History Matters: A Survey of Ideas about Evolution in Western Legal Theory from Antiquity to the Present Day in order to Propound a Theory of Evolutionary Jurisprudence

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Declaration

To the best of my knowledge information and belief this thesis contains no material previously published by any other person except where due acknowledgement has been made.

This thesis contains no material which has been accepted for the award of any other degree or diploma in any university

Signature .................................................................

Date .................................................................
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ABSTRACT

Evolutionary jurisprudence (also known as evolutionary legal theory or legal evolutionary theory) is a relatively new concept in legal theory. Some jurisprudence textbooks cheerfully dedicate entire chapters to it, while others do not even mention it. Evolutionary jurisprudence has struggled to gain a place in the legal theory pantheon due to its association with misconceived notions of what ‘evolution’ means such as Social Darwinism. However, linking evolution with jurisprudence is understandable since ideas about evolution, had a significant influence on western legal, social, economic, and political theories long before Darwin. This thesis surveys ideas about evolution from pre-Socratic Ancient Greece to the present day in law, sociology, economics, politics, and science. In particular, this thesis examines the influence of evolutionary thought on schools of western legal theory including historical and anthropological jurisprudence, sociological jurisprudence, Marxist Jurisprudence, feminist jurisprudence, critical legal studies, and postmodernist jurisprudence. Finally, the author propounds, based on this survey and what he submits to be an appropriate conceptualisation of evolution in a law and legal systems context, a fully workable theory of evolutionary jurisprudence, not only in descriptive terms but also in normative terms.
1.0 Defining ‘Evolution’

Upon hearing the word ‘evolution,’ many people are likely to think of Charles Darwin’s biological theory. 1 Indeed, Darwinism appears to have colonised notions of evolution in western public consciousness to the extent that it is difficult to envisage the concept of evolution in non-Darwinian terms.

Moreover, with the term ‘evolution’ in its name and the associated impoverished Social Darwinist idea of ‘survival of the fittest’, it is tempting to be sceptical of the nascent branch of jurisprudence known as evolutionary jurisprudence. However, more warranted scepticism of evolutionary jurisprudence as a bona fide legal theory is probably due to the fact that it is seen to borrow too freely from other disciplines without having first established itself as a stand-alone intellectual discipline. Mauro Zamboni articulates these concerns clearly when he opines:

Evolutionary theories have always been treated by legal scholars as a sort of cousin to the legal theoretical family, both in Europe and the United States. They are nice theories, they tell interesting stories, you sometimes listen to what they have to say and when among friends, you may even quote them. However, in the modern mononuclear family, when it is time to tackle important issues and reach important decisions, or simply to celebrate some success stories, these cousins are often left outside the door, being simply “relatives” and not part of the legal family in the proper sense. A former evolutionary scholar strikingly stated in a manner that can be seen as representative of the general scepticism towards the evolutionary approach of a large segment of the legal family, “Legal scholarship should not be so timid as to depend on others for its theoretical models. We might take our inspiration where we find it, but we should build our theories within our own discipline, constrained only by the data that defines it and the criteria of quality appropriate to it.” 2

Therefore, if evolutionary jurisprudence is to be a proper legal theory and more than just a mere metaphor, its use of ideas about evolution must not simply be a case of purloining these ideas wholesale from other disciplines. As the writer will argue, while the interdisciplinarity of evolutionary jurisprudence is one of its strengths, the point is to avoid injudicious use of other disciplines’ evolutionary precepts. Thus, a theory of

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evolutionary jurisprudence must meaningfully assimilate ideas about evolution into its own postulates. This involves an investigation of ideas about evolution common to all other disciplines in the social, economic, political and even scientific realms and a distillation of these ideas into essential components of what evolution means in the context of law and legal systems. Indeed, one must avoid cherry-picking an idea about evolution specific to any one particular realm. For instance, Darwinian evolution with its central tenet of selective adaptation in the biological sciences leads to unfortunate consequences when applied to law, society, politics or economics without modification and consideration of the proper context a la Social Darwinism as will be discussed.

Further, even if appropriately conceived and contextualised, such an important component of evolutionary thought as selective adaptation is not the end of the evolution story when applied to legal theory; other components, namely the ones discussed in this Chapter and throughout this thesis, must also be taken into account.

Hence, before surveying the influence of ideas about evolution on legal theory from antiquity to the present day, and where applicable, related social, economic, scientific and political theories, an enterprise which forms the bulk of this thesis, the writer’s first order of business is to suggest a working definition for the concept of ‘evolution’ in the context of law and legal systems. Attempting to formulate such a definition should assist the reader in gauging how ideas about evolution have not only been usefully employed in legal theory throughout western history but also abused when a concept of evolution that falls well short of such a definition has nevertheless been highly influential on legal theory (e.g. Social Darwinism, again). A working definition of the concept of evolution in the context of law and legal systems is also necessary to properly ground such a concept in, and employ it to propound, a workable theory of evolutionary jurisprudence which is the chief concern of the final phase of this thesis.

The Concise Oxford Dictionary defines evolution as:

1. gradual development esp. from a simple to a more complex form. 2 Biol a process by which species develop from earlier forms, as an explanation of their origins. 3 the appearance or presentation of events etc. in due succession (the evolution of the plot.; 4 a change in the disposition of troops or ships. 5 the giving off or evolving of gas, heat, etc. 6 an opening out. 7 the unfolding of a curve. 8 Math. dated the extraction of a root from any given power (cf INVOLUTION).3

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3 Bruce Moore (Chief Editor), Australian Concise Oxford Dictionary (Oxford University Press Australia and New Zealand, 5th Ed, 2009) 486.
The *Australian Macquarie Concise Dictionary* defines evolution as:

1. any process of formation or growth; development... 2 *Biol.* the continuous genetic adaptation of organisms or species to the environment by integration agencies of selection, hybridisation, inbreeding and mutation; 3. something evolved, a product; 4. a motion, incomplete in itself, but combining with coordinated motions to produce a single action, as in a machine; 5. an evolving or giving off gas, heat, etc. [L. from *évolvere* roll out].

Many of the notions included in definitions of evolution, such as those referred to above, no longer obtain in the present day but are mere vestiges of the term’s earliest usage in the 17th century (e.g. the disposition of troops or ships). Thus, it can be seen from these definitions that the term ‘evolution’ has itself evolved somewhat from its original meaning. Nevertheless, in spite of the evolution of the concept of evolution and its later colonisation by Darwin’s theory, it is submitted that there are essential components that are always integral to evolution as a concept in a law and legal systems context given that context’s inherent nature as a process to which definitions like those cited above allude.

These components are: *universal flux, historicism, dialectic, path dependence, selective adaptation, spontaneous order, and systems theory.*

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5 At an Australian Society of Legal Philosophy (ASLP) conference held in June 2014 at Murdoch University, Western Australia, the author delivered a seminar paper on a provisional definition of evolution for a theory of *evolutionary jurisprudence*, describing the components referred to above as the 7 ‘D’s of evolution for legal theory. It is not proposed to use the same terminology in the body of this thesis, but the key points from that seminar are summarised here to further clarify what is submitted to be the key components of evolution in a law and legal systems context in what follows in this Chapter. The 7 ‘D’s, as defined and explained in that seminar, were: *Dynamism* for universal flux (evolution is always about constant change); *Discovery* for historicism (evolution always has a past that is worth studying or discovering, it is not concerned with anything created anew as if nothing has gone before such as command economies or civil legal codes); *Dialectic* for dialectic (the history of change is informed by opposing forces,); *Darwinism* for selective adaptation (the struggle of opposing forces does not go on forever; there is a mechanism to resolve the struggle and selective adaptation usually favours, or selects for, the forces that fit into, or adapt to, the changing environment. This does not necessarily mean survival of the fittest but rather the merely fit); *Direction* for path dependency (evolution has no necessary end point but is not completely random in that there are usually discernible trends and pathways that an evolving system follows—e.g. China and the US have both evolved towards more capitalism but these common trends do not suggest any clearly defined or necessary final model of capitalism and both have followed very different paths along their journey to capitalism); *Destination* for spontaneous order (i.e. an equilibrium point spontaneously arrived at by evolution and not a predetermined end, plus there is no final destination in evolution as things go on changing ad infinitum from one spontaneous order to another); *Depth* for systems theory as there are systems within systems in evolution with interplay between them and various feedback loops—existential ‘in-the-worldness’ that challenges the rationalist view of things happening in a vacuum from ‘first principles’.
1.1 Key Components of Evolution

It is therefore submitted that the following categories reflect the essential components of what might be properly regarded as the concept of ‘evolution’ in a law and legal systems context.

*Universal Flux*

A necessary, if not sufficient, condition of evolution is constant change (*universal flux*).

As will be discussed in Chapter 2, opposing worldviews have existed ever since Ancient Greece about whether all of reality is ever-changing or, on the contrary, if there are some aspects of reality that are eternal and unchanging (‘universals’). Thus, we shall see that while Plato’s *idealism* holds that behind reality there are unchanging perfect forms, Aristotle’s *final cause teleology* (discussed below under the heading *Path Dependence*) is a conception of reality as something that is never eternal and fixed, but nevertheless strives towards its true (albeit changing) essence that inheres in its material substance and not in some ideal template of what it is supposed to be. Who is right? It is beyond the scope of this thesis to properly address such a broad ontological question, let alone resolve it (and, of course, no one has). However, this thesis will submit that *idealism* based on an idea of static, changeless perfection or universalism stands outside of, and is not affected by, anything that can be properly described as ‘evolution’.

Argue as one might about whether there might be some things in the world that never change, law and legal systems are not one of them as they inevitably change to address changing social, economic and political circumstances. While it is tempting to hold up some laws as eternal and unchanging such as the Mosaic Code, its most celebrated and earnest Commandment (i.e. the Sixth Commandment against killing), even this has had to change and adapt according to certain circumstances (i.e. self-defence, capital punishment, war, etc.).
**Historicism**

Change is always to something from something, so has a past or history that may explain the course of change. History matters in evolution.

As will be seen in Chapter 2, illustrated by the famous Ancient Greek paradoxes referred to in that chapter, the process of change in reality is not from one discrete stage to another but along a *continuum*. Martin Heidegger in *Being and Time* compares history with historicism as follows:

> Indeed history is neither the connectedness of motions in the alterations of Objects, nor a free-floating sequence of Experiences which ‘subjects’ have had. Does the historizing (sic) of history then pertain to the way subject and Object are ‘linked together’? Even if one assigns [zuweist] historizing to the subject-Object relation, we then have to ask what kind of Being belongs to this linkage as such, if this is what basically ‘historizes’. The thesis of Dasein’s historicality does not say that the worldless subject is historical, but what is historical is the entity that exists as Being-in-the-world. *The historizing of history is the historizing of Being-in-the-world.*

This ‘being’ can mean that of any entity, whether social, economic, political, legal, or even biological, and its ‘in-the-worldness’ refers to its contextualisation within an environment that is likely to matter to it (e.g. a biological entity within the natural world, or a legal entity such as a statute within the prevailing legal system and co-evolving society, economy or polity). In other words, *historicism* is the history of a thing’s *relations* with other things. What differentiates history from historicism is the former is primarily concerned with the study of discrete stand-alone entities (specific events, personages, laws, etc. at specific points of time) whereas *historicism* is concerned with the connections or, to use Heidegger’s term, the *linkages* between entities.

In legal theory, the common law tradition, building on what has gone before, represents a historicist approach whereas enactment of a complete Code all apiece does not. Likewise, Carl von Savigny’s challenge to the German Civil Code in the 19th century exemplifies support for a historicist approach to jurisprudence as will be seen in Chapter 5.

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**Dialectic**

To explain what drives the continual unfolding history of a particular entity, it is necessary to see what opposing forces are at work in shaping that unfolding (*dialectic*).

In the legal realm, for instance, forces for freedom of expression and privacy may vie with forces for personal security and safety in the making of laws in an environment where terrorism is commonplace.

As will be discussed in Chapter 2, Heraclitus’ *dialectic* with his view of opposing forces bequeathed to western society a binary view of the world which has persisted in western thought to this day (e.g. good versus evil, left versus right in politics, masculine versus feminine, etc.). The binary view underpins the *Social Darwinists*’ view of the fit versus the weak in direct competition with one another as will be discussed in Chapter 7 and the competition between dominant and submissive groups in Marxist and critical theory in Chapter 6.

However, it will be argued in this thesis that the various opposing forces (or ‘voices’ if one speaks of the socioeconomic and politico-legal realm) are not just two, but are numerous and many-sided, and not always directly in competition with one another. Thus, in the biological realm, the forces that shape that environment are not always two competitor species locked in an arms race for survival but also other species that occupy a separate niche (e.g. scavengers, benign bacteria that benefit their host, etc.). In the social realm, there is rarely one dominant class oppressing another, but many classes with different agendas. Being cognisant of the many forces that make up the *dialectic* makes for a keener appreciation of the forces of evolution in all contexts.

**Selective Adaptation**

Resolution to a greater or lesser extent of these opposing forces or ‘voices’ is inevitable and will occur at some point (and then again at some further point) in the evolutionary process, and the mechanism of *selective adaptation* is a way to describe this resolution.
Prior to the mechanism of selective adaptation, resolutions of dialectic of one type of another had been proposed in western history. As will be discussed in Chapter 5, Hegel described the process of resolution of dialectic of forces in society as one of thesis, antithesis, and synthesis, and the mechanism by which he saw this resolution take place was changes in the ‘World Spirit’ or Weltgeist. As discussed in Chapter 6, Marx, inspired by Hegel’s notion of dialectical historicism but not his notion of ‘World Spirit’, opted for a non-metaphysical resolution mechanism based on economics (those with the means of production versus those without), namely his dialectical materialism, that he believed would eventually spell the end of capitalism. Of course, history has told a different story, and selective adaptation was arguably a more empirically proven candidate for a non-metaphysical resolution mechanism of dialectic in evolution. Discussed in Chapter 7, the idea of selective adaptation is an important plank of Darwin’s evolution theory involving the notion that species adapt to their environments in order to survive and even though the idea pre-dated him, it is Darwin who most fully developed the idea and brought it into the public consciousness.

The principle of selective adaptation can be also transferred to other contexts such as society, politics and law, although care must be taken to modify the principle to the given context, lest the exercise descends into Social Darwinism.

Indeed, the principle of contextualised selective adaptation or variation is much more nuanced than Social Darwinism’s concept of survival of the fittest. What is fit is primarily selected for based on its varying (or adapting) in a way favoured by its environment rather than the need to be the fittest and then it is retained based on that variation or adaptive fitness. As Gralf-Peter Calliess, Jorg Freiling and Moritz Renner explain:

Evolutionary theory argues that the starting point of every kind of change is the variation of the structural elements in question. Whether and to what extent variations have a sustaining impact on evolution described by the second mechanism described by evolutionary theory: selection. Selection mechanisms differentiate between fitting and non-fitting variations with regard to the relevant environment. Variations which pass the fitness test are then preserved in a phase of retention or stabilisation.  

The resolution of dialectic through selective adaptation or variation leads to a form of equilibrium, or ‘a phase of retention or stabilisation’ as the authors above put it. Thus, order is achieved through a process that has not been designed or engineered but has arisen spontaneously which leads to the next evolutionary component.

