luhmann et al., *Beobachter: Konvergenz der Erkenntnistheorien?* (Munich 1990). Game theories are also relevant here; however, whether or not they can keep themselves apart from a constructivist systems theory in the long run, cannot be reliably assessed today. See in this respect the special issue Droit et société 17–18, 1991; further François Ost, 'Pour une théorie ludique du droit', *Droit et société* 20–21 (1992), 89–98, and Michel van der Kerchove and François Ost, *Le Droit ou les paradoxes du jeu* (Paris, 1992), including references to the recent discussion.

[16] This formulation is used by Humberto R. Maturana, 'Biologie der Kognition', quoted in id., *Erkennen: Die Organisation und Verkörperung von Wirklichkeit: Ausgewählte Arbeiten zur biologischen Epistemologie* (Brunswick, 1982), 34.

3. In proposing the concept of an observing system, systems theory opens the way to a fairly general constructivist epistemology. This allows not only for assessing systems that specialize in cognition,[17] but also for observing systems of all sorts that use self-produced observations. Such self-produced observations manage a system's relationship with its environment, which cannot be accessed directly in any operative way—which includes systems such as religion, art, economy, politics, and, of course, law.[18] The integration of such diverse, multi-contextual constructs has to be organized through a theory of second-order observations.

4. Having come this far, we can make out two alternatives and can accordingly distinguish two ways of observing law (whereby law is always as a system which observes itself)—a juristic and a sociological way. Sociologists observe the law from outside and lawyers observe the law from inside.[19] Sociologists are only bound by their own system that, for instance, might demand that they conduct 'empirical research'.[20] Lawyers, likewise, are only bound by their system; the system here, however, is the legal system itself. A sociological theory of law would, therefore, lead to an external description of the legal system. However, such a theory would only be an adequate theory if it described the system as a system that describes itself (and this has, as yet, rarely been tried in the sociology of law). A legal theory would lead to a self-description of the legal system, which had to account for the circumstance that self-observation and self-descriptions can only conceptualize their object in comparison with something else. They have to identify, that is, to distinguish, their object, in order to be able to assign themselves to it. So far, however, in this exercise, only problematic formulae have been advanced, such as 'law and society', which formulae promote the misconception that the law could exist outside society.[21] This

[17] See Niklas Luhmann, *Die Wissenschaft der Gesellschaft* (Frankfurt 1990).

[18] Concerning the possibilities of securing the interdisciplinary orientation of legal theory in a constructivist epistemology see André-Jean Arnaud, 'Droit et société: du constat à la construction d'un champs commun', *Droit et société* 20–21 (1992), 17–37, and Gunther Teubner, 'How the Law Thinks: Towards a Constructivist Epistemology of Law', *Law and Society Review* 23 (1989), 727–57.

[19] This distinction between internal and external is so well established since Hart as to be used in dictionaries; see the contribution in *Dictionnaire encyclopédique de théorie et de sociologie du droit* (Paris, 1988), 197, and François Ost and Michel van der Kerchove, 'De la scène au balcon: d'ou vient la science de droit', in François Chazel and Jacques Commaille (eds.), *Normes juridiques et régulation sociale* (Paris, 1991), 67–80. However, this discussion lacks the context of elaborate systems theory.

[20] Whether this happens or not, and there are proponents clamouring vehemently for it (e.g. Hubert Rottleuthner, *Rechtstheorie und Rechtssoziologie* (Freiburg 1981)), all depends on how narrowly the canon of methods is designed and on how many topics that are relevant in relation to the reality of law, are excluded from socio-legal research.

[21] See also the arguments of Csaba Varga against this 'fallacy of distinction' in 'Macrosociological Theories of Law: From the 'Lawyers' World Concept' to a Social Science Conception of

is precisely why the title of this book has been deliberately chosen to be 'society's law'.

These few remarks on the implications of an interdisciplinary dialogue already lead us straight into questions which theory has not yet solved. However, we have to stop at this point with the comment that an adequate sociological theory of law, on the one hand, can take full advantage of its being an external description, which is not bound to respect the norms, conventions, and premisses of the understanding of its object. Such a description can, and necessarily has, to use incongruent perspectives. On the other hand, such a sociological theory should not lose sight of its object. This means that it has to describe its object in a way in which lawyers will understand it. The sociological object (just as much as the legal one) is one that observes and describes itself. To acknowledge the fact that there are self-observations and self-descriptions of the object is the condition for a scientifically appropriate, realistic, and I venture to say, empirically adequate description. Otherwise one would simply and inappropriately deny that there are self-observations and self-descriptions in the legal system.

II

The considerations set out above necessitate the statement that everything, which is available using the title of legal theory, has been produced in conjunction with self-descriptions of the legal system. These are attempts at theory that—despite their often critical approaches—respect the character of law, and are committed to its corresponding normative references. This view applies to legal theories in the narrow sense in which they grow out of case law and relate their rules to more generalized points of view, for example, to the principle of trust. It applies, too, to reflexive theories of the legal system that reflect on the production of an intrinsic value in law and the meaning of the autonomy of the legal system itself. If one formulates such tendencies in normative terms, which arise 'naturally', as it were, from legal practice, they lead one to the need for *consistent* decision-making. This can be represented as deflecting external influences ('without fear or favour') or as reflecting an internal legal norm of justice, that is, the requirement to treat like cases alike. Obviously such criteria demand further specification, namely further distinctions, such as distinctions between relevant and

Law', in Eugene Kamenka, Robert S. Summers, and William L. Twining (eds.), *Soziologische Jurisprudenz and realistische Theorien des Rechts*, Special Issue of *Rechtstheorie* 9 (Berlin, 1986), 197–215, at p. 198. This should not mean, however, that one has to relinquish the distinction between 'internal' and 'external'; all that is required is the adequate theoretical foundation of the distinction.

irrelevant personal characteristics or between cases that are and those that are not alike. This is done with the help of concepts and theories, such as those used to decide the conditions for attributing causes, or for spelling out the subjective components of acts (premeditation, negligence), or for distinguishing various formal errors which can occur when contracts are made or performed. However, the overall material, which results from producing theory in this way, appears to outsiders as rational and as chaotic at the same time.

As far as lawyers themselves are concerned, they tend to keep their distance from such theory and concept construction. They assess legal constructions in relation to their effects, that is, by asking the question 'What is the result?' But lawyers have, of course, no way of telling what the empirical outcomes of their theory and concept construction will be. In this sense, any consequentialist orientation is for them nothing more than an indicator of the positivity of law, that is, an indicator of the competence to make decisions using their own estimations. In any event, such a consequentialist orientation does not itself generate theory.

Problems of consistency are principally nothing but problems that result from the *redundancy of information*. Logical consistency, or what might be seen as a self-imposed guarantee for the provision of propositions which are free from internal contradiction, is not required. There is, however, the requirement of providing information and thereby reducing demand for further information, in order to minimize the surprise effect of decisions, to compact information and thereby to make those decisions that can be expected. Law needs to be as predictable as possible or an instrument whose effects should be capable of being calculated in advance. Ideally a key concept reflects any legal decision—just as a precise analysis following the finding of a bone leads to the definition of the species to which that bone belongs.

But redundancy collides with the variety of the facts of life and of legal cases. The more multifaceted are the facts of life that appear under the gaze of the legal system, the more difficult it becomes to maintain consistency. That is why so much old law was guided mainly by formalities. As soon as there are 'internal states of affairs', 'motives', and 'intentions' to be reckoned with, a revision of the guiding concepts is called for. The same applies to the extension of legal proceedings towards a more demanding, indirect handling of evidence. In a historical perspective, it was by no means self-evident that law itself should provide the evidence in relation to questions regarding both facts and law; indeed, upon reflection, this is a rather surprising demand to make of law. For what we are concerned with here is, in essence, the issue of dissolving a paradox through self-organization and the implementation of societal autonomy. Apparently the breakthrough

happened in the twelfth century.[22] This development was driven forward with great success in medieval times but with a corresponding loss of certainty; a special jurisprudence then had to be developed which responded to this loss of certainty in order to pre-empt problems for decision-making.

All of this is only of marginal interest at the outset of our study, but we will have to revisit these issues later. All that matters for the moment is a summary of the consequences that flow from this way of developing theories. It produced a number of legal theories, but not a theory of law. It led to a reflection of its case-method in problem-specific theories, but did not result in an adequate understanding of law as a unity, which produces itself. The result was a plurality of theories but not a self-conceptualization of law as law. This approach managed to account for the demands for consistency (redundancy of information) raised by legal practice; its premisses, however, had to be introduced or assumed 'doctrinally', that is, with the help of abstractions, which themselves remained unanalysed.

These considerations are not meant to be a critique of the development of such theories, or an assessment of the level of their rationality. On the contrary: one can even claim that there is a deficiency today in the processing of information in this professional-rational sense.[23] So we are not concerned with a redefinition and re-articulation of the characteristics of this rationality. The issue with which we are concerned here is the question of how law can be conceptualized as a unity; in response to it, we shall apply the apparatus of systems theory in order to analyse what it means to define the unity of law as a system.

This is not a new issue, of course. There are a number of typical approaches which, however—and this should be a warning—never achieved any particular impact on legal practice.[24] Possibly the most influential, or certainly the most respected, approach to a construction of the unity of law used a hierarchy of sources of law or legal types: eternal law, natural law, and positive law. This approach relied on a stratified social system and, correspondingly, on a hierarchical architecture of the world; it postulated, however, the necessity for such a hierarchical order dogmatically, and thus obscured the paradox of unity from multitude. Unity, then, could only be the *difference* between the social ranks.

[22] See Harold J. Berman, *Recht und Revolution: Die Bildung der westlichen Rechtstradition* (Frankfurt, 1991), 252 (orig. *Law and Revolution. The Formation of the Western Legal Tradition*, 1983) for a view on the development of the methods of evidence and the introduction of assumptions (which had to be refuted). As to the problem of a paradox in this context see Roberta Kevelson, *Peirce, Paradox, Praxis: The Image, the Conflict, and the Law* (Berlin, 1990), 35.

[23] See Niklas Luhmann, *Rechtssystem und Rechtsdogmatik* (Stuttgart, 1974).

[24] There are notable exceptions, though. The arguments of the natural law approaches of Grotius or Pufendorf have found their way into jurisprudential literature while those of Hobbes or Locke have not.

This changed in the eighteenth century when the unifying difference between ranks was reorganized on the basis of the concept of progress, in the belief that the traditional order had broken down, with the increasing secularization and historical conception of descriptions of structure.[25] According to Hume, Rousseau, Linguet, Kant, and others, law is the historical domestication of violence. Darwin, however, already categorically rejected any attempt to mention 'higher' and 'lower'—and so sabotaged the idea of progress. This progressive reasoning was also undermined by evidence that came from Hegel's metaphysics of the spirit.

Another unexpected source of competition for legal theories also arose in the eighteenth and nineteenth centuries—at first in the form of social statistics, later as various social sciences that rapidly became differentiated. Up until then, law teachers were led to believe they were in charge of the concepts of society.[26] This induced them to treat 'societas' as a legal term and to regard the origins of society as if they followed the pattern of a contract. Their sociological competitors, however, very soon demonstrated how much law teachers were tied to their legal concepts. Their presentation of society as a legal institution could be undermined and rejected. The jurists had to seek refuge in theories of positive law, which ran into the problems of legitimation. Since the middle of the nineteenth century, therefore, legal theories retreated to a *validity of values*, which remained uncontested even if (or perhaps precisely because) it had no consequences for concrete cases.[27] The guiding difference was now between facts and legal validity, and in order to find the law only procedural conditions were acceptable and no longer material ones. This seemed to make it possible to conceptualize the unity of law as encapsulated in the rules for legal argumentation, or to put it more simply, in a balance of interests that had to be negotiated. Remarkably, all these efforts were afflicted by a peculiar sense of distance from the law. However, such a conceptualization seemed plausible and presumably unavoidable. For legal decision-making does not make decisions on the unity of law as such, rather it is produced and reproduced by deciding on issues of law as such. The approach of the economic analysis of law seems to manage to avoid this discrepancy between theories relating to problems, which are jurisprudentially productive, and, for the first time,

[25] See Wolf Lepenies, *Das Ende der Naturgeschichte: Wandel kultureller Selbstverständlichkeiten in den Wissenschaften des 18. und 19. Jahrhunderts* (Munich, 1976).

[26] As far as the common law is concerned, see W. T. Murphy, 'The Oldest Social Science? The Epistemic Properties of the Common Law Tradition', *Modern Law Review* 54 (1991), 182–215.

[27] This rough time frame does not deny that the idea of progress and with it the scheme of violence/civilization still have their protagonists. See' for instance, Walter Bagehot who assumes a development towards an 'age of discussion' in Physics and Politics: Thoughts on the Application of the Principles of 'Natural Selection' and Inheritance to Political Society 1869, quoted in *Works*, vol. IV (Hartford, 1895), pp. 427–592.

descriptions of the unity of law.[28] It offers a calculation of utility that is rational in a specific sense, and at the same time that is easy to apply. This has led to a surprising convergence of theory and jurisprudence, especially in the United States. However, this convergence comes at the price of simplification, without which the application of this approach to the various fields of practice would not be possible, but which largely restricts its impact to use in courts. After long experience with a kind of utilitarianism that is interpreted strictly and with regard to each individual, with the problems of aggregating individual preferences as social preferences, and with the distinction between the utility of actions and the utility of rules, sufficient opportunities are available for decision-making. The hypothesis that circumvents the known problems of aggregation is that it is possible, taking the individual as the starting point, to calculate a solution that is more or less beneficial for the common good (but, of course, is not the common good itself). Nevertheless, many problems remain. Possibly the most important one follows: the future cannot be calculated. Accordingly, the legal validity of the results of such calculations of utility cannot depend on their turning out to be right or wrong in the end. Like all attempts at introducing the unity of law in whatever form (and, that is, through a relevant distinction) into law, this attempt also rests on the dissolution (unfolding, making invisible, civilizing, making asymmetrical) of a paradox. And this indifference to right or wrong in relation to the future realization of expectations is a typical feature of risky actions. In this sense, the approach of the economic analysis of law justifies legal decision-making as a form of risk-taking.

These considerations encourage us to look for other approaches, but without going into detailed polemics.[29] We use as our guiding difference the distinction of system and environment, which is the basis for all more recent variants of systems theory. This has the important advantage, as can easily be seen, that society (and its entire environment) can be envisaged as the environment of the legal system. The approach of the economic analysis of law can account for society only as a general system for the balance of advantages, however indirectly achieved.[30] Systems theory can elaborate on

[28] This approach has now found its way into legal textbooks even in Germany. See for instance Hans-Bernd Schäfer and Claus Ott, *Lehrbuch der ökonomischen Analyse des Zivilrechts* (Berlin, 1986).

[29] See, for example, Karl-Heinz Fezer, 'Aspekte einer Rechtskritik an der economic analysis of law und am property rights approach', *Juristen-Zeitung* 41 (1986), 817–24; id., 'Nochmals: Kritik an der ökonomischen Analyse des Rechts', *Juristen-Zeitung* 43 (1988), 223–8. Also in the American law schools scholars are highly and unforgivingly divided on this issue. For a view on the other side see, for instance, Bruce A. Ackerman, *Reconstructing American Law* (Cambridge, Mass., 1984).

[30] This means also that delays have to be accounted for and exposes the approach of the economic analysis of law at its most vulnerable point: the impossibility of accounting for the future.

a much richer, more concrete description of society, and this not least in relation to *other* functional systems of society. In this way, the environment of law as internal to society appears as highly complex, with the consequence that law is referred back to itself: to its autonomy, its self-determined boundaries, its own code, and its highly selective filters which, when widened, could threaten the existence of the system or could even dissolve the structures which determine that system. Systems theory, like the approach of the economic analysis of law, has its disadvantages. In contrast to the legal theories outlined earlier, both are of a new kind, but they work in quite specific and different ways. The disadvantage of systems theory (if this is a disadvantage) lies in its high intrinsic complexity and the related abstractness of its concepts. Its cognitive base is interdisciplinary and it can only be accessed in segments when approached with the conventional means of scientific disciplines (even if they are hyper-disciplines such as physics, biology, psychology, or sociology). Jurists would be hard pressed to be informed sufficiently about these related disciplines, let alone to keep themselves informed of the rapid developments within these fields. This is not to say that practical applications would be impossible, but they will happen rather sporadically and incidentally, rather more at random and in the form of irritations than in the form of logical conclusions. Therefore, we do not attempt to present a theory that is supposed to guide practice. Instead, we describe the legal system as a system that observes itself and describes itself. Our description is of a system which develops its own theories and which, in doing so, has to proceed in a 'constructivist' mode, and that means without any attempt to represent the outside world in the system.

In addition, systems theory manifestly uses its own guiding difference, the difference between system and environment. It always has to define the reference to the system in relation to which something else appears as environment. If one considers the ability of systems to describe themselves, one inevitably arrives at the difference between the self-description of the legal system and its external description. Of course, one can propose an integration of both perspectives under the heading of 'legal theory'; however, one must expect, seen from the perspective of systems theory, that these approaches will then separate from each other again as soon as one spells out what is specifically required from a theory.

The purpose of this kind of description in the setting of systems theory is, above all, to establish a connection between legal theory and social theory, that is, a reflection of law in social theory. European society has developed, when compared internationally and interculturally, an unusual density and intensity of legal regulations since medieval times, even going as far as defining society itself as a legal institution. Here one has to note that a number of official positions were staffed in medieval times with clerics who had not studied theology at all but canon law. Further, one has to

note the directly related significance of law for the development of the modern state and the significance of proprietorship for the development of the modern economy—that is, legal institutions which we will examine below under the heading of structural couplings of law with other functional systems in society. The transformation of medieval society into modern society has been achieved with the help of law (and revolutions, seen as breaking the law, are included in this view of legal forms). There is nothing that justifies the assumption that this type of legal culture, which invades, permeates, and regulates the everyday life of a modern society, is here to stay. Already a quick glimpse at developing societies (and even those with modern industries, etc.) suffices to raise doubts.[31] Phenomena of overloading within existing legal systems are widely discussed. They may be a transitional problem that results from old claims for a density of legal regulation and new conditions for their application. But one only needs to mention the difficulty of shaping problems of risk or ecological problems into legal forms. How can one assess these issues, which type of theory can assist if the question is to determine the position of law in modern society, and to account for the changes that are beginning to reveal themselves? Definitely not by returning to a natural law of the Aristotelian or post-Aristotelian kind (i.e. legal rationalism); nor by trying to use the various 'ethics' approaches that lack conceptual clarity;[32] nor by resorting to the economic analysis of law, which informs us too little about the society to which it is supposed to apply.

