Essays

Law's Evolution and a 'Claim to Progress' - for a Philosophy of the History of Law

Massimo La Torre*

Abstract

The article aims at providing an attempt to reconsider the notion of evolution of law from a normative point of view and not from a functional or functionalist perspective. Evolution of law thus is disconnected from its possible roots in a Darwinian cosmology or in a functionalist or system theory of society. In such a perspective, evolution is rather interpreted as a punctual change (an improvement?) between two temporal sites. No grand '*Weltanschauung*' should here be presupposed. On the other side, law is considered as a historical practice and a normative concept that is projected towards a better state of affairs than the present one. In a legal decision there is embedded an intrinsic claim to progress: after the decision the world should be a better one that before it. In a sense, one might speak of an utopian projection of law. This however is not based on any thick philosophy of history, or on any history that could as such offer us a philosophy or a sense to itself. History is hardly a '*magistra vitae*', though it could perhaps be thematised as the case-law of morality, its 'jurisprudence'. The progress-inherent force of law could indeed be traced back to its performative character. Law - as Robert Alexy claims - has an intrinsic claim of correctness and justice. Now, the paper tries to show that such claim drives the law into a likewise pragmatically founded claim to progress. Evolution comes to light in the claim to progress. The phenomenology of law might thus be viewed as a practice aiming at what appears normatively better than a past situation, from which legal practice progresses and must come to terms with.

I. Preliminaries

The aim of this essay is to reconsider the notion of the evolution of law from

* Full Professor of Legal Philosophy, Magna Græcia University of Catanzaro. Previous versions of this work have been presented at the National Congress of the German Section of the *Internationale Vereinigung für Rechts und Sozialphilosophie* at the Münster University on 27-28 September 2012; and at the Department of Legal Sciences of the L. Bocconi University of Milan on 9 March 2016. Special thanks are due to Professor Robert Alexy for his comments and advice. I am also grateful to the Alexander von Humboldt Foundation in Bonn for having hosted me during my frequent study trips at Münster University, which have allowed me to carry out extensive bibliographical research and stimulating exchange with German colleagues and friends, among whom I have a special duty of gratitude to Professors Valentin Petev, Bodo Pieroth, Thomas Gutmann and Kurt Bayertz. A German version of this study has been previously published, as 'Kleiner Versuch einer Geschichtsphilosophie des Rechts.' Die Evolution des Rechts und der Anspruch auf Fortschritt', in M. Borowski, S.L. Paulson and J.-R. Sieckmann eds, *Rechtsphilosophie und Grundrechtstheorie. Robert Alexys System* (Tübingen: Mohr Siebeck, 2017).

I wish to dedicate this essay to Professor Günther Teubner, my *Doktorvater*, with gratitude.

a normative point of view and not from a functional or functionalist perspective. The discourse on the evolution of law is thus made independent from a finalistic, or teleological, *Weltanschauung*, from an intrinsic design of history, or a Darwinian cosmology, or from system theories, or else from long-time functionalist learning processes. In the following pages, the evolution of law is on the other hand interpreted and investigated as a timely *molecular* change, that is, as a progression and improvement, between two specific temporal coordinates. To this end, no Grand Theory as such is employed; no teleology inherent to human nature or to the history of society is placed under discussion. There is no 'immanence in becoming' no Heideggerian *Geschick*, no 'destiny of the Being', and certainly no 'Providence', in the events of history other than those brought about by the actors therein involved.

Nor is there any form of rationality inherent to human action that cannot be fathomed by discursive reason and that can thus be termed as being entirely unintentional, *à la* Hayek.[1] After all, law is assumed as a historical practice and normative concept that from such practice can be inferred. The phenomenology of law might thus be viewed as a practice aiming at what appears normatively better than a past situation, from which legal practice progresses and must come to terms with.

Intrinsically embedded in a legal decision - and therein lies the key thesis of this research - there is, as a performative condition of 'felicity'[2] the claim that that decision produces an 'improved' normative state. Following that legal decision, or legal act, the world of law has presumably 'progressed' with respect to what it was prior to the making of that legal decision, or legal act. Implicit in the legal decision is - I would argue - a 'claim to progress'. What we have here is a sort of utopian projection of a juridical phenomenon. This temporal progression is what makes sense, and allows, the conditional relation we find in a legal rule that is commonsensically structured in a previous 'fact' and in a following 'effect'. Whereby the relation is constituted by the rule, but nonetheless is required by the demand that is emerging in a fact asking for a specific legal consequence. This is to meet those interests that are revealed through that specific fact. There must be a basic congruence between that fact and that following consequence, a congruence that cannot be just arbitrarily construed and decided through the legal rule.[3] Otherwise, the rule would be unreasonable, and more often than not,

[1] On this topic and more broadly on the paradigm of legal evolution, I turn your attention to the research by M. Barberis, *L'evoluzione del diritto* (Torino: Giappichelli, 1998). The study on this same topic by N. Luhmann, 'Evolution des Rechts', in Id, *Ausdifferenzierung des Rechts. Beiträge zur Rechtssoziologie und Rechtstheorie* (Suhrkamp, Frankfurt am Main, 1981), continues to be authoritative.

[2] J.L. Austin, *How to Do Things with Words* (Oxford: OUP, 2nd ed, 1976). Cf. also E.D. Elliott, 'The Evolutionary Tradition in Jurisprudence' 85 *Columbia Law Review*, 38-94 (1985).

[3] See A. Falzea, 'Efficacia giuridica' *Enciclopedia del Diritto*, (Milano: Giuffrè, 1965), XIV, 19-25. Now also in Id, *Efficacia giuridica. Con uno scritto di Rodolfo De Stefano*, edited by P. Falzea and M. La Torre (Soveria Mannelli: Rubbettino, 2024), 74 (*forthcoming*).

invalid and ineffective.

This thesis, though, is not grounded in any way on a compact or solid philosophy of history, or on a certain conception of history, that as such offers a view or understanding that is sufficiently and globally meaningful to those intelligent enough to perceive it. History can hardly ever emerge as *magistra vitae*, although such an ambition could possibly, and more modestly, be formulated as a sort of 'jurisprudence' of morals. Historical events can be interpreted and used as precedents, whenever we have to face a new event that forces us to take a moral stance and decide about a distinct course of action. However, the history of 'precedents' can never be really binding.

The 'progressive' force of law could be outlined as one of the traits of its performative context - herein lies the gist of the essay. While Jürgen Habermas and Robert Alexy teach us that law contains an intrinsic claim to correctness, or rightness, which then can be held and made more explicit, once universalized, into a claim to justice, the aim here is to argue that the claim to justice of which the law is thus the bearer might be developed and articulated on a further claim - a claim itself pragmatically founded, which is the 'claim to progress'. Doesn't it become possible to postulate a teleology, an 'end of history', for law not only in terms of the material progression of events, facts, and actions, but also in terms of normative progression? In this light, by the way, law might be permanently thematised as 'modern';[4] a possible 'post-modernity' would but be a further step of 'modernity'.

II. Evolution in Law and Morality

It may be conjectured that the evolution of law is a notion in many ways inherent to the perception and conceptualisation itself of the phenomenon of law, indeed as a feature that could represent an additional distinctive trait of law with respect to morality. It could be stated that the registration or, better still, the claim that something is law, that a certain situation is legal and therefore linked to a certain claim to correctness and justice, implies that the qualification of something as legal marks a 'progress' with respect to a previous stage which is not law and not legal, or not yet fully law and legal. Thus, viewing an event as law may indeed be perceived or considered as 'better' than when that qualification is absent or controversial. That there is the right to this right is a progress with respect to the past when that right did not exist or was still not definitively acknowledged as such. Law is marked and defined by a specific localisation and even more so by distinctive temporal coordinates. *Tempus regit actum*: law is traditionally seen as the outcome of a deed or a series or sequence of deeds as occurring and above

[4] On the issue of 'modernity' and its incompatibility with 'the end of history', see C. Castoriadis, 'L'epoque du conformisme généralisé', in Id, *Le monde morcelé. Les carrefours du labyrinthe* (Seuil: Paris, 1990), III, 13.

all changing in time and bringing about a series of legal consequences.[5] Law is indeed exposed to transformation in time.

The same, though, could not be said of morality. If an action or a situation is declared moral or aligned to morality according to a performative register, it would certainly be implicit in such an affirmation that it is better than the action or situation that is in contrast with morality. What cannot similarly be said is that it is a 'progress' with respect to an 'immoral' situation or action. At least not a progress in a temporal sense. And, because the situation or action was moral in the first place, from the beginning, in the sense that the source of the moral qualification is not something new. If it were new, thus changing, doubt would be cast on its universal and permanent validity. If torturing an innocent - and someone guilty, for that matter - is immoral today, it was just as immoral yesterday. It is immoral at Guantanamo and in the case of Marcus Gäfgen, and similarly immoral in the case of Henri Alleg, tortured in the prisons of the French paratroopers in the Algeria in the 1950s.[6] 'Rien ne permet de croire que la morale ait jamais changé' - Simone Weil says.[7] The moral, or immoral, act escapes time; it shies away from time. Universalisation, which is the engine of ethical judgement, shatters temporality, overcomes it. Or takes no heed of it. On the contrary, law is fully placed and makes only sense within time and space. Its universalizability is temporally and spatially circumscribed.

It thus becomes difficult to talk about the progress of morality, its movement in time, unless we are not talking about 'positive morality', the morality of a dominating social group which is placed and effective within a given space and time. If morality is and must be a sum of regulative, not constitutive rules, the latter being only meaningful in time and space, and at the same time it endows itself with counterfactuality (a quality present in its characteristic attempt to become universal), morality does not represent a progress with respect to a previous state. Simply because a previous state of morality is not here normatively meaningful. There is neither ontic nor deontic novelty here, as Kurt Baier points out, outlining then morality's distance from positive law: 'It is nonsense to say, 'Yesterday God decreed that killing shall no longer be morally wrong' or 'The moral law against lying was promulgated on 1 May. Morality therefore cannot be any sort of law'.[8]

This is clearly different with law. Law requires factuality. Although it aspires and claims to be normative and, in some instances - at least according to a few doctrines - to be justice, law makes sense exclusively within the domain of facticity. Although

[5] See M. Bretone, *Diritto e tempo nella tradizione europea* (Roma-Bari: Laterza, 1999).

[6] See H. Alleg, *La question* (Paris: Éditions de Minuit, 1958). On the issue of torture and the feasibility of its morality and legality, cf M. La Torre and M. Lalatta Costerbosa, *Legalizzare la tortura? Ascesa e declino dello Stato di diritto* (Bologna: il Mulino, 2013).

[7] S. Weil, 'Refléxions sur l'hitlérisme', in Id, *Écrits historiques et politiques* (Paris: Gallimard, 1960), 41.

