Legal History – History of the Evolution of a Social System
A Proposal (p. 14)

1. Historiography is about the observation of changes. Even in a history of the moment, there has to be a before and an after. There is no history without event, without the difference perceived and described as "time". Legal history has to do with changes in the law. The law of some arbitrarily chosen point in time is examined and judged on the basis of what is new, what has changed, and what has remained the same. That has to be recognized and described before looking at the reasons why it has changed, and why it has changed in this particular way rather than in some other way.

2. Historians predominantly use "development" as the paradigm for explaining changes. "Development" means both continuity and change, upholding tradition and breaking with it, structure and event. The paradox of simultaneous identity and alterity is familiar not only to historians, but is the basis of observation of all biological and social phenomena. In the field of natural sciences, the theory of evolution has long been applied to this issue. In the meantime, however, it has also been tested increasingly as means of observing social phenomena.

3. Sociologists (among them Niklas Luhmann, Dirk Baecker, Rudolf Stichweh) have paved the way for social sciences based on a theory of evolution. This approach has also found its way into the field of law, especially – surely no coincidence – modern business law (Gunther Teubner and Marc Amstutz). Economists have also realised that the market can be described in terms of evolutionary theory (Thorsten Hens, H.H. Nau). Even literary criticism has begun to apply evolutionary theory (Hans-Ulrich Mohr, Gerhard Plumpe). Given the spread of this approach, hopes have been expressed that a universal theory "conceived as a consistent theory of evolution" (Wolfgang Frühwald) might alleviate the lack of communication between the natural sciences and the arts.

4. In historiography, on the other hand, including legal history, evolutionary theories have barely been acknowledged to date. This is quite remarkable, given that history and evolution are fundamentally related through "time". "Evolutionary biology is a historical science" (Ernst Mayr). Perhaps it is also true to claim the opposite, that the science of history is also a science of evolution – not only of biological systems, but also of social systems. What might be the theoretical framework for a legal history that perceives itself as the history of a social system (5-10)? What would be the consequences and the differences with regard to other forms of legal history (11-17)?

5. Anyone wishing to examine the evolution of law has to decide which aspect item to observe. This might mean choosing between "dogmatics", "litigation", "lawyers", "legislation", "jurisprudence". Yet law is not just about "dogmatics" or "litigation", and to study "lawyers" in this way would mean entering the realms of the history of evolution of a certain as it applies to the human species – just as legislation would correspond to the field of politics or jurisprudence to the History of Science. What is more, there has been and there still is law without jurisprudence, even law without laws and without dogma and even without trained lawyers. What is needed, then, is a unit of "law" that is not dependent on historically changeable contingencies.

6. "Communication" that is geared towards the basic difference between right and wrong lends itself as such a unit. After all, law exists wherever there is communication about

right and wrong, irrespective of whether there are court buildings or trained lawyers or jurisprudence. Communication is based on specific "information" selected from the general background cacophony of the world. In order to become communication, information has to be conveyed, either in the form of oral or written language, or through actions, gestures, sounds or images. Only once the message has reached others, and has been "understood" – or even misunderstood – by them, does communication become a meaningful social event that can be followed up by further communication.

7. Communications specialising in fundamental distinctions by which boundaries can be drawn constitute a system with its specific environment. A boundary is established and recognisable as soon as communications on what is lawful and what is unlawful are distinguishable from communications on "good/bad", "just/unjust", "sacred/profane", "true/untrue" etc. Unlike living, psychological or technical systems, communicative systems are social systems. This is why "law as a social system" is proposed as a unit for an approach to legal history based on evolution theory.

8. If we examine the social system of law over short or longer historical period, we can observe, as we can in living systems, that there are periods of "calm" (stasis) and periods of relative "unrest". Historians recognise unrest, or variation, in the emergence of unexpected, new, varied and often rival communications in the field of law. This is the case, for example, when two different types of legal order – civil law codified law as opposed to common law of precedence, Roman law as opposed to indigenous law – stand to discussion. This is also the case when environmental factors, technical inventions, natural events or political upheaval cause uncertainty or confusion in the field of law. Though there is no way of forecasting when variations in the law will occur and which events will trigger them, it is very probably possible to reconstruct this in retrospect.