Systems theory analysis today, if understood in broad terms, is the only candidate with a ready-made concept for the task.[33] It requires, first of all, that one replace the explanation through a principle (justice, calculation of utility, violence) with an explanation through a difference, in this instance, as outlined above, the difference between system and environment. However, there is mounting evidence that this is not enough and that a whole galaxy of distinctions is required, distinctions adjusted to each other. These are, alongside the difference between system and environment, above all the differences of variation/selection/restabilization, derived from evolution theory; the differences of information/message/understanding, derived

[31] See, for example, Volkmar Gessner, *Recht und Konflikt: Eine soziologische Untersuchung privatrechtlicher Konflikte in Mexiko* (Tübingen, 1976); Marcelo Neves, *Verfassung und Positivität des Rechts in der peripheren Moderne: Eine theoretische Betrachtung und eine Interpretation des Falls Brasilien* (Berlin, 1992).

[32] On the contrary, today such 'ethics analyses' or 'ethics commissions' serve the political preparation of agreed foundations for legal regulation and owe to the law their confidence that everything could be changed if new information came to hand or the situation were to be assessed differently in the future.

[33] It is important to note the historical character of this statement, which does not exclude other possibilities.

from communication theory; and, far more fundamentally, the difference between operation and observation. The resulting terminological apparatus will be used only selectively and appropriately. For the moment it is only important to point out the particular type of theory. A complex society cannot be described other than by a complex theory, even if one cannot achieve a strictly corresponding complexity (requisite variety). Nor can society's law be assessed in any other way.

III

We assume, on the basis of a general theory of knowledge, that each observation and description is founded on a distinction.[34] In order to describe (mean, thematize) something, an observation must be able to distinguish that thing. In so far as the observation distinguishes one thing from another it describes *objects*. However, when it distinguishes something from certain counter-concepts, it describes *concepts*. It follows that concepts can only be constructed when one can distinguish distinctions. A theoretical understanding of law requires a construction of concepts at least in the sense that has been roughly sketched out so far in this chapter.[35]

Let us review the approaches to legal theory one more time. It is evident that different legal theories apply different distinctions, and so provide different 'forms',[36] and thus construct different objects.

The old European Natural Law worked with a static architecture of the world, and so used a distinction between top and bottom, understood as a difference between ranks and quality. A general cosmological hierarchy of the essence of things supports this hierarchy of levels (of sources and of qualities) and law comes to be distinguished as a special essence within this hierarchy. This means that Natural Law does not rely only on knowledge of nature (such as physics today) but is supported—together with the hierarchy through which it is supported—by an ontological understanding of the world that is expressed in a binary logic. As a result, it is unclear what could possibly be seen as the other side. Illegality is not law. Theory cannot distinguish between injustice and non-law (although not every action results in a legal problem) and this non-distinction promotes, in turn, the impression that a legal order is inevitable.

[34] For an account which develops this idea see George Spencer Brown, *Laws of Form* (reprint, New York, 1979); as for the implications of the relationship between distinction and self-reference, see also Louis Kauffman, 'Self-reference and Recursive Forms', *Journal of Social and Biological Structures* 10 (1987), 53–72.

[35] It goes without saying that the elaboration of *theories* must satisfy further demands and that requires the construction of concepts only under specific conditions. One example here would be the requirement of consistency (redundancy) with increasing complexity.

[36] 'Forms', used in the sense of George Spencer Brown, as markers for boundaries that separate two sides.

The rationalist philosophy of law of the seventeenth and eighteenth centuries assumed to a higher degree a perspective of utility (of welfare) that moderates the relevance of stratification. Here the guiding distinction was useful/useless or harmful, and the postulate of freedom was put forward on the premiss that there was a large realm of human activity in which individuals could promote their own benefit without harm to others. Today's economic analysis of law can be seen as a continuation of this concept in response to concerns that have been expressed since the seventeenth and eighteenth centuries. *The postulate of generalization formulated by transcendental philosophy refers to this assumption as a principle.*

Running alongside these movements we find the temporal distinction between violence and civilization, a distinction that entitles the Enlightenment to claim that it is promoting progress. From its inception, this distinction has, in the concept 'violence' (*vis*, not *potestas*), a law-specific approach. Hence Natural Law has been seen, since the writings of the German jurist Thomasius, merely as law which is enforceable and which can be distinguished from morality, by relying on the distinction between inside and outside. In this form, the distinction between violence and civilization already had a tendency to accept only positive law. The term 'civilization', however, (created in the eighteenth century)[37] related to society's total development (including education and the advantages associated with an increased division of labour) and so made legal theory dependent upon an assumption of civilization's progress. In contrast to the older Natural Law with its waning significance over time, and the tendency to restrict the meaning of law to positive law only (however rationally thought through and guided by arguments), from the eighteenth century one sees a clear reorientation as representative of the conditions of modern society.

The distinction violence/civilization was already under attack in the eighteenth century, although initially without having any particular impact.[38] It disintegrated—not so much as a distinction but as a fundamental theory of law—as confidence in progress dwindled, and it was replaced by the distinction between facts and validity, or of facts and the validity of values. This distinction allows law to go on its own way, separately from the facts of social life; to ascertain its own 'intellectual' existence and to claim its autonomy as a separate part of culture. This led to doctrinal controversies within legal theory, for example the controversy between a jurisprudence of concepts ('Begriffsjurisprudenz') and a jurisprudence of interests

[37] According to Werner Kraus (*Zur Anthropologie des 18. Jahrhunderts: Die Frühgeschichte der Menschheit im Blickpunkt der Aufklärung* (Munich, 1979), 65) the term 'civilisation' is used for the first time by Nicolas-Antoine Boulanger, *L'Antiquité devoilée par ces usages* (Amsterdam, 1766). The term 'civiliser' is already used in the seventeenth century.

[38] See, for example, Simon-Nicolas-Henri Linguet, *Théorie des loix civiles, ou Principes fondamentaux de la société*, 2 vols. (London, 1767), especially the 'discours préliminaire'.

('Interessenjurisprudenz') and to a further distinction between legality and legitimacy where the latter is defined by reference to values.

Against this background it is not difficult to understand how the distinction between norms and facts supported early writings on the sociology of law and, at the same time, kept those writings at a distance from other legal theory.[39] Legal practitioners have always taken it for granted that they also have to assess facts and the relations between facts, all the more so when they are supposedly involved in 'social engineering'. In this sense the reduction of jurisprudence to a science of norms led to the complementary postulate that sociology of law should be an ancillary science of jurisdiction and legislation—in the form of what some have called, right up until today, 'research into legal facts'.[40] This did not have much impact on sociology. Sociology was more concerned with establishing a claim for the autonomy of its discipline, thereby presenting society as a fact which generated norms and yet which had to rely on other's normative orientations (such as those of religion, morals, law).[41] In any event, it was and is impossible for sociology, including sociology of law, to define the objectives of its research with the help of a distinction between norms and facts.

After such a long history, in the course of which a considerable number of distinctions have been used, demonstrating in each case not only their special virtues but also their limitations, one is faced with the question of how one can retain the knowledge that has been achieved and yet come up with a new formulation of legal theory. One could think of some attempt to mediate between the distinctions that have been applied so far. However, the next question would be: which distinction could have such transcending qualities as to be able to achieve this? Of course, lawyers are aware of the consequences of their decisions and may judge them differently depending on whose interests are at stake. And, of course, law is aware of the distinctions between norms and facts, and between facts and validity. However, apparently none of these distinctions provides a handle for using

[39] For a classical formulation see Hans Kelsen, 'Zur Soziologie des Rechts: Kritische Betrachtungen', *Archiv für Sozialwissenschaft und Sozialpolitik* 34 (1912), 601–14; id., *Der soziologische und der juristische Staatsbegriff: Kritische Untersuchung des Verhältnisses zwischen Staat und Recht* (Tübingen, 1922).

[40] See, for example, the monograph series under this title ('Rechtstatsachenforschung'), edited by the Federal Ministry of Justice in Germany. For an overview from the perspective of the user see Dietrich Strempel, 'Empirische Rechtsforschung als Ressortforschung im Bundesministerium der Justiz', *Zeitschrift für Rechtssoziologie* 9 (1988), 190–201.

[41] Some links between sociology and legal theory were made with the help of the concept of 'institution' (which is experiencing a revival at present). See above all Santi Roman, *L'ordinamento giuiridico*. Reprint of the 2nd edition (Florence, 1962); Maurice Hauriou, *Die Theorie der Institution und zwei andere Aufsätze*, German translation, ed. Roman Schnur (Berlin, 1965). These approaches may have provided sociological concepts for the sources of law but have not precipitated much further legal development.

those distinctions in a way that one side of them designates the law and the other side something else. Equally, it becomes apparent that none of these distinctions defines the form of law in terms of an object of observation and description. Rather, one has to assume that the law produces these distinctions by itself in order to gain guidance for its operations and to equip them with a capacity for observation. Tradition does not yield distinctions that constitute law but rather distinctions which are produced by legal practice and which are used in legal practice with varying degrees of success.

Having arrived at the question of how law can be distinguished, we can now lay our cards on the table. The question can be solved if one succeeds in describing law as an autopoietic, self-distinguishing system. A theory design of this kind implies that the law produces by itself all the distinctions and concepts which it uses, and that the unity of law is nothing but the fact of this self-production, this 'autopoiesis'. Society, then, must be seen as the environment that makes such a self-production of law possible and, moreover, tolerates it. One can use the term 'encourages' for 'tolerates' if one wishes. Although one typical objection to this theory design is that it advocates the total isolation of law from society, a kind of juridical solipsism, in fact the contrary applies. However, this can only be shown if one presents a complete account of some of the more recent developments of systems theory. Unfortunately, such a presentation, in turn, burdens the suggested approach with a heavy load of complex and highly abstract preliminary concepts which, by comparison, make all other legal theories appear endowed with an almost classic simplicity. If, however, it has precisely been the reliance on an inadequately constructed distinction that has been the problem with other theories, and thus the way in which they have distinguished law has proved to be inadequate, we cannot see any other approach to take but to develop theories with a superior ordering power and with a higher structural complexity. These do not necessarily have to follow along the lines that will be sketched out below; however, once the problem is defined in this way every acceptable theory must somehow be able to deal with the problem as defined.

IV

The sociology of law is addressed to science and not to the legal system. This contrasts with jurisprudential, philosophical, or other legal theories, which have as their goal their use in the legal system or which at least pick up and digest what makes sense in the legal system. This difference has to be kept in mind, however close the theoretical terms used are to those used in legal theory (after all, the object in each instance is law). This means, above all, that the following analyses strictly avoid normative implications. Their propositions remain throughout on the level of facts as they can be

ascertained by sociology. In this sense, all concepts that are used here have an empirical reference. However, this does not mean that the propositions will be restricted to only those that are supported or could be supported by empirical research relying on ordinary research methods. The scope of these ordinary methods is far too small for that.[42]

This makes it all the more important to choose carefully those terms which define the facts that can be observed, even if they do not comply with the proposed restriction to rely only on those propositions that can be ascertained by an empirical test. In other words, we avoid propositions in a world of ideas, that particular 'higher' level of values, norms, or 'ought', in Kelsen's sense, without an empirical reference. There is no 'idea of the law' above the law (for sociologists). Likewise there is no concept of a 'supra-legal law' (for sociologists) at a special level above legal operation from which an assessment could be made as to whether or not law is actually law.[43] Rather, law makes this assessment of itself by itself, and if this does not happen it (such an assessment) does not happen. This is why law formulates what could be seen as 'supra-legal law' in the positive norms of constitutional law. Without doing it in this way such law could not be recognized as law. The term 'norm' refers to a certain form of factual expectation, which has to be observable either psychologically or as the intended and understandable meaning of communication. Such expectations either exist or they do not exist. And if one wants to formulate an argument that expectations should exist, one does not have to refer to a separate level of normative 'ought' but, in turn, to further expectations—that is, expectations which normatively expect that there are normative expectations.

Similarly, the concept of validity is not understood here in a normative sense as if it had the implication that what is valid should be valid. We sever any recourse to a 'higher level' on which a value is allocated to 'ought'. Law is valid if it is signed with the symbol of validity—and if this does not happen, it is not valid.

Finally, the meaning of the concept of function does not contain any normative or even teleological connotations. All that is involved is a point of view representing a limiting effect, and seen from the point of view of society, a problem, the solution of which (with the one or other variant of law) is a precondition for the evolution of higher degrees of system complexity.

[42] This, in turn, is frequently seen as a deficiency of the theory of an autopoietic legal system that follows. See, for example, William M. Evan, *Social Structure and Law: Theoretical and Empirical Perspectives* (Newbury Park, 1990). However, with regard to how the ideas of this author proceed to such exaggerated claims, which exceed by far what empirical research can actually provide, it would be better not to make certain claims in the first place.

[43] For an example from the juridical side see Otto Bachof, *Verfassungswidrige Verfassungsnormen?* (Tübingen, 1951), reprinted in O. Bachof, *Wege zum Rechtsstaat, Ausgewählte Studien zum öffentlichen Recht* (Königstein, 1979), 1–48.

Legal theory, too, has at times come close to such a decidedly fact-oriented self-description of law, for instance under the influence of behaviourism in the first half of the twentieth century or of the 'unity of science' movement. However, a closer analysis can fairly quickly show the weaknesses in the argumentation, or at least ambiguities that can be found in the actual positions where such legal theory is expected to provide an understanding of a normative proposition. So, for instance, Karl Olivecrona introduced his programmatic monograph *Law as Fact*[44] with the topic 'The Binding Force of Law' and attempted to filter out all mystical notions of natural law or of positivist theory associated with the will of the state. But if one observed strictly the facticity of law as it happens, one would not even formulate the problem in this way. Law has no binding force. It consists purely of communication and of structural deposits of communication, which convey such meanings. We will also use the term '*Zeitbindung*' (time-binding)—but only in the sense in which one could also say that language is binding time by determining the meaning of words for the further use of words with that meaning.

To insist that the distinction between norms and facts is only made by the legal system internally is simply another version of distancing us from a 'law-friendly' legal theory. Merely by elaborating on this distinction legal theory defers to the legal system and is subsumed by it. For science this distinction has no relevance—as a distinction. In other words: when we are talking in the following chapters about the distinction between norms and facts then this refers to a fact, namely the fact that the legal system (understandably) uses this distinction. The system of science, however, deals only with facts and distinguishes between facts and concepts such as external reference and self-reference. That is why it is ultimately of such little importance to point out the non-normative character of the concepts and propositions in the text that follows.

V

Our starting point is the proposition that the legal system is a sub-system of the social system.[45] This differs from other approaches to the sociology of law that, usually, demonstrates their relationship with sociology by their use of empirical methods and then go on to apply sociological theories to law. Even though the analyses that will be presented here are also, primarily, a contribution to social theory, they are not principally interested in how

[44] Karl Olivecrona, *Law as Fact* (Copenhagen and London, 1939).

[45] For a similar view see Adam Podgórecki, Christopher J. Whelan, and Dinesh Koshla (eds.), *Legal Systems and Social Systems* (London, 1985).

society influences law (also in contrast to other sociological analyses of law). The formulation of the objectives of research, as is usually found in 'law and society' studies, assumes that the law is already constituted as something that is more or less susceptible to the influences of society. However, the more fundamental question as to how law is at all possible in society is then neither questioned nor answered.

The rest of this chapter and the one following will elaborate further on this question. We assume that the unity of the system can only be produced and reproduced by the system itself and not by any factors in its environment. This applies both to society and to its legal system. Even if we consistently state throughout in the following analyses that the system to which we refer is the 'legal system', it is necessary to clarify at the outset that the relationship of this system with the all-embracing social system is ambivalent. On the one hand society is the environment for its legal system; on the other hand, all operations of the legal system are always also operations in society, that is, operations of the society. The legal system performs in society by differentiating itself within the society. In other words, the legal system creates its own territory by its own operations (which are at the same time social operations). Only when doing so does it develop a social environment of law within society. This, then, allows the question to be asked as to how the influences of this environment can be brought to bear on law, without the consequence being that law and society cannot be distinguished from one another.

The problematic concept of the ambivalent relationship between law and society stands out, when we apply a strictly operative approach. The unity of a system (and this includes the structures and boundaries of the system) is produced and reproduced by the operations of the system. Thus, we will need to use the term 'operative closure' of the system. This applies both to the social system and the legal system. The mode of operation, which produces and reproduces the social system, is meaningful communication.[46] This statement enables us to say that the legal system is a subsystem of the social system in so far as it uses the mode of operation of communication, that is, that it cannot do anything else but frame forms (sentences) in the medium of meaning with the help of communication. It is an achievement of the social system that this has become possible, and that a long socio-cultural evolution has made this self-evident. This achievement, for instance, provides the legal system with the guarantee that neither paper nor ink, neither people nor other organisms, neither courthouses and their rooms nor telephones or computers are part of the

[46] See also Niklas Luhmann and Raffaele De Giorgi, *Teoria della società* (Milan, 1992), and for social systems in general: Niklas Luhmann, *Soziale Systeme: Grundriß einer allgemeinen Theorie* (Frankfurt, 1984); English-language version: *Social Systems* (Stanford, 1995).

system.[47] The social system has already constituted this frontier. Those who try to communicate with their telephones ('stop ringing, phone!') misunderstand systems; one can communicate not to but only with the help of a telephone.

Consequently, the legal system operates in the form of communication under the protection of boundaries that are drawn by society. This means, however, that the legal system must distinguish in a special way all that has to be treated as legal communication in the social system. This topic will be dealt with extensively. All that matters for now is how a position can be reached through the theory of operatively closed systems which goes beyond the debate which has kept semiotics and linguistic analysis busy for a long time, including their applications to law.[48] As far as signs or language are concerned, the French tradition founded on the writings of Ferdinand de Saussure accentuated more the structural aspects, while the American tradition based on Peirce stressed the pragmatic aspects. In the one tradition, the weight is on the structural constraints on which the use of linguistic signs depends (whatever philosophers claim to be their domain, for instance, under the concept of the autonomy of thought[49]). In the other tradition, the accent is on the intention of the speaker, on 'speech acts' in the sense of Austin and Searle.