[8] K. Baier, The Moral Point of View. A Rational Basis of Ethics (New York: Random House, 1965), 88.

it may have a strong normative purport, law does always have a beginning and an end; it is 'promulgated', or originated, has a 'source' that is a social given, and exists in time. It is then derogated, abrogated or disused after time. Likewise, contracts and the rights they imply or produce, a specific practice of law, are constituted, modified, and terminated in time. Moral obligations, and rights, are not subject to the same ruling of time.

And law, of course, is a construct of norms or rules. And these, unlike 'habit' - as Herbert Hart reminds us - are forward-looking, they look ahead to the future.[9] Lon Fuller tells us laws are, or must be, 'prospective', for a legal system exclusively based on retroactive norms would evidently be absurd.[10] Legislation - Hart insists - would be best understood by casting aside the coercive command model, comparing it instead to a promise,[11] or to commitment.[12] Promise and commitment clearly contain within them a temporal dimension pointing to what will be; both generate strong expectations for a future event. The time component is very significant in the sphere of public life. If there is no progress, there must at least be *durée*, projection in time, which alone can offer that degree of stability in terms of expectations that can make an institutional practice possible.[13]

We might conceive progress in the moral sphere, in so far as we deal with the learning of moral rules by people and possibly by societies too. But it the access to those rules that is posed to time transformation, not the rule themselves, which is instead the case of law. In the law the progress is inherent to its rules and acts; this is not allowed to a morality that is permanently subject to a requirement of universality.

III. Law as a Progress

Law is the product of a rift that is overcome with a forward leap. Law is progress. Or, at least, that is how it is theorised by the classics of political and legal philosophy. According to an initial model (corresponding roughly to Aristotelian but which is recurrent in Greek and Latin political thought as well), law is the outcome of a society fulfilled, accomplished. It is achieved through the formation of a group of families and their amalgamation into a more complete and self-sufficient organic unit. It is the outcome of the agora and its public nature, not of

[9] Cf H.L.A. Hart, *The Concept of Law* (Oxford: OUP, 2nd ed, 1997), 58.

[10] Cf L.L. Fuller, *The Morality of Law*, revised edition (New Heaven: Yale University Press, 1969), 53. The opening up to the future of legal norms is therefore interpreted by Lon Fuller as one of the eight requirements of law's 'inner morals'.

[11] 'This is the operation of a 'promise' which in many ways is a far better model than that of coercive orders for understanding many, if not all, features of law' (H.L.A. Hart, n 9 above, 43 in italics).

[12] 'An element of commitment by the lawgiver is implicit in the concept of law'. L.L. Fuller, n 10 above, 216.

[13] See H. Arendt, *Vita activa oder Vom tätigen Leben* (München: Piper, 18th ed, 2016), 68.

the home and its private nature. Law is had 'among private individuals' but not in 'private'. This is pointed out by Hannah Arendt when she recalls that *lex* has its etymological root in *re-ligare*, in the idea of reconnecting, of putting in relation.[14] You can oblige only those who can be obliged, and you oblige yourself only if you have a relation with those you are obliging yourself to. The occurrence of a relationship between private individuals thus postulates a venue that is shared by the private individuals who are related to each other and is, at the same time, removed from the proprietary and patriarchal disposition existing in the private sphere.

'Themis' would appear to have the same root as 'domus': justice is a house; justice requires a house and can be had (only) within it. It is a space, an ambit of action, an intra moenia. But the 'house' in turn, refers to justice, to the 'city', where everyone has his due unlike the patriarchal family where everything is due to the One who is the *pater familias*.

The grouping of families in the city allows one to exit the family and to build an independent space, a space higher than the family itself. And it is in this space that law is generated. Just as the politician is not a father or a shepherd, nor will the lawmaker be either. In such a way that, by proclaiming that there is no such parenthood or consanguinity with the families that make up the city, he is often a stranger. Law is the gift of the stranger - of his alienness - to the natural dimension where the family continues to be grounded, that very family that continues to be the centre for the reproduction of the vital cycle of human beings. Economy continues to dwell in the house; politics, through law, distances itself from it. The law of the human beings who are citizens is essentially conventional, not natural. Law is possible and viable in the progress from the house to the agora. Law lies in just this progression. Its development lies in its becoming, in its being enforceable as a value.

Natural law, it would appear, has put this crucial progression under scrutiny. And this may well have been if we were to go by Thrasymachus who shouts out to Socrates that justice is merely what is most useful to the strongest, or if the cruel sentence passed down by the Athenians to the citizens of Milos had emerged as a principle of international law, according to which the weaker must succumb because that is how it has always been in nature. But the sentence that ultimately decrees the demise of the Melians indicates that there is no law between cities and peoples to enforce but merely force to wield. There are no walls that protect friends or foes within, that protect cities at war, armies in battle. Yet, the analogy between war - generally an all-out war - and politics cannot be upheld. For natural law, which is the law of the strongest, applies not only in the former but also in the latter.

As thus far presented, one could object, natural law looks very much like a

[14] See H. Arendt, 'What is Authority', in Id, *Between Past and Future. Eight Exercises in Political Thought* (New York: The Viking Press, 1968), 121.

gross deformation or a caricature of authentic and genuine law of nature. On the contrary, it is of an altogether different nature: natural law serves to defend the weak, not the strong. It foresees or preconizes compassion or mercy, not cruelty. It is a limitation; it is restraint, not complacency. It is the law bestowed upon us by a master or by a source higher than that of a lawmaker or judge. It is no longer a human and contingent product. It is *lex aeterna*, *lex divina*, that needs no written codes; it belongs specifically to human reason, to *natural lumen*. It manifests itself to all by means of the intellect and the nature of things.

Yet this kind of law still requires an additional pro. There is no medieval natural law philosopher who could discard determinatio. The rule of natural law continues to be cognitively underdetermined; it is vague and ambiguous and much too vulnerable (because it lacks positive sanction and secular power). In this light, although not imperfect, it is still incomplete. It will be 'complete', only when *ius positivum* comes into play. Most certainly, the latter is not a normative progression with respect to the *ius naturale;* rather, it is its necessary aid, an institutional development that if missing would represent a serious pragmatic as well as moral flaw. In such a way, earthly authority, the sovereignty of the prince, would arise by natural law and be legitimised - as pointed out by John Finnis, a present-day Thomist law philosopher - solely because (scandalously, he seems to imply) it can impose its precepts by sheer force.[15]

This rift in the notion of progression - and the development that will ultimately complete and overcome it - comes back with even more potency in modern natural law, which breaks away from Thomist scholasticism. It returns and explicitly affirms itself at the time when history conceptualises itself as a process viewed as one which qualifies and gives meaning to the event.[16] This is exactly what Norberto Bobbio meant by the 'natural law model'.[17] In this light, what distinguishes the doctrine of law would not be law intended as a body situated above the prince, a law of nature, but a situation preceding that which is produced by law. Law impacts, drastically changing it, a condition where law is still absent: the natural state. Vico's 'ferine state' was not that different.

For Rousseau, too, the progress that comes with law is a fact, albeit still morally fragile. No matter how idyllically he may present the natural state, and no matter how much he may insist that progressive civilisation, that the development of arts and crafts, are but a corruptive element of the original condition of innocence of man, the evolutionary leap of law is not really cast in doubt, not even by him. In fact, for Rousseau corruption and decadence occur in a process still underway within the framework of the natural, non-juridical, state, a process triggered by the division of labour and the specialisation of social functions. From this point

[15] Cf J. Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon, 1980), 250.

[16] Cf H. Arendt, 'What is Authority' n 14 above, 63.

[17] See N. Bobbio, 'Il modello giusnaturalistico', in Id and M. Bovero eds, *Società e Stato nella filosofia politica moderna* (Milano: il Saggiatore, 1979), 17.

of view, the natural state has a primitive stage featuring the innocence of the *bon sauvage*, followed by a successive stage branded by the vice of egoism and the clash between subjects who have become hoarders of egocentric interests. '*Alors les choses en étoient déjà venues au point de ne pouvoir plus durer comme elles étoient*'.[18] It is only at this point, during this second stage, that there arises the need for a change, for an institutional exit from the domain of force - into which the state of nature had descended - to enter the domain of law.

In their fallen state of nature, human beings '*avaient trop d'affaires a démeler entre eux pour pouvoir se passer d'arbitres*'.[19] But this proto-legal situation, characterised by the presence of an arbiter or judge - in itself a progression - occurs *de facto*; it is a *fait accompli*, a further stage in the specialisation and development of the functions of arts and crafts. It is a situation that produces a primitive law, a law that under many aspects continues to be unjust, requiring a leap, a further progression. This, however, will not be irreflective or organic, driven by functional dictates, but ushered in an explicit or reflective manner, by means of a public deliberation. It is the social contract and the law as a general will.

In any case, it is only when one exits the natural state - a condition where there is no law, dominated by insecurity and force - that one can effectively speak about law. The sequence is nevertheless temporal, even when the natural state is but an instance in a mental experiment. And because law is, in this case, progress with respect to the natural state, it continues to be exposed to the risk of being pushed back because progress, evolution, may not be definitive. In any case, it is not necessarily the sign and the result of a teleological and evolutionary process, of a sort of temporal normative arrow. Evolution here occurs between two directly and comparable conditions where the unsustainability of the one paves the way to the sustainability of the other. Once within the civil state, progress drains, and it is difficult to see how it can reproduce itself. If anything, it could expand, for example, by transforming the relations between states into fully legal relations with the implementation in the international space of a civic condition.

In reality, the way legal history developed as envisaged by Vico does not differ significantly. From the 'ferine state' to the 'age of Gods', in which law is identified with the power of the strongest, and to that of the 'heroes' and the 'humans', it is a progression that besides reproducing the development of the human spirit - as manifesting itself initially as 'sense', successively as 'imagination' and finally as 'reason' - has been an accumulation of normative. In the 'ferine state', 'in the purported state of nature (that of the family), there being no empires of civic laws, the *pater familias* would appeal to the gods for the wrongs done unto them'. [20]

[18] J.J. Rousseau, 'Sur l'origine de l'inégalité parmi les hommes', in Id, *Du contrat social, Discours sur les science et les arts* (Paris: Union génerale d'éditions, 1973), 345.

[19] ibid 366.

[20] G.B. Vico, 'Princìpi di scienza nuova (1744)', in Id, *Opere filosofiche* (Firenze: Sansoni, 1971), 650-651.