9. Variation offers new potential for change. Selection means that, of all the different possibilities available, one is chosen, and another is not. In the field of law this happens particularly when a hitherto unnoticed factor becomes the subject of a distinction between lawful and unlawful (whereby failure to make such a distinction is also a form of selection). The steam engine and the internet, coins and road traffic may, or may not, become "legal issues". Whatever happens, selections are invariably contingent, otherwise they would not be selections, but determinate processes. On the other hand, selections are not arbitrary, but are linked to preceding selections and the structures created by them. Changing environmental factors do not turn communications on what is lawful or unlawful into communications on love or beauty. The radius of possible selections is probably staked out by the "memory" of the system that constantly distinguishes between forgetting and remembering, thereby limiting possible connections.

10. Re-stabilisation refers to the integration of the new element that has been selected into existing structures. In law, for example, dogmaticsdogmatic and systematization, adherence to the letter of the law and stare decisis are all elements that ensure stability. This tempers the unexpected effects that may otherwise be triggered by similar environmental occurrences in the future. The system stabilises itself by incorporating new factors and increasing its own complexity. The "end" of an evolutionary process marked in this way is the beginning of new opportunities for variation and selection.

11. Communication instead of individuals

In describing law as a social system, individuals are given a place and a significance different to those frequently ascribed to them in legal history. Communications require at least two psychological systems. However, unlike individuals, communications can remain valid and open to interpretation for centuries and, since the invention of writing and, more especially, of printing, can be called up again at any time as entities with a meaning and significance of their own, independent of individual views, to be rejected or accepted respectively. Communications on what is lawful and unlawful are not reinvented from individual to individual, nor even from generation to generation. A legal history which, like all historical sciences, operates on the basis of texts, can use these texts to monitor the course, density, acceleration, delay, extent and "volatility" of communications. The individuals who originally triggered the communications may remain completely unknown – an obvious fact in the legal history of Antiquity, but one that also applies quite often in more recent times. For legal history is not anthropology or brain research, nor even psychology: the history of a communicative social system cannot call upon past neuro-physiological, chemical, mental or genetic processes and dispositions. Accordingly, legal history should place the "authors" of legal communications in the environment of the social system, where they are capable of generating confusion for the legal system, and in some cases perhaps even of generating new populations of communications which though they are unable to control or guide in their own lifetimes, let alone in the long term. They have no control over them in their own lifetimes because a one-to-one transfer from brain to brain simply does not take place. And they have no control over them in the long term because the fate of any given communication once it comes into existence -whether it is remembered and upheld or sinks into oblivion, let alone the question of how it is interpreted – is completely uncertain.

(A rejection of anthropocentric historiography is, of course, at the same time a rejection of anthropocentric evolution theories.)

12. Communication instead of action

Actions, like communications, are contingent and selective momentary events. Like communications, they are undertaken by individuals. However, actions are not in themselves communicative events, being limited to information and its conveyance. The significance, relevance and social impact of actions are attributable only through the "understanding" of an observer, without which the action would otherwise remain socially irrelevant. In this way, action is communicatively generated and used in particular as a means of marking time. Whereas communications can be taken up and added to at any time, actions bear witness to the irreversibility of time. If a social system needs or uses "action" as a means of self-description, pragmatic studies regularly raise questions about the motivation, interest, awareness, consciousness, rationality, irrationality, aims and wishes of the individual to whom the action is ascribed. This protagonist, in the role of collective actor or "homo oeconomicus", is understandably of interest to scholars in fields that are normative and future-oriented, such as economists or political philosophers. Historians are to be satisfied with merely grasping the concept of "action" as part of the self-description of a social system, while limiting the constitutive elements of the system to communications.