So far neither the structuralist thesis nor analysis following the theory of the speech act have turned out to be particularly fruitful.[50] Obviously, lawyers use ordinary language as regards phonology, syntax, etc. (which represent the main interests of linguistics), interspersed only with some special terms or words which assume a meaning in juridical discourse which differs from the meaning they have in everyday speech. The idea of an 'autonomous' legal discourse or of an operatively closed system would be inconceivable when considered purely in relation to language since, of course, this language and its discourse takes place in society. However, the

[47] Objections to such an externalization not so much of houses as of people are legion. See, for instance, in relation to the sociology of law: Walter Kargl, 'Kommunikation kommuniziert? Kritik des rechtssoziologischen Autopoiesisbegriffs', *Rechtstheorie* 21 (1990), 352–73. However, even the most cursory of readings of these assessments reveals that they use terms like 'human being', 'subject', and 'individual' in the singular and so avoid reflection on who is actually implied. If one were to take account empirically of the states of affairs that are meant by these terms, there is no substance to the assertion that the reference to any individual (please give me: name, age, address, gender, etc.) would be suitable to explain social phenomena. To those who polemicize in this way we counter with the objection that they do not take the human being seriously as an individual.

[48] See, for instance, Bernard S. Jackson, *Semiotics and Legal Theory* (London, 1985), esp. 25.

[49] This also includes Jacques Derrida, 'Le supplément de copule', in Jacques Derrida, *Marges de la philosophie* (Paris, 1972), 209–46, who 'deconstructs' this distinction in his own way.

[50] See, in relation to linguistics, philosophy of language, etc., the presentation of a symposium, 'Le langage du droit', in *Archives de philosophie du droit* 19 (1974).

problem is that one often cannot understand legal discourse unless one is specially trained. This includes not only the understanding of meanings but also and, to an even greater extent, the understanding of the intentions and consequences of certain statements.

Only the switch from an analysis based on linguistic theory to an analysis based on communication theory opens the way for legal theory and sociology of law, and then to the problems associated with their intersection. This switch puts the relevance of the controversy between structuralists and speech act theorists in perspective. Both parties to this controversy only cover one part of the phenomenon. Communication cannot happen without either structures or speech acts. However, communication cannot be reduced to speech acts. It includes information and understanding as well. Further, there is a circular relationship between structure and operation, which means that structures can only be established and varied by operations that, in turn, are specified by structures. In both those respects the theory of society as an operatively closed communication system is the more comprehensive theoretical approach; and by defining the legal system as a sub-system of the social system any pretensions as to the dominance of either pragmatist or structuralist perspectives can be excluded from consideration.

There is not much point in deciding whether a theory of this kind should be called sociology or sociology of law, when it includes controversial issues of legal theory, linguistic theory, and semiotic theory. With sociology of this kind, which is so clearly bound by its interdisciplinary obligations, categorizing it in terms of a discipline makes little sense. All that matters is that the venture moves ahead at a level of abstraction which is rarely encouraged in current sociology.

6 The Evolution of Law

I

The history of law from ancient times to the present is comparatively well known. The available sources, however, have not been evaluated from a theoretical perspective. According to contemporary understanding, only concepts of evolutionary theory are suited to this task. The concept of evolution, however, has been used very imprecisely in the literature (including in the legal literature, in so far as it is used there at all) and has, moreover, been presented in a distorted way in criticizing evolutionary approaches.[1] As far back as the eighteenth century accounts can be found of the evolution of law, by, in particular, Hume, Lord Kames, and Ferguson, who point out features which come close to modern evolutionary theories (such as the lack of a plan, retrospective acknowledgement of achievements, gradual development, accidental triggers, accumulation of wisdom through decisions on a case-by-case basis). However, all these accounts lack a clear structure from the point of view of the theory of difference. The same can be said for the works of the historical school of law in the first half of the nineteenth century.[2] As far as the contemporary literature is concerned, it is apparent that contributions that deal with relatively concrete legal issues or with the 'evolution' of individual legal institutions[3] use the concept of evolution without any theoretical precision, while, on the other hand, the application of Darwin's schema variation/selection/stabilization is not sufficiently well formulated in relation to the legal system.[4] We shall use the concept of evolution in accordance with Darwin's theory of evolution which, despite its need for further improvement, must be counted as

[1] For an overview which is historically far-ranging but limited in its language, see E. Donald Elliott, 'The Evolutionary Tradition in Jurisprudence', *Columbia Law Review* 85 (1985), 38–94. See also the heterogeneity in the more recent literature, as pointed out by Gunther Teubner, *Recht als autopoietisches System* (Frankfurt, 1989), 61, with a call for terminological clarification. There is not even a uniform answer to the question of which system reference could be used as a starting point, and even a socio-biological approach to the discussion is suggested by John H. Beckstrom, *Evolutionary Jurisprudence: Prospects and Limitations of Modern Darwinism throughout the Legal Process* (Urbana, 1989).

[2] See on the comparison between the evolution of language and the evolution of law in this school Alfred Dufour, 'Droit et langage dans l'École historique du Droit', *Archives de philosophie du droit* 19 (1974), 151–80.

[3] See, for example, Robert Charles Clark, 'The Morphogenesis of Subchapter C: An Essay in Statutory Evolution and Reform', *Yale Law Journal* 87 (1977), 90–162; Robert A. Kagan et al., 'The Evolution of State System Courts', *Michigan Law Review* 76 (1978), 961–1005; Ronald A. Heiner, 'Imperfect Decisions and the Law: On the Evolution of Precedent and Rules', *Journal of Legal Studies* 15 (1986), 227–61.

[4] As suggested, for example, by the sociologist Albert G. Keller, 'Law in Evolution', *Yale Law Journal* 28 (1919), 769–83.

among the most important achievements of modern thought.[5] Reference to the origin of the theory, however, should not be taken as an argument by analogy but as a pointer to a general evolutionary theory, which can have many different applications.[6] We prefer this theoretical approach because it starts out from the theory of difference. Its main theme is not the unity of history as an evolution from a beginning up until the present day. It is concerned, far more specifically, with the conditions for possible unplanned changes of structure and with the explanation of diversification or the increase in complexity.

More recent developments of systems theory do not make it any easier to express and solve this problem; on the contrary, they make it more difficult. For if one has to start from the assumption that systems are closed and that their structures are determined, it is far more difficult to understand (1) how structures can be changed at all, and (2) why it is possible at times (but not necessarily, or is it?) to detect the direction of those changes, for instance in the diversification of species or in the increased complexity of societies. With the growing intensity of the problem, however, the demands on the theoretical instruments used to solve the problem also increase, as do the criteria for presenting something as evolutionary theory. Evidently evolution happens only if both *difference* and *adaptation* are preserved in the relationship between system and environment, for otherwise the object of evolution would disappear. But this understanding does not in itself explain how evolution is possible.

The form that explicates this problem is the distinction between variation and selection. If this distinction is established as a real distinction (for example, as a distinction between, on the one hand, mutation or genetic recombination and, on the other, the duration of survival), it necessarily produces a multiplicity of forms which generates deviations—in relation both to their points of departure and to differences between the species—which, in turn, influence evolution itself in the shape of differentiated environmental conditions. Everything else, even the dogma of 'natural selection', which was so important to Darwin, can be seen as secondary. The problem of elaborating on these and other aspects of evolutionary theory is shifting nowadays more and more onto the issue of the relationship between evolutionary theory and systems theory, or more precisely, onto the relationship between variation/selection and system/environment as different forms of a theory in need of further fine-tuning.[7] One can talk of 'natural selection'

[5] For emphatic support see Ernst Mayr, *Evolution und die Vielfalt des Lebens* (Berlin, 1979).

[6] See in agreement Kelle, *Law in Evolution*, 779.

[7] Evolutionary theory's recent flirtation with games theory is only one example of this statement, beginning with R. C. Lewontin, 'Evolution and the Theory of Games', *Journal of Theoretical Biology* 1 (1961), 382–403. For games within populations see also John Maynard Smith, *Evolution and the Theory of Games* (Cambridge, 1982).

in the sense of a selection outside a system only if one defines which system is exposed to selection by the environment.

The question is thus: which features of a system make evolution possible? We want to answer this question by referring to the pressure of selection that arises from the operative closure of systems and their limited complexity in relation to the world. The concept of the autopoietic system will be our guideline and we shall leave aside the further question of whether one can also speak of evolution in relation to certain areas of physics, that is, in relation to the formation of atoms, suns, galaxies, chemical molecules, etc. It is easy to see that the maintenance of autopoiesis, as a *conditio sine qua non* of all evolution, can be equally well achieved with the help of a change of structure or that evolution is compatible with a change of structure. Accordingly evolution will occur if various conditions are met and are coupled conditionally (not necessarily) with each other, namely:

1. *variation* of one autopoietic *element* compared with the hitherto existing pattern of reproduction;
2. *selection* of the *structure* which is now possible as a condition for further reproduction; and
3. *maintenance of the stability* of the system in the sense of dynamic stability, that is, continuation of the autopoietic, structurally determined reproduction in this changed form.

This means, in a further abstraction: *variation* involves the *elements*, *selection* involves the *structures*, *stabilization* involves the *unity of the system*, which reproduces itself autopoietically. All three components form a necessary context (there are no systems without elements, no elements without systems, etc.), and the improbability of evolution is ultimately due to the circumstance that a differentiated leverage of these components is *nonetheless possible*. But how?

We cannot examine here whether the evolution of society can be portrayed with the help of this theory. We assume that this is the case.[8] However, the question then arises whether there are still further evolutions within an evolving society, for example the evolution of the legal system.[9] This problem is directly parallel to the question whether autopoietic systems can, strictly speaking, be found within autopoietic systems, or whether dependence on an environment, which is the internal environment of an autopoietic system, contradicts the concept of autopoiesis. Put more

[8] See Niklas Luhmann and Raffaele De Giorgi, *Teoria della società* (Milan, 1992), 169.

[9] Biologists encounter the same problem in tackling the question whether there is only one overall evolution which has led to the diversity of species on the basis of a strictly uniform procedure of reproduction in a chemical sense, or whether one can also speak of the evolution of individual species or populations when the conditions of bisexual reproduction exclude these systems.

concretely: society communicates and in so doing delineates itself from an external environment. The legal system also communicates and in so doing executes the autopoiesis of society. Society uses language. The legal system also uses language, with only minor variations of the conditions for understanding. Society depends on structural coupling with systems of consciousness. Law likewise. Do these dependencies exclude the existence of an independent evolution of the legal system?[10]

The thesis of an independent autopoiesis of the legal system leads us to affirm the finding of an independent evolution of the legal system.[11] At this point we repeat, once more, that the concept of operative closure does not exclude evolution. Evolution is not a gradual, continuous, seamless increase in complexity but a mode for structural change that is altogether compatible with erratic radical changes ('catastrophes') and with long periods of stagnation ('stasis').[12] Certainly, for a new formation to emerge suddenly, numerous conditions must be met and 'preadaptive advances' must be made.[13] This also applies to the possibilities that a legal system has to establish a level of secondary self-observation on the basis of its long experience in arbitrating normative conflicts with the code legal/illegal. Long before legal coding starts to act in a strictly binary manner, thus becoming logically technical, there is a wealth of legal material recorded in the form of conditional programmes.[14] One knows therefore what is meant (and what is not meant) when observers are instructed to turn to the legal system. The conditional programmes, which are already in practice, thus take on

[10] At this point objections are often raised (but why only in relation to these dependencies?) whether there could be an autopoiesis of functional sub-systems. See, for example, in relation to the economy, Josef Wieland, 'Die Wirtschaft als autopoietisches System—Einige eher kritische Überlegungen', *Delfin* X (1988), 18–29; for science, Wolfgang Krohn and Günther Küppers, *Die Selbstorganisation der Wissenschaft* (Frankfurt, 1989), 21; for the legal system, William M. Evan, *Social Structure and Law: Theoretical and Empirical Perspectives* (Newbury Park, 1990), 44. Here the (theoretically unconvincing) argument on 'empirical' evidence plays a part, namely in the shape of the assumption that action can only be observed in individuals. This assumption is doubtful even when applied to illiterate societies. However, to argue like this is to exclude every application of evolutionary theory, in the sense used here, to anything other than biological phenomena.

[11] See also Huntington Cairns, *The Theory of Legal Science* (Chapel Hill, 1941), 29; Richard D. Schwartz and James C. Miller, 'Legal Evolution and Societal Complexity', *American Journal of Sociology* 70 (1964), 159–69.

[12] Perhaps this is, indeed, the typical case. See Niles Eldredge and Stephan Jay Gould, 'Punctuated Equilibria: An Alternative to Phyletic Gradualism', in Thomas J. M. Schopf (ed.), *Models in Paleobiology* (San Francisco, 1972), 82–115.

[13] Hegel's analyses, which are related to the transitional problems dictated by his theory, can be understood in precisely this sense; as, for instance, the beginnings of symbolic aesthetics in his lectures on aesthetics, quoted in the Frankfurt edition 1970, vol. 1 (*Werke*, vol. 13), p. 418. For preadaptive advances of an autopoiesis of the system of fine arts see Hans Belting, *Bild und Kunst: Eine Geschichte des Bildes vor dem Zeitalter der Kunst* (Munich, 1990).

[14] See for the detailed account Ch. 4.IV above.

the function of regulating the allocation of legal and illegal, and mature with that function. A further evolutionary leap, which takes all this apparatus as its basis, occurs when the legal system is obliged to defend its autonomy in a new context, that of the functional differentiation of society.[15] Whenever an autopoietic system achieves operative closure for the first time or when it has to maintain its closure and restructure its closure in the face of radically changed social contexts, it does not happen as a planned reorganization but through an evolutionary restructuring of established installations.[16]

However, recognizing the compatibility of systems theory and evolutionary theory is not sufficient in itself. Further, one must be able to demonstrate *how* evolution occurs at the level of a system. If one succeeds with such an attempt, that success would be another argument for the assumption of an independent autopoiesis of the legal system.

II

Before we begin our study of how the evolutionary functions of variation, selection, and stabilization are differentiated in the case of the legal system, we must spell out just how the structures of legal systems were established so that they became subject to the impact of evolution. One obvious suggestion here concerns the existence of written records, but a closer look shows that this raises rather complex questions.[17]

Writing operates as a social memory with the advantage that it keeps knowledge readily available for unexpected, optional access. Of course, the advent of social memory existed in society before the invention of writing. The assumption is often made that these societies had to rely exclusively on the psychical memory of individuals. This, however, was not the case. Social

[15] Even in this difficult transitional period of turning the political system into statehood, the autopoiesis of law prevails in its evolution, see Rudolf Stichweh, 'Selbstorganisation and die Entstehung nationaler Rechtssysteme (17.–19. Jahrhundert)', *Rechtshistorisches Journal* 9 (1990), 254–72.

[16] There is a similar problem structurally in the jurisprudential discussion, namely the question whether one can talk of, or how one can detect, how customary law develops or changes even if a practice which deviates from law cannot, according to general opinion, form law and even if an error of law is excluded as a source of law (D.1.3.39: 'Quod non ratione introductum, sed errore primum. deinde consuetudine optentum est, in aliis similibus non optinet'). See also Friedrich Carl von Savigny, *System des heutigen Römischen Rechts*, vol. 1 (Berlin, 1840), 14: 'die unzweifelhafte Thatsache, daß überall, wo ein Rechtsverhältnis zur Frage und zum Bewußtsein kommt, eine Regel für dasselbe längst vorhanden, also jetzt erst zu erfinden weder nöthig noch möglich ist' ('the undeniable fact that whenever the question of a legal relationship is raised or is brought to attention, the rule for it has long since been established and it is neither necessary nor possible to invent it.').

[17] See for a first overview Jack Goody, *Die Logik der Schrift und die Organisation von Gesellschaft* (Frankfurt, 1990), 211.

memory was formed by handing on available knowledge, that is, by the *temporal delay* of performances of psychological memory in sequences of their activation. This sequencing achieves a gain in time and this makes it possible to sustain knowledge even as times passes.[18] This form of temporal memory, however, had distinct disadvantages, which were especially apparent in areas in which it was important to treat uncertainty or disputes with reference to complex bodies of non-contestable knowledge, i.e. divination and law. Here we find a relatively early move to other forms of knowledge storage, namely written records, which could be activated by a specific means of access when an unpredictable situation arose.

Writing is, like the ephemeral sounds of oral communication, a mechanism of the structural coupling of physics, consciousness, and the communication of physiological, psychological, and social realities. Seen from this perspective, writing achieves a great deal more than that which it expresses. It achieves, above all, a differentiation of texts, which can serve as the *identical* foundation for the formation of *different* opinions. In order to achieve this, writing presumes an 'espace blanc' as an 'infinité marqué et marquable',[19] that is, an unmarked space which can be crossed to reach a marked space, by at the same time producing and defining a marker.[20] Only in a medium of possible markers are markers possible which, in all their various possible combinations, provide a medium for the form which, in its turn, appears as text.

The physical form of medium/form–form gives writing its consistency—it exists quite regardless of whether it is used in communication—or it dissolves. In its physical features, writing belongs to the environment of the communication system. Judging by these features, writing cannot be a component of social communication. The communication system only 'assimilates' writing, in the words of Jean Piaget, by using it as information.[21] This assimilation only relates to the meaning of writing, not to its physics.[22] This is why writing can guarantee a consistency, which does not hinder the differentiated recall of information in the closed context of the communication of the system and which makes it possible for the system to condense

[18] See on 'transmission delay' as a form of 'temporal memory' Klaus Krippendorff, 'Some Principles of Information Storage and Retrieval in Society', *General Systems* 20 (1975), 15–35, at 19.

[19] This formulation is used by Julia Kristeva, *Semeiotikè: Recherche pour une sémanalyse* (Paris, 1969), 315.

[20] This is the terminology of George Spencer Brown, *Laws of Form* (reprint 1979).

[21] This applies even if the form of writing and its visual layout, etc. play an important role in communication, as has often been pointed out recently.

[22] There is a similar distinction in the membranes of cells. Here, too, physical objects are integrated in the closed context of metabolism and the reproduction of cells without being changed. See Jean-Claude Tabary, 'Interface et assimilation, état stationaire et accommodation', *Revue internationale de systémique* 3 (1989), 273–93.

its identities in the recursive use of meaning. Writing makes it easier to re-access meaningful subject matter and makes it harder to forget it (beneficial as that might sometimes be).[23]

Writing makes communication independent of the time at which a message was written and thus largely independent of the sender's intentions too. Whether these intentions matter or not, is open to interpretation. The situational and intentional evidence ceases to count and must be replaced by the clarity of the statement and the directives for its interpretation. All participants in this communication, including the one who authored it, must be treated as 'absent'.[24]

Long before writing was used for communication, it served to document information that was worth recording. Legal issues are among the earliest matters deemed appropriate for the development and use of writing.[25] As far as we know today, this did not apply so much to laws as such—because a concept for law had yet to be developed in a written culture—but rather to legally relevant transactions of all kinds, that is, to records of obligations of performance, contracts, wills—in brief, everything that was mentioned above under the heading of change in legal validity. Recent research indicates a close relationship between early scripts and divination practices[26] that tried to find answers to questions about the unknown in various situations in everyday life.[27] There are some indications that writing developed through the stabilization of forms used in divination.[28] Moreover, the use of writing in the context of divinatory practices became widespread, with the transition to phonetic writing in Mesopotamia being part of this

[23] We say 'harder' for it has to be added that written legal documents can be forgotten or became obsolete. This applies especially to the period before the invention of printing. See Mario Bretone, 'Le norme e il tempo fra tradizione classica e coscienza moderna', *Materiali per una storia della cultura giuridica* 19 (1989), 7–26.