**Spontaneous order**

As will be argued in this thesis, a feature of evolution is that long term change is ultimately spontaneous, giving rise to apparent order out of chaos. No matter how much one tries for the time being to design, control and manage a system, such as a legal system, over the long term it will evolve of its own accord to achieve equilibrium (or rather successive equilibria as there is no definite end-point in this ongoing process).

As discussed in Chapters 8 and 9, spontaneous order, or ‘strange attractors’ in the parlance of chaos theory, is the tendency of the changing or evolving entity to resolve the opposites and conflicts within itself to achieve equilibrium or stabilisation (even if only temporarily). More than just a scientific phenomenon, spontaneous order was discussed in the context of economic and legal theory by Friedrich Hayek in the mid-20th century to argue that the best economic, political and legal systems would evolve naturally from a free flow of information in these systems, challenging the wisdom of top-down systems such as centrally planned command economies (e.g. Soviet Russia) which as we know, despite all their design, forceful control and management, ultimately yielded to what appeared to be evolving counter forces determined to find an equilibrium point that the command style economy was not providing.

But does spontaneous order, in whatever context, arise purely randomly?

**Path Dependence**

Aristotle’s final cause teleology is discussed in Chapter 2, namely that a thing pursues its true nature or essence. Given that terms such as ‘nature’ and ‘essence’ or even ‘purpose’ have all but been rejected in modern intellectual discourse on account of their elusiveness and potential to be value-laden, it is nevertheless generally accepted in evolutionary thought that evolution is, at the very least, path dependent. This is not
quite the same as Aristotle’s *final cause* teleology, unless one equates a thing’s *essence* with the much less dramatic and relatively uninteresting idea of that of the path it is likely to follow given the influences or constraints of its surrounding environment (but it is doubtful that this is what Aristotle had in mind). Still, even if not strictly teleological, *path dependence* suggests some sort of direction-orientation in the evolution of a given system, depending on the nature of the system itself. As Calliess, Freiling and Renner explain when discussing the idiosyncrasies of international institutions:

> But not only are the entities idiosyncratic, they evolve in specific ways. They are embedded into specific environments that none of them face in the same way. These environmental conditions in addition to past decisions might effectively constrain the evolutionary path of the respective entity.  

Wolfgang Kerber, in a similar vein and speaking of evolution in the context of economics, notes:

> History matters. Evolutionary economists have always emphasized the path-dependence of economic development. Dynamic economies of scale, network effects, technological paradigms and mental models can cause path dependencies - with potentially serious "lock in"- effects of inefficient technologies or institutions.  

Kerber gives as an example of a technology resistant to change the ‘QWERTY’ keyboard due to tens of millions of people being taught to touch-type on such keyboard layouts and recognises that this type of problem can also arise in legal theory with the stubborn persistence of inefficient albeit established ‘older’ laws when he suggests:

> All of these economic arguments can also be applied to legal evolution. For example, the well-known fact that the quality of a law increases with the number of decisions by courts which clarify the precise content of the law can be interpreted as the consequence of dynamic economies of scale from an economic perspective. This can lead to the typical path dependency problem that an older law with already much case law is superior to a potentially more efficient new law which still lacks sufficient jurisprudence.  

Therefore, although the principle of *selective adaptation* might be employed spontaneously by an evolving entity to achieve equilibrium or retention and stabilisation, the principle is nevertheless constrained or influenced by, and *path*
dependent upon, features external to the entity and within the system in which the entity is embedded.

But what about other systems in which that system is embedded, such as the shadow of economics that can be cast over the development of the law mentioned in the above passage? How those features and other ‘externalities’ inform, and are in turn informed by, the evolving entity leads to the final component of evolutionary thought in this discussion – *systems theory*.

**Systems theory**

The ‘being-in-the-world’ aspect referred to in Heidegger’s passage above is captured by another evolutionary component, namely *systems theory*. Systems theory not only examines the various histories unfolding within a particular system of evolving entities and the *spontaneous order* that emerges from them, it also looks at the interrelationship between the various systems, and the various feedback loops that may arise between them in the overall meta-system. Or ‘The world is the case’ as Wittgenstein wrote in 1921, to set in train his magnum opus of logic, *The Tractatus*.11

In the face of such world-induced chaos, Calliess, Freiling and Renners optimistically observe:

    The precarious relationship of spontaneous competition-induced order and idiosyncratic path-dependent evolution, however, can be further refined with the help of systems theory. 12

These commentators go on to provide as an example of these principles at work the field of international commercial arbitration and they suggest that while privatisation of the governance of cross-border transactions with such mechanisms as alternative dispute resolution appears to suggest a demise of the law, the oscillation between legal and non-legal global governance mechanisms of individual behaviour suggests that private ordering mechanisms are issues for jurisprudence as well as economics.13 In other words, law and economics co-evolve as two separate sub-systems in the overall

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12 Calliess, Freiling, Renner, above n 7, 406.
system of international commerce. The systems influence each other in feedback loops. Understanding what underpins these systems’ behaviour is the key.

In Chapter 9, the views of Niklas Luhmann are discussed, as well his notion of autopoiesis which holds that while a legal system is a closed system with its own internal logic and rules, it is structurally coupled to other systems such as the political system and the economy which can both influence and be influenced by the legal system. These concepts are crucial to understanding legal systems theory not to mention the development of a theory of evolutionary jurisprudence.

1.2 Reasons for Choosing these Particular Components of Evolution

There are two ways the author might justify his choice of these components.

Self-Evident?

The first way is to claim, as John Finnis did with his choice of the seven human goods which underpin his natural law theory,14 that these components are ‘self-evident’. The argument would go like this - evolution in a system always: 1) involves constant change, that; 2) has a continuous history within an environment, that involves; 3) a tension of two or more forces, which; 4) resolves itself to adapt to its environment, along; 5) a path influenced and constrained by external environmental influences, into a; 6) temporary state of equilibrium/spontaneous order, that; 7) interacts with other systems?

In the context of law and legal theory, perhaps an example will help to illustrate the point, namely the legal principle pacta sunt servanda (pacts must be kept) found in common law.15 The principle is an economic mainstay of most western economies that assures investors that they have some certainty when conducting business transactions in a marketplace where the rule of law will be applied and their contracts will be

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15 This was also the example used to discuss each of the seven ‘D’’s referred to in the seminar – see above n 5.
enforced. The principle is also allied to the right of *freedom to contact*, which is highly prized in western capitalist economies.

Let us subject *pacta sunt servanda* to the seven evolutionary components referred to above in an attempt to demonstrate their ‘self-evidentness’ in evolutionary terms.

*Universal Flux*

Impressive as it may be, *pacta sunt servanda* is not an impenetrable unchanging deontological ideal as the principle has been modified over time to yield to other considerations such as not being able to gain from unconscionable conduct or where a party to the transaction has gone bankrupt and cannot be sued for breach of contract. Like other legal principles, this principle is not an isolated abstraction in the Platonic sense, never to change, but is a man-made thing very much a part of the substance of this world, in the Aristotelean sense, and always subject to change as circumstances change. Therefore, it can be seen that legal principles constantly change.

*Historicism*

The very modification of *pacta sunt servanda* is due, as with other legal principles, to its ‘in-the-worldness’, such that its operation is seen as a relation between entities or in this case parties (i.e. producers and consumers, sellers and buyers, etc.). Lessons are drawn from that history to modify the principle (i.e. where some producers and sellers have acted unconscionably and some consumers or buyers have suffered detriment) rather than ignoring that history and applying the principle in a vacuum. Thus, legal principles always have a history. They are ‘in-the-world’ and not ideal abstracts.

*Dialectic*

With *pacta sunt servanda* there is a dialectic or tension on the one hand of the forces or impulses of those who wish the contract to be enforced and their right of *freedom to contact* and on the other of those who do not want the contract to be enforced in circumstances where to do so would infringe their *right not to be exploited or harmed*. A third force or impulse is society’s desire for *peace, order and good government* in
avoiding the unsavoury consequences of unbridled contractual power. Legal principles are products of social, economic and political policy which are always subject to opposing forces. The history of legal principles is always dialectical.

**Selective Adaptation**

Resolution of forces or impulses surrounding *pacta sunt servanda* have come about by its adaptation to its social, political and economic environment when circumstances have demanded it (e.g. fair trading, bankruptcy protection, etc.) The principle in non-adapted form would not survive nor be sustainable in a modern capitalist society with competing social and political interests. Legal principles always adapt or die.

**Spontaneous Order**

In contract law, equilibrium or a spontaneous order is reached by the resolution of the tensions between producers and consumers whose interests in a democratic society are championed by their respective supporters (business councils or associations for the former and trade unions and consumer protection bodies for the latter). Resolution is never final, and the battles are ongoing, but the enactment of new statutes or the pronouncement of the law by superior courts gives some semblance of stability, and some certainty in the law, if only for a while. Legal principles evolve spontaneously.

**Path Dependence**

The adaptation of the *pacta sunt servanda* principle and the allied idea of freedom to contract, have journeyed through very different landscapes in different jurisdictions. In the US, high profile cases result in significant damages for the aggrieved followed by a proliferation of consumer-oriented legislation. In the UK and Australia, also common law jurisdictions, damages are not determined by juries and the stakes are not as high and statute law is also often used to limit common law rights. It could also be argued the different size of the companies and their willingness to test the law are factors in these different jurisdictions which will determine the path dependence of the principle. In China, minimal consumer oriented legislation and significant state ownership of makes the path different yet again for the principle’s journey. All these factors will
determine the nature of the path. No path will be the same as another or purely random. External factors always influence or constrain the path of a legal principle.

*Systems Theory*

The legal system and its legal principles, such as *pacta sunt servanda*, are structurally coupled to other systems: the social system and its desire to protect individuals from unconscionable conduct; the political system in ensuring public peace and order by constraining contractual power; and the economic system in balancing contractual freedom and certainty in enforcement of contracts with fair trading practices. These other systems inform, and are in turn informed by, legal principles and the legal system.

*A Survey of Evolutionary Ideas in Western History?*

The second and preferred way the author seeks to justify his claim to the essentialness of the evolutionary components discussed (as arguments based on self-evident truths usually attract, with justification, claims of intellectual arrogance and hubris) is to be found in the thesis itself. That is, in the following chapters which survey the influence of ideas about evolution throughout western history, academic commentators frequently mention these evolutionary components in connection with notable scholars of legal theory (e.g. *dialectic* and *historicism* with Carl Von Savigny; *selective adaptation* and *spontaneous order* with Friedrich Hayek; *systems theory* with Niklas Luhmann, to name a few).

Furthermore, while the Chapters of this thesis are not specifically dedicated to each of the evolutionary components identified above, it will be noted even from the chapter breakdown below that these components appear to inhabit the Chapters in an order that follows the sequence in which they are discussed. Thus, *universal flux*, *historicism* and *dialectic* are discussed in Chapter 2; *historicism* and *dialectic* in Chapters 3, 4, 5 and 6; *selective adaptation* in Chapter 7 and 8; *selective adaptation* and *spontaneous order* in Chapters 8 and 9; and *spontaneous order* and *systems theory* in Chapters 8 and 9. This was not deliberate on the author’s part, but is not surprising as, conceptually, these components become progressively more complicated with constant change or *universal flux* being the easiest to grasp, even by those living over two millennia ago,
while spontaneous order and systems theory are phenomena so complex we are still yet to grasp them in the twenty first century. This further illustrates the point made earlier that the concept of ‘evolution’ is itself evolving with more and more being understood about the process over time.

1.3 A Definition of/Assumptions about Evolution for the Purpose of this Thesis

Bearing in mind the above components of evolution, a working definition of evolution (and certainly not a definitive definition so more in the sense of a “concept”) of evolution is now cautiously proffered for the purpose of our investigation and the propounding of a theory of evolutionary jurisprudence in the final stage of this thesis. Thus, evolution is: an entity or being’s continuous, spontaneous, adaptive change and development over time within a system (itself within another or other systems) from one state to a different state.

It should be noted, however, that it is not a necessary condition of the different state reached that it be superior to, or more improved than, the previous state – the term ‘evolution’ is value-free, and this is significant when one looks at the misconceived idea that ‘evolved’ means ‘better’ or ‘improved’ or ‘progress’, or that evolution is in some way ‘purposeful’ (i.e. the teleological fallacy often associated with evolution). All that is required is that the new state is different which could mean only the slightest change, so long as it is not exactly the same as the previous state (or is not unchanged, since evolution always involves some degree of change).

Furthermore, the fact that change has come about by a mechanism such as selective adaptation does not suggest that there is absolutely no direction in which the change is heading (hence the suggestion above that there is a tendency to follow a certain path or that there is an overall discernible trend to the change). Rather, there is no specific or necessary end, for this is really ideology which is at odds with the spontaneous nature of evolution. For instance, in biological evolution, no one is sure how the living world will end up but one can discern certain directions in which life-forms tend to evolve in order to adapt to their surroundings. There are of course, some ends which in reality are fact and thus, inevitable (e.g. death). Thus, evolution might be spontaneously directed toward an ‘is’ end (e.g. the world human population increasing), but never an
‘ought’ end (e.g. the world human population becoming nicer and more peace-loving, or just the opposite, depending on personal preference) which ideology requires.

Moreover, it is further submitted that evolution means something that is unidirectional and non-cyclical, so that once something has evolved from one state to another, there is no returning to its former state (‘time’s arrow’ only goes forward in our experience).

Following on from the point made in the previous paragraph, it is submitted that ‘evolution’ is a linear process. That is to say, evolution is lineal. Further, it is submitted that evolution can be unilineal (as when a plant breaks the soil and grows upwards, for example) or multi-lineal (as when a plant stalk sprouts lateral shoots or branches which grow outwards in different directions). Furthermore, while evolution is usually considered to be in a forward linear direction (i.e. towards a more complex state), it could just as easily be in a reverse linear direction towards a more degenerated state. This is a special case of evolution since many of the key components are still there to inform the process (e.g. historicism and dialectic), but the tendency towards less complexity rather than more complexity admittedly goes against our intuitions about evolution (e.g. when we say someone has ‘evolved’ we normally mean some form of positive development, but that need not be so). Nevertheless, this special case of evolution is still important for our investigation, particularly in Chapters 2 and 3 with the perception of the inevitable degeneration of society and the human condition, so for the purpose of this thesis, the author will give it the label devolution.

Finally, whatever one considers to be the correct linguistic or conceptual meaning of the term ‘evolution’, it is important when considering its role in the history of ideas to not ignore misconceptions surrounding this term such as the teleological fallacy noted above or when evolution is equated only with competition (e.g. Social Darwinism). Indeed, as will be demonstrated, these very misconceptions have had the greatest influence on the deployment of ideas about evolution in society and provide the most interesting (or rather, disturbing) cases in the study of the history of evolutionary thinking. As mentioned earlier, our survey is of the use and the abuse of ideas about evolution. One can learn as much about what evolution is by studying what it is not.
1.4 Thesis Approach

The main portion of this thesis comprises a historical survey of ideas about evolution, classified into the categories or components outlined above, and their influence on western legal theory from antiquity to the present day as well as, where relevant but to a lesser extent, its concomitants social, economic, scientific and political theory, which all form part of the fabric of, and co-evolve with, the law and the legal system.