13. Possibilities instead of causalities

Communications are threefold selective processes: information, message, understanding. Evolution, too, is a threefold selective process: variation, selection, re-stabilisation. All selections, however, are subject to the principle of contingency: it was as it was, it could

have been different, though if not arbitrarily different. Under these premises, familiar patterns of causal and linear development are more than problematic. This applies to all explanations that go back to a single "root", thereby suggesting that this communication alone, and no other, could have grown from that root. On the contrary: any information that introduces a communication – in view of the vast, overflowing reservoir of alternative information or non-information – is unlikely. Equally unlikely is any selection that follows a variation – in view of the considerable possibilities of not selecting or selecting differently. But then it is not enough, and is even confusing to say: "trial by formula Litiscontestation has developed from the trial by legis actio process of litigation" or even "The roots of penal law lie in ecclesiastical processes of repentance", let alone "The industrial revolution led to the invention of social security". All these assertions and countless more besides ought to be reformulated as the question: was the trial by legis actio one of the conditions of the possibility of establishing the trial by formula? process of litigation one of the factors that created the possibility of establishing litiscontestation? Or, to put it more precisely: did legal structures take shape during the trial by legis actio that process of litigation that were capable of further development such that structurally determined selection – in favour of the trial by formula litiscontestation – became possible?

14. Chance instead of influence

Like the causality model, its milder version of "(mutual) influence" is to be revised and outlined more precisely. When the "influence" of the French Revolution on law or the "influence" of new natural sciences on law etc. are mentioned, it is also a question of how it can be that the environment of law "affects" the law. Events and changes in the environment of law are "coincidences" that include, for example, political upheaval, printing, earthquakes, assassination, economic recession, the construction of a road network, the emergence of the nation state, the schism of the church, the internet or simply the famous beating of a butterfly's wings. Whether such coincidences trigger variations in a legal system certainly does not depend on the significance that the event may have in its natural or social system. What is a "catastrophe" for the political system need not affect the law in any way. For example, the establishment of the principate in Ancient Rome had no effect on Roman law for a long time. Inversely, however, things that do not immediately appear to have anything to do with law can indeed affect it considerably, such as technical inventions.

15. Co-evolutions

A co-evolutionary model might be useful in observing and describing the relationship between law and environment. It works on the assumption that societies are based on a more or less sensitive balance of social systems. The economy relies on the structures of law, law on the structures of politics, politics on the structures of religion, and so on. For modern, functionally sophisticated societies, such structural link-ups generally permit and facilitate co-evolution. Yet even before any obvious functional distinctions emerge within society there are certain evolutionary achievements – language, writing, money, traffic, contract – that are clearly pluripotent, which is to say that they can trigger different variations in different contexts. The invention of writing, for example, can open up significant evolutionary opportunities for the economy, without affecting law – or vice versa. Which functional and communicative systems emerge on the basis of such pre-adaptive advances and which co-evolve with them – rapidly or with a time lapse – is one of the most exiting questions in legal history, especially the legal history of pre-modern times.

16. Circularity instead of teleology

If a legal history based on evolutionary theory is to gain plausibility, it will have to consider the awareness of evolutionary mechanisms of variation, selection, and retention as a product of evolution. Evolution is not a necessity, but a product of itself. Evolution is not linear and is by no means target-oriented. Therefore it "serves" nothing and no one. And yet, ever since it was first noted, it has been happening everywhere all the time. It has been observed scientifically, as we all know, since Darwin. This does not exclude the possibility that even earlier "pre-scientific" observers also noted and described the issue of evolution and its separate stages, with all its difficulties and unpredictability, the opportunities and risks of selection and the techniques of re-stabilisation. By way of an example, Dionysius Halicarnass, the Roman historian of Greek descent, described the end of the Roman monarchy and the beginnings of the Roman republic as follows in the first century before Christ:

The end of the monarchy is marked by an action – the public suicide of Lucretia. In this act of drastic transition from life to death, the irreversibility of time is clearly marked. The act immediately triggered excited and tumultuous reactions. There was no doubt that the message, in the form of suicide, reached the audience, and that communication had succeeded. Dionysius has his protagonist hold long speeches to a large audience about the many now conceivable political orders: not just any order but many different models had now become possible. Structures of political systems are known and permit a number of possible continuities, if not all. Indeed, they permit so many that Dionysius recognizes this as a problem that is "highly difficult and barely possible to resolve". Nevertheless, the pressure of selection is there. Dionysius avoids it by recommending that no selection be made, but that the ruler should "merely" be doubled: instead of one king there should be two kings, who he proposes should be called consuls. Doubling has, of course, been the basic underlying principle of all evolution since Adam and Eve – since the division of the very first cell. Two consuls were duly appointed. The political system was soon re-stabilised: when two (!) sons (!) of one of the two founding consuls sought to re-establish the monarchy, they were executed by their own father. Could there have been any other way – or any clearer way – of demonstrating that the republic was there, that it was stable and that no new duality could bring back unity?

Theodor Mommsen once wrote that the founding of the republic had resulted from the "organism" of the old political order by "inner necessity". Re-reading Dionysius, we note that, on the contrary, a variation – in the form of a scandal – was the necessary trigger to destroy the state of stasis in the first place. Variation then led to so many possibilities that there could be no talk of "necessary" selection. What Dionysius describes is open contingency. By describing selection in terms of non-selection, he underlines the problem inherent in all selection as soon as it becomes clear that there are multiple possibilities. And to ensure that it does not continue anew, the gruesome example is made: things remain as they are – at least for a while (which, in the case of Rome, was quite a long time).

Reflecting not only on Mommsen's interpretation and reading, but also on our own, and recognising the inherent circularity, should be an acknowledged duty – albeit one that should not block our reading.

17. Texts instead of facts

One particular reading block should be dismantled: the habit adopted by many historians of discriminating texts in terms of "facts" on the one hand and stories, legends and myths on the other hand. If we want to find out whether and how (self-)descriptions identity and

alterity explain the existence and respective state of a system, whether they distinguish between evolutionary mechanisms, whether they construct causalities or permit coincidences, then we cannot simply dismiss a large proportion of the texts. If we do so, irrespective of whether we are researching Antiquity or own era, all that is left is a new and slender myth of facts. "Reality is not concrete reality, but what lies between things" is the first lesson in quantum mechanics. "Between things" lies communication.

Marie Theres Fögen

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Against a Systemic Legal History (p. 21)

This paper questions the resort to systems theory as the foundation of an evolutionary legal history. In particular, the theoretical legacy of Niklas Luhmann upon which Marie Theres Fogen proposes to draw seems to have limited application outside a context in which advanced system differentiation is present. Although (like Marx, Durkheim and Weber before him) Luhmann drew in a broad evolutionary trajectory, he was concerned principally with »functionally differentiated society«. Earlier phases – covering precisely those formations that historians will presumably focus upon – are very hazily sketched in and relatively poorly theorised. In general, we should not too readily acknowledge »the exhaustion of the paradigm of modernity« (Santos, 1995) or rush to proclaim the obsolescence of multi-dimensional approaches such as those of Bourdieu (1977) and Giddens (1984). Any legal history that marginalises both human actors and the conditional environment has a considerable task in making up the ensuing deficit.

Simon Roberts

Baconian Facts (p. 36)

Not only facts as words and concepts, but also facts as a form of experience have a history. The origins of the scientific fact as a category of experience lie in the legal fact, particularly in the work of the English jurist and natural philosopher Francis Bacon (1561–1626). The category of the fact, as a bare statement of that which is the case, unembellished by inference, interpretation, or generalization, was the creation of early modern lawyers, and then eagerly taken up by historians, natural philosophers, and even theologians–first in English, then in French, and still later in German. Baconian facts forged a new kind of scientific experience, with distinctive objects, practices, and textures. The legal distinction between matters of fact and matters of law seemed to many seventeenth-century natural philosophers to be eminently useful in driving a wedge between observations and hypotheses, between data and conjecture, especially for controversial issues.