[24] Derrida takes this idea as his point of departure in his radicalization of the concept 'écriture'. See especially Jacques Derrida, *De la grammatologie* (Paris, 1967); id., 'Signature, événement, contexte', in id., *Marges de la philosophie* (Paris, 1972), 365–93, at 376.

[25] As far as the registration of transactions is concerned, this presumably even holds true of a period which goes thousands of years back before the invention of writing, that is, to the beginnings of the neolithic age. See on this point Denise Schmandt-Besserat, 'An Archaic Recording System and the Origin of Writing', *Syro-Mesopotamian Studies* 1/2 (1977), 1–32.

[26] We are content to use the international term 'divination' rather than 'prophecy'.

[27] See above all Jean-Pierre Vernant et al., *Divination et rationalité* (Paris, 1974).

[28] See, in relation to China, Léon Vandermeersch, 'De la tortue à l'achillée: Chine', in Vernant et al., *Divination et rationalité*, 29–51. We also find here, incidentally, a good example of the evolution of writing. Characters were originally generated through the imitation of patterns found on bones and on tortoises if they were prepared in a certain way. They are read in great numbers, and enriched with meaning, as ideograms, and turned into independent writing. The suddenness of the generation of a rather complex writing cannot be explained any other way. Writing requires the 'preadaptive advance' of a rationalized divination practice, which extends to many situations in everyday life.

process.[29] In these early high cultures legal problems arose as divination problems, that is, as problems of finding out what had happened and how fault and innocence were to be distributed by relying on a close analogy to favourable and unfavourable circumstances.[30] In this way law participated in the increase in complexity and rationalization as well as in the increase in professional expertise which had been developed for the purposes of divination; and writing served as a record of the requisite knowledge in both these contexts. Thus the written records which have come to light, for instance the famous code of Hammurabi, were not laws in our sense, that is, they were not records of laws which had been enacted or authorized. In their form of if/then they corresponded exactly to the normal rules of divination and were used in this context to solve problems in cases, including in judicial practice.[31] The generalization of case law and the binary coding of favourable and unfavourable signs and symbols were created primarily for the purposes of divination, and law benefited from the associated push towards the increased complexity and sophistication of writing.

In other words, there existed a legal culture and associated expertise which developed with the help of writing, long before written records were recognized as a condition for legal validity. Even the Roman *stipulatio* was a unilaterally binding statement, which was made in an oral form but could also be written down for purposes of evidence. The written record did not dispense with the requirement that witnesses be present.[32] Written documentation, however, had the great advantage—and this may explain its early use in legal matters—of *highlighting deviations* that could easily get lost in the heat of contentious oral debate. In this respect writing also serves as a proactive and conflict-avoiding record. (On the other hand, as is pointed out time and again in antiquity, writing lends itself much more readily to deception and fraud than does communication between witnesses.) It is

[29] See Jean Bottéro, 'Symptômes, signes, écritures en Mésopotamie ancienne', in Vernant et al., *Divination et rationalité*, 70–197. See also further relevant references in Bottéro, Mésopotamie: *L'écriture, la raison et les dieux* (Paris, 1987), 133 and 157.

[30] See Bottéro, 'Symptômes', 142 who calls it 'identité formelle entre justice et divination'.

[31] See Jean Bottéro, 'Le "Code" Hammu-rabi', *Annali della Scuola Normale Superiore di Pisa* 12/1 (1988), 409–44, reprint in id., *Mésopotamie*, 191–223. Bottéro interprets the code as a self-aggrandizement of the king, as a kind of political will which indicates how legal decisions had guaranteed order.

[32] In commercially highly developed Athens, differently from in Rome, this stage seems to have been reached in the middle of the fourth century BC; Athens was engaged in long-distance commerce and depended on it and witnesses are, of course, only a locally useful legal institution. See, for instance, Fritz Pringsheim, 'The Transition from Witnesses to Written Transactions in Athens', in *Gesammelte Abhandlungen*, vol. 2 (Heidelberg, 1961), 401–09. See also William V. Harris, *Ancient Literacy* (Cambridge, 1989), esp. p. 68, and generally on the history of the increasing literacy in Greek law Michael Gagarin, *Early Greek Law* (Berkeley, 1986), 51, 81, and 121.

only relatively recently that writing has also assumed the function of 'publication' and 'revelation' of the law. A handful of expert scribes are sufficient to point out any concrete deviations from law; widespread literacy is necessary to make the law public.

While oral cultures depend on strict repetition (no matter how fictitious) to memorize things, for instance in ritual form, there is a greater degree of latitude with written documents because of their ability to be used in new or unforeseen situations, with the proviso, however, that the texts themselves have been carefully drafted. They have to be understandable in their own right and must set limits to how they can be interpreted. Above all, they have to eliminate contradictions and ensure sufficient consistency. Jan Assman has called this the 'transition from the dominance of repetition to the dominance of recall, from ritual to textual coherence'.[33] In very early times, as far back as the beginnings of written culture, the use of writing in legal matters served mainly, as mentioned above, to clarify and highlight possible deviations. And this was the extent of the development in those writing cultures. For their purposes it was sufficient to archive the documents only for the short period for which their context was topical. Originally the written form was not intended as a way of preserving a text for all foreseeable future applications, that is, for a free and active reinterpretation.[34] Only much later was writing given a further function, namely that of documenting a change of law or confirmation of law; and only then could writing become a *condition for the validity of law* because the written form could be identified relatively easily. It is only on this basis that *lex scripta* and *leges non scriptae* can be distinguished because there may also have been written records, speeches in courts, court records, collections of expert opinions, etc., behind such laws.[35] Long before an elaborate legal

[33] See Jan Assman, *Das kulturelle Gedächtnis: Schrift, Erinnerung und politische Identität in frühen Hochkulturen* (Munich, 1992), 17 and 18 (quoted at p. 18).

[34] On the slowness of this development, even when directed by literacy, and on the problems of archiving legal texts in Athens, see Rosalind Thomas, *Oral Tradition and Written Record in Classical Athens* (Cambridge, 1989), 34; Harris, *Ancient Literacy*.

[35] This distinction was a reason for the *criticism* of the literacy of law in Athens (among other things in relation to the possibilities of falsification and problems of interpretation). Thus unwritten law acquired an aura of 'superiority'. See John Walter Jones, *The Law and Legal Theory of the Greeks: An Introduction* (Oxford, 1956), 26; Jacqueline de Romilly, *La loi dans la pensée grecque des origines à Aristote* (Paris, 1971), 27. A related doctrine can be found even today in Jewish law. The law had been revealed for oral and written transmission on Mount Sinai. Jahwe, who was—according to his nature—supposed to be time and thus also the future, was supposed to have been aware of the need to create a flexible, adaptable law, that is, law which would leave room for interpretation at the expense of an incomplete and possibly controversial reproduction of law. See George Horowitz, *The Spirit of Jewish Law* (New York, 1953; reprint New York, 1973); Eliezer Berkowitz, *Not in Heaven: The Nature and Function of Halakha* (New York, 1983); Geza Vermes, 'Scripture and Tradition in Judaism: Written and Oral Torah', in Gerd Baumann (ed.), *The Written Word: Literacy in Transition* (Oxford, 1986), 79–95. There is an assumption here that the precept of oral doctrine and tradition does not exclude the recording of opinions in notes, glosses, and commentaries. Finally, for the common law see Sir Matthew Hale, *The History of the Common Law of England*, first published (posthumously) in 1713, quoted from the edition by Charles M. Gray, Chicago 1971, at 16: *Lex scripta* is defined as 'Statutes or Acts of Parliament which in their original Formation are reduced into Writing, and are so preserved in their Original Form and in the Same Stile and Words wherein they were first made'. There may well also be written material about the *leges scriptae* but it is not relevant to the identity and validity of the meaning of texts, and is only a form for the handing on of meaning.

culture existed, 'laws' were passed on verbally and in writing, one notable example being the Ten Commandments. New measures became necessary to stop people doubting these laws. This is difficult when written material is involved (for the simple reason that it gives people more time to think about it). To deal with this problem, an additional religious semantic was injected into the texts, mainly as a reference to a distant source of validity (or at any rate to a source which was in the past and thus no longer accessible) with corresponding myths concerning the origin of those texts. The semantics for all the divinatory practices which tried to find the unknown in the known were replaced by a new religion which measured, rejected, or accepted human practice in the light of God's will. Unlike in secular interaction, the written text became the familiar form of this religion, symbolizing the unfamiliar in the familiar, the secret in the revealed, and the transcendent in the immanent.[36]

The preservation of 'political' laws in writing, for instance Solon's Laws, is a comparatively recent product of evolution. It depends on legitimized proceedings. Because it does not cover all that can claim to be the law it causes all the problems of a written text that is unequivocal in its choice of words. After the Laws of Solon there developed the doctrine of *agraphoi nomoi*, to which a higher rank was attributed, starting the long tradition of the search for 'higher', 'extra-legal' foundations for law.[37] Obviously it is only after the introduction of writing that one can talk of an oral

[36] On this form of presentation of religious meaning see also Niklas Luhmann, 'Die Ausdifferenzierung der Religion', in id., *Gesellschaftsstruktur und Semantik*, vol. 3 (Frankfurt, 1989), 259–357. The Greek *symbólaion* has here the secularized meaning of a written contract (alongside the more common *syngraphê*) and this means the unity of something that is separated, or the possible proof of this unity.

[37] Possibly the best-known case of the claim to the higher ranking of unwritten law is that of Antigone. But it is directed typically against 'modern' tyranny. See explicitly on the topic of the old-fashioned use of language in written law which requires an interpretation, that is, a distinction between text and meaning: Lysias, *Against Theomnestus* I. 6–7, quoted from the edition of the Loeb Classical Library (London, 1957), 106. Incidentally, one can still find in Lysias' distinction between written and unwritten law the hint of a fundamental religious meaning (albeit for rhetorical reasons) when he stresses in *Against Androcines* 10, Loef edn., p. 121, that penance is also due to the gods for violating their law. Finally, it is evident that only a culture of literacy can speak of 'unwritten law'.

tradition—regardless of how one evaluates its importance—that is, after the distinction written/oral became available;[38] in this sense, every emphatic reminiscence, and every canonization of an oral tradition is the historical recall of a literate society (for instance, the oral part of the Torah is like a back-projection of the Talmud).

It must have been a 'catastrophe' for oral societies and their use of law when law became valid as a written text (and 'valid' is used here as discussed above in Chapter 2.VIII). It meant adjusting to a different principle of stability and to a radical change in the conceptual boundaries of everything that was meaningful to them, including a new attitude to religion, which excluded contingency and reconditioned its admission. Clearly the growing use of writing ran parallel to society's shift from a segmental to a stratifying differentiation, which, in its turn, encouraged the spread of literacy. This led to an unprecedented concentration of material and symbolic (rhetorical) resources in the upper classes, or, when the stratification was less pronounced, in a dominant bureaucracy.[39] However, this is a rather superficial explanation, which does not tell us much about the present day. For it goes almost without saying that all forms of communication are tightly linked to the forms of differentiation in their respective societies. As a study of the legal issues surrounding divination shows, the transition to urbanization and stratification, to the formation of empires and the endogamy of classes, was not enough to produce the differentiation of a special legal system, as happened in the form of the Roman civil law and then again with the medieval systematization of law. However, if writing is available in an easily understandable (phonetic, alphabetical) form, then—and then only—is a medium created in which legal texts can be distinguished from all other texts. Only then can law become autonomous in the sense that it not only uses writing but also depends on a kind of text which can be distinguished from other kinds of text. In view of this recent historical development, we must analyse the achievement of written law more thoroughly.

If meaning becomes set through writing, it is passed on in a process of repeated reading, of condensation and amplification of meaning. 'The original sign plus its reading constitutes an expanded structure. The expanded structure is composed of the sign and some form of response to it. This is the heart of cultural evolution.'[40] Owing to this expansion, the

[38] See Niklas Luhmann, 'The Form of Writing', *Stanford Literature Review* 9 (1992), 25–42.

[39] Peter Goodrich, *Reading the Law* (Oxford, 1986), deduces from this a *pervasive* connection between law, literacy, and the symbolic-repressive political use of power; but, of course, this tends to mystify the very concept of power.

[40] Dean MacCannell and Juliet F. MacCannell, *The Time of the Sign: A Semiotic Interpretation of Modern Culture* (Bloomington, 1982), 26. Further on, the authors call this the 'self-reading of culture'.

mechanisms of evolution are able to take hold and to select. There is hardly any research on the conditional relationship between an interpretation of texts (hermeneutics) and evolution (in a Darwinian sense);[41] but in both the circularity of the hermeneutical development of meaning and the autopoiesis of systems it is not hard to see the possibilities for responding relatively quickly to (equally sudden) changes in the environment.

At any rate, the access to law became both more open and more limited with writing, and the question since has been: access for whom? Law became enclosed in the written form and, through that, differentiated as a form. This made it easy to *distinguish* law but that does not necessarily mean that it became easier to find out what the valid law was. It was no longer readily available for the formulation of normative expectations, for which one could find support in social situations. Law could no longer be simply counted by the number of 'oath helpers' which a party could muster. 'The Code encodes the law, it secludes it in a new form and guards it with a new class of interpreters.'[42] On the other hand, the function of writing is premised on the fact that one knows that the written sign is not the law itself but only its expression. Like the evolution of language, the evolution of writing produces a difference. This evolution is dependent on the distinction working, the sign not being mistaken for its meaning and people being able to rely, in everyday life, on the fact that others can use this difference as well. Writing can too easily be copied and too easily destroyed for the artefact of the sign to matter much. But in that case, why have writing? Why have the duplication of the spoken word in signs? Or, more particularly: what is the eigenvalue [the function which under a given operation generates a multiple of itself] of the difference between written *and* oral communication?

It is worthwhile first to ask to which demands writing is a response. It then becomes clear that, together with an interest in representations of recall, it is *norm-typical* problems that have created this demand. This is linked with the *expectation of disappointment*, which is the core reason for communicating expectations in a normative style. This relates to a time difference, which needs to be bridged. The information, which says that a particular expectation conforms to the law, or not, must be able to serve twice (or more times) as information—at the time of its presentation and whenever disappointing conduct turns out to be the result. Deeds can be recorded, be it in the Quipu of the Incas or any other place, to remove any future doubt whether these deeds were really carried out. Similarly, laws serve as information that is used *over and over again*, whereas a piece of information usually loses its value if it is communicated time and time

[41] But see, for at least a few suggestions, L. L. Salvador, 'Evolution et herméneutique: vers une écosystémique de la cognition', *Revue internationale de systémique* 6 (1992), 185–203.

[42] Goodrich, *Reading the Law*, 27.

again. In other words, it is the precarious, contra-factual stability of normative expectations that is balanced by writing. As one never knows whether one's expectations will be met, and as one is reluctant to give in and learn from experience when they are not met, there is an advantage to be gained from being able, if necessary, to repeat the information about what is legal.

Thus it would be taking a rather simplistic view if one were to be satisfied with this reference to the stability of written signs. There is no interest in the stability of meaning in the dynamically stabilized, autopoietic social system. The issue here is the prospect of *repeated* interest in the *same information* and not simply the notion that the enduring is better than the transient. And this is why representations of norms were the first to create the acute need to couple the now with the later. The use of writing in the area of cognitive expectation (in the sense of *aletheia*, namely to save this information from oblivion) followed much later and required a high degree of adaptation of written signs to the diversity of expressions in the spoken language, for instance by phonetic character.

All this is not to say that writing brought the desired certainty to law. If it had, legal systems would not have evolved. It also did nothing to remove the uncertainty as to whether normative expectations might not be met at some point in the future or might not later be recognized as legitimate/illegitimate. All writing did was to transform the uncertainty and substitute a new difference, namely the difference between sign and meaning. A written text, once it is taken into the context of meaningful communication, that is, when it is read, written, or quoted, etc., opens up and organizes references to possible meaning. Furthermore, this is a double process of reduction and creation of complexity, the creation of complexity through reduction. The difference between medium and form is doubled in the medium of meaning. New distinctions emerge in which the text occupies one side of the form and opens up the other: the distinction between text and interpretation, the distinction between text and context, the distinction between verbal and intended meaning. These are the largely overlapping distinctions which expose the written law to evolution, even and especially if the written body of law is passed on intact.

Written texts give us cause to review continuously the law in the light of new distinctions. With these distinctions, limits are set to the task of interpretation. This is the form in which the validity of law is accounted for. For instance, the form cannot be modified by an interpretation when there is a clear meaning (such as a statute of limitation). On the other hand, the question whether the meaning is absolutely clear is in itself open to interpretation.[43] Thus,

[43] See on this point Karl Clauss, 'Die Sens-clair-Doktrine als Grenze und Werkzeug', in Huber Hubien (ed.), *Le raisonnement juridique: Actes du Congrès Mondiale de Philosophie du Droit et de Philosophie Sociale, Brussels, 30.8.-3.9.1971* (Brussels, 1971), 251–5.

the interpretation remains sovereign even in its self-limitation. It applies to law as a whole and not only to those parts where the records are unclear.

It follows that all written law is law that requires interpretation. As soon as this was recognized, texts were expected to authorize their own interpretation, for instance to spell out who was in charge of the interpretation and how the interpretation had to be conducted. In selecting this 'who' and 'how', law, written law included, adapted to the evolutionary changes in society, even after legislation was introduced to change texts in their written form.[44] Every valid text is exposed to interpretation, and is indeed text only in the context of interpretation. In this sense the text constitutes a new medium, namely the totality of the interpretations which refer to it, and new forms can condense in this new medium, whether as intriguing, attention-hogging controversies (to take but one example, the 'original intent' controversy in the interpretation of the constitution of the United States), or as theories which are derived from the interpretation of texts and become accepted by 'dominant opinion'.

All legal evolution—above all, the unique evolution of Roman civil law over 2,000 years, but also the evolution towards law in modern society, in which legislation is beginning to drive evolution with consequences which are as yet difficult to ascertain—has been made possible by the difference between text and interpretation, and this has had a decisive impact on the form of outcomes.