In other words, as Guido Fassò pointed out, 'there still were no rules of conduct'.[21] In the 'heroic' age, legal experience was obedience to command and its strictest formulation, while justice intended as fairness would occur only in the 'age of men'. Progression occurs only between a stage where there is no law but only an appeal to the forces above (divine judgement) and a situation where there is law with a claim to justice (human judgement), 'where the truth of the facts is paramount'.[22] In between, there is an intermediate stage where normative is exclusively based on a claim to fairness (ordinary judgement) and the juridical order grounded on the rigorous management of the formal rule, on the 'maximum scrupulousness of the word'.[23]

Natural law, intended as a practice that is structured by way of the conceptual connection between positive and moral law, is the destination of this journey. That is what Jules Michelet, the great French historian and admirer of Vico, says: '*Jusque-là, il n'y a qu'un droit civil: avec l'age humain commence le droit naturel*'.[24]

IV. Law as Regress

But what if law, even while underlining a progression, proved to be, in any case, a defective or even perverse mechanism? What if the cost it imposed for the soundness and objectivity of the rules were too high and became unsustainable? And what if progress contained within itself the germ of its own ineluctable decadence? This appears to be what we are told by that philosophy which is least affected by the advantages and allures of modernity emerging from the rejection of the natural state. A law that is too conventional and contract-based now seems to be replicating very closely the relational dynamics and reciprocal dependence that were features of the natural state. Is law, then, too close, too dangerously close, to the condition that denied it and from which it had wanted to distance itself? To the extent that law, if it were to be real progress, must be in the condition to overcome and even deny itself.

Broadly speaking, what is being outlined here is the Hegelian-Marxist model. In this model, law is but a temporary progress that ultimately leads to its superseding and even extinction. We are aware that for Hegel law is the starting point of a path that must be objectified in morals before developing into an ulterior stage, ie, into the ethical dimension of the state. The state, according to this model, overcomes and reassembles law. And for Marx, as is well known, law lies ambiguously between the space of ideology and the factuality of political violence. It is a progress that should soon lead to something else - something that can highlight its shortcomings

[21] G. Fassò, Storia della filosofia del diritto, II, L'età moderna (Bologna: il Mulino,1968), 283.
[22] G.B. Vico, n 20 above, 656.
[23] ibid 654.
[24] J. Michelet, 'Discours sur le système et la vie de Vico', in M. Gauchet ed, *Philosophie des sciences historiques. Le moment romantique* (Paris: Seuil, 2002), 217.

and sanction its absence.

Alexander Kojève affirms on the basis of Hegel's *Phenomenology of the Spirit* that law is generated in the Master and Servant dialectics, *Herr* and *Knecht*. Human evolution is grounded on the struggle for acknowledgement. In this struggle, someone wins, and someone loses. The winner becomes the Master and the loser the Servant. But the Servant has stripped himself of humanity by accepting the absolute domination of the other in exchange for his life. For the Master, the mere acknowledgement of the Servant is not enough, having stripped the Servant of his autonomy and dignity. Acknowledgement is meaningful only if it comes from a source of dignity. And a slave is no such source of dignity. Law arises in this struggle and in dialectics. However, law in the beginning is the privilege of the Master; it is law only in power and not in act, for the Servant is not in a position to recognise and realise as being valid and legitimate. That law must be contested and overcome if it must be realised and meet its claim to legitimacy. '*L'histoire du Droit est donc le passage du Droit de la puissance à l'acte*'.[25] For Kojève, the process leads to the figure of the Master and the Servant to that of the Citizen, and law will occur only at the end of history intended as Universal Imperium.

It should therefore not be taken for granted that modern philosophic tradition would lay its hopes on positive law. The evolution it traces often boils down to an absence that needs to be filled. The critical attitude is often turned into a thrust towards the plurality and variableness of legal positivity, in turn countered by a specific theoretical move which is that of reinterpreting, more or less optimistically, law as a general form, finally conceptualising it as a structure from whence individual rights originate. If law wants to avoid exposing the risks that are inherent in its nature to mercantile corruption and authoritarian meddling, it must rise once again as an aggregate of rights, or as a 'form' implying subjective rights. The development of law will thus be the progress of rights.

Nevertheless, the passage from right in the singular to rights in the plural, from objective to subjective law, is somewhat problematic at least when considered within the very modern paradigm of legal positivism. It is for this reason that law is essentially command and prescription. Law is here conceived imperiously, in such a way that it becomes conceptually and practically extremely difficult to derive from it spheres of liberty and autonomy for the recipients of these commands and prescriptions. As a result, starting from Bentham, including John Austin and Georg Jellinek, all the way to Hans Kelsen or Alf Ross, positivist theories have focused on attempting to marshal the notion of subjective right and to reduce it - as programmatically affirmed by Hans Kelsen - to objective law.[26] Rights are not, in this case, a progress but probably only an illusion or a mutation that can have a dangerous impact on the legal system as a whole and its claim to be in charge and

[25] A. Kojève, *Esquisse d'une phénomenologie du droit* (Paris: Gallimard, 1981), 133.

[26] On this topic, see M. La Torre, *Disavventure del diritto soggettivo. Una vicenda teorica* (Milano: Giuffrè, 1996).

in control. While rights multiply the normativity of the system, they reduce the ability to exercise control at a central level inasmuch as they refer to the autonomy and self-certification of the rights holder. However, *auctoritas, non libertas facit legem*, besides *non veritas* (for the legal positivist).[27] Truth and liberty are obstacles to the smooth running of the modern machinery of positive law, and rights must refer to both to be exercised.

Law is only authority and sovereignty as a factual power from a somewhat external point of view, that is, from the point of view of subjects who are not involved as the participants of a common practice. If we analyse law as a series of material acts or positive orders, the subject who stands out as the key figure is the author of those material acts, ie, the lawmaker. It is on this figure that legal positivism focuses its conceptualisation of the legal practice, which is in this case essentially a sequence of decisions. Those who do not decide but are nevertheless involved in the legal practice (lawyers) disappear from the theoretical radar of law. Yet the law is their concern, too. Clearly, it is the judge's concern, although in classical legal positivism the judge is essentially but a relayer of the lawmaker's precepts and that consequently - it may be affirmed - legal propositions are merely 'reiterated precepts'.[28] A 'reformed' legal positivism could in any case give a broader scope and stronger role to the judge, which is what Kelsen posits when he affirms that the judge is not simply 'the law's mouthpiece'. As we well know, for the Austrian jurist the judge is himself a producer of norms albeit covering a narrower spectrum. The judge, according to this view, produces 'individual' and not general norms, the latter being the laws.[29]

For Herbert Hart, the judge is the subject who is in some ways the paramount and 'creative'[30] figure, from an internal point of view, among those taking part in the legal system, among those who have legal title to the norms. Curiously, though, Hart reserves to the judge exclusively an internal point of view, affirming even contradictorily that parties in court and citizens (who are those who have legal title to the norms) are seen from an external point of view.[31] In other words, the judge sees law as a practice focusing in giving and demanding motives, while the common man - the citizen and, with him, the lawyer, who is in some ways his 'double' - actually adopts before the law a prudential approach. For both lawyer

[27] See U. Scarpelli, 'Auctoritas, non veritas facit legem' 75 *Rivista di filosofia*, 29-43 (1984).

[28] Cf U. Scarpelli, 'Le "proposizioni giuridiche" come precetti reiterati' 44 *Rivista internazionale di filosofia del diritto*, 465-482 (1967).

[29] See H. Kelsen, *Reine Rechtslehre. Einleitung in die rechtswissenschaftliche Problematik*, re-edition edited by M. Jestaedt (Tübingen: Mohr Siebeck, 1st ed, 2008), 89-90.

[30] See H.L.A. Hart, n 9 above, 135-136.

[31] ibid 115-116. Hart is aware that a reduction of this kind in the ambit of the internal point of view means turning law into a radically authoritarian practice, or into a 'slaughterhouse' where citizens are sacrificed as animals: 'In this more complex system [in a system of primary and secondary rules], only officials might accept and use the system's criteria of legal validity. The society in which this was so might be deplorably sheeplike; the sheep might end in the slaughterhouse. But there is little reason for thinking that it could not exist or for denying it the title of a legal system' (ibid 117).

and the citizen alike, the law does not speak with the language of obligation and even less so with the language of rights.

This way of portraying legal practice does not render it justice. Substantially speaking, legal practice is 'controversy', conflict between opposing parties, each one standing up for their grievances. Each party - and the lawyer representing them - demands that the law be applied, but they do so by invoking their rights. Law is thus applied by the mobilisation of subjective rights. The parties claim their own rights. Law in action thus appears as the 'right of rights'. And that is not all, for by demanding that their subjective right be acknowledged, the parties pretend to be in the right, to be right. It is what Ronald Dworkin[32] calls the 'rights thesis', which brings to mind the inescapable internal aspect of law characterised by the claim to rights and - even more significantly - by the *claim to be correct*, the claim to be within one's right, to be in the right, which inasmuch as requiring to be universal, gives rise to the *claim to justice*.[33]

The right of rights is thus anything but self-sufficient or exhaustively contained in itself; it is, on the other hand, consigned to a dimension of morality: the claim to be in the right, the claim to fairness and justice. The right of rights exits the formal and systemic enclosure within which legal positivism wished to circumscribe it, repositioning itself in the area of solid normativity - that very same area some believed had been left behind once the road to the legal state had been paved. Once, that is, the state of nature had been abandoned and the situation had come to be governed by positive law. For that is indeed how this evolutionary passage has been conceptualised, as an overcoming of counter-facticity and strong normativity and as the upholding of facticity and positivity. But in the right of rights (that which best reflects the phenomenology of the legal practice intended as controversy), the very essence of law is its moral projection, the required and not contingent overture to moral thought.

The evolution to positivity does not exempt us from making considerations on the criteria of justice and morality, so that a further passage is required which, nevertheless, cannot be the denial of the deliberative and institutional practice and the mere reliance, once again, on the counterfactual situation. The overture to the moral dimension occurs and remains within the institutional framework. There is no return to the 'state of nature'. The fundamental norm of law - especially in a constitutional state - is eminently constitutional, not regulatory; its aim is the generation of a new reality, not the regulation of a pre-existing reality. It is the 'constitutional moment' Bruce Ackermann speaks about.[34] Normative law has an ontic layout and impact that moral law does not have. There is in law a novelty that is missing in morality.

[32] See R. Dworkin, 'The Model of Rules I', in Id, *Taking Rights Seriously* (London: Duckworth, 1978), second chapter.

[33] See R. Alexy, *Begriff und Geltung des Rechts* (Stuttgart: Alber, 1992).

[34] See B. Ackerman, *We the People, Foundations* (Cambridge: Belknap Press, 1993), I.

The novelty in the evolution of law lies also in its progressing without too many breaks and disruptions, like a series of cases and decisions that follow the narrative flow almost as if they were the chapters of the same, unfinished, novel - a novel that is continued whenever a new controversy arises and is solved. The decision must present itself as the ring of a chain, like the continuation of a story, that hinges on an issue of justice where it is the story as a whole - the story intended as the process and progress of events - that gives meaning to every legal decision. In a nutshell this is what Ronald Dworkin says in his hermeneutical and coherentist reconstruction of legal practice.[35]

In jurisprudence, the projection is once again evolutional. It is a proceeding towards the ideal sense of juridical practice. It is, as Dworkin puts it, 'the pressure of law beyond law'.[36] The norm is intended, explained, and applied in consideration of its contribution to the ideal form of life, of legal cohabitation and condition; that very same ideal that justified and motivated the exit for the 'state of nature'. The norm is its *sense*; and its sense must be set against the background of the driving idea and the 'utopia' of the corresponding form of life.