Lorraine Daston

Ius sacrum. Girgio Agamben und das nackte Recht (p. 56)

Why does Giorgio Agamben not tell and analize in his Homo Sacer the famous story of Franz Kafka »In the penal colony« – although he is an outstanding knower of Kafka's work and treat this work in detail in his book? In the course of the answer to this question we discuss the complex relationship between law and life. One assumption will be cristallized: Behind Agamben's dogma of the indistinguishability of law and life (with all the awful consequences for the human living together) in the Homo Sacer is hidden a concept of law that is based on a value-judgement that demands from law to much and to few (not enough) in the same time. To much – considering the dangers that precisely a »good« law burdens in himself, also a law, that is decipherable, understandable and so (for Agamben) distinguished from life. To few (not enough) – considering the advantages that precisely offers a functional differenciated law, also a law that is formal, undecipherable, ununderstandable and so (for Agamben) undistiguished from life. In any case, Agamben's apokryph hope on the comfort and charity of an understandable law is deceptive, as shows the penal colony of Kafka's in a bloody clearness. The lethal judgement-machine of the penal colony, that engraves understandable judgements in the life of the adjudged is radically contradicting Agamben's legal theory. The undistinguishability of law and life, that Agamben assumes, depends precisely not of the understanding, the decipherability of law. And this is why the »lethal machine« of the penal colony can not be presented in the Homo Sacer and must be invisible.

Rainer Maria Kiesow

Amtskalender (p. 71)

From the end of the 17th century onwards, a new type of periodical emerged in no fewer than 74 territories of the Old Empire, most of them in the form of court and state almanacs, gazettes or manuals. They took on their specific characteristic as a distinctive text through the inclusion of a directory of authorities listing the court, state and military officials of the respective territory. Such lists make this particular type of text an invaluable source

of information for administrative history, in particular. Moreover, these texts constitute a distinct genre that lends itself to historical research in its own right as a record of the development of trends in cultural and media history throughout the 18th century. Given that the entire life and business cycle of each series of official lists was dependent upon the respective territorial ruling class, the relevant publications came to be regarded to all intents and purposes as the official organ of government. Since they portrayed the way the ruling classes saw themselves and wished to be seen by others, they also served the purpose of political representation. Admittedly, during the second half of the century, over and above the deliberate and intentional courtly-ceremonial function of these texts, a subversive statistical usage emerged involving a quantitative analysis of the official lists that employed the available data as a critique of the royal courts and principalities. In this way, a medium that had originally served the needs of courtly society became an instrument of the emerging bourgeois public. What is more, from the 1760s onwards, an increasing number of popular almanacs were transformed into official gazettes by the addition of official lists. At the same time, the astrological sections of practice and prognosis were increasingly replaced by scholarly contributions, so that the genre also acted as an essential vehicle for the edification of the populace, ousting the traditional use of almanacs. Thus, the history of the official gazette centres on a process in the course of which information on the extent, personnel and organisation of the state apparatus, previously the sole preserve of the ruling elite, became available to a far wider circle that even included the lowly subjects of the state.

Volker Bauer

Grenzen vor Ort (p. 122)

The changing perception and reality of the boundaries of rule in Western Europe are outlined on the basis of current scholarly research and discourse. State control over the drawing of boundaries implied changes that had a substantial impact on the powers of local entities. Instead of an interactive local demarcation of boundaries, they came to be determined as an act of sovereignty by neighbouring states. Yet the populations living near the borders made their mark, appropriating them creatively according to their own perception and reality of state and nation. The tendency to regard the drawing of boundaries as an exclusive attribute of state sovereignty had an enormous effect on relations with non-European societies. Yet even in colonial contexts non-Europeans were not helpless in their dealings with European officials and authorities. The Moslem subjects of France in eastern Algeria, for instance, instrumentalised colonial surveys as a tool to be used against their Tunisian neighbours. In many places along the colonial borders of West Africa, closely linked markets were formed. The boundaries drew the population into cross-border trading networks that exploited the discrepancies in fiscal burdens. Border regions formed their own »third spaces« to whose specific requirements European officials and authorities had to adapt.

Christian Windler

Bibliographie zu
KARL HÄRTER, Von der „Entstehung des öffentlichen Strafrechts“ zur „Fabrikation des Verbrechens“. Forschungen zur Entwicklung von Kriminalität und Strafjustiz im frühneuzeitlichen Europa, in: Rg 1 (2002)

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