III

As with autopoietic systems, the conditions for evolution are a product of evolution. This applies also to the difference between text and interpretation, which we have just discussed. But further amplification of the conditions of evolution, of the impact on elements (variation), the impact on structures (selection) and integration in the autopoiesis of the reproductive context of complex systems (restabilization), also comes about as a product of social evolution. The threshold for the autonomy of the evolution of law is given by the operative closure of the legal system. When we address individual evolutionary mechanisms, we have to keep the historicity of history in mind.

The decisive variation, as far as the evolution of law is concerned, relates to the communication of unexpected normative expectations. This probably happens retrospectively most of the time and is occasioned by conduct, which—with hindsight—turns out to be a disappointment. This

[44] Evidently, the problem culminates when legislation is insufficient or only barely sufficient, namely in the interpretation of *codifications* and, today increasingly, in the interpretation of *constitutions*.

disappointment brings to mind the norm, which did not exist as a structure for communication in society before this occurred.[45] *Ex facto ius orietur.* Such events happen as soon as there are normative expectations, that is, in all societies we can identify this in a historical retrospective. A variation of this kind does not even depend on a distinction being made in society between rules and conduct. It is sufficient for one to see a reason to reject certain conduct and to be successful in having this rejection accepted by others. The formation of structures and the change of structures are hard to separate if structural effects are to be discerned. Undifferentiated societies solve this problem by constructing a suitable story around such events. Variation and selection cannot be distinguished, and what is eventually passed on as expectation depends on a number of situational and socio-structural conditions. Even if orientation towards valid law is excluded, for whatever reason, one still finds exactly the same structure today, namely the tendency to create some form of ambivalence by accusation and counter-accusation, the introduction of further facts, and the realignment of the attribution of causes. Thus the tendency is to work against the assumption that only one party is right and consequently the other is wrong.[46] The reason underlying this is that accusations, on the other side of the form, are always at the same time self-justifications—and vice versa. This elementary mechanism undercuts the seemingly fixed and objective code of legal/illegal and creates ambivalence in the shape of the question of which norm can actually be applied to the case. The point of departure for an evolution that attempts to reduce the pressure for clarification may lie in this pressure-inducing tendency to make the reference to norms ambivalent.

In simple circumstances, one cannot really find out whether someone who offends against order—for whatever reason—simply goes ahead and does it, or actually does it in the belief that he is right. If caught, he will try to defend himself and will thus cooperate in the repair or the modification of the contemplated order.[47] However, in the absence of a differentiated

[45] We shall apply this observation to the evolution of 'human rights' in the modern global society in Ch. 12.V.

[46] See on this point Heinz Messmer, 'Unrecht und Rechtfertigung' (Doctoral thesis, Bielefeld 1993), which contains an overview of the relevant research. The study addresses attempts to avoid criminal proceedings in cases of juvenile delinquency by using perpetrator–victim conferences.

[47] Situations like these have been discussed in the sociological literature under the keyword 'neutralization'; the accused accepts the difference between law and non-law and thus defers to law; but he or she tries to find arguments (joint guilt, presentation of different causalities, etc.) that 'neutralize' this difference. See above all Gresham M. Sykes and David Matza, 'Techniques of Neutralization', *American Sociological Review* 22 (1957), 664–70; David Matza, *Delinquency and Drift* (New York, 1964), see especially on 'moral holiday' at p. 184. The reason for this form of presentation is that the accused always operates in other roles according to the norms and that he or she, most importantly, depends on the norm-conformist conduct of others.

legal structure, one laid down in a written text, legal conflicts are barely distinguishable from simple expectations, where the person who appears to offend against law and order has no legal claim. The multifunctional contexts of all social arrangements (especially, of course, family and religious arrangements) make it difficult to establish a stable set of rules, as the situations in which people have recourse to these arrangements differ widely from each other and thus appear not to be comparable or easily aligned.[48] This has nothing to do with inadequate procedural rules or the trend in proceedings towards opportunistic conflict-resolution, but is the consequence of the multifunctional embedding of all those points of view which could provide support. This is also the reason why contemporary observers of these societies might gain the impression that there was no law or only repressive, criminal law.[49] And it is the reason why the use of writing does not start 'from the top down' with the documentation of the most important rules and laws, but 'from the bottom up', with the evidentiary documentation of events, such as promises or performances. All the more remarkable, then, is the early development of a law of transactions in Asia Minor, which overcame such barriers, as did Roman civil law (apparently, largely independently from the former).

The departure point for the evolution of law is this initially barely marked distinction between uncontested and contested cases of disappointment. Only if conflicts can be verbalized and only if troublemakers defend themselves and try to achieve some recognition of their exceptional

[48] This has been captured accurately by Sally Falk Moore, 'Descent and Legal Position', in Laura Nader (ed.), *Law in Culture and Society* (Chicago, 1969), 374–400, at 276: 'the more multiplex the social relations, the more contingencies there are that may affect any particular act or transaction. This multiplicity not only makes it difficult to state norms precisely, but sometimes it may even make it impossible, since the assortment of contingencies can vary so much from one case to another.' Even in these societies there are rules with almost juridical quality, namely those that refer to the inclusion of persons in sub-systems of society. But these rules become evident as the acquired or achieved quality of persons and do not have any immediate legal consequences.

[49] Thus the research on law in undifferentiated societies was guided by the question whether one could even call it law if there were no fixed rules and frequently not even the possibility to distinguish between the quality of conduct and rules. Using this approach, social anthropologists have addressed the question of how conflicts are treated and resolved in disputes—with or without rules, which were evident from case to case. See, for instance, Max Gluckman, *The Judicial Process among the Barotse of Northern Rhodesia* (Manchester, 1955); Paul J. Bohannan, *Justice and Judgment among the Tiv* (London, 1957); Lloyd Fallers, *Law without Precedent: Legal Ideas in Action in the Courts of Colonial Busago* (Chicago, 1969); Philip Gulliver, 'Structural Dichotomy and Jural Processes among the Aruscha of Northern Tanganyika', *Africa* 31 (1961), 19–35; id., 'Dispute Settlements without Courts: The Ndendeuli of Southern Tanzania', in Nader, *Law in Culture and Society* 24–68; Leopold Pospisil, *Kapauku Papuans and their Law* (1958; reprint New Haven, 1964). See also, for even more archaic conditions, Ronald M. Berndt, *Excess and Restraint: Social Control among a New Guinean Mountain People* (Chicago, 1962).

circumstances or even claim to have special rights, can a second-order observation arise, because only then is one obliged to decide who is in a legal position and who is in an illegal position. Only situations such as these lead to a gradual increase in critical confrontation with problems or to the development of the schema of rule/exception. In tribal societies proceedings relating to transactions and the ensuing demand for decision-making were created even when there was neither 'political' authority for collectively binding decisions nor a recursive network for argumentation based on written texts.

This point of departure can be put more abstractly. The evolutionary achievements of language and law not only adjust society as a collection of living beings to its environment *structurally* but also enable *transient* adjustments to deal with *transient* situations. As soon as conflicts explode, they have to be solved, or at least diffused, case by case. This does not necessarily require the rigid preservation of a set of decision-making rules which can be passed on from case to case, let alone a set of environmentally adjusted norms. However, the greater density of such problems leads to the demand for stable orientations, which can be formed in many ways, whether in the form of a situationally and pragmatically developed knowledge of divination, or in the form of normative principles. Both these scenarios result in the type of relationship with the evolution of writing discussed above. Evolutionary achievements, which are successful under these circumstances, must be able to provide transient problems with patterns of solutions that are available to be recorded, but also potentially to be redundant, and which thus combine both variability and stability.

Any further development depends, however, on the differentiation of interacting systems, which allow for the negotiation of solutions to conflicts of norms.[50] Then communication becomes possible, which first attempts just to mediate (not very differently from the negotiations that result in a contract),[51] but which—with the addition of further conditions—can also aim to find out who is in a legal position and who is in an illegal position. Then more is at stake than just pacifying the wrath of Achilles. Here procedures are at stake, which must lead to decisions on the issue of legal and illegal. With this task in mind an understanding of viewpoints develops

[50] Here and in what follows, we leave aside equivalent divination practices which were definitely functional but point out that societies which cultivated this orientation (for example, China) and developed their literacy on this basis had much less need of an elaborate legal culture.

[51] This is evident from a large number of studies on currently still existing tribal societies (see for references above n. 49) which, however, hardly bear the marks of their original conditions but are societies which live (especially in Africa) under the influence of high cultures and more recently under the influence of colonial regimes and are, therefore, really parts of global society.

which are situationally invariable and reusable, and they help to confirm the law when variations occur. In this respect, too, it all depends on how expectations can be maintained. Only in the case of deviation do expectations turn into norms and only in the case of variation does an interest develop in the choice of reusable viewpoints.

No 'natural' points of view for such a selection exist in the minds of people, as was assumed in older natural law theories. No society can found its law on consensus if one means by that that all of the people will agree to all of the norms all of the time. Such a fixation with such states of mind is not achievable and, even if it were achievable, it would not be ascertainable. Thus consensus cannot be a condition for the validity of law and would, incidentally, exclude any possibility for evolution. Evolution depends, *instead*, on how the problem of social reconciliation is solved. This is the aim of the development of norms of competence, and of the proceedings that limit the former. Before the advent of proceedings, one had to operate with the presumption of consensus and a successful disregard for those who dissent. Moreover, proceedings make it possible that *a few people* (judges, legislators) take the validity of norms as binding *for all of the people* and for those few to make the correspondingly relevant decisions. Compared with the mere presumption of consensus, this principle of 'a few for all people' allows for a higher specification of norms and thus a sophisticated awareness of legal problems and the inadequacies of a wide array of norms. Presumptions of consensus do not become dispensable in this way. There is only a clarification (and with that possibly also a question) as to who defines those presumptions and to what they ought to refer.

Obviously there are certain preconditions for the emergence of proceedings and with them the principle of 'a few for all people'. They require at least that there be societies based on rank with status roles, if not even stratification with status families and the possibility of different members of a leading social class (aristocracy, patricians in city-states) occupying these roles. Reading and competence in writing were added to this requirement in the further course of evolution. Only via the detour of the clerical structure of the Middle Ages did legal roles become increasingly independent of status at birth, and thus accessible to upwardly mobile individuals. And not until the functional differentiation of society is fully established can the principle of 'a few for all people' be replaced by the person-neutral principle: the legal system for society.

But perhaps we are moving on too quickly. Initially the evolution of proceedings, in the sense of goal-oriented, differentiated, decision-seeking episodes in the legal system, led to a clearer visibility of the processes of selection. Through this, the evolutionary functions of variation and selection were separated. Variation attended to the mutation of law (which is largely unsuccessful but occasionally can be confirmed). Without it, no

evolutionary changes would be possible. Selection attends to the task of defining which opinion is in accordance with the legal system.

The decisive deviation from older social formations occurred when in the proceedings—which were differentiated for the purpose of selecting decisions—arguments were *no longer made exclusively ad hoc and ad hominem.* Such arguments, which are quite useful for conflict resolution and for an adjustment to changing situations, were discouraged, if not prohibited outright. They were perceived as not being in accordance with the law and were rejected. With this, the institution of confirming legal claims with oaths and oath-helpers lost its meaning. From then on—this must be noted and appreciated—people could manage without all the advantages of elasticity, which were only achieved by a transient adjustment to transient situations. The suppression of *ad hoc* and *ad hominem* arguments was initially improbable—and it is for that very reason that a decisive threshold of evolution lies here. The formulation of (and then, the memory of this formulation) law-specific concepts and rules for decision-making replaced the old arguments. The reference to old 'laws'—for instance, those of the reformer Solon or the people's laws in Rome—may have been helpful but they soon turned out as a more or less illusory reference in the daily business of legal decision-making. The decisive point was not the mode of legitimation but the unseating of the *ad hoc* and *ad hominem* arguments, which was achieved by one means or another. This prevented social structures outside the law—above all, of course, class-related status and familial relationships, friendships, and patronage—from having an excessively direct influence on the administration of justice. More than anywhere else, the forms of permissible argumentation and their limitations, however formalistic and traditionalist, reveal the differentiation of the legal system. The differentiation of legal proceedings is only a condition for the potential of evolution. The specification of the way in which arguments refer to legal materials in the legal system is the true carrier of the evolution of the legal system and the breakthrough to an autonomous legal culture, which can then even be differentiated from morals, common sense, and the everyday use of words.[52]

In sum, if *ad hoc* and *ad hominem* arguments are not permitted, a demand for justification arises which has to be satisfied in a different way, and that means that it must move, above all, in the direction of the identification of binding norms and the development of concepts and rules for

[52] There has been relatively little historical research on this process of differentiation, and ironically the adoption of social science approaches has led here to a move in the opposite direction, namely to an underscoring of what structures have in common and not what is different about them. See, however, on Roman law Antonio Carcatera, *Intorno ai bonae fidei iudicia* (Naples, 1964), and on the common law Oliver W. Holmes, 'The Path of the Law', *Harvard Law Review* 10 (1987), 457–78.

decision-making which can be assumed to apply to other cases as well. Not until this practice is established can a concept of justice be accepted which stipulates that equal cases are treated equally, and that unequal cases are treated unequally. This leaves it up to the legal system to establish what, based on what rules, can be seen as equal or unequal.[53] The long-term effect of all of this is a base of concepts, maxims, principles, and rules for decisions that forms the materials which are applied partly formally, partly critically, and which enable the judge to reject *ad hoc* and *ad hominem* arguments.[54]

Only in the case of Roman civil law did this result in abstractions, which rendered the law and its self-referential concepts independent of plain facts and made a law-centred evolution possible.[55] In conjunction with this there emerged a development, which is not found in the legal cultures of Asia Minor, or even of Athens: namely, the differentiation of special roles for legal experts, for lawyers. At first, this was restricted to the Roman aristocracy, and this restriction worked without the situation of members having specific offices or receiving role-specific forms of income.[56] A complete professionalization, equipped with the full range of economic and monopolistic offices, happened much later, especially in canon law and English common law of the Middle Ages, and in the early modern territorial states.

The decisive factor behind this non-standard development, which prepared the ground for a law-centred evolution, must have been the

[53] The reference to differentiation confirms indirectly that ethics never managed to solve *this* problem. The distinction between like and not like requires a lead from distinctions which were already successfully employed by the autopoiesis of law. A merely ethical and morally pure argumentation would lead to arbitrariness, and arbitrariness would lead to injustice. Obviously, this is contentious, but see David Lyons, 'Justification and Judicial Responsibility', *California Law Review* 72 (1984), 178–99; id., 'Derivability, Defensibility, and the Justification of Judicial Decisions', *The Monist* 68 (1985), 325–46, and on this point Neil MacCormick, 'Why Cases, have Rationes and what these Are', in Laurence Goldstein (ed.), *Precedent in Law* (Oxford, 1987), 155–82, at 166.

[54] This is not to deny that exceptions are possible. One of my first experiences as a legal trainee was the request of a judge in a local court that he noted in a draft of the judgment—on a motor vehicle accident—that the culpable driver had been awarded a war medal, an Iron Cross of the First Order. The amended draft gave, as a reason for the judgment, the fact that highly decorated persons presumably overestimate their driving competence and drive carelessly, if not aggressively. But this did not satisfy the judge either. He wanted the wartime decoration to be seen only as an aspect of the defendant's character, and it was not to be mentioned in relation to the (reviewable) juridical consequences.

[55] See Joseph C. Smith, 'The Theoretical Constructs of Western Contractual Law', in F. S. C. Northrop and Helen H. Livingston (eds.), *Cross-Cultural Understanding: Epistemology in Anthropology* (New York, 1964). 254–83.

[56] See Wolfgang Kunkel, *Herkunft und soziale Stellung des römischen Juristen.* 2nd edn. (Graz. 1967); Mario Bretone, *Storia del diritto romano* (Rome, 1987), 153. On the rhetorical and political handling of legal questions in Athens before this development see J. Walter Jones. *The Law and Legal Theory of the Greeks: An Introduction* (Oxford, 1956), 128; Hans Julius Wolff, *Rechtsexperten in der griechischen Antike, Festschrift für den 45. Deutschen Juristentag* (Karlsruhe, 1964), 1–22.

differentiation of Roman case law, especially the numerous instructions which office-holders passed on as premisses for decision-making to judges whom they had appointed. Because this material was documented in the form of edicts, it could be edited or refined when new conditions so required. This gradually increasing complexity necessitated the existence of a corresponding expertise, which could be used by the participants (who, of course, were not lawyers in any modern sense of the word). Legal knowledge (jurisprudence), therefore, was initially no more than knowledge about what was happening and an attempt to order it with the help of classifications, and later epigrammatic forms (*regulae*). There was no need to assume that there was a self-evident order in the realm of helpful abstractions, and it was not until the Middle Ages that the accumulated texts began to be interpreted in this way and to be subjected in turn (i.e. independently of the demands of case law practice) to ever changing forms of tests for consistency. The idea of validity *qua* system was unknown to Roman civil law and so it remained. But at least the tendency to condense law in legal propositions (*brocardia*) was developed to provide a link to the Middle Ages; and only since then have legal dogmatics and doctrine become a stabilizing factor *which has begun to affect the evolution of law itself*.[57]

The development of Roman civil law into a more complex law, which refers concepts to cases and cases to concepts, certainly did not happen accidentally. It took place in conjunction with those legal concepts which lend themselves to a structural coupling of the legal system and the economic system, namely property and contract.[58] A specific concept for property was hardly necessary as long as all vital holdings could be subsumed under the concept of 'family': wife and children, slaves and cattle, house and land.[59] And for a long time it may have been sufficient to understand

[57] Harold J. Berman, *Recht und Revolution: Die Bildung der westlichen Rechtstradition* (Frankfurt, 1991), uses a similar argument when he refers to the confluence of social and organizational developments with the rediscovery of Roman texts in the eleventh and twelfth centuries as being the decisive turning point. Similarly, the motive here was the resistance of the Church to a possible theocracy of the emperor and a politico-religious despotism and not the still uncreated legal system. [58] See for more detail, Ch. 10.III.