Using the results of this survey, the author will then argue that the abuse of evolutionary ideas throughout history, and particularly in the 19th and 20th centuries, has resulted from a misconception of the nature of evolution or ideas about evolution. It will be submitted that such misconceptions usually arise due to the subjectivising of evolutionary concepts with ideology of a metaphysical, religious or secular nature (even in some sciences where there is purported objectivism) rather than attempting to understand these concepts objectively as a natural process or parts of a natural process.

The thesis will then argue that a proper conceptualisation of evolution in the law and legal systems context involves understanding evolution as an objective process taking into account all of the key components discussed (each of which themselves must be objectively understood) and that this is necessary to underpin a workable theory of evolutionary jurisprudence. What such a theory might look like in terms of its descriptive and normative content are discussed in the final Chapter 10 of this thesis.

1.5 Thesis Structure and Chapter Breakdown

The chapters that follow this introductory Chapter 1 are summarised and set out below.

Chapter 2 – Ideas about Evolution and their Impact on Western Social, Political, Economic and Legal Theory in Antiquity

Charting the early history of the concept, or rather ideas about, evolution (since evolution is not a fully realised concept at this stage), this Chapter argues that such ideas in western thought began with Heraclitus’s notions of constant change (universal flux) brought out by opposing forces (dialectic).
The discussion then moves on to how these notions of change later influenced Plato, whose *historicism*, another key component of evolutionary thinking, informed by his *idealism*, involved a negative view of evolution (*devolution*) of society as one of ongoing degeneration and decay from a past ideal state (‘the Golden Age’).

This Chapter then discusses Aristotle’s *final cause teleology* as an idea about evolution and a thing’s striving towards its true nature or *essence* and how, as noted earlier, this represented a different view of change to Plato’s *idealism* as it was based on a more materialistic view of reality. *Final cause teleology* was to prefigure the evolutionary (but non-teleological) idea of *path dependence* which, as mentioned, is less about a thing’s striving towards it inner *essence* but rather how a thing’s changing state is constrained and influenced by factors in its external environment.

Plato’s and Aristotle’s legal theories are also discussed and how they were informed by their ideas about evolution.

Other Greek philosophers’ views on change are then examined, including Pythagoras and his notion of cyclical change and Parmenides who was to have an influence on Hegel’s logic and political philosophy, and Empedocles who posited perhaps the world’s first, albeit implausible, biological evolution theory. Also discussed are the stoics, sceptics and cynics, and the Epicureans and their modest contribution to evolutionary thinking, most notably Epicurus’ social theory of evolution and the cynics’ challenge to thinking about change as discrete steps rather than a continuum, with Zeno’s paradoxes.

Finally, the discussion moves to ancient Rome where although ideas about evolution did not appear to be particularly prevalent in that largely pragmatic stoic era, we nevertheless see the emergence of the earliest fully developed social theories of evolution (Lucretius, Cicero and Seneca), precursors of the more well-known later social contract theories of Hobbes, Locke and Rousseau which corresponded with the rise of legal positivism discussed in Chapter 4. Also, in this era we see for the first time in the west the development of a sophisticated legal system which had evolved in fact if not in theory.
Chapter 3 – Ideas about Evolution and their Impact on Western Social, Economic, Political and Legal Theory from Late Antiquity to the Reformation

This Chapter examines the impact of ideas about evolution on social, political and legal theory during the Middle Ages, from the decline of the Roman Empire to the Reformation. It will be seen how it was in the twilight of the Roman Empire that Plato’s notion of social devolution influenced Plotinus and the neo-platonists in the 3rd century and (rather than the relatively more upbeat ideas of Origen of Alexandria) Saint Augustine in the 5th century. Augustine’s notion of the Fall was to become highly influential throughout the rest of the Middle Ages and, in religious thinking, well beyond that time to the present day. This notion broadened the scope of the Platonic idea of ongoing degradation or devolution of society to ongoing degradation of every individual from the time of the Biblical Adam on account of his original sin.

The author also discusses Scholasticism and how its chief proponent Saint Thomas Aquinas in the 13th century embraced the Augustinian notion of the Fall but also employed the philosophy of Aristotle in an attempt to base Christianity on reason as well as faith. Aquinas also applied Aristotle’s metaphysical final cause teleology to ideas about evolution within the limiting context of Catholicism in the doctrine of predestination - a view which held that an individual’s evolution is not along a path that is teleologically determined by his or her nature or essence as Aristotle held, but simply as God has already decided. This chapter then explores how the ‘evolutionary’ notions of the Fall and predestination informed legal theory in the Middle Ages and its role in conceptions of Natural Law, particularly Aquinas’ celebrated theories in this realm.

Next discussed is the rise of the papacy before turning to Martin Luther’s robust challenge to, and ultimate defeat of, Catholic hegemony, ushering in the Reformation. While the protestants, like the Catholics, still clung to the doctrines of original sin and predestination, the Reformation was to lead to personal autonomy and a challenge to tradition and dogmatism, leading to the Renaissance and the sovereignty of reason from first principles (an anti-evolutionary way of thinking as it involved a wilful ‘forgetting’ of history) and the opening of the door for legal thought of, paradoxically, both a positivist and natural law bent.
Chapter 4 – The Impact of Ideas about Evolution on Political Social and Legal Theory from the Rationalists of the Renaissance to the 19th Century Romantics

This Chapter discusses how, following the Renaissance, with the rise of rationalism and the refutation of religion (other than as a tool for political power), the state had replaced God as the ultimate sovereign to fill the inevitable power vacuum. States were conceived along purely rationalist lines by thinkers such as Hobbes and Locke. Ideas about evolution were not significant during this time as people wanted to forget the repressive past of the earlier Middle Ages. Hobbes and Locke, like all good ‘enlightened’ men of their age, saw constructing society and the construction of a political and legal system all apiece a rational enterprise with the future being independent of the past, but at the same time taking it for granted that evolution of future human progress was inevitable— a secular inversion of the Fall. ‘Past-less’ or ahistorical anti-evolutionary Reason was the new religion and could inform legal thought that could lean either towards natural law (Locke) or legal positivism (Hobbes).

The thesis then argues that Rousseau’s social contract model, with its notion of the general will, prefigured a more evolutionary historicist approach, in contrast to that of Hobbes’ and Locke’s. Rousseau was a key figure in the rise of Romanticism in the 19th century, a movement which also believed in progress but sought (or, rather yearned) a narrative that would explain the present’s relationship to the past. Romanticism was therefore something of a backlash to the Rationalism of the Renaissance and the Romantics would thus seek to discern in history forces at work (albeit secular ones), the most famous being, as previously noted, Hegel’s thesis-antithesis-synthesis argument or dialectical historicism in discerning the ‘world spirit’ or Weltgeist. Thus, change or evolution of society was now itself the subject of study, but in an unscientific metaphysical form of historicism. Hegel’s evolutionary ideas of historicism and dialectic were to have an impact on legal theory and led to the movement referred to as historicist jurisprudence discussed in the following chapter.
Chapter 5 - Ideas about Evolution in German Historicism, Sociology and Sociological Jurisprudence

This Chapter explores how the legacy of Hegel changed western thinking from the 19th century onwards in the way society thinks about itself including how it orders and makes rules and laws for itself. There was now a perceived need to pay close attention to the social context in the study of a society’s history rather than as a mere sequence of unconnected significant events and persons – i.e. the usual suspects: battles and monarchs. Moreover, Hegel’s *dialectical historicism*, which saw history as a playing out of opposing forces or ideas, was a notion about evolution that has resonated to this day as is discussed in this and subsequent chapters.

Hegel’s immediate successors, scholars of the *German Historical Movement* of the 19th century and the *German Historical School* of jurisprudence exemplified by Carl von Savigny, are discussed. Similar to the Hegelian concept of *Weltgeist*, a ‘people spirit’ or *Volksgeist* permeated this school’s thinking so ideas about evolution were co-opted to discern the spirit of (German) society over time and how its laws had evolved to suit it (or were rejected if they did not). Also discussed is the historical jurisprudence in England and the US of Henry Maine and Francis Wharton respectively.

This Chapter also examines a competing view of society that was also emerging at that time in the 19th century that was positivist and purported to be empirically based: *sociology*. This led to historical studies of society being placed on a supposedly scientific basis rather than on assumptions or conjectures about a supposed ‘state of nature’ (*a la* Hobbes, Locke and Rousseau) or a metaphysical ‘spirit’ (*a la* Hegel and Savigny). The work of the movement’s earliest proponent and purported ‘fathers’, Auguste Comte, Max Weber, Karl Marx and Emile Durkheim is discussed in this Chapter (although Marx is discussed in more detail in the following chapter). Also discussed is the effect of these developments in *sociology* on legal theory and how *sociological jurisprudence* first became a reality in the late 19th century with Roscoe Pound. Pound’s approach to the study of law was also empirically based, although limited to the study of statutes and cases rather than broader sociological phenomena, so it had mainly pragmatic instrumental goals rather than descriptive ones – an
approach that died as serious sociology with the emergence of its even more pragmatic instrumental and methodologically insular progeny American legal realism. This Chapter also discusses lesser known contemporaries of Weber and Durkheim, namely Petrazychi and Ehrlich. These writers’ sociological jurisprudence had a particular evolutionary flavour that anticipates the work of systems theorists such as Niklas Luhmann and Klaus Ziegert discussed in Chapter 9.

Chapter 6 – The Impact of Marxist Ideas on social, economic, political, and legal theory

This Chapter discusses how Hegelianism expressed itself in the economic realm in the theories of Karl Marx who employed the evolutionary idea of the dialectic, not in the ideal realm as Hegel had done but in a material sense in the economic sphere, as mentioned earlier, with his notion of dialectical materialism. Also discussed is the attitude towards the rule of law in Marxist theory and how the evolutionary idea of dialectic was seen to impact on that and lead to radical schools of thought in jurisprudence. These ranged from those who saw the rule of law as a tool of the bourgeoisie in classical Marxism to oppress the proletariat to more modern schools of Marxist thought such as critical legal theory or critical legal studies. These movements range from those who have argued that rule of law favours the interests of the dominant party of the dialectic (be it the dominant gender, race, etc.) to proponents of ‘outsider jurisprudence’ who look at dialectic as a discourse of many opposing forces/voices, not just two major opposing forces (the classic binary view).

Finally, this Chapter will discuss postmodern jurisprudence which although having its roots in Marxist theory, employs linguistic theory to effectively empty Marxism of its evolutionary content (i.e. by denying the structuralist nature of its dialectic of oppressor and oppressed). From postmodernism’s relativist perspective, no one is being oppressed since this implies values by which oppression can be judged whereas the postmodern view is that the oppressors’ and oppresseds’ values are equally valid.
Chapter 7 - Social Darwinism and political, social, economic and legal theory

This Chapter examines one of the most ‘recent’ and arguably explicit theories of evolution, Darwin’s theory of biological evolution. Whereas Marx had proposed to resolve the dialectic riddle to social change in terms of economic forces, one particular feature of Darwin’s theory, selective adaptation, would be seen to provide a more scientific solution to the riddle, culminating in a new movement: Social Darwinism. 

Social Darwinism is a limited view of evolution, or rather of the dialectic inherent in the process of evolution, with the notion of selective adaptation as not just a mechanism to resolve the dialectic by a survival of the fit adapting to challenges thrown up by the natural environment, but rather survival of the fittest in not so much adapting to environmental challenges but completely negating them, carrying with it the implication of a zero-sum game with a victor and a vanquished, one having a right (even a duty) to conquer, the other a duty to simply perish.

Also discussed is how such a limited view of biological evolution was nevertheless embraced wholeheartedly in Germany from as early as the late 19th Century to complement a mindset already awash in feelings of racial and cultural superiority and an organic view of the state since the time of Hegel. However, this mindset could now appeal to a purportedly scientific basis aided by the pseudo-Darwinian views of scientist Ernst Haeckel to justify its exclusionary stance to prop up Nazi ideology which this Chapter argues was enabled (and actually even made possible) by prominent jurists. These members of the legal profession were also deeply influenced by Social Darwinist views and used both legal positivism and an interpretative approach to the law based on a distorted natural law approach (i.e. the pure Aryan Race ideal).

Chapter 8 - The Impact of Ideas about Evolution on liberal economic and legal theory

Beyond Social Darwinism, the influence of biological evolution on classical liberalism and libertarianism in the US and England on economic and legal theory is examined in this Chapter. First discussed are pre-Darwinian notions of evolution in the 18th century Scottish Enlightenment with David Hume and Adam Smith’s celebrated ‘invisible hand’ of the market place and his quite affecting moral theory
which was very much at odds with the self-interest of Social Darwinism. The discussion then moves on to the Law and Economics movement from the early 20th century with its ultra-rationalistic efficiency hypothesis and then to Friedrich Hayek’s notion of spontaneous order in the mid-20th century. This is followed by modern conceptions of jurists in the late 20th century and the present century of the notion of selective adaptation in politics, economics and law that have moved well on from Social Darwinism.

Chapter 9 – Ideas about Evolution in Systems Theory and their Impact on social, economic, political and legal theory

This Chapter explores how systems theory in jurisprudence takes notions such as spontaneous order and evolutionary epistemology to the next step in systems theory and how it has developed with the works of sociologists such as Talcott Parsons and sociologists such as Niklas Luhmann and Klaus Ziegert. This Chapter argues that systems theory is influential in all intellectual disciplines since not only is it a synthesis of all of the key evolutionary components previously discussed and the interplay between them, but it is also closer to ‘pure’ empirically-based evolution than the metaphysical or eschatological conceptions of evolution that have defined other schools of thought such as Hegelianism, German Historicism, Marxism, Social Darwinism, and Rationalism (with its obsession with ‘progress’).

Chapter 10 – Evolutionary Legal Theory as a Distinct Branch of Jurisprudence

This Chapter will summarise the survey of ideas about evolution in the previous chapters and the various uses and abuses of their application in social, economic, political and legal theory throughout western history. It will be argued that conceptions of evolution that have had the most pernicious influence on western thinking have been subjective rather than objective, and that since evolution describes an objective natural process, such conceptions are not really properly descriptive of evolution at all, but wish or will (or both) a desired or preferred outcome, where the natural or spontaneous order is supressed (e.g. conceptions based on the perceived evolutionary advantages of a preferred race by persons, coincidentally, belonging to that very race, or where the virtues and ‘inevitability’ of a particular social or economic system are championed by
those most likely to benefit under them). The Chapter will then propose an appropriate objective conceptualisation or model of evolution in a law and legal systems context incorporating the definition and key components of evolution discussed in this thesis. Utilising this model, this Chapter will then suggest what a workable theory of evolutionary jurisprudence might look like, both in descriptive and normative terms, by using a hypothetical scenario involving a proposed new law enabling same sex marriage in Australia (a jurisdiction which does not currently have such a law) and subjecting it to the model to assess whether such a law would affect the integrity of the legal system as being poorly adapted to it or whether it might be suitably adapted to it and thus ‘fit’, and, if so, how such law should be introduced in light of the current debate on whether a plebiscite should precede a parliamentary vote or whether it should be simply introduced directly, and voted on, in Parliament.