V. Evolution and Legal Theory

The evolutionary model is also at the base of some key influential law theories. The notion that law must be explained as a progress from a previous situation of normative incompleteness occurs not only in modern natural law but also in some of the most influential doctrines of legal positivism. Law is the outcome of an evolutionary leap, claims John Austin, the founder of 'analytical jurisprudence'. Hans Kelsen says it in his own way as does Herbert Hart even more explicitly. In Austin's theory, law is outlined and conceptualised against the backdrop of a situation defined as 'positive morality', where the presence and functioning of a centre of autonomous power is yet to be crystallised and where there are yet no differentiations in terms of specific functions (as in the case of deliberation and enforcement of sanctions).

Considering his cultural background, Kelsen would appear to be reasonably immune to all evolutionary temptations. Yet even for him, positive law is the result of an evolution, where progression starts from an underdetermined normative system, heading to a more developed one. It is the shift from what he calls a 'static' to a 'dynamic system'. In a dynamic system, normative production - as is well known - concerns but specific organs to which the corresponding competencies are attributed. The system is dynamic because it is the outcome of a development, of a progression from previous norms. And it is a creative progression because it is not envisaged in the previous and higher norms. The norm signals a 'leap' with

[35] See R. Dworkin, *Law's Empire* (London: Fontana, 1986), 228.
[36] ibid 407-408.

respect to the norm from which it derives. In the 'static' system this leap does not occur; here there is no progress, because the norms already exist in the initial, previous, or higher norms. The successive and individual or concrete norm is only the logical consequence of the general norm. The temporary status here heralds no specific gap or progress.

Once a dynamic system is in place, Kelsen believes that system may be more or less advanced. Such a system is constituted when there is an organ that decides on the application of the norms. The judge is the primary organ that allows for the technical emergence of the 'dynamic system', therefore, of positive law. The latter will perfect itself successively when, following the rise of the figure of the judge, there successively develops a legislation of sorts as well as a centralised sovereignty or at least one that can be conceptualised as such. Thus, if for Austin international law is still merely a form of positive morality, failing, therefore, to achieve the full dignity of law,[37] for Kelsen it is to all effects positive law albeit still 'young' and developing and notwithstanding the various forms of judiciary or jurisdiction involved. International law, Kelsen says, is true law. Once a form of jurisdiction is in place, Kelsen is confident there will be a further evolutionary leap that will develop and institutionalise the normative structure that had been established in the first place through a legal procedure.[38]

Kelsen is here once again indebted to natural law and, more specifically, to Kant's interpretation of it. For the philosopher from Konigsberg, it is the demand to take recourse to a judge that drives the shift from the natural to the civil state. Subjects need their rights to be publicly and impartially acknowledged: '*Da sie sich einander nahe sind, so kommt jedes Recht dem des anderen in Weg. Sie bedürfen Richter*'.[39] It is therefore the activation of the legal function that sets in motion the evolutionary stage of law.

With respect to Kelsen, Hart is by far more sceptical about the legal value and qualification to be ascribed to international law.[40] For Hart, there is still no such thing as a rule of acknowledgement, that is, a practice or series of practices, from which it would be possible to assume the rule establishing its belonging to the legal system and, therefore, the validity of the norm in question. Yet, Hart shares with Kelsen the view concerning the centrality of the role played by the judge - the judge intended as the institution that crystallises a law that is no longer primitive. For Hart, as is well-known, there is a primitive law consisting exclusively of primary norms - norms of conduct - and a fully-developed law, an advanced law, where

[37] See J. Austin, *The Province of Jurisprudence Determined* (London: Weidenfeld & Nicholson, 1954), 142.

[38] See for example H. Kelsen, *Peace Through Law* (Chapel Hill: University of Carolina Press, 1944).

[39] I. Kant, 'Ausgewählte Reflexionen aus dem Nachlass', in Id, *Schriften zur Geschichtsphilosophie* (Stuttgart: Reclam, 1980), 236.

[40] Scepticism that is expressed, as is well known, in the tenth chapter of *The Concept of Law*.

the primary come with the secondary norms.[41] The latter include the so-called norms of 'judgement', that is, the norms that establish jurisdiction, the procedure that ensures if the primary norms of conduct have been observed or violated.

The rise of jurisdiction is, also in this case, the decisive moment in the formation of an advanced legal system. Although it would appear that for Hart, jurisdiction is not possible without two other secondary norms, the norm of acknowledgement (functionally not dissimilar to Kelsen's *Grundnorm*) and the norm of change (the norm that introduces legislative power in the legal system). The latter is a kind of norm that reconnects in a significant way positive law as an advanced system to its changeability, which is in a way something equivalent to the 'dynamicity' Kelsen has spoken about in his *Stufenbau* doctrine. According to Hart, law is positive and not primitive if endowed with norms that allow it to change, ascribing the related competences to a specific organ.

According to Hart, 'secondary norms' - those that attribute power, meta-norms, norms that generate norms - are those that make a legal system modern and not primitive. Their appearance is therefore an evolutionary acquisition. Their introduction as the constituent norms of legislation and jurisdiction, besides those 'acknowledging' law as a coherent legal system, 'is a *step forward* as important to society as the invention of the wheel'.[42]

The evolution of law, it could be said, is connected to the system's ability to reflect on itself. A normative system is juridical if it acquires a meta-normative ability; in other words, the evolution of law is a law that explicitly assumes as its task its own evolution. This reflective ability may be sharper, more radical, to the extent that the meta-norms could become the principles of norms. That is, the dynamicity or progressivity of law may refer to what the Austrian civil law scholar Walter Willburg said about the need to concretise legal measures through underlying principles when he indicated law as a 'bewegliches System', a 'mobile system',[43] introducing a position that Ronald Dworkin would successively develop more systematically.

But there is an exception: legal realism, at least that of the American kind. There is no claim to progression here, for two main reasons. In the first place, law is considered by the realist from an external point of view, the point of view of Oliver Wendell Holmes's 'bad man':

If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside it, in the vaguer sanctions of conscience.[44]

[41] Refer to *The Concept of Law* n 9 above, 91.

[42] ibid 41, italics mine. See J.M. Finnis, 'H.L.A. Hart: A Twentieth-Century Oxford Political Philosopher' 54 *The American Journal of Jurisprudence*, 166, 161-185 (2009).

[43] W. Willburg, Entwicklung eines beweglichen Systems im bürgerlichen Recht (Graz: Kienreich, 1951).

[44] O.W. Holmes, 'The Path of the Law' 10 *Harvard Law Review,* 459, 457-478 (1897).

What prevails here is the point of view of the immoral or amoral subject who does not find reason for his action in his conscience but in the observation or, better, in the prediction of the consequences of his conduct and, therefore, in the negative consequences that law may cause him. Therefore, law is essentially the harbinger of negative material consequences, the giver of sanctions, pain, and sacrifice. Law is thus unable to make the situation which called for its application less miserable than what it was before it was enforced. From this point of view, the consequences produced by law, far from being a progress, is most certainly a regress, a cost, a loss.

VI. A Philosophy of the History of Law

It is not easy to find legal theory experts or philosophers who have specifically dealt with the philosophy of the history of law. I am aware of only two scholars who have tackled this issue explicitly in recent times: Gustav Radbruch and Gerhard Dulckeit, two German jurists. Since Radbruch is certainly more interesting, we will not deal in this paragraph with Dulckeit, a neo-Hegelian who trained under Julius Binder in the 1920s and 1930s.

Radbruch, is the one who interests us more in this venue. All but neo-Hegelian, he is considered as a jurist and legal philosopher who belonged to the German neo-Kantian school of thought that developed between the 19th and 20th centuries. Radbruch focused, *expressis verbis*, on the 'philosophy of the history of law' in both his principal philosophy of law studies, namely *Rechtsphilosophie*, the last edition of which was significantly published in 1932, and *Vorschule der Rechtsphilosophie*, the lectures he gave when universities reopened in post-Hitler Germany, which were published in 1946. In both these publications, a chapter is dedicated to the *Philosophie der Rechtsgeschichte*. As well-known, these two books are quite different: the former, *Rechtsphilosophie*, is wider in scope, more systematic and developed, while the latter reflects the pace and tone of lectures and is more apodeictical and concise. But there is a further difference between the two works.

Rechtsphilosophie upholds a neo-Kantian point of view. It is in many ways its paradigmatic application. And considering the type of neo-Kantian approach Radbruch adopts - the neo-Kantian thought that developed in the south-west, in Windelband - it boils down to the implementation of what is tendentially a non-cognitive metaethics. In this work, Radbruch is a metaethical relativist who draws ethical and political theses and legal theories from relativism. The second work, *Vorschule*, brings to light a kind of 'conversion' in which we observe the earliest formulation of the so-called 'Radbruch formula', according to which in the conflict between legal certainty, between positive law, and the demand for justice, certainty and law must prevail (in consideration of the prominent value of certainty). Except when the injustice generated by the application of the law is

so excessive as to be intolerable. It is a formula that, overcoming pre-war legal positivism, paves the way to a new normative perspective, the post-positivist perspective of a conceptual link - and therefore also pragmatic - between law and morality.

The tragic experience of the Hitlerian State was an eye-opener for the professor from Heidelberg, whom the regime had forced to retire. An ethical thesis, no matter how perverse, cannot be countered by a meta-ethical thesis if not at the risk of being argumentatively and existentially prevailed upon. Inapplicable is the argument - similarly upheld by Kelsen who was also a relativist - according to which, there being no certain truth in matters of values, all values must be respected, thereby justifying democracy. Thus, if a value cannot be justified and is, therefore, arbitrary, entirely relative, it is difficult to understand how it can be considered worth protecting. You protect something that has value, yet if that value cannot be proved, protecting it makes no sense. Indeed, we could insist that that is 'our' value, that it is a value 'we want', but there is no reason to respect it if it is absurd, evil, or perverse. Thus, in the absence of any justification or reason, what remains is persuasion with facts, regardless if they arise from rhetoric, from the manipulation of sentiments, or from force outright. If you cannot convince, you can still win. But you will have to rely on force so that, at the end, the strongest will prevail, although force may not always be right. Unless you rely on some Hegelian 'cunning of the reason' or some romantic 'normative force of the fact'. Which are not, however, the options taken by Kelsen or Radbruch.