[59] Originally property in land did not belong to individuals but to the kinship. Only the movable, manipulable things were *res mancipi*. This, however, changed with the effects of the formation of cities. At first, even here a general concept of property and a distinction between law concerning persons and law of things were missing. For instance, distinctions here were between *res mancipi* (and consequently *mancipatio, emancipatio*) and *res nec mancipi* (for instance, cattle, *pecus, pecunia*). They reflect a clear reference to the prevalence of strongly segmental societies and what is important or unimportant to them. This also applied to the access to *mancipatio* for foreigners without *ius commercium*. Even the highly developed late republican jurisprudence sees law primarily under the perspective of the family household, *familia*. See on Quintus Mutius Scaevola, Aldo Schiavone, *Nascita della giurisprudenza: Cultura aristocratica e pensiero giuridico nella Roma tardorepublicana* (Bari, 1976), 116.

property as possession and control over everything one owned. It may have been deemed adequate to protect it against interference from outsiders and, if necessary, to detect an offender and punish him, or to force him to surrender possessions or make up for loss. Only relatively recently do we find the decisive distinction between property and possession, that is, the purely juristic construction behind the visible property relations which also deserve protection in their own right. Not until recent times could property as a juristic construction be enforced, with the help of whatever protection could be given to factual possession; but such entitlements do not entitle the application of (putative) law coercively, but rather only and exclusively enforcement by legal procedure. Not until then did legal title become independent of the physical strength and fighting strength of the titleholder.[60] This alone led to the division between civil law and penal law and opened up property as a point of reference for quite different forms of contract, especially for the disposition of credits. Only then could possession be argued in legal proceedings, independent of the question of who was the owner of the things in possession.

One is an owner not only in relation to offenders but also in relation to everybody else, and in relation to any number of participants in the legal system who are bound to respect the property right and who have the option of eventually buying the property or obtaining other contractual rights over it, for example the rights of use. Thus the universality of property, and its reference to the legal system, is not related to the arbitrariness of the use or abuse of possessions. It is precisely this which was guaranteed or recognized as fact by *manus*, in terms of the control over things. The universality is, in fact, given by reference to the system, that is, by the fact that everybody has to respect the owner as the owner, unless the legal system provides otherwise. Universality is given by the fact that, in relation to all property, everybody else is a non-owner.

Similar specializations happen in contract law. Here the difficulty lies in seeing the contract as a reason for obligation and not simply as a transaction from hand to hand; one could say that the contract becomes synallagmatic (i.e. becomes a bilateral contract with binding reciprocal obligations), which is a regulatory principle for the relations between partners and, above all, in cases where performance may be disrupted. The transaction itself is irrelevant, or, at best, relevant only as a juridical condition for the development of special kinds of contracts (executed contracts). The contract itself takes the place of the exchange. It regulates its own execution.

[60] See on this point Robert C. Palmer, 'The Origins of Property in England', *Law and History Review* (1985), 1–50 for the period 1153–1215. Property in the modern sense is described here as a clear result of an evolutionary development, as 'part of the law developed by accident: by acts that had unintended consequences' (p. 47). The motive was originally the solution of political conflicts between vassals and between master and vassals in the context of feudal society.

There is little doubt that this is how it still works today, by and large, and that this working has been made easier by legislation that replaced the rules representing decisions that were developed and improved by legal practice. This sense of obviousness, however, diverts attention away from the forms of argumentation which are, once again, coming dangerously close to *ad hoc* and *ad hominem* arguments—take only, for example, the 'balancing of interests' as the Trojan horse of all juridical reasoning.

Neither variation nor selection amounts to an externally induced innovation of law. Evolution is not a planning scheme. Many different things can lead to a legal dispute, but they arise frequently (if not mostly) from an uncertain and unclear state of affairs. The legal system cannot control the factors that lead to a dispute and thus require a decision to be made. Neither do legal proceedings serve to change the law—they merely clarify it. Legal proceedings 'declare the law', as is said in the common law. Even if a court searches and finds rules for its decisions, which, according to the opinion of the judges are new, and even if there is a realization that an established legal practice is no longer satisfactory because circumstances have changed, this is merely an example of punctuated structural change and not evidence of a plan, or the control of the system as a system. It follows that the incremental transformation of law is not the result of purpose-oriented activities. It is a result of the ongoing reproduction of the difference between variation and selection and is a residue of effective evolutionary difference. Hence there is initially no need to find a place for the changeability of law in the self-description of law; this does not need to be reflected in law. Law's changeability comes by itself.

As such, dispute resolution is not always a decision between old law and new. For example, the myth of Antigone, which stylizes an exceptional situation, is not about this conflict. The idea that new law is better than old is a very recent reflection of a long-standing practice. When legal knowledge already exists, there is at first only room for cautious amendment, for arguments according to analogies,[61] for extending experience with cases to new cases. Evolution is here, like elsewhere, not a result of purposeful processes but an unintended by-product, a result that occurs for external rather than genetic reasons.[62] A society which can afford this kind of legal organization has already built in it a level of second-order observation that allows it to

[61] And one could add, in view of Jewish law, even allegories, see Louis Ginzberg, *On Jewish Law and Lore* (Philadelphia, 1956; reprint New York, 1977), 127–50.

[62] This applies as well to the evolution of organic systems, especially if one takes as the indication of its direction the sense of an 'increase of the systems' own complexity' as a feature of evolution. See on this point G. Ledyard Stebbins, 'Adaptive Shifts and Evolutionary Novelty: A Compositionist Approach', in Francisco Ayala and Theodosius Dobzhansky (eds.), *Studies in the Philosophy of Biology: Reduction and Related Problems* (London, 1974), 285–306, at 302. See also id., *The Basis of Progressive Evolution* (Chapel Hill, 1969).

differentiate the legal system. In the form of legal proceedings in courts, there is already a level on which normative expectations can be confirmed or rejected, depending on whether they are in accordance with the law or not. The code legal/illegal is already being used and the effect of this coding occurs as predicted: a residue of programmatic semantics builds up, which can be referenced if one needs criteria for the attribution of legal values.[63] The selection function, however, cannot, as yet, be distinguished from problems associated with the restabilization of the system. It operates in relation to law, which is assumed to be stable, with the justification of old law, or if that is not sufficient, with references to nature or to a divine order. Even if there exists, as in the later Roman Empire, a comprehensive practice of imperial edicts (*constitutiones*) which affect the law, the law gives such edicts—with every appearance of reluctance—only a special status.[64]

Independently of legislation with its poorly articulated concepts, the practice in courts and the doctrines, which paved the way for this practice, are also increasingly undermined by reference to the stability of the existing law. This began in the late republican epoch of Quintus Mutius Scaevola, after an earlier generation of lawyers had begun to record the products of their counselling activities in writing. First attempts at a conceptualization of a predominantly dialectical kind (that is, by abstraction of the '*genus*') appeared, together with a doctrine which was no longer interested exclusively in individual cases.[65] Because legal opinions (and not only laws) were recorded in writing, lawyers realized that traditional law was no longer suitable.[66] so they tried to preserve it by conceptual systematization—a typical example of the conservative tendency of evolutionary innovation.[67] With the rapid growth of textual material during the classical time of Roman jurisprudence, these attempts were extended to the establishment of legal concepts and rules for decision, which were supposed to assist in the application of law. In a society in which legal norms and opinions were recorded in writing but in which their diffusion was largely oral due to the

[63] See Ch. 4.

[64] This insight, formulated as a concession in the famous words of Ulpian 'Quod principi placuit, legis habet vigorem' (D.1.4.1.1), did not attain the status of a maxim of sovereignty until early modernity; and even then one could assume initially that a truly virtuous sovereign would not be pleased by just anything because if this were the case he would not be a sovereign but a tyrant who could be resisted legally.

[65] See on this point Schiavone, *Nascita della Giurisprudenza*, 69.

[66] Schiavone talks about jumps of quality in jurisprudence on the basis of an intensively nurtured bond with tradition, namely a 'nascita della giurisprudenza romana come pratica intellettuale definita, formemente portata all'autoriproduzione, dotata di un quadro concettuale e di meccanismi logici che le assicurano uno statuto teorico altamente specifico, autonomo rispetto ad ogni altra forma di sapere, e tendente a mantenersi costante' (ibid. 86).

[67] This is often called Romer's Principle following Alfred S. Romer, *The Vertebrate Story* (Chicago, 1959).

limited availability of books, that is, in a society before the invention of printing, legal knowledge often developed an idiomatic form for memorizing rules in cues or mnemonic devices which were listed and learnt for use as rhetoric in court.[68] In this way, idioms which had been borrowed partly from the *Corpus Iuris* and partly from other sources could be turned into legal maxims that could be learnt and used, as apparently old ideas, to implement innovative demands.[69]

Legal knowledge that gives stability to legal practice developed on the basis of the careful comparison of old, already decided cases with new ones. Relevant to this comparison were conceptual classifications, types of legal institutions, and tried and tested rules for making decisions. The method was basically the repeated testing of the scope of conclusions drawn by analogy—that is, neither a deduction from principles nor an inductive generalization—for the goal was not to find rules that could be generalized but to come to decisions that could be justified. In this process, the new and as yet unmade decision was not necessarily determined by what already existed in legal knowledge. It could very well be that the newness of the extant case was revealed by the existing repertoire of cases. As is typical of evolutionary contexts, the consolidated result was both the end of a phase

[68] It is widely acknowledged today that even 'literate' societies, which have achieved a high level of literacy, communicate almost exclusively orally and preserve requisite forms in written texts. See, for the case of law, especially Peter Goodrich, 'Literacy and Language of the Early Common Law', *Journal of Law and Society* 14 (1987), 422–44. The same can be said for the area of medicine and the study of medicine. See here above all the texts of the medical school of Salerno, in: *The School of Salernum: Regimen Sanitatis Salerni: The English Version by Sir John Harington, Salerno, Ente Provinciale per il Turismo* (n.d.). This English version was written in 1607 (!) to be printed (!).

[69] This can be seen very well from the juridical justifications which already proclaimed the legally sovereign domination of the ruling house before Bodin. In Jacobus Omphalius, *De officio et potestate Principis in Reipublica bene ac sancte gerenda libri duo* (Basle, 1550), the usual formulae can be found, such as 'Princeps legibus solutus est', 'Princeps lex animata in terris', 'Principis voluntas pro ratione habeatur', or the consistently applied formula quoted in n. 20, even though neither substantive law nor the texts themselves exempt the sovereign from being bound by law. As an example of maxims created out of context and thus given false meaning see also Adhémar Esmein, 'La maxime "Princeps legibus solutus est" dans l'ancien droit public français', in: Paul Vinogradoff (ed.), *Essays in Legal History* (London, 1913), 201–14, and on the history of this formula in more detail Dieter Wyduckel, *Princeps Legibus Solutus: Eine Untersuchung zur frühmodernen Rechts- und Staatslehre* (Berlin, 1979). Another example is the use of a formulation from D45.1.108, which deals with a complicated case of dowry. The text reads 'nulla promissio potest consistere, quae ex voluntate promittentis statum capit'. Jean Bodin, *Les six livres de la République* (Paris, 1583; reprint Aalen 1967), 132, quotes wrongly, namely instead of *promissio obligatio*, and deduces the momentous doctrine that a sovereign could not bind himself because of natural law. And a last example: the sentence 'quod omnes tangit omnibus tractari et approbari debet' referred originally to a case with a number of guardians but reappeared in the Middle Ages as an argument in discussion on the principle of representation in corporations.

of evolution and the condition for the recognition and specification of further variation.

If legal practice closes itself in a temporal continuity, if it is ready to be guided by self-produced rules and if the task in the individual case is to measure the case against the rules and the rules with the case, evolutionary selection achieves a very specific form. In each case one has to ask whether the case, when seen from the perspective of the rules, is equal to other cases or not. If it is equal to them, then and only then can one 'subsume' it, namely apply the rules to that particular case. If the case is not equal to other cases, then new rules have to be developed. It is this practice that provides the platform for understanding justice not as just the *idea* of equality but as the normative form of equality, that is, as the requirement to distinguish between equal and unequal, and to treat what is equal equally and what is unequal unequally.

Depending on the result of such (and exactly such) a decision, the evolution of law is within its own communication networks directed towards either negative or positive feedback. Either the legal system remains stable on the basis of existing rules, which are applied over and over again, and which may cause tensions outside the law, or it deviates from the existing point of departure and constructs a higher complexity by distinguishing and overruling (in the terminology of the common law) over and over again. Only in this last case is one faced with the problems of structural (and not only procedural) re-stabilization, namely the question whether and how the system can still function autopoietically in view of this ever increasing complexity and how it can remain, for instance, sufficiently attractive to users who rely on it, and keep on producing legal cases.

The guidance of effective legal knowledge by stereotypical formulae, initially delivered and implemented by oral transmission, disappeared with the increasing influence of printed literature. Increasingly, the medieval legal system with its glosses and commentaries, its privileges and contracted individual obligations, its procedural structure of writs and *actiones* by which the substantive law is guided, presented itself as tangled. Printing offered the opportunity for diffusion of legal material into other forms of texts. These texts were written directly for printing. Additionally, printing allowed for the collection, selective documentation, and further diffusion of this legal material, which until then had only been passed on orally.[70] Only printing provided the opportunity, and thus the demand, for simplification, systematization, and a methodical approach, which resulted in the

[70] Above all, the official editing of the French *coutumes* is famous in this context. It was begun in the fifteenth century, before the invention of printing, but was later improved, juridically worked through, and modernized with the help of printing. For a brief overview see Phillipe Sueur, *Histoire du droit public français XVe–XVIIIe siècle*, vol. 2 (Paris, 1989), 39.

shape of continental legal science.[71] At the same time, printing provided one opportunity which was used particularly by the common law: namely the opportunity to concentrate on the particularity and artificiality of case-law practice and on the context for the legitimation of historicity and rationality, that is, to move on to a phase of self-observation and an ideological and, in the eighteenth century, national self-aggrandizement.[72]

To sum up, we can now speak of legal dogmatics, which take note of historical consistency and the systematic use of concepts. This semantic material, which has been abstracted from legal practice (but which is by no means impervious to it), raises the opportunity to discuss issues of construction. This material can be used to reject decisions which cannot be so constructed; but it can also be used to justify decisions which comply with the long-standing use of concepts. The result is that in many cases the scope of legal institutions has gradually spread,[73] this being the typical evolutionary process of the 'amplification of deviance': institutions of considerable importance have developed from small but effective beginnings. Their significance can scarcely be described in the form of definitions because they sum up the experience of countless cases. Only practitioners 'understand' their relevance.

Not until the end of the nineteenth century did one begin to turn against this approach and to reject it as 'legal formalism'. Increasingly,

[71] In Italy a humanist (or better: rhetorical) criticism of the typical juridical working with texts began back in the early fifteenth century, namely before printing. Here, however, questions of style were in the foreground and long practice with the rhetorical tradition provided the means. See, for example, Domenico Maffei, *Gli inizi dell'umanesimo giuridico* (Milano, 1956; reprint 1968). On the consequences of printing, which did not turn out to be a problem until the sixteenth century, see Hans Erich Troje, 'Wissenschaftlichkeit und System in der Jurisprudenz des 16. Jahrhunderts', in Jürgen Blühdorn and Joachim Ritter (ed.), *Philosophie und Rechtswissenschaft: Zum Problem ihrer Beziehungen im 19. Jahrhundert* (Frankfurt, 1969), 63–88; id., 'Die Literatur des gemeinen Rechts unter dem Einfluß des Humanismus', in Helmut Coing (ed.), *Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte* II.1 (Munich, 1977), 615–795, at 741. In the area of the common law one can find initiatives in the same vein, which fall short of the rhetorical humanist trend on the continent. See Peter Goodrich, *Languages of Law: From Logics of Memory to Nomadic Masks* (London, 1990), esp. 70; further, there is also Francis Bacon's unsuccessful initiative to react by way of legislation through new compilations and a methodical and scientific approach to legislation. See *De augmentis scientiarium* 8. 3, aphorism at 59, quoted from the English translation in: *The Works of Francis Bacon* (London, 1857—), vol. V (1861), 10; id., A Proposition to His Majesty . . . Touching the Compilation and Amendment of the Laws of England, *Works*, vol. XIII (1872), 57–71, and on Bacon, Barbara Shapiro, 'Sir Francis Bacon and the Mid-seventeenth Century Movement for Law Reform', *American Journal of Legal History* 24 (1980), 33–360.

[72] See on this and counter-movements from Bacon via Hobbes and Blackstone to Bentham, Gerald J. Postema, *Bentham and the Common Law Tradition* (Oxford, 1986); David Lieberman, *The Province of Legislation Determined: Legal Theory in Eighteenth-Century Britain* (Cambridge, 1989).

[73] For examples, such as the law of liability and the due process clause in the United States, see Lawrence H. Friedman, *Total Justice* (New York, 1985).

innovations were justified directly as a result of the use of norms of competence, whether those of the legislators, or—increasingly—those of judges. The general instrument of making distinctions could then be used much more freely, even though it had considerable effects on what was produced as legal semantics with the requisite programme functions.

By differentiating legal dogmatics, which—with their unique features—belong to the legal system (and should not be confused with natural law as taught in Latin schools), the stabilizing function of law is also differentiated. Legal proceedings may adopt variations and give them structural significance for future decision-making. Even if this is successful, the question remains whether this has an impact on legal doctrine or is only part of the legal system, which can be changed or become a precedent for legal decisions at any future time. There is, in other words, a differentiation between the function of selection and the function of stabilization, and in this differentiation process everything that serves stabilization transmits its own impulses for innovation. As recently as the seventeenth century the political system was warned against reforms, which always brought the risk of resistance, rebellion, and civil war.[74] The legal system, however, had already achieved a dynamic stability, which gave rise to innovation with far-reaching consequences—for example, the concepts of property and of subjective rights, the latitude for litigation relating to informal contracts, and, last but not least, the innovative concept, compared with the Middle Ages, of a 'public law'.[75]

Only through complex legal dogmatics can the stabilization and restabilization of law be shifted from the simple (and most of the time religiously justified) validity of assigned norms to their *consistency*. Dogmatics guarantees that the legal system approves itself in its change as a *system*. That is why this dogmatic approach was called the 'systematic method'.[76]

[74] See, for example, Iustus Lipsius, *Politicorum sive civilis doctrinae libri sex* (Antwerp, 1604), 96; Jean de Marnix, *Résolutions politiques et maximes d'Estat* (Brussels, 1629), 286; Johann Hieronymus Im Hof, *Singularia Politica*, 2nd edn. (Nuremberg, 1657), 241; Estienne Pasquier, *Les Recherches de la France*, new edn. (Paris, 1665), 678 ('Il n'y a rien qu'il faille tant craindre en une Republique que la nouveauté').

[75] The finding that the conditions for a modern (capitalist) economic order are created in the legal system and not in the political system applies also to the United States at a later period. See Morton J. Horwitz, *The Transformation of American Law, 1780–1860* (Cambridge, Mass. 1977). But see criticism on this point by A. W. B. Simpson, 'The Horwitz Thesis and the History of Contracts', in id., *Legal Theory and Legal History* (London, 1987), 203–71. Simpson denies the independent achievement of common law and refers to receptions from European civil law. See also id., 'Innovation in the Nineteenth Century Contract Law', in *Legal Theory and Legal History*, 171–202.