1.6 Research Methods

The legal research methodology in this thesis will involve an extensive literature review. This literature comprises, due to the nature of the subject matter in this thesis, mainly secondary sources which will include scholarly books, journal articles, and classic literary works where appropriate, but to a more limited extent, also includes primary legal sources such as judicial decisions, statute law and extrinsic materials.

1.7 Conclusion: Significance of this Thesis

This thesis aims to impart a better understanding of the role evolution plays in legal theory through a survey of ideas about evolution in western legal and associated social, political, economic, and scientific thought from antiquity to the present day.

This in turn should contribute to a better understanding of the nature and function of law and legal systems in the way other process-oriented branches of jurisprudence which have this aim in mind do (e.g. sociological jurisprudence) which are also touched upon in this thesis and which have much in common with the nascent branch of evolutionary jurisprudence.
 Attempting to describe a workable theory of evolutionary jurisprudence in the final phase of this thesis should engender confidence in jurists to develop evolutionary legal theories of their own and for law and policy makers to apply such theories to proposed new laws to assess their ‘fitness’, their effect on the integrity of the legal system, and the best timing and means of their introduction and implementation. It is not proposed the theory propounded in this thesis is the theory of evolutionary jurisprudence, merely a respected variant based on the writer’s particular conception of evolution being based on the definition and comprised of the seven evolutionary components discussed in this thesis. Others may have a slightly different conception of evolution and put greater or lesser emphasis on these components or even suggest components not envisaged by the writer, as there is no one definition for evolution which itself is a concept evolving all the time. However, any theory of evolutionary jurisprudence based on a well thought out concept of evolution is likely to be a sound descriptive and normative theory of law that grasps its true nature as a process which other legal theories such as legal positivism and natural law do not. Thus, such a theory leads to not only an improved understanding of our laws and legal systems but has predictive power and practical application when it comes to assessing proposed new laws and their implementation.
CHAPTER 2
IDEAS ABOUT EVOLUTION AND THEIR IMPACT ON
WESTERN SOCIAL POLITICAL AND LEGAL THEORY IN
ANTIQUITY

2.0 Introduction

Ideas about, and the concept of, evolution arguably first make their appearance in western thought in Ancient Greece. That is not to say the concept ‘evolution’ entered the Greek public consciousness ready-made; indeed, as has been noted in the previous chapter, the actual term ‘evolution’ did not come into use in any known language until the 17th century. Moreover, ideas about, and the concept of, evolution, like many things that are eventually expressly identified, long predate any specific title given to them.

Therefore, it is not really possible to point to any particular intellectual construct throughout the course of western history and announce for certain (not even of Darwin’s theory) that ‘that is evolution’. As is argued throughout this thesis, evolution means different things in different contexts even if there are certain components which might be found common to evolution in most contexts (i.e. the components discussed in the previous chapter).

This Chapter, and the two following chapters, do not discuss a lot of legal theory in the context of evolution. A discussion of the influence of ideas about evolution on legal theory could, and usually does, start with such figures as Henry Maine and Carl Von Savigny or Scottish Enlightenment figures such as Adam Smith and David Hume who will of course be discussed in this thesis, from Chapter 5 onwards. However, their theories did not arise in a vacuum and have a pedigree going back centuries. The purpose of this Chapter and the next two chapters is to chart that pedigree. Key evolutionary components, universal flux, historicism, dialectic, and path dependence (or rather its precursor final cause teleology), which underpin evolutionary legal theory and other forms of evolutionary theory are born in this era and discussed in this and the following two chapters.
Thus, in connection with the idea of universal flux, for example, it will be seen throughout this thesis that the Platonic idea discussed in this Chapter that some things (ideal forms) remaining unchanged was to go on to influence in later eras natural law thinking based on eternal transcendent unchanging values or ideals, both religious and secular. Ironically, Platonic idealism arguably also influenced a purely positivist scientific approach to law based on abstract principles in a similar way to mathematical reasoning. Such approach is exemplified by certain schools of analytical jurisprudence associated with distinguished jurists such as Hans Kelsen and Herbert Hart.

Rather than Plato’s idealism, however, it is the more materialistic Aristotelean conception of change (that everything changes as there are no ideal forms in Aristotle’s epistemology) discussed in this Chapter that later gave rise to most forms of legal positivism that look for a source of law not in the transcendent realm of values or even mathematical or scientific abstraction (although Aristotle was no stranger to the abstract scientific method) but in things based on reality. These include the will of a sovereign and their commands a la Austin (or the will of the people a la Savigny) or social facts such as the rule of recognition or an individual’s internal and external perspectives of the law a la Hart, or the complex social facts that have been sought to be discovered in anthropological and historical jurisprudence or sociological jurisprudence as underpinning the nature and purpose of law in society as will be discussed in Chapter 5. No less than any other intellectual discipline, legal theory has found itself at the centre of the tug-of-war between the Platonic idealism/Aristotelian materialism divide in western thought ever since antiquity.

With regards to the evolutionary component of historicism, in particular Plato’s conservative view, as will be discussed in this Chapter, that social change is likely to lead to degeneration and decay, hard legal positivism finds good company with this pessimistic view with its focus on commands as a necessary expedient to preserve social order and the tendency of law’s subjects to follow the law not from some innate sense of justice but only from a habit of obedience. On the other hand, Aristotle is not an historicist and his final cause teleology is a look to the future if not the past and has a much more positive tone than Plato’s historicism; where Plato saw social change inevitably leading towards decay, thus making the future look bleak, Aristotle’s take
on the direction of future change is more positive with individuals and society striving to attain their virtuous essence. This is a view reflected in some forms of legal positivism, particularly in its quest to ascertain the social facts underpinning not only the law’s nature but also (or instead of) the purpose of law in such areas as sociological jurisprudence and the founders of the American Realism movement, as will be discussed in Chapter 5.

Finally, the other evolutionary component introduced in this Chapter, dialectic, like historicism was not employed, and is often not discussed in legal theory until the time of the Hegel-influenced Carl von Savigny and also Sir Henry Maine in the 19th century. However, the purely binary nature of dialectic that has shaped Western thinking has its roots in antiquity with Heraclitus’s theory of opposites. Examples of the influence of this strong binary emphasis in dialectic can be found in radical strains of legal thought (e.g. Marxist jurisprudence, feminist jurisprudence and critical legal studies) discussed in Chapter 6 which advance the idea of one dominant power and the dominated ‘other’ and the law as a mere tool of the former, or, as discussed in Chapter 7, Social Darwinist conceptions of strong and weak to justify immoral laws. Also, theocratic notions of the law are and will continue to be based on a strongly binary dialectic of good versus evil, as we will be seen in the discussion of Chapter 3.

This Chapter will chart ideas about evolution propounded by the pre-Socratic philosophers, most notably Heraclitus, followed by Plato and Aristotle and how these ideas informed the legal theory of these two intellectual giants of the ancient world. The discussion will then move on to the Hellenistic philosophers (the cynics, sceptics, Epicureans and stoics) whose thinking have influenced not so much ideas about evolution but rather attitudes towards such ideas (and especially attitudes to the concept of evolution from the 19th century onwards when it was regarded as new or ‘novel’). The Chapter will conclude with a discussion of ancient Rome and its primarily stoic character, making it more an era of doing rather than thinking, but nevertheless leaving a legacy of an evolved system of jurisprudence, if not in theory but in fact, that has influenced western law and legal systems to the present day.
2.1 Ideas about Evolution in Ancient Greece - Heraclitus (544-483BCE)

Heraclitus, according to Karl Popper was ‘the philosopher who discovered the idea of change.’\(^\text{16}\) Clarifying this claim, Popper explains:

Down to this time, the Greek philosophers, influenced by oriental ideas, had viewed the world as a huge edifice of which the material things were the building material…They considered philosophy, or physics (the two were indistinguishable for a long time), as the investigation of ‘nature’, ie of the original material out of which this edifice, the world, had been built. As far as any processes were considered, they thought of either as going on within the edifice, or else as constructing or maintaining it, disturbing or restoring the stability of the balance of a structure which was considered to be fundamentally static. They were cyclic processes….This very natural approach, natural even to many of us today, was superseded by the genius of Heraclitus. The view he introduced was that there was no such edifice, no stable structure, no cosmos. ‘The cosmos, at best, is like a rubbish heap, scattered at random’ is one of his sayings. He visualised the world not as an edifice, but rather as one colossal process; not as the sum-total of all things, but rather as the totality of all events, or changes, or facts. ‘Everything is in flux and nothing is at rest’ is the motto of his philosophy.\(^\text{17}\)

Indeed, the truly novel approach of Heraclitus’s notion of change was to break with the notion of a state of a permanent status quo, or one that is returned to after a temporary change (i.e. cyclical change), that had pre-occupied other pre-Socratic Greek philosophers such as Pythagoras, discussed later in this Chapter.

Heraclitus hailed from a royal family of priest kings of Ephesus in Iona, and, while resigning his claims to royal ascendancy to his brother, he continued to support the aristocrat’s cause against the rising tide of social revolutionary (democratic) forces under Persian rule.\(^\text{18}\) However, as Popper notes:

Heraclitus’ fight for the ancient laws of his city was in vain, and the transitoriness of all things impressed itself strongly upon him. His theory of change give expression to this feeling: ‘Everything is in flux’ ….‘You cannot step twice into the same river’. Disillusioned, he argued against the belief that the existing social order would remain forever….\(^\text{19}\)

Hence, Heraclitus’s notion of change in the sense of degeneration and decay can be seen as a lamentation of a new social order replacing an old one from his conservative perspective, although his main point is simply that things do not stay the same. Does anything stay the same for Heraclitus? One exception he gives is the ‘living fire’:

\(^{17}\) Ibid.
\(^{18}\) Ibid 9.
\(^{19}\) Ibid 10.
Heraclitus’s notion of everything being reducible to fire follows, in a sense, the thinking of his contemporaries, the Milesian school (Thales, Anaximander, Anaximenes) who believed that everything is made of one substance (Thales – water; Anaximenes – air; and Anaximander – one indefinable substance from which the elements earth, wind, fire and water are formed). Unlike them, however, Heraclitus was not strictly a monist, as for him fire was not the substance from which things were made, but rather the principle of creation and destruction and change from one substance to another.

Russell suggests that the permanence of the principle of Heraclitus’s fire makes it a process rather than a substance, and although he cautions this view should not be attributed to Heraclitus himself, it is submitted this is perhaps the correct way to view Heraclitus’s notion of change – that is, an ever-changing process, the only constant being that of change itself. Further, Heraclitus was not only concerned with destructive forces, but also creative forces (i.e. all change), and if according to him things are constantly in flux, a destroyed thing will develop into something else after being subjected to the ‘ever living Fire’. Indeed, it is a truism that few things can be created without something first being destroyed. Less cautious than Russell, the contemporary philosopher Daniel Graham has even described Heraclitus as the world’s first ‘process philosopher’.

Finally, Heraclitus’s theory of opposites introduces the evolutionary concept of dialectic. Although this concept is usually explicitly linked to later thinkers such as Hegel and Marx, who will be discussed in Chapter 5 and 6 respectively, it is with
Heraclitus that the concept is actually born, if only in a very rudimentary form. Plato, as will be seen, is known for employing dialectic in his Socratic dialogues to test the strength of an argument (i.e. take an opposing position in order to play ‘devil’s advocate’ to bring to light and test the contradictions of an argument), but more as a rhetorical device than anything that could be said to shape ways of thinking about politics and society. On the other hand, Heraclitus’s dialectic contains ideas, as will be discussed below, about fate favouring the great and the strong (presumably against the weak), that have since influenced opponents of democracy, fascists and Social Darwinists as will be discussed in Chapter 7. However, arguably the greatest legacy of Heraclitus’s brand of dialectic on western thought is not this, but its highly binary nature (i.e. two opposing or directly contradictory forces), as noted earlier. As will be discussed later in this thesis, rather than just two opposing forces, many multidirectional forces in contradiction with one another comprise dialectic, which provides a truer picture of the process of change.

2.2 Other Pre-Socratic Ancient Greek Philosophers’ Ideas about Evolution

It is worth briefly mentioning some other prominent identities and schools of the pre-Socratic era. While these thinkers’ ideas about evolution have arguably had much less impact on economic, political, social or legal thought than Heraclitus, firstly, their prominence in history demands that they be accounted for in the type of survey undertaken in this thesis, and secondly, their ideas may in some measure have helped shape the ideas of the thinkers already discussed, or later thinkers influenced by the idea of evolution, in subtle and indirect ways.

Pythagoras (581-497BCE)

After the Milesian school which has already been mentioned, arguably the most significant early Greek philosopher and a contemporary of that school was Pythagoras. Pythagoras spoke of change in a cyclical sense, but it was mainly informed by his celebrated mysticism including his teachings that ‘first, the soul is an immortal thing, and that it is transformed into other kinds of living things; further, that whatever comes into existence is born again in the revolutions of a certain cycle, nothing being
absolutely new.'

Although much of Pythagorean thought has echoed down through the millennia (not least his mathematical theories), it has had little impact on the ideas of evolution in Western social, political or legal thought which are mainly premised on the notion that evolution is a linear process as was discussed in the previous Chapter. Hence, this thesis is not concerned with cyclical processes but linear processes insofar as ideas about evolution is concerned in western thinking.

Parthenides (515BCE-Unknown)

Parthenides was a contemporary of Heraclitus, albeit some 30 years younger than the latter. His theory of change is the antithesis of Heraclitus’s theory of change. Rather than the Heraclitean notion of everything being in a constant state of flux, according to Parthenides, nothing changes. Citing key passages in his poem Nature where Parthenides famously set out his dual doctrines the way of opinion and the way of truth, Russell explains with respect to the latter doctrine (since this is the doctrine relevant to Parthenides’s theory of change) that:

What he says about the way of truth, so far as it has survived, is, in its essential points as follows:

‘Thou canst not know what is not – that is impossible – nor utter it; for it is the same thing that can be thought and that can be.’

‘How, then can what is be going to be in the future? Or how could it come into being? If it came into being, it is not; nor is it if it is going to be in the future. Thus is becoming extinguished and passing away not to be heard of.

‘The thing that can be thought and that for the sake of which the thought exists is the same: for you cannot find thought without something that is, as to which it is uttered’

The essence of the argument is: When you think, you think of something; when you use a name, it must be the name of something. Therefore both thought and language require objects outside themselves. And since you can think of a thing or speak of it at one time as well as another, whatever can be thought of or spoken of must exist at all times. Consequently there can be no change, since change consists in things coming into being or ceasing to be.'

Russell pays Parthenides’s abovementioned argument the generous compliment of being ‘the first example in philosophy of an argument from thought and language to

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26 Bertrand Russell quoting Dikaiarchos –see Russell, above n 20, 41.
27 Russell, above n 20, 56.
the world at large’ 28 and notes that ‘what makes Parmenides historically important is that he invented a form of metaphysical argument that, in one form or another, is to be found in most subsequent metaphysicians down to and including Hegel.’ 29 Parmenides’ theory of change, celebrated as it is in the realm of metaphysical thought, could hardly be said to have any direct impact on the idea of evolution as applied to much more down-to-earth realm of social, political, economic or legal thought. However, Parmenides’s theory could be said to have had an indirect impact on later thinkers who have had a significant impact on this realm (perhaps most significantly Hegel, as Russell notes in the above passage, and who will be discussed in Chapter 5).