Reiterating in 1932 what he had already said in a previous essay entitled 'The essence and value of democracy', Kelsen sustains that only he who believes to be invested by the Absolute, to be the new 'Son of God', can claim to be endowed with moral certitude, implying consequently that only a fool could pretend to have such divine or moral status. Unfortunately, as he was outlining these thoughts, the 'serpent's eggs' hatched, and the world found itself breathing air that had changed, and dealing with a new kind of people, led by a leader, the *Führer,* who believed he had been anointed by that certitude. Who believed was the very incarnation of that certitude. And against those abominable and aberrant moral theses, it was perfectly futile to affirm that those theses were unfounded. Against the Absolute, even when invoked in folly, there was little cognitivism and relativism could do. What can be affirmed instead was that those who stood against evil must have arguments that were unequivocal and universal, sounder, and stronger than those upheld by the great *Leader*. If you are unable to do so, your moral position is in danger.

In such a situation, I must be in the position to affirm plausibly the following: in defending democracy, I'm right, while you, in demanding dictatorship, are wrong. And, indeed, this *is true*. In wanting liberty, I am in the right, and you, in upholding slavery, are *in the wrong*. And this was something Radbruch realised during the tragic years under Hitler. Indeed, by 1945 his relativistic beliefs had

been deeply shaken. The Nazi regime had shown there was no truth in normative enunciations, now that they were rooted in absolutism. This led Radbruch to also abandon legal positivism - which was a derivation of relativism - and to opt for a relatively moderate and reflective form of natural law. This change was first outlined in the lectures he held at Heidelberg in the autumn of 1945 and in his *Vorschule*, the new 'Propaedeutic to the philosophy of law'. Now, what interests us here is to understand to what degree this change impacted Radbruch's position with respect to the philosophy of the history of law.

In *Rechtsphilosophie*, Radbruch starts his discussion on the philosophy of the history of law by pitting two doctrines against each other: *Allmacht der Rechtsform* ('omnipotence of the legal form') vs *Ohnmacht der Rechtsform* ('impotence of the legal form'). According to the first doctrine, the legal form finds little or no resistance in the *Rechtstoff*, in the stuff of law, in the legal matter, while in the other, *Rechtstoff* comes across resistance, a limit, to its 'form'. But let us clarify matters further.

By 'legal form', Radbruch intended the substantial content of the value of law, while 'the stuff of law' was the situation on which normative value applied, it was a kind of conduct by example. A paradigmatic version of the theory of 'omnipotence' was natural law, according to which the normative content would, in any case, emerge and shape positive law-making and *de facto* situations and chance. A characteristic doctrine of 'impotence' is, on the other hand, the German Historical School of Jurisprudence as set down by the likes of Friedrich Carl von Savigny.

According to this line of thinking, normative content is the outcome of historical contingency, of a *de facto* situation. Now, regarding the approach to the history of law, to its progress in time, it would appear that the 'omnipotence' doctrine tends to underestimate, to mitigate, change and transformation. According to this doctrine, 'legal form' is unaffected by and overcomes time. The opposite, on the other hand, occurs in the historicism as advocated by Savigny: law is subject to the constant flux of time and no immobility is possible considering that legal forms as well as regulations are determined by the contingency and mutability of events.

But a third option is viable, Radbruch tells us. This option in reality had already been outlined in Hegel's critique to Savigny:

Barbarians are ruled throught instincts, customs, feelings, but they do not have any awareness of it. Once the law is posited and know about, all that is casual is driven out from sentiments, opinions, from the forms of vengeance, compassion, and egoism, and in this way only the law gets its true determinacy and is acknowledged dignity [*Barbaren werden durch Triebe, Sitten, Gefühle regiert, aber sie haben kein Bewusstsein davon. Dadurch, dass das Recht gesetzt und gewusst ist, fällt alles Zufällige der Empfindung, des Meinen, die Form der Rache, des Mitleids, der Eigensucht fort, und so erlangt das Recht erst seine wahrhafte Bestimmtheit und kommt zu seiner Ehre*].[45]

[45] G.W.F. Hegel, *Grundlinien der Philosophie des Rechts* (1820) (Frankfurt am Main: Ullstein,

Customary law does not have a basic feature of positive law in the shape of legislative acts; it misses reflexivity. When legal experience, intended as a primitive and unwitting vehicle of tradition and visceral sentiment, organises itself, especially when exercising the controversial struggle for law as outlined by Jhering, must be able to put on the line the 'legal form', the reflective normative regime, in such a way that it cannot be dragged solely by the contingency of the situation. It may even be observed that for Savigny progress occurs by accumulation, by the multiplication of time strata, without producing an evolutionary or normative leap. On the other hand, Hegel, albeit within a historicist but nevertheless rationalistic system, believes law can occur as both disruption and improvement, therefore, allowing it to stake a claim to progress. Although this may be part of a 'List der Vernunft', it does not exclude or put out of contention the performativity of the legal experience, which is the result of self-awareness. And that's why Hegel is so much closer to legal Enlightenment than Savigny could ever be.

But it was the issue concerning legal validity that for Radbruch had a value as philosophy of history. Here we have, once again, the clash between the two opposing theses. The rationalistic, on the one hand, which claims that law stakes its validity on a previously valid law. There is continuity here, for the issue of validity is grounded exclusively on a previously valid title. Or, there is the romantic position where, as Fichte said, all that had become law had done so against law: '*Alles, was in der gegenwärtigen Menschheit an Recht ist, ist auf die erst Weise zustande gekommen, gegen die Form des Rechts*'.[46] Radbruch defines this latter doctrine 'Volcanism', a sort of catastrophe theory, while the theory of continuity is called 'Neptunism'.

While 'Volcanism' foresees a permanent breach in history, Radbruch points out that this is possible due to a perspective that also envisaged continuity. In fact, to sustain itself, such a perspective would require a broad thesis on the events of human and legal history, namely the principle 'according to which those who were called to produce law are those who are able to produce law'.[47] It is worth mentioning at this point the striking coincidence between this proposition of philosophy of history and the concept of law recently presented by two Oxonian natural law philosophers, Joseph Raz and John Finnis. For the latter, law is founded on *de facto* authority, on 'the extraordinarily crude principle' according to which normativity is the outcome of *de facto* power.[48] Joseph Raz, too, says something similar when discussing the nature of law; he offers an 'exclusive' legal positivist interpretation of it, one that always excludes all conceptual links between law and morals. Law - Raz affirms - is the product of an authority, ie, an entity capable of

1972), § 211, Zusatz, 171.

[46] F.H. Fichte, Wissenschaftslehre und das System der Rechtslehre: Vorgetragen an der Universität zu Berlin in dem Jahre (Bonn: Adophus Marcus, 1834), 514.

[47] G. Radbruch, *Rechtsphilosophie*, Studienausgabe, R. Dreier and S. Paulson eds (Heidelberg: C.F. Müller, 1999), 91.

[48] J. Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon, 1980), 250.

imposing its instructions to others, capable, that is, to be an authority. Herein lies its 'true essence'.[49]

In *Vorschule,* Radbruch's treatment of the philosophy of law is more concise. While no mention is made here of 'Volcanism' or 'Neptunism', focus is once again on the alternative between the doctrines of 'omnipotence' and that of the 'impotence' of law, producing an *impasse* that can nevertheless be broken. Radbruch bases this conviction by developing the idea of the struggle of law first outlined by Jhering in *Kampf ums Recht*. Anticipating the 'rights thesis' of Ronald Dworkin, Radbruch underlines the fact that the nature of law can be fully grasped only by starting with the controversy of controversy. Law cannot be explained by looking at the decision, the command, or the bureaucratic application of the rule. It is the clash between conflicting motives and the decisions taken as a consequence that really explain what law really is: '*Nur wenn man den Rechtssatz als Konfliktlösung betrachtet, kann man ihn von einer blossen Beamteninstruktion unterscheiden*'.[50]

A legal system - Radbruch says - is more resistant to history the more it is abstract and broad; the more it is *lebensferner*, 'far from life'. A system based on casuistry, one that is more adherent to the peculiarities and minutiae of the realities of society, *lebensnäher*, 'closer to life', is, on the other hand, more exposed to and less protected from the attrition of passing time.[51] The omnipotence of the legal form is bound externally by the coexistence of various centres of sovereignty, and internally by the impossibility to derive a new constitution from the older one.[52]

VII. Modern Law as Progress

Whatever the case may be, we could say that progress is the myth or tale that shakes and nourishes the experience of law. And this is something that is clearly evident in modern law. Modernity radicalises the notion of improvement and novelty, conceiving progress as a torsion in time's arrow - a conviction that continues to be predominant today. Progress no longer requires a *tertium comparationis* but is presented in the garb of history of philosophy as secularised theodicy. What manifests itself here is providence ('*Die Vorsehung leitete den Faden der Entwicklung weiter*'[53]) - a providence that manifests itself not so much to single individuals as to humankind. A providence that manifests itself as history of society. Indeed, society *is* the agent of providence, becoming, as such, ontologically more compact, distancing itself further and becoming more independent with

[49] See J. Raz, 'Authority, Law and Morality' 68 *The Monist*, 295-324 (1985).

[50] G. Radbruch, 'Der Zweck des Rechts', in Id, *Der Mensch im Recht* (Göttingen: Vandenhoeck & Ruprecht, 1957), 94. See G. Radbruch, *Vorschule der Rechtsphilosophie*, A. Kaufmann ed (Vandenhoeck & Ruprecht, Göttingen, 3rd ed, 1965), 85.

[51] ibid 85.

[52] ibid 83.

[53] J.G. Herder, Auch eine Philosophie der Geschichte zur Bildung der Menschheit (Stuttgart: Reclam, 1990), 14.

respect to single individuals. It is thus no longer conceivable as being the outcome of a 'pact', or agreement, a deliberation or a reflection.

What now emerges is therefore a dimension that is distinct from the strictly public or state spheres, and sufficiently also removed from the private sphere of subjects: it is the 'civil society' that secularises what had previously been conceived as a religious dimension. Similarly, the providential tone of human events in time occurs along a path that is at the same time unintentional but also strictly human. History becomes a narrative told by those who can already read the course of events. History and society thus become concepts characteristic of modernity that are strengthened by the notion of progress and by the temporal propinquity to an ideal state which is also a finality. The evolution of law is thus a sequence of stages having an ultimate end, driven by the same engine. We thus find ourselves deep in the broad sweep of the philosophy of history and in the evolutionistic sociological theory.

Modernity is somewhat akin to the Baron of Munchhausen who wants to prop up his collar. Modernity is insatiable because it can generate new desires and projects and, therefore, perennially unsatisfied of what it possesses, see and experience. Law is therefore subjected to a constant dynamism and to an accelerated consumption of its own resources. Good law is no longer the venerable and consolidated one, but the latest available one – the newest that quashes the previous. Law has been motorised and become the outcome of continuous revision and destruction. When Voltaire in his Dictionnaire philosophique under the entry Lois asks what is intended as a good law, he answers by pointing to the tabula rasa: '*Voulez-vous avoir de bonnes lois? Brulez les vôtres et faites-en de nouvelles*'. The 'rule of change', to use a formula by Herbert Hart, is its basic norm.