[76] See, for example, following Nicolai Hartmann, Heino Garn, *Rechtsproblem und Rechtssystem* (Bielefeld, 1973), 28, in relation to the ongoing adjustment of system and solutions to problems.

However, consistency should not detract from the fact that such a dogmatic approach does not require a reflection on the unity of the system or orientation by a sense of the system as a whole.[77] It is only an attempt to solve 'similar' cases consistently. Like changed law, traditional law is valid if it can be upheld in the context of related legal ideas. The possibility of a dogmatic construction of a case solution can serve as proof of consistency. This, in its turn, makes it possible to identify situations where a construction is not possible, and to be aware that there is a problem if the result is at odds with a changed perception of justice or that which a trained legal mind would accept as a reasonable solution. Legal dogmatics, or a correspondingly broad knowledge of the *ratio decidendi* in a large number of legal decisions, makes it possible to identify defects and to look, not always successfully, for better possibilities of construction. The law gains the opportunity to mature through its own defects. An example of this would be the admission of strict liability in certain circumstances in spite of limited liability being acknowledged in principle and upheld by statute, either because the party not liable, by a subjective test, had created a dangerous situation or because this party alone controlled possibilities and alternatives which could have helped to avoid the risks altogether.[78] On the basis of dogmatic constructions, the idea was conceived in the late Middle Ages that the principle of *bona fides* could fill all the gaps in the traditional system of Roman contract types and corresponding litigation (*actiones*), so that each legal contract could be accepted as a title: *ex nudo pacto oritur obligatio.* Likewise, eighteenth-century interest in the accumulation of capital and limited liability searched for and found legal forms for juristic persons, forms which could not be accommodated in the old law on the privileges of corporations. This can be seen as an adjustment of law to changing conditions, but it does not mean that the environment determines the legal system. Rather, the legal system notices defects only in its own devices and fixes them with its own means.[79] The environment may irritate the legal system and it may cause disturbances for its sense of

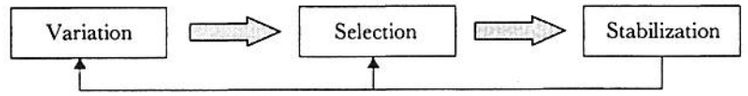
[77] This is yet another version of the finding that the orientation by the function of law is not sufficient to determine the decisions of the system.

[78] See on this point and similar developments in the common law, Edward H. Levi, 'An Introduction to Legal Reasoning', *University of Chicago Law Review* 15 (1948), 501–74.

[79] See Alan Watson, *The Evolution of Law* (Baltimore, 1985), with good examples from the evolution of Roman contract law. Here the formation of types of contracts for non-pecuniary contracts (*mandatum, depositum*) is interesting because it cannot be explained by economic development, and the plausible (legally derived) explanation is that the law must especially protect acts of friendship where the insistence on a formal allocation of rights and obligations is felt to be an embarrassment. Moreover, the institution of contract is a good example of the fact that legal problems are not inherent in the balance of mutual performances—which can be left to the economic system—but in the persistence of the 'synallagmatic' connection and in the control of disturbances which can occur unexpectedly after the *conclusion of the contract.*

justice: already such irritations, however, are system-internal formulations of the problem and the solutions are of course tied to what is deemed to be within the reach of a construction made under valid law.

From the standpoint of law, legislation is included in this sort of innovation for the fixing of defects. When a deficiency is detected, it is a question of whether it can be overcome with or without changing the law. This kind of 'mischief rule' is still applied in the common law today, at least as a maxim for interpretation.[80] It postulates that law be seen as a system, as a totality of consistently practised problem-solving solutions, and that one of them be selected in a given case. Furthermore, it postulates in the case of the interpretation of legislation that it be seen that the legislator wanted to proceed in this particular way, or that a judge insert a suitable rule for generalization if no rule could be found. In this sense law itself is a motivator for innovation, but at the same time encourages the rejection of innovation for the sake of its stability, consistency, and justice. At any rate, legal evolution which advances in this manner cannot be thought of as blind, or wholly intentional or, least of all, as a point-by-point response to impulses from outside.[81] The evolution operates in a circular fashion by responding partly with variation to external impulses, and partly by reusing its stabilization as the motivation for innovation:



This circular and not sequential model of evolution allows us to pose the question of the evolutionary change of the conditions for legal evolution. First of all, it is important to note here that the arrangements for the stabilization and restabilization of law have become dynamic themselves and promote the variation of law in their own right. The legal system is no longer waiting in the wings for people to engage in a dispute in order that it can find a just solution that is in accordance with the law. Instead, law itself produces the situations, which trigger off conflicts, by regulatory manipulation of everyday life. Law promotes itself.

We can find the reasons for this changed form of evolution, above all, in the massive impact of legislation in the nineteenth and twentieth centuries.

[80] See Peter Goodrich, *Reading the Law* (Oxford, 1986), 55 and 117.

[81] See, for example, W. Jethro Brown, 'Law and Evolution', *Yale Law Journal* 29 (1920), 394–400, on the rejection of such a distinction. From a sociological perspective the assumption that the distinction between intention/non-intention amounted to a crucial distinction is related to the transition from the theory of social action to systems theory.

This is closely related to the democratization of the political system and the constitutional channelling of political influence through legislation. Politics has a massive impact on the legal system by issuing huge numbers of new directives, which need to be received, understood, and worked through. Of course, there exists in legislative procedure a professionally competent assessment whether political wishes can be fulfilled with existing valid law or whether they require a change of law. In this respect the legal system still operates as a system and, as before, a variation becomes effective only as something that is perceived by the system as an irritation and for which it can find a form. The mechanism of variation itself, however, has changed. The 'noise' of the political system turns into another incident for variation, but the one that is probably the most prevalent today. The law is no longer varied exclusively by disputes, which may precipitate a preference for new rules. Politics has its own goals and thereby creates the differences, which may result in other conflicts. If a country demands that certain forms be filled in at immigration control, and if—as in the United States—questions have to be answered regarding one's race, this does not provide a solution to a conflict but creates an unfavourable situation for someone for whom this question may create a conflict. Without the norm there would be no conflict. The mechanism of variation of law becomes circularly supercharged with self-produced conflicts, in which the norm stipulates how the conflict is going to be solved.

In situations like these, the evolution of law must resort to interpretation. Interpretation performs a consistency test by examining which meaning of a norm fits in the context of other norms. In contrast to the great codifications of the eighteenth and nineteenth centuries, statutes are no longer interested in consistency. In view of this, courts developed with much greater freedom for interpretation. But they cannot use this freedom to regain consistency in view of the mandated texts on which they must rely. There is now—and this is an indication of the crack that has opened up—a lively discussion about the methods of interpreting statutes, which, however, has little bearing on decision-making (why should courts lay down a certain method for their decisions?).[82] The solution rather lies in a higher tolerance of ambiguity, a softening of the traditional doctrinal positions, indeterminate legal concepts and forms for considering the facts and circumstances of a case, with which courts can find, *ad hoc*, a seemingly suitable solution, but which cannot establish a thoroughly consistent legal practice. Legislators, in turn, adopt these formulae because they, for their part, cannot make out the limitations through which consistency can be maintained in spite of adding new norms.

[82] See, from a comparative point of view and the resulting typification, D. Neil MacCormick and Robert S. Summers (ed.), *Interpreting Statutes: A Comparative Study* (Aldershot, 1991).

The fact that norms hardly represent their interest in consistency any longer indicates at the same time that they can easily be changed as individual norms. Legal change becomes normal. The average period of the validity of norms decreases. Often norms are put in force only temporarily or with the expectation of a better insight at a later point in time. Temporal inconsistency (which may be less painful or less unjust) compensates for what cannot be achieved through factual consistency.

Karl-Heinz Ladeur put forward the view that the unity of law can no longer be maintained under these circumstances and that it is replaced by a pluralist concept of law as far as values and interests are concerned.[83] What speaks against this concept, however, is the fact that the legal system continues to reproduce itself autopoietically, and that it is not interchangeable with other systems. Using a terminology which will be discussed in greater detail in Chapter 8, one can formulate the argument that the legal system increases its variety (its number of possible operations) while it decreases its redundancy (more economy of information, accessibility, and ability to recognize errors, etc.). In this way, law may become more robust and in this sense more 'amenable to errors'.[84] In turn, however, law loses its transparency and reliability for all the other systems in its environment that want to apply it. And that is exactly why the legitimacy of law is questioned time and again—acutely or hopelessly, out of frustration or anger, full of value-perspectives that are beside the point for law.

The consequence of this evolution for the legal system is that there is only positive law, although moral philosophers may want to express a different opinion. This means that there is only law which the legal system itself implements with the symbol of legal validity. And this applies independently of the actual historical form of legal tradition. This applies to continental civil law and it applies to English common law; and it also applies independently to our extensive legislation, which proactively creates new law or codifies old law. This can clearly be seen in the common law in the way, for instance, in which precedents reinforced decisions in the nineteenth century, when the legislative positivism recommended by Bentham and Austin could not take hold.[85] It is incontestable that valid law

[83] See K.-H. Ladeur, *Abwägung—Ein neues Paradigma des Verwaltungsrechts: Von der Einheit der Rechtsordnung zum Rechtspluralismus* (Frankfurt, 1984).

[84] The tendency discussed above in Ch. 4.IV to seek reasons for decisions in the *consequences* of decisions, which are not yet known at the moment of the decision but somehow have to be assessed, is clear evidence of this tendency to become more 'amenable to errors'. It makes no difference to the validity of law if the assessment of the consequences is faulty. See also the verdict on the apparently so precise 'economic analysis of law' by Anthony D'Amato, 'Can Any Legal Theory Constrain Any Judicial Decision', *University of Miami Law Review* 43 (1989), 513–39.

[85] On this development in England in the eighteenth and nineteenth centuries see the contributions of Gerald J. Postema and Jim Evans in Laurence Goldstein (ed.), *Precedent in Law* (Oxford, 1987).

cannot be understood as a logically closed system because no logical system can give reasons for the absence of contradictions in its own system. The answer to this problem of incompleteness, however, is not given by an external guarantee of validity but by the ongoing production of legal texts, which identify what is valid law and what is not. The 'rationality' of the system, then, is not given by a goodness which is secured by principles, but by the question, which arises anew in every situation, whether or not the valid law should be changed in relation to the references which have become a problem. Therefore, the validity of law is founded not on unity but on difference. It cannot be seen, it cannot be 'found'—it is the ongoing reproduction of law's difference.

IV

The previous comprehensive section, which discussed the evolution of law towards systemic operative closure, requires a correction in one important respect. The statement that law has evolved by itself and that society as its environment has provided accidental impulses, which have caused variations and occasional innovative selections, can still be upheld. Such responsiveness in relation to the environment is evident in individual legal institutions, for instance in the sensitivity to people's frailties gradually being recognized in criminal law or the forms of civil law with their preference for providing possibilities for litigation. Parallel to the development of the modern territorial state, such responsiveness is also evident in the development of public law (which at first sight is hardly distinguishable from civil law or natural law) and its culmination in modern constitutional law. However, are there not also social conditions—beyond the varied species of law—which determine that a legal system becomes operatively closed, specifying its own structures by its operations and changing them if events, internally identified, so warrant?

Our assumption is that Hobbes's problem—how to account for the ubiquity of physical force—represents such a condition. Formulated positively, the law has to start from the condition of peace already secured if it is to achieve more than just the conditioning of physical force. This, then, refers to the dependence of the evolution of law on the parallel evolution of the political system that, with a kind of primary expropriation of society, withdraws the means of power, of physical force, from society and consolidates its own powers on this basis.[86]

In a very basic sense, law has always had to deal with solutions to conflicts that might need to be resolved violently. This has to be seen in relation to

[86] See on this development in the context of a theory of symbolically generalized media of communication, Niklas Luhmann, *Macht* (Stuttgart, 1975).

the fact that law itself is a source of conflict in the first instance that often—and more frequently as law becomes more developed—leads to conflicts in which both of the parties refer to law. It is precisely this development that has led to the evolutionary achievement of proceedings in which law is, as it were, passing judgment on itself. This fact alone, however, did not facilitate the separation of civil law and criminal law even though it did make proceedings dependent in their decision-making on the question of which decision was enforceable. The sheer number of 'oath-helpers' which a party could muster and the obvious conspicuousness of being prepared to enforce the law could be taken as an indicator of that. Apart from some cities in ancient times and in the Roman Empire, which were islands of peace, the symptomatic incorporation of violence in law must be seen as normal until the high Middle Ages and as a barrier to the further development of juridical semantics and juridical self-reference.[87] In its readiness for violence, law was tied and remained tied to the structures of its societal environment, which it could not control, and it was tied, above all, to the kinship and clan formations of segmental societies. This necessarily impeded the refinement of juridical semantics, the condensation and confirmation of experience with new cases, and the juridical attention to conceptual and dogmatic consistency (and their impact on legal decisions).

It became possible to overcome this barrier to further evolution only when politics took control of physical force and promised peace (even though in the Middle Ages the prime political force was the organized Church, equipped with canon law). This implies that legal claims can be enforced once their legality is ascertained.[88] Then the problem of structural coupling can be restricted to the relationship between politics and law—either by taking these functioning systems as a unit, which converges at the top, or by coupling them with the special institution of the constitution.[89] One could say that evolution 'searches' for solutions to the problem of how the legal system can be structurally coupled which do not impede the evolution of the legal system—or, leading to the same result, solutions which facilitate the development of the internal complexity of law through the special evolution of the legal system.

If this starting point of the legal system has its critical moment in the problem of violence, it should be possible to observe that this dependence on violence takes on a different form after a new evolutionary push. This is, indeed, the case. Punishable offences were no longer understood as the

[87] See above all Berman, *Recht und Revolution*.

[88] Up to the seventeenth century, there were exemptions in a quasi-concentrated form, namely for the aristocracy; and they are still found today when police refuse to act on the grounds of 'public order and security', that is, in order to avoid further disorder.

[89] For a further discussion of these two concepts, which can, in their turn, be distinguished by the degree of freedom they leave to the coupled systems, see below Chs. 9 and 10.

violation of a victim, who could defend himself or demand satisfaction, but as a violation of criminal law. Because of this, there was an unprecedented rise in criminality in the seventeenth and above all in the eighteenth century—in the public interest, so to speak. It produced modern theories of crime (Beccaria, etc.), led to the establishment of penal colonies, and caused bourgeois society to sanitize itself with the help of work ethics and moral outrage. Only when mediated by legislation could legally protected interests find their way into law. Hence the rule: *nulla poena sine lege.* The archaic law of the repayment of violence with violence was broken, or transferred to the state as the only actor entitled to apply a violent response. Initially the state still claimed 'raisons des executions sans proces' with the quasi-medical advice 'le mal se guarist par le mal' [evil is healed by evil].[90] However, in the course of the developing pacification of various territories in the seventeenth century, even this right to adjudicate without proceedings turned out to be superfluous—at least as long as law and order prevailed.

Can one say that the law fractures its own peace with violence in the course of its differentiation as a self-evolving legal system? At any event, law's reliance on itself had thus become visible as a paradox—and was formulated in these terms.[91] An external reference—in this case, violence—had to be expunged and replaced with a self-reference which had to come to terms with the environment—and that now meant with the central will of the political sovereign—in a different way.

Since the eleventh century, a civil law has been developing in Europe on the basis of Roman law and separately from criminal law. Initially it was divided into canon law and secularized civil law.[92] The recourse to violence by an individual who felt his rights had been violated also had to be stopped in this area of law. Access to legal proceedings had to compensate for the removal of violence—legal culture could develop no other way. This compensation was, of course, only convincing if judgments by courts could be enforced and decision-making was not distorted by an anticipation of the particular power relations. If one wants to appreciate the evolutionary improbability of such a development, one has to note another remarkable fact: *law* itself had to determine and eliminate *violations of the law.* It had to

[90] See this justification by Pierre Ayrault, *Ordre, formalité et instruction judicaire* (1576; 2nd edn. Paris, 1598), 90 and 97. This text refers to criminal procedure.

[91] 'Qu'il n y a rien si iuste qui ne puisse avoir son opposite aussi iuste' [There is nothing so just that could not have an equally just opposite] says Ayrault, *Ordre,* 91. The example here is patricide or matricide in the case of Orestes. The solution to this paradox is executed straightforward juridically with the formula of rule/exception. One would also have to take into account that the cult of paradoxical formulations was quite fashionable in the late Renaissance and was not seen as an error in logic but as a challenge to think further. See for ample material on this point Rosalie L. Colie, *Paradoxia Epidemica: The Renaissance Tradition of Paradox* (Princeton, 1966).

[92] See in detail Berman, *Recht und Revolution.*

replace its test of power, which had secured its adjustment to the environment, with self-regulating proceedings—a paradox of determining illegality, which could be incorporated in the system according to legal rules. The paradox of the unity of the code legal/illegal was not to become 'gödelized'—was not to be solved by externalization—but had to be unfolded internally in the legal system.

The solutions are so familiar to us today that we can scarcely see the problem. However, as late as the early Middle Ages (for instance, in the context of the peasants' wars of 1525 and Luther's reaction to them), the connection between the functioning/non-functioning administration of justice and the violent approach of law was still very obvious.[93] Today the problem is evident in the anomaly of the self-defence/emergency law. There remain residual and borderline cases where the law permits the violation of law in legally defined terms and conditions. It is no accident that there are cases in which the use of physical force is permitted and the typical reference to legal procedure excluded. *Whenever violence is involved, the paradox of legal coding shows up—but in a form which is immediately unfolded within the legal system through setting conditions which make the paradox invisible.*

Translated back into the terminology of evolution, this analysis confirms the connection between autopoiesis and structural coupling as a precondition for evolution. Evolution can only use the autopoiesis of the systems that it requires. Therefore, circular formulations, such as variation/selection/re-stabilization, are unavoidable in the classical distinctions of evolutionary theory. Inputs from the environment appear as accidents in relation to an evolving system and these accidents are transformed by the system into a guided development. If one introduces the concept of structural coupling (to which we shall return more systematically in a later chapter), one can further describe how and through which forms these 'accidents' are domesticated, which accidents are felt as irritations in the system and which of them can be attended to, under the label of 'problem', with solutions which suit the system (that is, which function autopoietically). As far as the evolution of law is concerned, the problem of physical violence appears to perform this critical function of making evolution possible or blocking it.