Empedocles (490–430BCE)

Empedocles also developed a metaphysical notion of change. Like Heraclitus, he believed strife was the agent of change, but unlike Heraclitus, he did not believe strife was the only agent of change, and believed there were effectively two agents at work: love and strife. 30 The fact that these forces effectively see-saw over time with the world being dominated by one or the other in an endless cycle is an attempt to explain motion in terms of the arguments of his older contemporary Parmenides, but he was not in agreement with Parmenides about an unchanging universe. 31 Empedocles also saw these agents of change being ruled by chance and necessity rather than purpose. 32 Empedocles is primarily remembered for being a scientist (arguably, the West’s first scientist, if not the West’s first eccentric scientist). 33 His contribution to evolution as an idea is limited to the realm of metaphysics, although his metaphysical arguments have not had anywhere near the impact on western philosophy as Parmenides’ celebrated change paradox mentioned above. On the other hand, Empedocles’ account of biological evolution, could earn him the appellation of proto-Darwinist, even if not quite proto-social Darwinist, given his colourful account, involving, among other

28 Ibid.
29 Ibid 55.
30 Ibid 62.
31 Ibid.
32 Ibid.
33 Bertrand Russell notes ‘Legend had much to say about Empedocles. He was supposed to have worked miracles, or what seemed such, sometimes by magic, sometimes by means of scientific knowledge. He could control the winds, we are told; he restored life to a woman who seemed dead for thirty days; finally, it is said, he died leaping into the crater of Etna to prove he was a god’ – see Russell, above n 20, 60.
things, solitary limbs, eyes and other body parts joining together to form human bodies in prehistoric times.34

Like Heraclitus, we do not have any information about the legal theory of these pre-Socratic philosophers. Unlike Plato and Aristotle who followed them, they were more concerned with the physical questions about human existence and nature rather than ethical ones which are the usual precursors to questions about legal theory. However, what limited exploration that exists of these philosophers into the field of ethics suggested a naturalistic approach, perhaps best illustrated by Heraclitus’ opposites and Empedocles’ variation on this theme ‘love and strife’ characterised by relativism as previously noted. Thus, given their ideas about change, the pre-Socratics would, it is submitted, have held that laws ought to obey the laws of nature or the cosmos. As discussed later in this Chapter, what little is known of Heraclitus’ legal theory would seem to suggest he was of this view. Interestingly, if that had been the legal theory of the pre-Socratics, there is a case to be made that such legal theory has perhaps come full circle with systems theory discussed in Chapter 9 where a modern day pure theory of law a la Kelsen might demand that laws ought to obey the nature of a Luhmannian autopoietic system of which they form part.

2.3 Plato (427-347BCE)

Plato’s Theory of Change

Heraclitus’s view, noted above, that the society in which he lived was undergoing a process of degeneration and decay, was a view shared by many of his aristocratic contemporaries and near-contemporaries, perhaps most notably Plato. Karl Popper paints the following picture of the young Plato:

Plato lived in a period of wars and of political strife which was, for all we know, even more unsettled than that which had troubled Heraclitus. While he grew up, the breakdown of tribal life of the Greeks led in Athens, his native city, to a period of tyranny, and later to the establishment of a democracy which tried jealously to guard itself against any attempts to reintroduce either a tyranny or an oligarchy, ie a rule of the leading aristocratic families. During his youth, democratic Athens was involved in a deadly war against Sparta, the leading city state of the Peloponnese, which had preserved many of the laws and customs of the ancient tribal aristocracy…..Plato was born during the war and he was about twenty-four when it ended. It brought terrible epidemics, and in its last year, famine, the fall of the city of Athens, civil war,

34 Ibid 61.
and a rule of terror, usually called the rule of the Thirty Tyrants; these were led by two of Plato’s uncles, who both lost their lives in the unsuccessful attempt to uphold their regime against the democrats.35

While Plato’s notion of unchanging ideal forms discussed below is, ideologically, the polar opposite of Heraclitus’s more down-to-earth ideas about constant change, the two men share a similar social heritage that led each of them to have a deeply pessimistic view of the societies in which they lived and where those societies were headed, compared to, what appeared to both men, a far more superior past. This pessimism led Plato to be of the view, as Heraclitus had been, that constant change was indeed an inevitable fact of life, particularly social life. As Popper explains:

From the feeling that society, and indeed ‘everything’ was in flux, arose, I believe, the fundamental impulse of his philosophy as well as the philosophy of Heraclitus; and Plato summed up this social experience, exactly as his historicist predecessor had done, by proffering a law of historical development. According to this law....all social change is corruption or decay or degeneration. This fundamental historical law forms, in Plato’s view; part of a cosmic law – of a law which holds for created or generated things. All things in flux, all generated things, are destined to decay. Plato, like Heraclitus, felt that the forces which are work in history are cosmic forces.36

However, both men also saw a potentially positive aspect of change in their societies, albeit in very different ways. Popper describes Heraclitus’s more ‘positive’ vision thus:

But having reduced all things to flames, to processes, like combustion, Heraclitus discerns in the processes a law, a measure, a reason, a wisdom; and having destroyed the cosmos as an edifice, and declared it to be a rubbish heap, he reintroduces it as the destined order of events in the world process. Every process in the world, and especially fire itself, develops according to a definite law, its ‘measure’. It is an inexorable and irresistible law, and to this extent it resembles our modern conception of natural law as well as the conception of historical or evolutionary laws of modern historicists. But it differs from these conceptions in so far as it is the decree of reason, enforced by punishment, just as is the law imposed by the state. The failure to distinguish between legal laws or norms on the one hand and natural law or regularities on the other is characteristic of tribal tabooism; both kinds of law alike are treated as magical, which makes a rational criticism of the man-made taboos as inconceivable as an attempt to improve upon the natural world: ‘All events proceed with the necessity of fate....The sun will not outstep the measure of his path; or else the goddesses of fate, the handmaids of Justice, will know how to find him’. But the sun does not only obey the law; the Fire, in the shape of the sun and ... of Zeus’ thunderbolt, watches over the law; and gives judgement according to it.37

One can see in this, from a political perspective, something more insidious than a mere sigh of resignation toward the changing nature of things. After apparently avoiding any teleological fallacy with his notion of entropy-like destruction in his conception of the

35 Russell, above n 20, 16-7.
36 Popper, above n 16, 11.
37 Ibid.
cosmos (‘a pile of rubbish’), Heraclitus then appears to succumb to this fallacy, in his particular conception of society, by recruiting these very same cosmic forces in ensuring that justice, through its ‘goddesses of fate’ or its ‘handmaids’, will somehow prevail in the natural order of things. But justice in favour of whom? Popper discusses Heraclitus’s apparent relativism in his theory of opposites, but notes that this:

[d]oes not prevent Heraclitus from developing upon the background of his theory of the justice of war and the verdict of history a tribalist and romantic ethic of Fame, Fate and the superiority of the Great Man, all strangely similar to some very modern ideas: ‘Who falls fighting will be glorified by gods and by men…The greater the fall the more glorious the fate…The best seek one thing above all others, eternal fame… One man is worth more than ten thousand if he is Great.’

Although Heraclitus’ brand of historicism is not an express adoption of the idea of evolution to advance his worldview (if for no other reason because at the time there was no sophisticated concept of evolution), his attitude certainly has a lot in common with the later Social Darwinists. Like Heraclitus, these thinkers betrayed their true natures by superimposing their personal ideals and will upon the supposed blank slate of their self-avowed amoral ‘relativist’ positions as will be discussed in Chapter 7.

As to Plato’s view on the ‘positive’ aspects of change, Popper observes:

Whether or not he (Plato) also believed that this tendency (to depravity) must necessarily come to an end once the point of extreme depravity has been reached seems to me uncertain. But he certainly believed that it is possible for us, by a human rather than a superhuman effort, to break through the fatal historical trend, and to put an end to the process of decay. Great as the similarities are between Plato and Heraclitus, we have struck here an important difference. Plato believed that the law of historical destiny, the law of decay, can be broken by the moral will of man, supported by the power of human reason….Plato believed that the law of degeneration involved moral degeneration. Political degeneration at any rate depends on his view mainly upon moral degeneration (and lack of knowledge; and moral degeneration, in its turn, is due mainly to racial degeneration). This is the way the general cosmic law of decay manifests itself in the field of human affairs…..Plato may well have believed, just as the general law of decay may have manifested itself in moral decay leading to political decay, the advent of the cosmic turning-point would manifest itself in the coming of a great law-giver whose powers of reasoning and whose moral will are capable of bringing this period of political decay to a close. It seems likely that the prophesy, in the Statesman, of the return of the Golden Age, of a new millennium, is the expression of such a belief in the form of a myth…The state which is free from evil of change and corruption is the best, the perfect state. It is the state of the Golden Age which knew no change. It is the arrested state.

Like Heraclitus, Plato’s historicism is pessimistic but Plato believes in a degenerated society being restored to something approaching past glory, not by Fate, but (in the

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38 Ibid 13-4.
manner of his Republic), by using politically and morally directed forms of action to arrest the devolution of society on the path of degeneration and decay (and, once built, to arrest any further evolution of the Republic, since it would only again fall into degeneration and decay). While Plato’s belief that the future course of a society can be guided by action, his program is primarily one to restore it to its supposedly former ideal self. Indeed, Plato’s ideas run counter to ‘evolution’ as a concept (a concept which can never accept arrested development or an ideal permanent status quo as valid postulates).

Thus, while the constant-change aspect of the idea of evolution and that all the rest is up to Fate has been bequeathed to us by Heraclitus, we can thank Plato for the idea that change and even evolution itself might be actively arrested and even reversed. Although this may seem a preposterous idea and not physically possible (which of course, it is not), it has been an idea entertained often throughout history since Plato, namely in association with that phenomenon in society which could call itself the arch-rival of the idea of evolution in its desire to arrest it and maintain an existing status quo favourable to itself: conservative elitism. Plato is arguably the ‘Godfather’ of western conservative elitism and with that appellation one would expect his influence on the use of ideas about evolution in social, political, economic legal and social thought to be all about arresting change and preserving the status quo.

However, it is submitted that Plato was also influential on subsequent thinkers who fought against the status quo to encourage rather than arrest change to advance their radical totalitarian worldviews based on certain Platonic ideals. While this seems to be a paradox, it really isn’t, particularly when one considers that the propensity of conservative elites and totalitarians (of whatever background) is to use their theories as a means of gaining the one thing they both want: power or control. Ideas about evolution are of course very differently deployed by these two groups – conservative elitists, in the negative sense, by attempting to turn back the clock and arrest development or ‘progress’, or at least development or progress which they do not like nor have any control over; and totalitarians, in the positive sense, attempting to take society in some new direction in line with what their economic, racial, religious or cultural beliefs, preferences or (in Plato speak) ideals dictate it ought to be. (And often to a more privileged future than their unprivileged pasts – it is well known, that two of
the greatest modern dictators, Hitler and Stalin, came from profoundly unprivileged backgrounds compared to their future positions in the regimes they subsequently helped to create).  

*Plato and Totalitarianism*

It should be borne in mind that the philosophers we have discussed regarding Plato, namely Popper and Russell, are renowned for their negative take on Plato. Renford Bamborough speaks of the ‘friends’ and ‘enemies’ of Plato in the 20th Century, citing Popper and Russell as examples of the latter. Nevertheless, he does not refute the claims of totalitarianism of these ‘enemies’ in connection with Plato. As he explains:

The first attack of the modern critics is directed against Plato's concrete proposals for the organisation of human society. The critics recoil in democratic horror from the censorship proposals, from the cold-blooded justification of lying propaganda, from the control of breeding, which treats man as a mere animal. They are incensed at the autocratic principles on which Plato organises his ideal community. Popper, Russell and Crossman speak of 'totalitarianism', of 'the closed society'. Plato's state is presented as a Fascist state, reflecting the worst excesses of modern totalitarianism. Some of the friends of Plato have tried to answer this criticism by denying that Plato's state is constituted as the critics have declared it to be. But this line of defence is unprofitable. There is no doubt, even in the minds of most of Plato's friends, that his ideal community is authoritarian in principle and practice, and that its most important institutions are such that very few of Plato's friends would be prepared to tolerate them in the modern states in which they live.  

One of the problems with the discussion around Plato and totalitarianism is confusion about what totalitarianism is. Bamborough in the above passage refers to authoritarianism in connection with the name of Plato but he sees the politics of Plato representing much more than this, and goes on to state his own position on whether Plato’s views were totalitarian; namely, a resounding ‘yes’. In doing so, he proffers the
following definition of totalitarianism and concludes Plato’s doctrine falls within it when he states:

[totalitarianism] may be defined as the doctrine that there is a unique and accessible source of infallible guidance on the issues of morals and politics: that in any properly formulated dispute about good and evil, right and wrong, one side is right and the other wrong, and that there is a reliable method of determining which is which. It is clear that in this sense Plato is a totalitarian, and it is clear that in the same sense Marxism, Fascism, Nazism and Roman Catholicism are also totalitarian doctrines.43

Totalitarianism is often underpinned by a particular notion of evolution conceived through some distorted ideological lens (e.g. racial purity or social class preference). It is submitted that this distortion is usually due to subjectivism which is central to the abovementioned definition when it maintains that, ‘one side is right and the other wrong’. Subjectivism is in direct contrast with the objectivity which describes any actual process of evolution, which results in a spontaneous and not a personally prescribed (or proscribed) order. In regard to totalitarianism it is submitted that subjectivism, even more than absolutism or deontology (which are also features of the above definition – ‘infallible guidance on the issues of morals and politics’), is the main flaw with notions of evolution used to justify totalitarian regimes.