But where is all this change leading? What direction is it taking? Will a time come when the law-making machine will be switched-off? Is there an ultimate end to all this? Will it ever end? While some cannot see where all this is going, others see a direction.

Growing social complexity, increasing specialisation of functions and widening globalization of economic processes, in addition to ever more sophisticated information technologies and game changing technological progress, have all contributed to making change and evolution a feature of daily life. But where is all this heading to? What is the target of the arrow of time that shores up the legal system?

The category of change is partly hostile or impregnable to jurisprudential decisionism. This makes it very attractive for an approach that ceases to be shaped by the rationality of sovereignty and command. If law is governed by change, it cannot be the authoritarian and contingent outcome of a decision. The course is set and norms pile up on each other without having to rely on the force of decision. Norms are strung like beads on a thread tied in space and time. Law can thus configure itself as not bound to convention, force, and punishment. It is believed

that evolutionary law can do without coercion and force. It accumulates and proceeds by layers and genetic mutation without having to constrict but only rely on the strength of time. Sovereign power thus lies with those who hold and govern time with no exception. The regularity of time remains unfaltering even in the face of catastrophe and emergency. The beholder of time, in terms of orthogenesis and phylogenesis, is time itself. In this kind of setting, the sovereignty of constituent power dissolves.

Law expands in layers, by accumulation and necessity. A fitting metaphor is not the clock - not the mechanical device that is the product of matter fused, shaped, and reshaped and then turned and hammered and assembled - but the tree. The clock is an act of force, the tree far from it. Or one may resort to a notion of history featuring cycles that have already been arranged within a given framework. A cyclical history does not present junctions where the players involved must assess and evaluate alternative routes; its understanding and fruition is exclusively cognitive.

Evolution as assessment is an observer's privileged category from an external point of view. If shifted internally, the self-observer's point of view would collapse as a mode of participation, such as one that could be able to provide an answer to the need for pragmatic action. To have participation it does not make sense that a participant does just observe himself, and that participation would assume the meaning of the description of a distinct fact, for in such case the self-observation could only certify the participant's taking distance from participation, his lack of commitment in the practice of participation, his inability to lay down a standard of conduct, and the assuming of a different performative register. The internal point of view would break down if it did not perceive the alternatives that action was confronted with, if, that is, the normative intuition of choice was not confirmed by and justified in the cognitive experience of empiric reality, and if, finally, it was not capable of affirming or claiming what must be pursued.

> *Da hier* - in Kant's own words - *ein Vorhersagen des künftigen die Aufgabe ist, dieses aber nicht geschehen kann, wenn man nicht a priori urteilen kann, was geschehen werde, mithin dass das Bessere notwendig aus der Verkettung der schon gegenwärtigen Ursachen mit ihren Wirkungen erfolgen müsse, die Notwendigkeit des beständigen Fortschritts zum Besseren […] in Betrachtung komme.*[54]

The alternative for action arises in the gap between the previous and successive condition, between cause and effect in a specific given context. If the effect of this action is also the cause of a successive effect and so on, this an assessment that is not covered by the performative mode needed by a course of action to deliberate about.

[54] I. Kant, n 39 above, 213.

Clearly, in the practical reasoning you could, and probably should, take into account the successive mid-term consequences of the proposed action. But this continues to be a cognitive consideration that is all the more hypothetical the more its consequences are mediated and require the activation of an efficient cause. The internal point of view requires almost exclusively a specific causal chain. As for the lengthy sequence of causes where the junction to be engaged must be placed, it cannot be ignored by those who consider the same situation *sub specie evolutionis*. It should not likewise be neglected that that specific action leading to that specific effect can be improved and repeated at each deliberative turning point.

The claim to progress is stronger and more conspicuous where, as in law, there is a claim to correctness and justice. In law, the claim to correctness and justice reach out to an ideal where requirement is met and perfection achieved. Of course, an ulterior conceptual consequence of this claim is that progress cannot define or consider itself merely temporary or accidental. Progress cannot be followed by a regress, that the claim to justice must necessarily remain unrequited because it is vain and unfounded. I can stake a claim to correctness and justice, I have the founded hope that both can be attained. The claim to justice assumes that an analogous claim can once again in a remerging or new legal controversy. Progress is presumably followed by more progress, and that there cannot be conceptual space is a landscape of this kind for regress and decline. In the demand for justice, the arrow of time always goes straight.

What will then be the ultimate end of this progressive movement? How can it be conceptualised? I believe there are three options. One could rely on the notion of the end of history, or to that of the eternal return. Or even point to a meeting point in an infinite, *Treffpunkt in Unendlichem*. But where is law going? What is its destination?

For law, the end of history is not really an option, because without history law would not be able to consider itself as progress, albeit temporary. There would not be any progress if history ended or were accomplished. If the 'mobility' of process were only temporary, so would the legal system be, which would ultimately coil itself up. Principles would become rules. But when would that occur? And why? Under which circumstance or case would it be possible to affirm that the process has come to a definite end? Why shouldn't the principle be expressed and compounded beforehand as a rule and the hermeneutical and applicative activity of the norm as merely a deductive operation?

The experience of law as progress is also not encouraged by the eternal return, by cyclical 'corsi e ricorsi'. Here, as Herder critically points out, all conceptual tension would be absent and lead to confusion and scepticism. '*Kein Plan! kein Fortgang! ewige Revolution – Weben und Aufreissen! – Penelopische Arbeit!*'.[55] Jurisprudence would then be akin to Penelope's shroud, to be done and undone and unable to achieve narrative sense. Where law is cyclically destined to retrace its footstep

[55] J.G. Herder, n 53 above, 37.

back and to start judgement afresh, where there is no longer any *res judicata*, its ability to set a direction is seriously put in doubt.

When the hourglass of deliberation is turned and the judge is doomed to decide on the same object and controversy, nothing whatsoever has been decided. Nor will anything be resolved. Injustice - that very same specific injustice - would forever re-emerge, and law would be like Sisyphus who addresses wrongdoing only to see it come crashing down as a heavy boulder that must be heaved up again *in saecula saeculorum*. Injustice would forever return and law merely be the negative impression of the event or merely a futile aesthetic revolt against it. Unless, when the eternal return is given an entirely normative reading and transformed into a Kantian imperative or mental experiment of sorts, do not create a line of conduct, and do not pass a judgement that you cannot recapitulate every time the circumstance arises again and again, forever.

Or it may lay its hopes on a meeting point in the infinite. In which case, progress would be permanent, ceaseless. There would be no coming back and there would be no end. All would forever be unaccomplished, but at a point that is ever higher and further. But how will law, whose aim is to offer stability and security, correctness, and universal outreach, be able to sustain this continuous shifting of the normative coordinates? And, above all else, who will govern a law, so mobile and changeable? Will its users – those who apply and resort to it - be able to deliberate a way to slow it down, to stop its relentlessness, to change its direction?

To a degree, law is conceptually linked to evolution intended as progress. Law is legitimate and valid where it presents and justifies itself as a condition that has improved with respect to a previous and divergent one. But law is nevertheless placed under duress and ultimately blunted if its prescriptions, now entirely under the influence of time, are conceptualised and succeed each other, becoming an unstoppable and unwieldy movement that breaks up in vast sequence of normative contents. The solution may ultimately reside in the practical device law, intended as the action it wishes to manage, assigns itself in the gap between two conditions. The causal chain that concerns it is not *sub specie eternitatis*, nor consequently *sub specie evolutionis*, which belong exclusively to the 'no place', or to the observer or moralist. Its gaze is addressed to the present, on which it will however decide tomorrow. And to this end, it must be able to operate to the very best or better. It must therefore be conceivable and dependable (esigibile). The tomorrow of law can therefore be claimed only as 'progress'.

VIII. Involutionary Models: Law Without Progress

In a minor work, *Das Ende aller Dinge,*[56] ie, 'The end (but also the goal) of

[56] I. Kant, 'Das Ende aller Dinge', in Id, *Schriften* n 39 above, 166. On this work, see H. Simony, *Kants Schrift "Das Ende aller Dinge"* (Zürich: EVZ-Verlag, 1962).

all things' Kant outlines in a long footnote four possible models of human society. These four pessimistic and involutionary models are the 'caravanserai', the 'correctional centre', the 'mental asylum', and, finally, the 'cloaca'.[57] The caravanserai features overcrowding, congestion, and confusion, where people are squeezed tight, push, and shove each other minding their own business and rush by unconcerned. In the second model, the correctional home, life is conceived as a permanent penal retribution, an endless punishment, where rules are but punishment. Secondary norms or sanctions are the only ones that apply here. These are, in fact, so pervasive that the norms of conduct – the primary norms – are no longer of any consequence.

As for the madhouse, nothing really makes any sense there, as all kinds of suffering and humiliation are inflicted for no reason at all. There really are no fully-fledged norms, whose contents must first be understood before they can be applied. The inmates are not at fault and the suffering inflicted upon them is without justification.

And then there is the cloaca, which is nothing more than a 'dump', where filth, grime and all manners of putrescence are dumped. This is where we stand at this moment, where we bear witness to our age. This is what we deserve because we produce ordure, because we corrupt and are corrupted. The cloaca is the society where everything and everyone are examples of debasement and meanness where purity, good intention, virtue cannot emerge.

That is why man was chased out of the terrestrial paradise, Kant tells us citing a Persian legend. In the terrestrial paradise, all edible plants could be digested without producing waste, with the sole exception of sweat. Only one plant, if eaten, led to defecation. And that was just the plant Adam and Eve ate, soiling that divine and untarnished corner of the world. It was for this reason and no other that the two were chased out of the terrestrial paradise and dumped in the world, where their descendants survive. Their original sin was that of having created the need for a dumping ground, so that a sewer, a land filled with waste, was assigned to them.

Now, what shape will law take, what meaning, in each of these scenarios? In the caravanserai, law will probably look like a traffic code governing the orderly interaction on the public ways. What matters here is that a regulation can be applied, but as to what type is less relevant. The normative is regulatory and is not constituent. It does not require, produce nor refer to a form of life.

In the correctional facility (*Zuchthaus*), law is, on the other hand, a set of sanctions, a series of rules designed exclusively to apply punishment, to inflict pain. In the mental asylum (*Tollhaus*), rules are not merely measures of containment, a means of mechanical control, a set of restraining orders, because those to whom the measure is applied do not understand it and are not capable to reflect on it. As for the cloaca, what role will law have in a society that is a dump where human

[57] I. Kant, 'Das Ende' n 56 above, 171.

experience can manifest itself only in the form of corruption and degradation? In such a scenario law, too, is waste, something that is without quality and virtue, the token of baseness. Law is thus corrupt, like everything else around it.