V

The preceding discussion has not as yet produced a solution to the problem that has played a considerable role in the discussion on evolutionary theory. This problem concerns the question whether there are certain patterns in the formation and disintegration of structures throughout

[93] See, for example, Winfried Schulze, *Bäuerlicher Widerstand und feudale Herrschaft in der frühen Neuzeit* (Stuttgart, 1980).

evolution or whether all things happen arbitrarily. The concept of progress has been used to answer this question. It needs to be reformulated, however, if one does not see evolution as progress. In this case, either a new concept must be found, or evolutionary theory has to be detached completely from any description of an order which has come about through evolution.

Following Darwin, it has often been thought sufficient to use evolutionary theory to explain how society has achieved a highly developed and differentiated legal culture.[94] Institutions which have developed through evolution, such as property, contract, the juridical personality of corporations, subjective rights, court proceedings, etc., are taken as preconditioned and therefore need no further analysis. Evolutionary theory provides an explanation of how improbable achievements and far-reaching deviations from original states of affairs have become possible, and of how one can practise them as normal states of affairs. At the same time, this explanation implies that evolution is inevitable and that all intentions to plan and improve the law may contribute to its evolution but cannot have a decisive impact (or, if anything, a destructive impact) on the outcome.

Theories that attempt to say more noticeably seem to suggest that there is such a thing as progress. Frequently the argument of evolution serves to camouflage the fact that one has already opted for a preferred theory. Claiming that the structures, as stated by the theory, have been supported by evolution or have been created by it proves the theory. Ronald Heiner's writings can serve here as an example of the problem caused by incomplete information.[95] Similarly, Robert Clark states that evolution supports institutions that save transaction and other costs.[96] However, many old problems resurface (and that may be the reason why evolutionary theories of law and economics today resort to sociobiology). Above all, there is the problem that since participants do not calculate in a predictable way, one does not really know how quantitative conclusions are formed in their heads.[97] Then

[94] See for such an approach, even if it lacks a well-developed evolutionary theory, Watson, *The Evolution of Law*, in relation to the tradition of Roman civil law.

[95] Ibid.

[96] See Robert C. Clark, 'The Interdisciplinary Study of Legal Evolution', *Yale Law Journal* 90 (1981), 1238–1274. When studied in greater detail, a lot of things within this economic analysis of law are doubtful, and among them the exact formulation of the principle of selection. See also the contribution by Paul H. Rubin, 'Why Is the Common Law Efficient', *Journal of Legal Studies* 6 (1977), 65–83, and Jack Hirshleifer, 'Evolutionary Models in Economics and Law: Cooperative versus Conflict Strategies', *Research in Law and Economics* 4 (1982), 1–60. These approaches do not help us solve the question of the criterion of success, but they do take account of the advantages of litigation and economic cooperation with the view that the contesting of inefficient rules must make economic sense.

[97] See, for example, Jean Lave, *Cognition in Practice: Mind, Mathematics and Culture in Everyday Life* (Cambridge, 1988).

there are all the problems that are related to the unknown future and the inevitable social costs of all time-binding.[98]

Starting from the premiss of systems theory one is not gaining distance from one's own theory, but rather a more complex instrument for analysis.[99] We assume (and this is quite conventional) that evolution permits the formation and maintenance of highly complex systems, alongside which (or inside which) more simply structured systems also have a chance of survival. Evolution leads—without any particular purpose or *telos*—to the morphogenesis of systems, which can proceed with their autopoiesis, even when there is a high degree of structural complexity and requisite multiplicity and diversity of operations. Accordingly, such operations must be able to discriminate internally. Hence, what stands out, quite clearly, is that the development of higher complexity is triggered off unwittingly, and that the evolution of the legal system is a good example of this process. The main result is that people begin to complain of the complexity of the legal system and to look for relief from it. The evolution begins to react to its own result. But is there any 'higher meaning' involved in this—apart from the fact that it just happens? Is this the way in which 'civilization', or even 'spirit', is realized, as was assumed in the eighteenth century?

Today, hardly anyone still claims that complexity as such improves a system's chances of adaptation. If one entertained such a hypothesis, one would have to take into account the self-inflicted disadvantages of complexity as well. For us, the indisputable fact that evolution makes higher complexity possible suffices, and there can be no doubt that law in modern societies has become far more complex than the law of older social formations, regardless of all the new abstractions, generalizations, and simplifications.

It is simply another version of this state of affairs if one says that, as far as is possible, evolution normalizes improbabilities, improbabilities being understood here as the degree of deviation from an original state.[100] To put it this way, though, does little more than create new questions for further research, which would need to find out how a legal system adjusts its institutions to increasing complexity—or, in other words, how evolution

[98] These arguments are not meant to be a rebuttal; they are merely meant to draw attention to the fact that greater accuracy is needed in the application of empirical evidence and clearer argumentation in evolutionary theory.

[99] Another point that could be made in a comparison with the economic analysis of law is that systems theory analysis of law can produce references to itself (autologies) and can cope with them better.

[100] One can also define this as the improbability of the probable, and most likely incur a protest from statisticians. This merely means that, in language, it is highly improbable that a certain sentence is uttered and, at the same time, that this improbability is perfectly normal, that is, a characteristic of every sentence that is uttered. This is precisely the reason why the development of language can only be explained with evolutionary theory.

operates as pressure for selection and produces suitable structures—structures which allow for complexity, or obstruct further evolution.

Operative closure of the system and a coding that is indifferent towards the environment are the primary answers to these questions. The environment is excluded—unless the system itself considers it worth observing according to the system's own abilities for processing information. In order to achieve this, the system must develop the ability to distinguish between self-reference and external reference. We shall see later[101] that this takes place today in the form of distinguishing between concepts and interests,[102] provided that effective legal doctrines have been developed.

Further achievements, which correspond to higher complexity, are the dissociation of the symbol for legal validity from its historical origins (in the sense of *arche*, its ground) and from external references (in the sense of nature or reason given by nature). We have discussed the differentiation between property and ownership and the differentiation between transaction and contract above from the viewpoint of a loss of simplicity. The legal system renders itself autonomous in its self-description too. In this context, the system-internal distinction between legislation and jurisdiction has always made it difficult for the legislator, and impossible for the law-abiding judge, to be swayed by friendship, connections, attention to status, etc.[103] The dissolution of the uniform concept of the monarchical *iurisdictio* and the transition to doctrines of the separation of powers in the eighteenth century took this tendency further, restructured the system-internal feedback loop between legislation and jurisdiction, and permitted an increased use of undetermined legal concepts or political 'formula compromises' in laws, on the one hand, and the rejection of innovative judge-made law by reference to relevant legislation, on the other. As a result of these achievements the sum of all law can be described as self-made, as positive law. The doctrine of legal sources (whatever the term may now mean) was revised in the nineteenth and twentieth centuries to include, as legal sources, not only legislation but also jurisdiction, customary law—in so far as courts made decisions on it—and even legal dogmatics.[104]

The key concept here is 'temporalization of complexity' and it leads to further insights. The definitions in relation to persons and to space were in

[101] See below Ch. 8.VI and VII.

[102] At any rate it does not happen in the form of distinguishing between norms and facts. This is a distinction which runs across the distinction between concepts and interests. The reason for this is that the legal system can also receive external norms by having legal norms refer to them, and it can deem internal facts to be relevant (for instance, the formally correct publication of a law).

[103] This is at any rate the opinion of Aristotle, which was highly regarded in the Middle Ages, see *Rhetorics* 1354^{b}. See also Aegidius Columnae Romanus, *De Regime Principum* (Rome, 1607; reprint Aalen 1967), 506.

[104] See on this point, as far as England and Scotland are concerned, Neil McCormick, *Legal Reasoning and Legal Theory* (Oxford, 1978), 61.

many respects replaced by definitions in relation to time.[105] New law annuls old law, and therefore even sharp temporal inconsistencies should not be seen as unjust *per se*.[106] Discussions which are triggered off by this circumstance become politicized.

Another mechanism which absorbs complexity can be described with the aid of the distinction between variety and redundancy. We shall discuss this in more detail in Chapter 8. For now it may suffice to mention that the legal system can deal with more and more varied cases if it relaxes strict requirements as to the consistency of legal decisions (redundancy) and instead finds new forms which are compatible with higher variety. In this context it has always been an important regulatory device to leave the decision to start legal proceedings in court to the concerned parties. Moreover, Roman law limited the number and types of legal actions which could be brought in courts. The litigation of all legal claims (a concept of the nineteenth century!), and the wide-ranging admission of the autonomy of the parties, adjusted the law to the requirements of modern society. In so far as the autonomy of the parties was accepted as a ground for the definition of rights, one proceeded on the assumption that the requirement of consistency (that is, justice as the equal application of all laws) could be relinquished. The protests which agitated against this development led to political pressures and a great amount of legislation that limited freedom. One could think here, for instance, of labour law or of socio-political legislation. As a result, however, the consistency of numerous laws has become a problem. Before one has come even faintly close to the end of experimenting with all the ways in which one might regain redundancy under these conditions, a new problem arises, namely the problem of public interest litigation undertaken by dedicated individuals, especially where it is undertaken in order to find an effective solution to ecological problems.

As a result of this evolution, which enables the differentiation and formation of complexity, and marks it, once achieved, for further evolution, we today find structures in the legal system that differ greatly from those which are found in tribal societies. The pivotal difference can be defined as the *personalization* of legal matters. It is connected to what is probably the most important achievement of the evolution of law in modern times: the concept of subjective rights.[107] Through them, an unfolding of the paradox

[105] This rules out the fixing of temporal limits in relation to persons, for instance, the linking of the validity of a law or the validity of a contract to the lifetime of a person who had agreed to certain conditions. This corresponds to a quasi-natural perspective that, as is well known, the Middle Ages relinquished only reluctantly.

[106] This has the remarkable consequence that constitutions must be exempted because otherwise new law would gradually undermine a constitution. It also has the consequence that changing the constitution must be largely achieved by interpretation.

[107] We note, however, that the modern form of the 'subjective law' represents only a part of this personalization. Essentially, one must also bear in mind that claims of the violation of

of freedom (that is, the necessity of the limitations of freedom as a condition for freedom) can be achieved, which is technically useful for law.[108] This paradox takes the form of an inclusion of the excluded and juridifies arbitrariness. In the framework of subjective rights, anybody can act arbitrarily; motives are not legally scrutinized. And if one wants to moderate this, one must (and can) do so by investigating the legal form of a limitation of subjective rights. Further achievements, which were available at the end of the eighteenth century, assumed this legal form and used it for related generalizations—for instance, a legal capacity which was independent of status and birth, and the positivization of law, which allowed the boundaries of the blank sheet of freedom to be reordered if there is a demand for it. The general access to law and legal proceedings (and through it the equal inclusion of all of the population in law) are premised on subjective rights too. For it is indispensable to the differentiation and combination of material law and procedural law that the material law indicates who appears as the plaintiff and who is sued. Also, the criminal law largely disregards collective liability and collective obligations of restitution or collective claims for compensation, which are customary in tribal societies. Organizations of any size are subject to this development. For such organizations, the legal form of the juridical 'person' has been developed in case they become a party in a legal action.

Since we are used to this form, considerable effort must be made to fathom the infrequency and the evolutionary improbability of its existence. First and foremost, law must provide social support for contra-factual expectations. A regulatory device for the solution of conflicts—which deprives the individual of all social support by possible allies, friends and relatives, or associations (for instance, guilds) to which he belongs and in which he can earn respect and merit—is likewise highly unlikely. In legal proceedings, the individual is at first isolated, confronted with the court, and then referred exclusively to the legal system for assistance. Corrective devices (in substantive law, for instance, trust funds which limit the control of the individual in order to protect family interests; and in procedural law, for instance, legal aid, legal insurance, or concepts of legal ethics and their implementation through professional bodies) require such a personalization and then build

rights or other forms of unlawful conduct can only be addressed to persons and not to groups or any other range of relations. See Brian Tierney, 'Religion and Rights: A Medieval Perspective', *Journal of Law and Religion* 5 (1987), 163–5, for the beginnings of this development, which are related to the dissolution of clan structures in the feudal system but also to the Church's resistance to a looming political theocracy, which already manifested itself in England as early as the twelfth century. See also in more detail, Tierney, *Religion, Law and the Growth of the Constitutional Thought 1150–1650* (Cambridge, 1982), and Palmer, 'The Origins of Property in England'.

[108] See also above at Ch. 5.IV.

on it. The differentiation of the legal system cannot be achieved without the decomposition of social ties, obligations, and expectations of help. And not until this pattern is successful in evolution can one see any direct social, influence on judges as a matter of corruption, and social influences on law as a general problem, which problem cannot be legalized, and as such having been found through the statistical methods of sociology.[109] Here, as in so many other functioning systems, the detour via the separation of 'persons', and the semantic correlates of modern individualism, prove to be a precondition for the formation of complex functioning systems and their ability to control decisions of inclusion and exclusion.

What has evolved in the legal system—and what is, by and large, successful if the harshness of the basic pattern is recognized—becomes more of a problem, the more the political system attempts to use law as a regulatory instrument. Comprehensive political goals, then, have to be detailed into a form which refers to justiciable persons. It becomes clear, however—above all by the transformation of ecological problems and regulatory aims in environmental law—how little the inevitable personalization suits the matters concerned. This relates primarily to the difficulties in the attribution of causes when socially conditioned conduct has an ecological impact. Here the ability to achieve significant results is precluded by the necessity to relate all arguments to individually motivating obligations and rights. This is why, for instance, there is so much discussion, with so little success, about litigation in the public interest without having corresponding positions defined in substantive law.[110] It is this, in particular, which makes it clear how much the form of personalization is a product of the evolution of law and not a dictate of the environment, whether internal to society or external to society. This example supports our theoretical assumption that the evolution of autopoietic systems is more a test of how much room autopoiesis frees up for the formation of complex orders, than of adjusting the system to a given environment.

This discussion must remain sketchy and should not anticipate the results of further detailed research. Hence it may suffice here just to introduce the hypothesis: it is not economic efficiency but complexity that is the intervening variable that translates evolutionary structural changes into adjustments within the system.

VI

In this chapter we have left to the last one of the most difficult questions for a historical discussion of law. Can we say that the social significance

[109] See also below Ch. 10.I.

[110] See, for example, in relation to constitutional law, Dieter Grimm, *Die Zukunft der Verfassung* (Frankfurt, 1991), esp. 190.

and above all the size of the legal system have increased because of the evolutionary internal dynamics of the legal system? If one relates this question to absolute numbers, this is evidently so. There are now more lawyers and more laws than ever before (even if there are considerable regional differences, as can readily be gleaned from a comparison of the United States and Japan).[111] There is, consequently, ever-growing weariness, more complaints about the excessive number of legal regulations oppressing every free individual, and demands for deregulation, alternative dispute resolution, and de-bureaucratization. The counter-argument would be that these kinds of enlargement developments could be found in all functioning systems, from the political system to the education system, from scientific research to the medium of money in the economy. Jürgen Habermas called this development, albeit in a slightly different context, the colonization of the lifeworld. In other words: the significance of the functioning systems in everyday life increases, and in many respects there are counter-movements of a 'back to nature' kind which, however, have little chance of succeeding. Generally, the result is the paradox that these counter-movements must use the structural means of the functioning systems, as if the production of organically grown plants were at issue. Simplifications of administration, however, require additional regulations of control and review procedures, which put more strain on that administration.

The impression of 'too much' can be confirmed superficially, but the problem is less one of absolute numbers and more one of relations. Since many resources, time of course above all, are finite, one would need to find out whether the increase of individual functioning systems takes up more time, more money, more natural resources, energy, motivations, etc., which are thus withdrawn from other usages. This leads empirical research to grapple with almost insurmountable problems. For, how can one find out which alternatives would have been used if the resources had not been taken up to such a large extent by the enlargements in the development of law? Above all, however, it is unrealistic to assume fixed sums in such a research design. Society at large has increased in size and complexity. With the increase in the means of communication the possibilities of satisfying demand have increased too.

Conventional empirical sociology may calculate the increase in the number of lawyers or of legal incidents (for example, laws, legal proceedings) per capita of the population.[112] But even this approach is fraught with

[111] See for regional case studies, for example, Vilhelm Aubert, *Continuity and Development in Law and Society* (Oslo, 1989).

[112] See, for example, Friedman, *Total Justice*, 6. But see also, contradicting his own earlier analysis, the important insight that the activity of just a few people can create the perception of considerable change (ibid. 97) and that this perception follows from the significance of communication.

difficulties because one can only define the correlated units (how large is the workload of a lawyer, how complex are legal proceedings) arbitrarily. Above all, the size of populations is not a relevant indicator with regard to the development of media and techniques of communication. What would be relevant is the number of communication units, and here it would also be meaningless to assess them regardless of quality and outcome. Indeed, there is hardly a methodology for operationalizing scientifically the strong impression that the legal system has grown explosively and is invading more and more areas of everyday life which used to be determined by customs, lack of alternatives, socialization, social control, etc.

This unsatisfactory state of knowledge should be one reason to avoid making statements on the unity of the legal system in the context of evolutionary change. One can certainly ascertain that structures change in the course of the evolution of the legal system, that new evolutionary achievements take shape, and even that expectations of the juridification of matters change, and that with the improvement of techniques of procedure and evidence, for instance, formalism can be reduced and 'internal' facts (motives etc.) can become legally relevant. In this sense one could follow Lawrence Friedman's thesis, which points out that expectations of justice have changed to assume the function of compensation for chance events.[113] More generally one could say that a full differentiation of the legal system leads to the universalization of its code and does not accept that there are any matters that are not by their nature juridifiable (for example, private family matters).[114] It is now a matter for the legal system itself to decide which matters are legally regulated and which are not, and which types of regulation are appropriate. The same applies, *mutatis mutandis*, to other differentiated functioning systems. Limitations can now be realized only as self-limitations. However, all these statements remain statements about the structures of the system and their variations. They do not permit us to make any inferences about the increase or decrease in the social significance of law. In the last chapter, we shall return to this discussion.[115] That chapter will not end with prognoses either. The concept of evolution itself prohibits such prognoses.

[113] Ibid.

[114] For curiosity's sake and as a comment on feminist jurisprudence, one can add that a society which used law to limit the *patria potestas* could be defined as a save society only 150 years ago, at least in Spain: 'El pueblo en que el jefe de familia no puede arreglar sus assuntos domesticos sin pedir permiso al juez, o sin consultar de continuo la ley, es un pueblo esclavo . . . Qué sacaremos de ser reyes en el Parlamento si no podemos reinar en nuestra casa?' (Felix M. de Falguera, 'Idea general del dérecho catalán: Su espiritu y principios que lo informan', in *Conferencia del dérecho catalán* (Barcelona, 1883), quoted in Juan B. Vallet de Goytisolo, *Estudios sobre fuentes del dérecho y método juridico* (Madrid, 1982), 51.

[115] See Ch. 12, esp. section V.