Furthermore, bearing in mind the above definition and its emphasis on subjectivism, it is submitted that totalitarianism’s link to the name Plato is less to do with his Republic than is his historicism informed by his idealism. The Republic is often held up as a forerunner to modern totalitarian regimes, but as will be soon discussed, whether Plato intended it to be a model for an actual working society is doubtful. On the contrary, it is the sincere belief that there actually exist ideals in a Platonic sense to which society should conform at all costs (even if Plato himself seriously didn’t believe they could or should) that has been more influential upon the coming into being of such regimes than any particular model described by Plato. Indeed, it has even been suggested Republic was really just intended to be a hypothetical model to be held up as a mirror to actual societies to expose their flaws. J. H. Abraham states Plato’s theory of society:

[c]onsisted not in considering the actual political institutions in order to make sense of them in terms of their legitimacy or functions, but in demonstrating the imperfection of every form of

43 Ibid 111.
human government and setting up instead an ideal of government conforming to an a priori
definition of a social justice.\textsuperscript{44}

Whether or not intended to be an actual model for society, \textit{Republic} was not Plato’s
last word on how a society should be organised. He envisioned a less extreme version
of society in his later work, \textit{Laws}.\textsuperscript{45} It is doubtful this later vision was a totalitarian free
zone, but certainly much less totalitarian than \textit{Republic}. Not so much a softening of his
views but more a realisation that men of the philosopher king ilk needed to run a
\textit{Republic} were in short supply (or didn’t exist as they were themselves ideals) led to
Plato’s less aspirational societal vision set out in \textit{Laws}. As David Cohen has put it:

\begin{quote}
Indeed, in the Laws Plato explicitly rejects the famous principle enunciated in the Republic
concerning the rule of the wisest and best, the philosopher ruler. Such a principle, he concedes,
cannot be implemented because only a god would have the qualities necessary for its fulfilment.
Any mortal, he argues, will necessarily be corrupted through the exercise of such virtually
unlimited authority \dots What Plato proposes instead of the principle of the rule of the
wisest is the rule of law. Only the rule of law, he maintains, can guarantee a just and stable social
order.\textsuperscript{46}
\end{quote}

\textit{Plato’s Legal Theory}

Plato’s political theory is well known but his legal theory is less clear. A society along
the prescriptive lines of the \textit{Republic} or \textit{Laws} would appear to be models of legal
positivism with law being purely instrumental in making these particular models of
society function. However, Cohen has also suggested that Plato’s \textit{Laws} challenges
positivistic jurisprudence in that it is based on voluntary rather than coerced
obedience.\textsuperscript{47} \textit{Laws} represents a shift from the command-theorist’s positivist position of
the \textit{Republic} where the philosopher king is the diviner of what is good and right and
that his will is not only right but also must be followed simply because it \textit{is} his will.

Smith and Weisstrub even argue, far from being positivist, the main legacy of the
Platonic conception of law is its rational basis as an ordering principle:

\begin{quote}
\textsuperscript{23}.
\textsuperscript{45} John Cooper (ed), \textit{Plato Complete Works} (Hackett Publishing Co 1977) 1318-1616
Philology} 301, 301.
\textsuperscript{47} Ibid 302.
\end{quote}
In ancient Greek philosophy, and particularly the Platonic conception, law was the primary ordering principle. The philosophic ideas which governed public institutions were rationally and consciously stated. Socrates attacked the dramatic, the gods and poetry; in short, he attacked everything which was uncertain. The poetic, for example, was thought unscientific and, therefore, ultimately unable to ascend the heights of the good, the just, and the beautiful. Under the Socratic influence philosophy aligned itself with absolutist scientific thought, change was viewed with suspicion, and the ideal a predictable, certain changeless world was embraced.\(^{48}\)

Law based on a rational principle of order rather than purely as an instrument in the service of a particular model of society (whether rational or not) certainly saves it from being called purely positivist in any sort of command sense. However, is then the Platonic conception of law, based on a rational principle of social order, akin to natural law (based on secular reason)? According to Huntington Cairns, law for Plato should be a product of reason and to be identified with Nature.\(^{49}\) Plato’s ‘Nature’ is an idealised realm, a universal soul. In Laws, Plato’s Athenian addresses Cleinias thus:

Now consider all the stars and the moon and the years and the months and all the seasons: what can we do except repeat the same story? A soul or souls – and perfectly virtuous souls at that – have been shown to be the cause of all these phenomena, and whether it is by their living presence in matter that they direct all the heavens, or by some other means, we shall insist that these souls are gods. Can anybody admit all this and still put up with people who deny that ‘everything is full of Gods.’\(^{50}\)

So, law for Plato should be the product of the reason of a perfectly virtuous soul or souls. The perfectly virtuous soul is embodied in the philosopher king, but as we have seen, Plato had conceded the ideal society was beyond reach given the philosopher king, the diviner of natural justice, was himself an ideal.\(^{51}\) For Plato, there does not in reality exist ideal justice but only law, the ‘second-best’ option. As Cairns observes:

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\(^{50}\) Plato, above n45, 899b, 1556.

\(^{51}\) As will be discussed in Chapter 3, this type of natural law stance is seen in the Middle Ages with the Church Fathers and their concept of divine justice never to be attained but always to be yearned for (eg Augustine’s City of God). Both views are rooted in the idea that the ideal world is perfect and the temporal world is flawed. Both views are mistrustful of spontaneous evolution since this will lead to decay. Like the Church Fathers, Plato believed that perfection was not attainable in this world and was simply an ideal. The closest thing to perfection existed in the past (whether it be Plato’s Golden Age or the Church Fathers’ Garden of Eden), so any spontaneous change away from that should be arrested. On the other hand, in subsequent times those influenced by Plato’s idealism would believe that ideal perfection could be achieved here on earth – that the ‘philosopher king’ did indeed exist and society should be run accordingly in an inevitably totalitarian manner. Hence, philosopher king status would be conferred in the Middle Ages on absolute monarchs and popes and in the modern era on dictators such as Hitler. The difference between Hitler’s philosopher king status and those in the Middle Ages is that the former was believed to be a product of evolution (a member of the Aryan race) whereas the latter were divinely appointed.
If ever a man were providentially endowed with a native capacity to apprehend the true power and position of the irresponsible autocrat he would need no laws to govern him; for no law had the right to dictate to true knowledge. But, as things were, such insight nowhere existed, except in small amounts; that was why we had to take the second best-law the generality of which could not always do justice to particular cases.\textsuperscript{52}

Thus, actual laws end up being a compromise and are embedded in the societies which they affect. They are contingent. What follows is a passage from Cairns effectively describing Plato’s capacity to wear the hat of a pragmatist as well as a philosopher of \textit{idealism}; that this pragmatism can be employed to aspire to if not actually achieve an ideal (in the case he discusses, group unity):

\begin{quote}
[P]lato considered the suggestions that law is of divine origin and that man's function is to discover its true rules; that it is a product of impersonal social and natural forces economic, geographical, and sociological or, as he expressed it, the result of chance and occasion; and that it is an invention of man to meet social needs, Art cooperating with Occasion. He accepted all these views as being in some sense partly true; but his ultimate idea was in the nature of a compromise. In his final position he regarded law as the art of adjusting human conduct to the circumstances of the external world. Sometimes, as Montesquieu was later to insist, the conditions of society shape the laws and sometimes, as Condorcet urged, the laws shape the conditions. Plato thus regarded law as both a genetic and teleologic process whose primary function as an art is to correct the inequalities in the relationship between society and its environment. Stated concretely, the precise end of law is the achievement of group unity, which cannot be obtained if minority groups are disregarded or by legislating for single classes. This is the philosophic or highest view, and it leads to the position that if the function of law as the interest of the entire community is observed faithfully, in the end it will yield an understanding of the ideal laws in the world of Forms which may then be utilized as models.\textsuperscript{53}
\end{quote}

In this sense, Plato appears to be thinking in evolutionary rather than static terms as for him law adapts to changing circumstances to effect its social purpose, not unlike the views of later proponents of \textit{sociological jurisprudence} discussed in Chapter 5.

However, even though for Plato the laws might be contingent (on social change and needs), his values and ideals are not. This is what prevents Plato from being a truly evolutionary thinker for whom not just laws but also values change and are to some extent contingent. Plato’s conception of natural law (his \textit{ideal justice}) is static, conforming to fixed unchanging values or ideals, even if he does not seriously believe in their full realisation through actual laws. He is not open to spontaneous change which is a hallmark of evolution. For example, if we concede that although Plato might agree to some level of social equality as part of his value system, it is doubtful he would have ever envisaged

\textsuperscript{52} Cairns, above n 49, 363.  
\textsuperscript{53} Ibid.
nor agreed to a society that would be slave free or contain many of the democratic freedoms one finds in a modern society which are the products of spontaneous change.

2.4 Aristotle (384-322BCE)

*Aristotle’s Theory of Change*

Plato’s famous pupil Aristotle did not embrace his teacher’s *Theory of Forms and Ideas* so he did not regard all sensible things as imperfect copies of their ideal original selves. On the concept of change, he did not share Plato’s view that there is a degeneration or decay from a thing’s perfect past (where it inhabited the ideal realm) to its far from perfect present (which is an imperfect copy of its former glorious self). Aristotle did have his own ideas on change; however, it was effectively an inversion of Plato’s theory of change: for him, sensible things tend towards perfection rather than retreat from it. This is apparent in Aristotle’s *Final Causes* doctrine, as Karl Popper explains:

> Aristotle insists, of course, that unlike Plato he does not conceive the Forms or Ideas as existing apart from sensible things. But in so far as this difference is important, it is closely connected with the adjustment in the theory of change. For one of the main points in Plato’s theory is that he must consider the Forms or essences or originals (or fathers) as existing prior to, and therefore apart from, sensible things, since these move further and further away from them. Aristotle makes sensible things move towards their final causes or ends, and these he identifies with their Forms and essences.54

Prolific as his output was to the history of ideas generally, Aristotle did not seem, unlike his master Plato, to have a historicist bent. Significantly, he did not apply his notion of *Final Causes* to the evolution of society; but this is not to say that others have not done so. After noting that Aristotle ‘who was a historian of the more encyclopaedic type, made no direct contribution to historicism’55 and that he did not seem ‘to have interested himself in the problem of historical trends’56 Popper opines that ‘In spite of this fact…his theory of change lends itself to historicist interpretations, and that it contains the elements needed for elaborating a grandiose historicist philosophy.’57

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55 Ibid 224.
56 Ibid.
57 Ibid.
Although Aristotle’s theory of change is unlikely to be totalitarian in the sense that we have seen Plato’s is, his *essentialism*, pointing to a particular desired direction based on *subjectivism*, is a key ingredient of totalitarianism as mentioned earlier.

**Aristotle’s legal theory**

Aristotle’s way of thinking (i.e. the role of nature in a human’s social development) is able to accommodate notions of natural law in the same way Plato’s *idealism* does (i.e. both are based on natural reason). Like Plato, Aristotle has, but does not articulate, a theory of natural law, but merely distinguishes between *natural justice* and *legal justice* (or *conventional justice*).\(^{58}\) However, we can at least determine that while Plato’s *ideal justice* is just that, an *ideal*, for Aristotle it is a *virtue*. After discussing justice in its broad sense (as natural justice) in *The Nicomachean Ethics*, Aristotle states:

> Justice in this sense, then is complete virtue; virtue, however, not unqualified but in relation to somebody else. Hence it is often regarded as the sovereign virtue, and ‘neither evening nor morning star is such a wonder’. We express it in a proverb: ‘In justice is summed up the whole of virtue’. It is complete virtue in the fullest sense, because it is the active exercise of complete virtue; and it is complete because its possessor can exercise it in relation to another person, and not only himself.\(^{59}\)

By grounding his natural law in virtue, Aristotle is not appealing to a static ideal of justice as Plato had done, perhaps ultimately unattainable, but rather a dynamic personal attribute which one develops and which evolves over time: *virtue*. This sounds reasonable enough, but the challenge here is to avoid *subjectivism* when speaking of such a broad concept as *virtue* and what has been considered ‘virtuous’ under totalitarian regimes.

Whereas Plato’s divinely conferred soul is the source of his natural law, Aristotle’s source of natural law is *virtue*. However, in his *Politics*, Aristotle lists religion as the fifth most essential good for the existence of states and even suggests ‘though it might

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\(^{58}\) ‘There are two kinds of political justice, one natural and the other legal. The natural is that which has the same validity everywhere and does not depend on acceptance; the legal is that which in the first place can take one form or another indifferently, which once laid down, is decisive’ – Aristotle, *Nicomachean Ethics* (Penguin Classics, 2004) 130.

\(^{59}\) Ibid 111 (quoting Euripides from fragment 490 and then Theoginis and Phoeylides).
have been put first’. Nevertheless, this was arguably more to do with political utility than personal conviction. As Thomas Lindsay notes:

Aristotle views as impossible the full, public dissemination of philosophic truth, or true religion. The unattainability of the simply rational society, in turn, necessitates the employment of less-than-scientific "supports." "Political religion" is required to move the less-than-fully rational multitude in the direction of the rational course.

2.5 Ideas about Evolution in Hellenic and Hellenistic Greece

Ideas about evolution in Hellenic and Hellenistic Greece made various appearances in the three main schools of philosophical thought of that era: Stoicism, Scepticism/Cynicism, and Epicureanism. It is submitted that although such ideas did not impact economic, social, political and legal theory in the same way as Plato’s historicism, dialectic, and idealism and Aristotle’s final cause teleology did, they nevertheless have served to inform attitudes towards ideas about evolution throughout western history.

We have already seen how Plato’s ideas shaped an attitude towards change, namely pessimism with the notion of degeneration of society and arrested development to preserve the status quo, both of which attitudes betray a conservative bias against positive ideas about evolution (i.e. that spontaneous social change can be beneficial).

The following philosophers are well-known originators of certain attitudes that have seeped into western consciousness (to the point of becoming part of the English vernacular, as in the case of ‘Epicurean’ for example).

Stoicism

The Stoics were pragmatic people, dealing with the issues of the day and of course are known for their celebrated asceticism and studied moderation and temperance (hence the term ‘stoic’ being part of the English lexicon). Although it is nigh on impossible to point to stoicism as having any direct impact on evolutionary social, political or legal thought (although its direct impact on many other aspects on western

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62 Bertrand Russell notes that the philosophy in this age ‘includes the foundation of the Epicurean and Stoic schools, and also of scepticism as a definitely formulated doctrine’ –see Russell, above n20, 211.
63 Stoicism is thought to be founded by Zeno in the early part of the 3rd century BC – ibid 241.
thought is undeniable), stoicism as an attitude has had an impact on ideas about evolution in western history the sense of rejecting them or embracing them (rejecting them in the stoic Middle Ages with religious views antithetical to ideas about evolution and embracing them in modern times by the stoic personalities of totalitarians who eagerly adopted distorted ideas about evolution such as Social Darwinism to build their various dystopias). Whereas the influence of other Hellenic schools of thought came later (i.e. Epicureanism during the Renaissance), Stoicism made its mark much earlier, on Cicero among others, and became very much part of Rome’s culture informing its jurisprudence and the stoic attitude came to define the austerity of the Middle Ages.

**Scepticism/ Cynicism**

Systematic Western Scepticism as a school of thought dates back to Pyrrho⁶⁴ in opposition to dogmatic assertions of the Stoics. Scepticism per se arguably began even earlier with the pre-Socratic philosopher and poet Xenophanes’ critique of the Greek pantheon of Gods, or with Socrates’ ‘gadfly’ method of questioning all facts and assumptions and his celebrated claim of only knowing that he knew nothing. However, the Pyrrhonian school was the first to systematise doubt, as Rene Descartes and the phenomenologists were to do many centuries later. The same could be said for cynicism, a school derived from Socrates’ pupil Antisthenes through its founder Diogenes⁶⁵ whose main contribution to western philosophy was to challenge rather than construct intellectual edifices, and often with humour as their weapon. Of course, no serious Sceptic or Cynic would posit something as vulnerable to attack or ridicule as a full-blown theory of evolution, but the sceptics’ and cynics’ impact as an attitude, namely a counterfoil to positivist evolutionary dogma, is of course incalculable.