Kant's four pessimistic and involutionary models of society, show us on the contrary four essential qualities of law. Law points to the existence of a community where there is none in a caravanserai made up of people who meet by chance and soon part ways. A caravanserai is little more than a crossroads where people stay for a short time without bothering to take notice of who comes and goes.

Law is a set of rules that implies the freedom of those it addresses. But in a correctional facility, where an exclusively disciplinary regime prevails, there is no longer any functional freedom left. The recipients of the regulation are no longer those to whom the sanction is applied. There is no longer any conduct that can avoid the application of the sanction. Retribution loses its bearings the moment the detention facility is separated from the rest of society. This is all the more paradoxical because the purpose of detention is paradigmatically that of giving retribution.

Law continues to be essentially a system of rules that calls upon reason. It is reason and through reason that law is realised. Law, in other words, is a reflection of law. But in a mental asylum, reason is a missing commodity. Here, rules are not meant to govern conduct but somewhat irrationally to repress it. In a madhouse, it is no longer possible to speak about sanctions; what prevails here are security measures and means of repression, because the subjects placed under restrictive measures cannot be held accountable. No redemption or correction can be expected. Nor can the principle of retribution be applied.

And what about the cloaca? In a society overrun by the wholesale corruption of mores, law no longer has any quality or virtue, nor a public morality it can appeal to or mobilise. Law no longer has any stake to claim. Law is without virtue and is hogwash like everything around it. Law could be, on the other hand, a cleansing tool that can clear up a reality - a reality grounded on power and interests - that is intrinsically corrupt. Law could provide a veil that can cloak the filth, that can conceal what is not pleasant to behold.

In the four negative and involutionary settings envisaged by Kant, law appears to have lost all meaning because community, liberty, reason, and virtue have been taken out of the picture - because Kant has removed his fundamental 'transcendental categories'. And this occurs because in such involutionary societies the idea and experience of progress have gone amiss. In the caravanserai, time is substantially circular, a perpetual merry-go-round, that defines the structure of social relations. In the correctional facility, punishment is mere retribution and there are no prospects of rehabilitation for the inmate. In the mental asylum, time has stopped alongside all movement. The ideal here is the straightjacket that immobilises. And communication is voided. The patients' improvement is intermittent and, in good substance, only apparent. In the cloaca, in corrupt society, there is no ideal criterion or subject which can be indicated as an example. With the good also the

beauty has gone missing. And when good is wanting, the just and equitable will be unable to anchor its project. In none of these regressive models does the notion of progress find its place.

Also, because in such models, a critique of the rules that hold up the corresponding systems would not only be impossible but also meaningless. In the caravanserai, the critique would be fairly straightforward, because the *Witz* would simply lie in the traffic rule. It's either the right- or alternatively left-hand drive. And there really is not much to comment upon. There is no singularity of meaning or relevance that distinguishes the one alternative to the other. One could fortuitously decide which one to adopt, entrusting oneself to chance. There is little deliberation to be done here.

In the correctional facility, there is no room for a critique of punishment because this is the place where only authoritarian punishment is handed out. Nor can a critique be developed on the specific punishment applied to the subject because the sentence has been passed; it is *res judicata*, the judgement is final. The correction is the execution of a judgement that has been passed. It is not a forthcoming judgement against which an appeal may be lodged.

In the mental asylum, critique clashes with the irrationality of the subjects who live and operate therein; those who develop a criticism must heed a principle of reason. Indeed, they must hope in the possibility that their arguments can be accepted exquisitely on their merit. But in a mental asylum, there is no one who can follow the arguments of a line of reasoning. There is no claim to correctness, because a discourse of this kind is addressed to no one who can understand it.

And finally, in the cloaca, the critique would not be grounded on an anthropological base; those who criticise must be able to show some sort of respect for the subject of the criticism, for criticism is meaningful only if it can be received and, in turn, shared. It can be received and shared, that is, by those who are in good faith. But in this festering and corrupt place no one deserves respect because no one is and can be in good faith.

Law is therefore meaningless when set against a backdrop where progress cannot be conceived, where there is no aspiration for progress. And this occurs when law can no longer count on one of its basic phenomenological tenets: that it comes into play when there is an aspiration to correctness and justice and is therefore criticisable inasmuch as perfectible, and therefore experienced as but a stage in the progress towards moral betterment.

IX. Claim to Progress

Law is not content with the present; it looks ahead to the future, to something that is not there yet. A key mode of being is lying in wait. By waiting, law dilutes the present, takes away value from it. To be or having to be, law prefers the latter. But this takes our focus away from life 'here and now'. It fills us with hope and

demands. Normativity is arrogant. Laws are insatiable because there is nothing that can meet their expectations. In hoping to be endowed with law, to be in the right, may therefore be turned against itself to the extent that law may receive the stigma of frustration and desperation. For, we are well aware, or the legal practice tells us, that that enormous amount of hope and ambition of justice cannot be fully met. The bag of Miss Flite, the delusional old woman in Charles Dickens' *Bleak House*, fills up with old papers, writ of summons, memorandums, burdening her soul with a demand for justice that the time of the law forever dilates.[58] The 'here and now' is replaced by the 'not yet' of the trial, of the claim to correctness.

But after all is said and done, law continues to be configured in terms of progress and evolution. An evolutionary theory of law is that which identifies law fully and exclusively with the law of modernity, with the law, that is, of the *Rechtsstaat*, with the rule of law, where a certain substance of the law, its 'generality' and 'abstractness', is shaped as a form of law. An evolution of this kind is intended also as an argument that would exempt us from investing legal practice with moral contents. This would be founded on its own substantially autochthonous normativity, which would be ensured by its very same action. This latter legal action would consist in an articulation of general rules and laws, additionally sustained by adversarial procedures, or something similar as sustained, for example, by Lon Fuller who, as we well know, believes there is an intrinsic morality in law by virtue of its *modus operandi* and not contents. A different version of this theory is provided by Niklas Luhmann, according to whom it is the functional and rational procedure that separates law from other social practices, religion in the first place.[59]

'Secularization' constitutes a decisive evolutionary leap for law intended as an independent social phenomenon. The independence of modern legal concepts from all political theologies is radicalised as an expression of an accomplished normative autarchy. Law and sovereignty are separated the one from the other. This is basically, with some further variations, the thesis of Franz Neumann, according to whom law produces its own normativity, which resides above all in the general and abstract law, which is equal to all and applicable notwithstanding the specificity of cases. 'Law as a phenomenon distinct from the political command of the sovereign is possible only if it manifests itself as general law'.[60]

Habermas' theory of law, too, can be pinned to a legalist approach if we bear in mind his position on the inner functional link between the law and laws, between objective law and subjective laws he outlines in the third chapter of *Faktizität und Geltung*.[61] The law as 'form', specifically as *Gesetz*, would necessarily imply

[58] Refer to the first encounter with this character, C. Dickens, *Bleak House* (London: J.M. Dent, 1994), 30-32. For a deeper analysis refer to B. Cavallone, *La borsa di Miss Flite* (Milano: Adelphi, 2016).

[59] See N. Luhmann, *Legitimation als Verfahren* (Neuwied am Rhein: Luchterhand, 1969).

[60] F. Neumann, 'The Change in the Function of Law in Modern Society', in Id, *The Democratic and Authoritarian State*, edited by H. Marcuse (New York: The Free Press, 1957), 66.

[61] See J. Habermas, Faktizität und Geltung. Beiträge zur Diskurstheorie des Rechts und des

coherence through subjective rights: '*In diesem Sinne sind die subjektiven Rechte mit dem objektiven Recht gleichurprünglich*'.[62] Subjective law would play a key role within the normative articulation and validity of positive law and wouldn't produce, as such, any tension or discrepancy between the authority of the supreme decision and the autonomy of the administration and the vindication of individual rights.

From these perspectives, as well as for Neumann, Luhmann, and Habermas, law stakes a claim on justice that, however, does not go beyond a somewhat tautological claim on legality. It could therefore be objected that legal practice would not stake any further claim on progress, for justice is not in any way intended as a 'bridge' or link between law and morals. Progress and what it claims can be had only if this link can be established. Otherwise, law can indeed evolve and differentiate itself functionally, separating itself even further from the 'world of life', from the functional machinery of society, which for Habermas at least before the turnaround in *Faktizität und Geltung)* was represented by the media ecosystem, which included the law, considered on a par with the currency, market and technical administration,[63] and sustained not by communicative but by an exquisitely *strategic ratio*.[64] Evolution will occur here, not progress, for that is a moral category.

It should nevertheless be said that for Habermas the law, too, has a moral legitimisation deriving from the cognitive and normative shortcomings of the moral discourse. For the latter to become effective, both in terms of the motivations and determination of conduct, it requires the establishment of positive law. Against this backdrop, the moral discourse is sustained by the communication dimension which in the community is 'perceived' within the democratic deliberation. Positive law and democracy can therefore be understood as a progressive instance with respect not only to merely the moral discourse, which lacks sanctions and legal specificity, but also to the mere articulation of a public domain set up as a political community expressing its own idea of good life. After having operatively activated the moral discourse, positive law separates itself from it, akin to democracy, whose

demokratischen Rechtsstaates (Frankfurt am Main: Suhrkamp, 1992), 109.

[62] ibid 117.

[63] J. Habermas, Theorie des kommunikativen Handelns, II, Zur Kritik der funktionalistischen Vernunft (Frankfurt am Main: Suhrkamp, 1980), 536.

[64] Refer to J. Habermas, 'Überlegungen zum evolutionären Stellenwert des modernen Rechts', in Id, *Zur Rekonstruktion des Historischen Materialismus* (Frankfurt am Main: Suhrkamp, 1976), 260. In Habermas' reflection on the concept of law three phases can be singled out. In the first phase, law focuses exclusively focused on the strategic rationality of players who are essentially concerned about meeting their economic needs. Luhmann's theory on the systemic rationality of law is therefore rejected in this first phase. In the second phase, which was initially outlined following the publication of *Theorie des kommunikativen Handelns*, law is thematised as having a two-pronged nature – as an 'institution' (making it 'discursive', endowed with communicative and systematic rationality) and as a 'medium' (and, therefore, endowed with strategic and functional-systemic drive). The third phase is introduced by *Faktizität und Geltung*, and here law is conceived as having a fully discursive scope, unlike the economy and administration that continue to be 'media', areas of strategic action that are hardly open to communicative rationality.

aim is to protect the good life, which isolates itself from the universally aspiring normative discourse. Law (and democracy) thus achieve an autonomous normative dimension, which no longer requires to be verified with respect to universalising morality, which is the stronger normativity. For Habermas, who is here in line with Klaus Günther,[65] the discourse of justification driven by the universalising principle is no longer that which orientates the application of the positive norm or case put before the judge. What applies here is the 'coherence' with the positive legal system, for the application of positive laws is clearly separate and independent from justification. At hand in the first instance is the establishment of the validity of the norm, while in the second the key issue is the suitability of the situation in which the rule is applied.[66]

The progress law establishes with respect to morality paradoxically leads to a situation where law cannot stake a claim to progress. For positive law, once set down, would no longer operate purporting justice, but rather according to a self-referential claim for coherence and integrity. In this instance, integrity acquires contours of functionality that are significantly different from normative and moral contours, from 'Dworkin's integrity'. For Dworkin, the legal discourse reproduces or simulates the moral discourse, by activating it in all cases especially the 'difficult'.[67] For Habermas, 'integrity' implies the coherence of the *ratio decidendi* with the remaining and previous cases, besides the adequacy of the decision to the specific case.[68] For Dworkin, integrity means the robust universalizability of the criterion adopted and its interpretation, where legal interpretation is based on the interpretation, for example, of a musical score, which in pragmatic terms is – or claims to be – the best possible interpretation of that specific piece of music.[69] Progress can indeed be claimed because for Dworkin the legal decision claims to be not only correct or just but presents itself as the best possible in law.