The famous paradoxes of Zeno⁶⁶ also destroy the notion of change being made up of discrete ‘chunks’, including time. This is the central point of the evolutionary idea of historicism which maintains history unfolds in a continuum, not as discrete events. Thus, when Zeno says that Achilles will never catch the tortoise who has a head start in a race since whenever Achilles reaches the tortoise, the latter will have moved a little bit further on, and when Achilles reaches that point, the tortoise will have moved still

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⁶⁴ Russell, above n 20, 224.
⁶⁵ Ibid 221.
further on, so that Achilles will never catch the tortoise, Zeno is showing that the rate
of change of time and distance is not divided up into discrete steps as our logical
faculties have the habit of doing, but are continuous. Of course, Achilles catches up to
and passes the tortoise because time does not stop and start again but is a continuum.

Scepticism is a useful western attitude that rigorously tests intellectual kite-flying by
requiring evidence to support one’s claims and promotes a healthy spirit of inquiry.
More scepticism might have reduced the damage Social Darwinism inflicted in the mid
20th century in Nazi Germany with its unquestioned notion of evolution set in stone.

Epicureanism

Epicurus (340 –271) had a concept of change that was, like Parmenides’, of an eternal
unchanging realm comprised of an eternal substance, but refuting Parmenides’
monism, and following the pre-Socratic Democritus, Epicurus posited this eternal
substance was comprised of unchanging atom-like particles (so that the forms they
comprised change but not the atoms themselves) in a void.67 Epicurus embraced
scientific notions, according to Russell, mainly due to his stance against superstition
and its erstwhile perceived agency in human affairs. Although believing in their
existence, Epicurus believed that the gods ‘did not trouble themselves with the affairs
of our human world.’68

Epicureanism’s main impact on intellectual thought is arguably as a precursor to
humanism which was to emerge during the Renaissance. The Epicurean movement qua
humanism prototype and its notion of hedonism as pleasure being the only intrinsic
good was nothing short of heretical to religion-dominated medieval thinking. If one
considers the idea of evolution in the form that it was expressly articulated from the
time of Darwin onwards as a continuation of the Enlightenment project commenced a
century or so before, as an attitude (if not a systematic thought discipline).
Epicureanism can be seen as a significant emotional support for the idea of evolution,
even if not an intellectual influence.

67 Russell, above n20, 235.
68 Ibid 239.
However, one probably should not leave off on a discussion of the Epicureans’ role in shaping ideas about evolution in antiquity without looking to the Roman poet Lucretius, who has been described as the ancient world’s most eminent follower of Epicurus. In his celebrated poem *The Nature of Things*, Lucretius sets out the natural philosophy of Epicurus which includes a social theory of evolution and how civilization evolved. While this theory did not directly or even indirectly influence later social and political thought in the way Epicureanism influenced humanism did from the time of the Renaissance onwards, it is probably fair to say the Epicurean social theory of civilisation as set out in Lucretius’ poem is perhaps the most explicit and thoroughgoing account of the evolution of society up to that time - the prototype of the later celebrated social contract theories of Hobbes, Locke and Rousseau - but of course we will never know if it can be attributed to Epicurus or Lucretian poetic licence.

### 2.6 Ideas about Evolution in Ancient Rome

Rome’s ascendancy began in the first and second Punic Wars (264-241 and 218-201) in which Rome defeated the then dominant powers in the western Mediterranean, Syracuse and Carthage, followed by the conquest of Macedonian monarchies in the second century BC, Spain (in the course of Rome’s war with Hannibal) and France in the middle of the first century BC, and finally England about a hundred years later.

Russell notes that ‘The only things in which the Romans were superior (to the Greeks) were military tactics and social cohesion’ and opines that:

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69 Ibid.
70 Ibid 237.
71 Lucretius *On the Nature of Things* circa 50 BCE, verse translation by Ronald Melville 1997 (Oxford University Press, 2008) Book V verses 1010-1457. Verse 1010 heralds the moment man began to keep the company of his own kind: ‘And then when huts and skins and fire they had got themselves, And woman joined with man had made a home, And laws of married life were known to them, And they saw loving children born to them, Then first the human race began to soften’. Verse 1457 concludes the long journey of civilisation reaching its Zenith with ‘Til by their arts they scaled the highest peak’.
72 Russell, above n 20, 257.
73 Ibid 263.
To the end, Rome was culturally parasitic on Greece. The Romans invented no art forms, constructed no original system of philosophy, and made no scientific discoveries. They made good roads, systematic legal codes, and efficient armies; for the rest they looked to Greece.\footnote{Ibid.}

While this seems a harsh assessment, it is probably fair to say the Romans’ main philosophical influences were those to do with stoic virtue rather than the more abstract philosophical notions of Ancient Greece, let alone ideas to do with evolution (although as will be discussed towards the end of this Chapter there were, like the Epicurean conception of social evolution, Roman social evolution theories by Cicero and Seneca). Yet, as will be seen in Chapter 7, Roman stoic virtue as nurtured in modern times has been an infamous albeit paradoxical support to the pernicious type of ideas of evolution that characterised the darkest sides of Social Darwinism and its appropriation in totalitarian regimes such as Nazi Germany.

Although ideas about evolution were not particularly prominent in Rome, its legal system was itself in practice a fine product of evolution. John Kelly describes the legal system in republican Rome thus:

\begin{quote}
[\textit{t]here were on the civil side several different jurisdictions which did not exactly compete or overlap, but whose coexistence cannot be explained on theory, only by reference to their origins and to the typical settings in which they are found operating.}\footnote{John Kelly, \textit{A Short History of Western Legal Theory} (Oxford University Press, 1992) 42.}
\end{quote}

Kelly also notes that Rome’s first emperor, Augustus (previously Octavian, nephew of the last of the Republic’s rulers, Julius Caesar) did little to rupture this natural evolutionary course of the law and apparently had ‘a genuine reverence for ancestral Roman laws and manners [which] might have led him to preserve everything in the old constitution which was not inconsistent with his own permanent ascendancy.’\footnote{Ibid 43.}

However, this was not to say Augustus did not put his own personal political stamp on Rome’s legal system, as Kelly notes:

\begin{quote}
The old system of judicature still functioned as before, its procedures actually rationalized. But a silent, hardly visible transformation, even transubstantiation, had in fact taken place; because every part of the constitution now contained a new, tacit term, namely acquiescence in the will of an individual.\footnote{Ibid 44.}
\end{quote}
Kelly notes that Augustus’ as well as his successors, took care not to demolish the old republican structure, but instead installed a new one alongside it which was dependent on and drew its force from the personal authority of the emperor.  

Although Greece did not have as developed legal systems as the Romans, the Romans’ legal systems were informed by Greek thought and philosophy. The Roman poet Horace’s epigram addressing Greek philosophy on the Roman mind reads ‘Graecia capta ferum victorem cepit (captive Greece took captive her wild conqueror).’  

Kelly notes that ‘A Stoic philosophy became the principal influence of the Roman educated class, and on the Roman lawyers… and hence contributed to what legal theory the Roman world can show.’ Also, that ‘…the Stoic philosophy found a most congenial soil in the Roman temperament, too; the streak of austerity, of simplicity, of indifference to good or ill fortune.’ And finally, that:

[the Stoic view of the world virtually conquered the mind of the late Roman republic and of the early empire; almost all Roman jurists, whose profession began to emerge at about the epoch of the Scipionic circle, followed Stoic teaching, as did those Romans who themselves wrote on philosophic themes: Cicero at the end of the republic, Seneca in the first century AD, the emperor Marcus Aurelius in the second.]

Nonetheless, apart from a rich legacy of philosophy, Kelly suggests the impact of Greek models or methods of law on Roman rules of practical law ‘was nil, or virtually nil’ and paints a picture of a lack of structured legal method in ancient Greece:

It (the law) was the one area in which the Greeks had nothing to teach their intellectual captives… the Greek cities had laws, and traditions of lawgiving. But nowhere was there a legal science or any very sophisticated legal technique. A mid fifth century Greek law code such as that of Gortyn in Crete, might be as elaborate and as extensive in scale as the Twelve Tables enacted by the Roman legislative commission at about the same date; but the subsequent life of a Greek system was led without any jurist’s profession to guide, organise, expound and develop it. Moreover, at any rate in Athens if we can judge from the speeches which have survived from the fourth century orators of whom Demosthenes was the most famous, litigation was conducted less in the spirit of a contest about the objective applicability of a legal norm than as a rhetorical match in which no holds were barred. Even in Athens we do not know the name of a single person who worked

78 Ibid.
79 Cited in Kelly, above n 75, 46.
80 Ibid.
81 Ibid 48.
82 Ibid.
83 Ibid.
as a legal adviser (rather than as a court orator), or who taught law to students, nor the name of a single book on a legal subject.84

Where did all this legal sophistication come from if not from the Greeks (like so many other aspects of Roman cultural life)? Kelly explains that ‘already some time before the first encounter with the Greek mind…there were the beginnings of a legal profession of a kind that never existed in Greece and remained, unique in the world until the rise of the common lawyers in the high Middle Ages’85 and:

This profession, pursued in some measure through a sense of public duty and the responsibilities of their class by men of rank engaged in running public affairs, was entirely secular, even though its remoter origins may lie partly in the function of the Roman priesthoods in an era when cult ritual, magic and the activation of legal forms were different aspects of the same complex of ideas, namely, those connected in the involvement of the gods in bringing about results in human affairs’.86

If one suspects from the above description of Roman law that there is a sense of it having evolved rather than being handed down from another already established tradition, Kelly removes all doubt when he states:

For a period of nearly 400 years, from the last century of the republic until the turmoil of the third century AD, the science of these jurists represents – together with the Roman genius for imperial government – the most characteristic flower of Roman civilisation, and the one least indebted to foreign models, evidently growing spontaneously from some part of the Roman national spirit without parallel elsewhere in the ancient world.87

As noted above, however, while Roman law is a striking example of a legal system evolving in fact from humble beginnings to an impressive edifice that influenced later Western legal systems, it would not be correct to say such a system was informed in any appreciable way by ideas about evolution. But it did influence subsequent jurists, including Henry Maine and Carl Savigny whose study of Roman law inspired their evolutionary historicist jurisprudence as will be discussed in Chapter 5.

84 Ibid 48-9.
85 Ibid 49.
86 Ibid.
87 Ibid 49. My emphasis on the word ‘spontaneously’.
As mentioned earlier, the Epicurean theory of the origins of the state were set out in the Roman poet’s Lucretius’ poem *On the Nature of Things*. Interestingly, however, Kelly is of the view that this theory of the origin of the state was not Epicurus’ invention, but rather a Lucretian add-on, as he maintains that ‘Unlike Epicurus himself, however, he included in this monumental work a theory of emergence of society and settled laws…’\(^88\) Epicurus’ theories mainly concerned the natural world, not society.

This germ of a contractarian idea was taken up by Cicero, a slightly older contemporary of Lucretius who was familiar with the latter’s work, and who wrote his treatise on the state (*De Republica*) which Kelly describes in the following terms:

> The state is presented, first, in more general terms not unlike those of Lucretius: it is the ultimate fruit of man’s instinct to associate with his fellows, broadening out from the primary association of marriage to parenthood. That instinct is the ‘origin of the city, as it were, the seed-bed of the state…once one had explained this natural social instinct of man, the ‘source of laws and of law itself…could be discovered.’\(^89\)

However, Cicero distinguishes his from Greek conceptions of the social contract and gives it a Roman flavour. Kelly writes:

> That, in restating in Roman terms, the social contract theory of the state’s origin which had already appeared among the Greeks, Cicero was conscious of the forerunners is perhaps proved by his express dissent from the idea – first put forward by the sophists – that the weakness of individuals had been their motive in entering the primordial social bargain. In this contract based state there is (unlike the polity imagined long afterwards by Hobbes as under an absolute ruler whose dominion all have acquiesced in) no room for tyranny. Cicero represents tyranny, indeed, as the negation of the state itself….A similar thought is expressed later by Seneca, when he visualises an original golden age subverted by the vice and sinking under tyranny: it was then, and tyranny’s antithesis, that the need of laws arose.’\(^90\)

It is surprising that these evolutionary ideas have not had more influence on history; Cicero is often celebrated as one of world’s first true natural lawyers but his social contract theory does not often get mentioned along with those of the usual suspects Hobbes, Rousseau and Locke, although his (and later Seneca’s) version of the social contract seems no less sensible than those of any one of the aforementioned trio. Perhaps the times were not very receptive of these ideas. Kelly, quoting W.J Gough,
notes ‘while contractarian thought and phraseology were evidently still in being, the whole political atmosphere was one of absolutism and submission’ and thereafter notes ‘he (Seneca) was forced under Nero, to commit suicide’.91

2.7 Conclusion

Although the concept of evolution is primarily a modern phenomenon, only having been defined since 17th century, ideas about evolution which were to influence western legal, political, economic and social thought more explicitly in later times have existed since antiquity. These are:
1) Heraclitus’ notion of constant change or universal flux which is a necessary though not sufficient condition for the idea of evolution and notion of opposites or dialectic;
2) Plato’s historicism coupled with his idealism which associated change with degeneration and decay from a past ideal state;
3) Aristotle’s final cause teleology (a precursor to path dependence) which, conversely, saw change as a thing’s striving towards its true nature or essence;
4) the influence of metaphysical arguments of change from Parmenides and others on philosophers such as Hegel;
5) the supporting, oppositional, or questioning attitudes by the Stoic, Epicurean and Sceptic schools of thought respectively to ideas about evolution; and
6) Roman jurisprudence, if not for its explicit ideas about evolution (including some of the earliest theories of the social contract), then the fact of how it itself evolved.

In legal theory, Ancient Greek thought has often been linked to natural law. Platonic idealism made possible the notion of transcendent ideals or values having an existence independent of sensible reality and thus able to form the basis of natural law. Although Plato saw justice as being based on the perfect reason of the soul, he saw law as something different and only the second-best option as ideal justice was not likely to be realised in actuality. Plato’s conception of justice is static (based on unchanging ideals) but his conception of law is dynamic, contingent upon the needs of a changing society, so exhibits some evolutionary thought. Aristotle’s notion of natural law or natural justice stemmed from virtue and the final cause teleology of self-actualisation

91 Ibid 66.
that saw the individual striving towards his or her essence as a virtuous person, although he also contemplated a type of justice that was simply contingent on time and place and instrumental to a particular society’s needs having no special virtue, namely conventional justice. Both Aristotle’s concepts of justice are dynamic and would appear to be based on an evolutionary view of the world.