By burdening the 'form' of law with a cumbersome core, while surreptitiously attaching a strong normative content - as Luhmann and Habermas have done - law ends up justifying itself. It becomes self-sufficient. Its legitimacy and justice are autopoietic, and moral reasoning must give way to legal dogmatism: *Sileat ethica in munere alieno*. The secularization process moves along a path that is further away than that followed not only by religion but also by morality, thereby restoring to law its full normative autonomy. Law, in other terms, no longer must justify itself with respect to the criteria or principles it cannot establish on its own.[70]

[65] Günther's theory is not outlined with utmost clarity in his *Der Sinn für Angemessenheit. Anwendungsdiskurse in Moral und Recht* (Frankfurt am Main: Suhrkamp,1988). His position is outlined more clearly in the debate with Alexy at the European University Institute in March 1992, which was published 6 *Ratio Juris*, 143 (1993).

[66] See J. Habermas, *Faktizität* n 61 above, 266-267.

[67] See R. Dworkin, 'Is There Really No Right Answer in Hard Cases?', in Id, *A Matter of Principle* (Cambridge-Massachusetts: Harvard University Press, 1985), 119-145.

[68] See J. Habermas, *Faktizität* n 61 above, 276.

[69] See R. Dworkin, *Law's Empire* (Oxford: Hart, 2nd ed, 1999), chapter three.

[70] This would make the anti-poietic paradigm - on this subject refer to G. Teubner, *Rechts als*

Yet, the recurrent aspiration for justice that comes with legal practice in its various stages cannot be avoided. Nor can the aspiration for progress that is necessarily connected to it, as has been pointed out. Similarly, the hope for justice and progress too cannot be avoided - that hope that can turn into the grief of frustration and become a time forever extendable that will bring forgetfulness of the present and ultimately lead to desperation.[71]

X. External and Internal Point of View

One could, however, still object that the claim to progress does not apply to those theories where law features a static, non-dynamic vision, and is conservative. According to such theories, law is the embodiment of an age-old status quo, where change is viewed as betrayal and failure of that self-same law, whose task is to maintain order as it is, as it was established. Medieval law looks not ahead, but behind. The best law endorses; it is the oldest, not the newest. It is the previous title, the oldest, that prevails. It is related to private law, for possession is tantamount title. Antiquity establishes law. The supreme values of law lie in certainty and stability, principles that abhor change and transformation. In this light, the legal act is declaratory, the assertion of a normative evidence that is produced over time confirming a normative core that has been established once and for all and is, therefore, inalterable. As the great Georges Ripert puts it:

> '*Il ne faut pas oublier que toute loi nouvelle est en elle même un mal, puisqu'elle detruise des situations acquises et par là crée un désordre au moins momentané*'.[72]

Yet, here too the legal decision - which claims to perform and give justice - cannot be but progress despite any momentous or general crisis of the law,[73] being able as it is to improve the situation that has been affected by controversy and transgression. The *status quo ante* is thus re-established, restored, ensuring

autopoietisches System (Frankfurt am Main: Suhrkamp,1989) - very attractive to those who wish to keep the law's operativity independent from functional imperatives that are alien to it. This is at least what is sustained by A. M. Hespanha, *Cultura jurídica europeia. Síntese de um Milenio* (Mem Martins: Publicações Europa-America, 2003), 362.

[71] Law as a generalising structure can indeed become mere legal fiction and become a none too subtle form of injustice, as has been pointed out: 'There are many pleasant fictions of law in constant operation, but there is not one so pleasant or practically humorous as that which supposes every man to be of equal value in its impartial eye, and the benefits of all laws to be equally attainable by all men, without the smallest reference to the furniture of their pockets'. C. Dickens, *Nicholas Nickelby* (London: Penguin, 2000), 596.

[72] G. Ripert, 'Evolution et progrès du droit', in G. Balladore Pallieri et al, *La crisi del diritto* (Padova: CEDAM, 1953), 9. See G. Tarello, *Sul problema della crisi del diritto* (Torino: Giappichelli, 1957), 16.

[73] See G. Ripert, *Le déclin du droit. Etudes sur la legislation contemporaine* (Paris: Librairie générale de droit et de jurisprudence, 1949).

the resolution of the disturbances that the legal decision was called to tackle. The decision resolves the question, which is reintegrated in the legal order so that we now have an 'improved' situation with respect to that which had been affected by uncertainty and conflict. Legal certainty is thus re-established. The old law is returned, which is 'better' than the previous situation, better than when the age-old established order had been challenged. There is improvement, there is 'progress'. But it is a 'timely' progress that does not necessarily entail a broader perspective – the perspective of the history of law. This kind of progress is modest and does not require a philosophy of the history of law to justify or drive it.

Even where law is not considered as a change to an end - a change with a direction or a destination - it is operatively in its aspiration to justice marked by two temporal landmarks that indicate a progression. The 'dynamism' of law, even when considered age-old and unchanging, emerges every time a decision has to be made on a case, which is nevertheless new, unlike any previous one. As Lord MacMillan said in a well-known speech on the lawyer's ethics:

> 'The law formulated in the light of past experience becomes dynamic when it has to be applied to the events of the present. In the Law Courts history never repeats itself. No two cases are ever the same'.[74]

In other words, if from an 'external point of view', from the detached viewpoint of an 'observer', law may appear static and considered as making no progress, the dynamism of the legal experience and the claim to progress that accompanies it are clear to those who see it from the inside. Law is dynamic from the point of view of the persons who are involved in and contribute to making a legal decision.

XI. Man as Novelty

There is history because there is man. To this end, Hannah Arendt recalls Franz Kafka's parable. The story is told of *Er,*[75] 'he' (the human being) who is stuck between the two forces of time - one force is dragging him back to the past and the other pushing him forward into the future. 'He' must resist both forces to survive, to stay where he is, in that empty place between past and future, which is represented by the *present*. 'He' is strongly tempted to quit the fight, to remove himself from his space and place himself in an external dimension. He could do it if he were in a position to act as the arbiter or mediator between the two forces, which, if it hadn't been for his resistance, would most likely offset each other. History would thus collapse if it had not been for 'him' or for the 'gulf' his existence opens up, or for the 'leap' it makes along that time sequence that would otherwise be

[74] Lord MacMillan, 'The Ethics of Advocacy', in Id, *Law and Other Things* (Cambridge: Cambridge University Press, 1937), 174.

[75] Refer to F. Kafka, *Er*, in M. Walser ed (Frankfurt am Main: Suhrkamp, 1984).

uniform and continuous. Human history is the outcome of 'man's' resistance to the past and future. History occurs when the past does not repeat in the future. Between the past and future, a rift emerges, a hiatus, a fracture, which is the *present*. The *present* in this scenario is a break from the past as well as a suspension with respect to the future. Thus, not continuity with what was, but not even the immediate advent of what will be. What matters is the here and now, *nunc stans*.

But what really happens to 'Er', who is capable of opening a rift in time between what was and what will be? His birth - Hannah Arendt says - marks a radical beginning. 'He' has no past before his birth. He just was not there prior to his being born. The existence of the human being rolls out for those who experience it, who live it, as an *ex-nihilo* dimension, as 'the beginning of a beginning'.[76] Now, this is a circumstance that occurs collectively, going beyond the single human subject, and affects all individuals in their relationship and cohabitation. Human relationships, too, not unlike the life of the single individual, are braced between past and future in a temporal flux that appears to be endless. Where then can we lay our feet, where can we find a spot where we can, even briefly, be ourselves? Where can we rest and regain ourselves? Where can we learn to know who we really are away from the flux of time? Or even better how can we protect ourselves from time that consumes us and corrodes all things material and natural? That place, Arendt tells us, is the 'home': '*Boden gerade kann ich nur in der Gegenwart haben. Die Dimension der Heimat ist der Gegenwart*'.[77] This is where human beings build their dwelling.

Nevertheless, the home, 'man's home', highlights once again the beginning, which is the nature of the new-born, of birth. Here, the home is the community, society as the public sphere. In this regard, Simone Weil speaks of positive laws as 'walls' echoing a fragment of Heraclitus.[78] The home is the legal system where the principal feature is not violence but is 'constitutivity', contrary to the opinion expressed by jurists and their postmodern critics.

Indeed, there is something new in the system of institutions generated by the constitutive norms of the legal system. This constitutivity reproduces at a social level the individual given of birth, of the radical beginning of the self ('him', 'I'). What occurs here involves collective performance. A performative act - a promise, for example - takes place between clearly distinguishable subjects who entertain a clearly identifiable single intersubjective relationship, which, nevertheless, presupposes the validity and efficacy of social rules, as well a set of practices and a common language and way of life. In this setting, the performative act occurs within the framework of a normative system, whose specific strengths are its

[76] H. Arendt, *Between Past and Future* n 14 above, 10.

[77] H. Arendt, *Denktagebuch 1950 bis 1973*, I, in U. Luds and I. Nordmann eds (München: Piper, 2002), 301.

[78] S. Weil, *La source grecque* (Gallimard, Paris, 2nd ed, 1953), 37.

constitutivity and ability to establish new practices in the world. Now, if the performativity of the single legal act contains the aspiration to correctness, followed by the universal nature of the demand for justice and, as pointed out previously, its existential translation into a claim for progress, the sequence that is thus outlined similarly occurs in the constitutivity of the legal system as a whole. A constitution that closes with an article affirming that 'this constitution in unjust' would be as contradictory in terms of performance as would be the enunciation where it is said that 'the cat is on the carpet, but I don't believe it'.[79] From the aspiration for justice inherent in the constitutional system, like what occurs in the single legal act, there may derive the claim to progress. In the sense of a legal order that manifests itself in its constitutivity, there also is its implicit aspiration for progress. This constitution is better than the previous one - this is the statement that the constitutive norm of the legal system cannot deny.

[79] See. R. Alexy, 'Law and Correctness' 51 *Current Legal Problems*, 210, 205-221 (1998).