Plato’s and Aristotle’s views, subjective idealism versus objective materialism respectively, have resonated throughout all of Western history. However, we have seen that Plato’s idealism is a remarkably anti-evolutionary stance and such a stance would go on to define the epoch that immediately followed, arguably the least evolutionary-minded one in western history: The Middle Ages.
CHAPTER 3
IDEAS ABOUT EVOLUTION AND THEIR IMPACT ON WESTERN SOCIAL POLITICAL AND LEGAL THEORY FROM LATE ANTIQUITY TO THE REFORMATION

3.0 Introduction

Ideas about evolution in Roman political and legal theory were not particularly evident during the Roman Empire’s decline, nor were they at its height as we have seen. Nevertheless, as we also saw in the previous chapter, these traditions still continued to evolve in fact and were to have a marked influence on future western legal systems. Indeed, with the rise of Scholasticism and the rediscovery in medieval Italy at the end of the 11th century of the Justinian Digest (which had been compiled in 534), Roman jurisprudence was to become the basis for modern civil law systems and most common law systems in the West. As Harold Berman notes:

[t]he rediscovery of the legal writings compiled under the Roman Emperor Justinian, the scholastic method of analyzing and synthesizing them, and the teaching of law in the universities of Europe - are at the root of the Western legal tradition. The Roman law gave all Europe (including England) its basic legal vocabulary. The scholastic method has remained the predominant mode of legal thought throughout the West to this day. The universities brought together legal scholars-teachers and students-from all over Europe; brought them in contact not only with each other but also with teachers and students of theology, medicine, and the liberal arts; and made of them a calling or, as we would say today, a profession.92

In the twilight of the Christianised Roman Empire, Platonism influenced Plotinus and his ilk (the ‘neo-platonists’) in the 3rd century which in turn influenced Saint Augustine in the 5th century at the dawn of the Middle Ages following the fall of Rome in 410 to Alaric the Visigoth. Augustine broadened the scope of Plato’s historicism (social degeneration and decay) from a narrow corner of the world (the Athenian States) to all of humankind (the Biblical Adam’s descendants) with his notion of the Fall. Thus, historicism was filtered through the same distorted lens as it had been (for Plato, at least) in antiquity – a history of a thing’s (society’s or humankind’s) evolution as one of inevitable degeneration and decay from an idealised past.

Although Augustine shunned the idea of material Christian progress or millennial eschatology advanced by many of his religious contemporaries (i.e. the view that the rise of the Roman Empire was God’s will and the fall of the Roman Empire was a sign of the end of times respectively), he still made use of the Aristotelian evolutionary idea of final causes teleology discussed in the previous chapter, but within a particular Biblical context, to advance the notion of divine predestination. In this way of viewing the world, a thing’s path of change (society’s or humankind’s) is not a striving towards its essence but simply scripted by the Hand of God with an ending only God knows.

These doctrines of original sin and predestination were further built upon by the Catholic Scholars in the ‘higher’ Middle Ages in the 12th, 13th and 14th centuries, most notably by Thomas Aquinas in the 13th century, who insisted faith could be justified by reason as well as through revelation. These doctrines, with their negative historicism and divinely scripted teleology, already antithetical to the idea of spontaneous evolution, would now acquire a degree of intellectual respectability with their appeal to Aristotelian practical reason.

As regards the evolutionary component dialectic that we have previously discussed, no clear forces were discernible in antiquity about what drove the process of change or evolution (except a generic notion of ‘opposites’ or metaphysical suggestions such as ‘love and strife’). However, a very clear dialectic informed the prevailing worldview throughout the Middle Ages, of good versus evil, God versus Satan, in a cosmic struggle for eternal power with God ultimately being the victor according to the Bible’s Book of Revelation.

The Middle Ages was to be the longest period of arrested development of evolutionary thinking in western history as religious idealism held firm sway during this period. The evolutionary components of historicism, dialectic, and final cause teleology (as precursor to path dependence) which are usually employed to discern, in respective order, the history, forces and path of the process of change were effectively straight-jacketed into religious ideology during this era (which is not to say they have not been straight-jacketed in secular ideology in later times as we shall see) in a manner antithetical to any view that would embrace spontaneous evolution.
As will be discussed at the end of this Chapter, it was the *Reformation* that set up important groundwork for the Renaissance (to be discussed in Chapter 4) and humankind being released from religion’s tight embrace. This was mainly due, ironically, to one of history’s most fervent religious figures, Martin Luther, on account of his promotion of personal autonomy in a person’s relationship to God. Arguably, the impetus for the Renaissance was personal autonomy reaching beyond faith and into all facets of public life which resulted in the subsequent freeing of ideas about evolution from religious ideology and into the realm of secular reason. Unlike Darwin, Luther’s name is not one linked to evolution (and no doubt he would have been a fierce opponent of Darwin had the two men been contemporaries), but he is nonetheless its ‘accidental hero’.

This Chapter will commence with a discussion of the final days of Rome and its Christianisation and the neo-platonic Plotinus, the last ancient philosopher, before moving onto a discussion of the Church Fathers, Origen, Saint Augustine and Aquinas who were inspired by Plotinus. Finally, there will be a discussion of the *Reformation* and its role in ushering in the Renaissance, the subject of the next Chapter.

Like the previous chapter, there is not a lot of discussion of legal theory in this Chapter. However, the evolutionary ideas of *historicism, dialectic* and *final causes teleology* (as a precursor to *path dependence*) receive a certain treatment in this period that explain their role in legal and related economic and political theory in later times such as modern conceptions of natural law, totalitarianism and *Social Darwinism* which can only be properly understood by examining what happened to these evolutionary ideas during this period.

### 3.1 Late Ancient Rome and its Christianisation

Although Ancient Rome finally embraced Christianity from the early 4th century, it is well known that Christians and their prescriptive theology did not fare well initially under the Roman Empire, as Kelly explains:
While the Graeco-Roman pagans did without an organised theology, and were easily tolerant towards new or strange cults, the Christians took their God and the exclusive truth of his revelation seriously. This in the eyes of official Rome, was anti-social, disruptive, and a threat to civic and military discipline; and explains the hostility to Christians which frequently became exasperated to the point of cruel persecutions.93

Nevertheless, Kelly also notes that Christianity still spread rapidly due to the intermittent rather than sustained nature of these persecutions and was able to become strong and gain converts from both rich and poor, winning a significant minority by the late 3rd century including sizeable proportions of Roman armies who had converted to Christianity. Moreover, the emperor Constantine converted to Christianity after attributing to the Christian God his win at the battle of Milvian Bridge in 312 against a challenger claimant to the empire, and made Christianity the official religion of the empire.94

The Christianisation of Rome was to be a launching pad for Christianity and its influence across all of Europe for centuries to come. Kelly describes the times which immediately followed the collapse of the Western Roman Empire in the early 5th century as a period of ‘intellectual stagnation’95 and, comparing the times to night, notes that what little intellectual activity there existed at this time was in hands of the Church. As he explains:

[This night was lit, sparsely, only by the Christian Church, whose bishoprics and especially – once the great movement begun by St Benedict (c.480-542) got under way – whose monasteries were the centres of whatever education the Western world could still provide. Literacy of any kind was virtually confined to clerics, if only because a priest must at least be able to read the Gospels and expound them; even the most enlightened king (Charlemagne the best example, despite sincere patronage of learning, never himself learned to write). It is, therefore, the Fathers of the Church who provide in their writings virtually the only vestiges of political and legal theory in the early medieval world, all secular literature on this and most subjects have ceased to exist.96

Apart from a virtual monopoly on literacy and education, another factor that aided Christianity’s sway over Europe during the centuries that followed the fall of the Roman Empire was what Kelly describes as the descending theory of government which had typified the Roman state, namely:

93 Kelly, above n75, 83.
94 Ibid.
95 Ibid 88.
The view according to which power is originally centred in the ruler, who is beholden to no human being for it (though in its Christian guise the theory imputes to God its original bestowal on the ruler), and whose subjects have no role in moderating or imposing conditions on its exercise, but must simply submit.97

Although the conquering Germanic peoples were more in the opposite camp of ascending theory (i.e. power deriving ultimately from the people, from who it is delegated upwards to the leader), according to Kelly, they:

[adopted the theory inherent in Christian doctrine….and the ascending theme was, so to speak, driven underground, not to emerge again as a theoretical proposition until the late thirteenth century. Once it had done so however, it was to remain the pulse of constitutional reform up to and throughout the era of revolution in England, America, and France …].98

Rebellion against a king, no matter how tyrannical, was unheard of in early medieval theory. Gregory the Great, pope from 590 to 604, wrote that ‘even to criticize, let alone resist, a wicked ruler was sinful’ and that his contemporary St Isidore of Seville was fond of citing the prophet Hosea as authority for the doctrine that ‘God gave a good ruler in mercy, a bad one in anger and as punishment to people’s sins’ - in other words, the king was to be obeyed as the appointee of God.99

The question of divine sovereignty was resolved after the 11th century when there broke out a long conflict between the popes and the German emperors over the question whether a temporal ruler had the right to appoint bishops (the Investiture Conflict) following Pope Gregory VII’s deposition of German emperor Henry IV.100 The German monk Manegold who sided with the pope on the basis that he (the pope) was just formally authenticating the emperor’s subjects justifiably renouncing their allegiance to him (the emperor), said:

Since nobody can make himself a king or emperor, the people raise some man above themselves for one purpose only, that he should rule and govern them on principles of just government, rendering to each his due, cherishing the good and removing the evil-doers, weighing out justice to all. But, indeed, if he breaks the agreement by which he is elected … and rushes to disrupt and confound the things which he was appointed to keep in order, the reasonable conclusion is that he releases the people from their duty of obedience, seeing that he was the first to abandon the bargain…which bound one party to the other in faithfulness.101

97 Ibid 92.
98 Ibid 95.
99 Ibid 98-9 including citations of St Isidore and Hosea.
100 Ibid 98.
101 Cited at ibid 98.
Kelly suggests this doctrine of mutual compact was ‘an explosive doctrine with revolutionary potential’ and that the thing that catalysed English parliaments in the 17th century to resist their Stuart kings was the supposed violation of this original compact. Indeed, Manegold’s notion of mutual compact was to foreshadow more advanced Christian thinking in the Carolingian Dynasty and Scholasticism which marked the beginning of the High Middle Ages, to be discussed later in this Chapter.

Now that we have briefly sketched the rise of Christianity at this time, it is necessary to look at how Christian thinking shaped the first few centuries that followed the final days the Roman Empire. The story begins with Plotinus’ neo-platonism and the early Church Fathers, Origen and Saint Augustine.

3.2 Plotinus (204-270CE) and Neo-platonism

It has been suggested that Plotinus was the founder of neo-platonism, and was the last of the great philosophers of antiquity. However, his influence, as will be discussed, was much greater on the Middle Ages than on his ancient contemporaries. This is particularly true of Christianity and one of the greatest of the Church Fathers, Saint Augustine discussed below.

Plotinus’ contemporaries in late ancient Rome were in an age well after the time of Plato and Aristotle and had embraced new ways of thinking, Stoicism and Epicureanism, that were more practical and gave comfort in their turbulent times. As David Knowles explains:

[...]he great creative period of Greek philosophy continued for half a century after the death of Aristotle, and within that half-century were born two new systems of thought which continued, till the end of the Western Empire, to rival the Academy and the Lyceum. These were Stoicism, founded at Athens by the Cypriot Zeno (363-264) and Epicureanism, which took its name from its founder Epicurus, an Athenian by race (341-270). Though both these systems, and especially the former, had a long and lasting influence, first in the Hellenistic world, and then in the Roman Empire, they did little to fashion the shape of Christian and medieval thought, save for the Stoic element in the Roman legacy of law and political thought, and the Stoic vein of moral exhortation.

Knowles suggests that neither of these two schools of philosophy, Epicureanism and Stoicism, ‘produced speculative or metaphysical doctrines of any importance; that each

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102 Ibid 99.  
103 Russell, above n20, 269.  
rested upon a dogmatic cosmology and psychology that was entirely materialistic\textsuperscript{105} and whose ethical teaching, in different ways, attracted its followers to ‘escape the ills of society,’\textsuperscript{106} and further that:

[The Epicureans’ and Stoics’] materialism was as repellent to the surviving Platonists as it was to Christian thinkers, while on the other hand the extremely theocentric and dynamic Christian moral teaching, with its twofold assumption of human depravity and divine aid had no common ground with the self-sufficient and aristocratic endurance of the Stoic or with the escapist quietism of the Epicurean.\textsuperscript{107}

Metaphysics, Knowles suggests, ‘had come back into fashion, but within the context of religion or at least deism in sympathy with the needs of the age and directed attention to the religious element that had always been present in Plato’s thought\textsuperscript{108} and that:

A feature of this period was a readiness to admit into the philosophical synthesis that was being constructed elements from other schools of thought, particularly from Aristotle and the Neo-Pythagoreans but although many of the thinkers who encouraged this have been called eclectics, they did not select favourite doctrines from this or that system which might prove incompatible with Platonism; rather, they took genial and fruitful ideas from outside to complete or enrich the system of Plato. They also amplified or prolonged suggestions or hints that Plato had thrown out in the form of myth or obiter dictum, and then perhaps had dropped, whether from accident or design. As a result of this, a series of notable, but not remarkably original thinkers converted the rich but often undigested and unsystematic mass of Platonic thought into something that resembled a coherent system and one which was, at least in its theological aspects, more susceptible of a monotheistic interpretation.\textsuperscript{109}

It has been suggested that Plotinus’s Platonic modes of thought have had a most decisive influence on the history of western thinking\textsuperscript{110} from which Plotinus created a system and an order capable of being adopted and transformed and that the history of such transformation is in fact in part the history of all medieval philosophy.\textsuperscript{111}

However, it is important to understand the times in which Plotinus lived in order to grasp the true import of his thinking. Noting that Plotinus’ life was ‘coextensive with one of the most disastrous periods of Roman history,’\textsuperscript{112} Russell paints a picture of that troubled era in the following terms:

\textsuperscript{105} Ibid 17.
\textsuperscript{106} Ibid.
\textsuperscript{107} Ibid.
\textsuperscript{108} Ibid 17-8.
\textsuperscript{109} Ibid.
\textsuperscript{110} Ibid 18.
\textsuperscript{111} Ibid 19.
\textsuperscript{112} Ibid 30.
Shortly before his (Plotinus’) birth, the army had become conscious of its power and had adopted the practice of choosing to give occasion for a renewed sale of empire. These preoccupations unfitted the soldiers for the defence of the frontier, and permitted vigorous incursions of Germans from the north and Persians from the East. War and pestilence diminished the population of the empire by about a third, while increased taxation and diminished resources caused financial ruin in even those provinces to which no hostile forces penetrated. The cities, which had been the bearers of culture, were especially hard hit; substantial citizens, in large numbers, fled to escape the tax-collector. It was not till after the death of Plotinus that order was re-established and the empire temporarily saved by the vigorous measures of Diocletian and Constantine.\footnote{Ibid.}

Indeed, bleak pictures such as the above help to explain how a highly esteemed intellectual man such as Plotinus came to be a man not of his time, rather than a man of his time, as Russell explains, continuing on from the above passage:

Of all this there is no mention of Plotinus. He turned aside from the spectacle of ruin and misery in the actual world, to contemplate an eternal world of goodness and beauty. In this he was in harmony with all the most serious men of his age. To all of them, Christians and pagans alike, the world of practical affairs seemed to offer no hope, and only the Other World seemed worthy of allegiance. To the Christian, the Other World was the Kingdom of Heaven, to be enjoyed after death…\footnote{Ibid.}

Russell provides a vital clue as to the driving intellectual force behind this worldview (or rather other-worldview) of Plotinus and men of his stamp, namely Plato, as he explains:

[...] to the Platonist, it was the eternal world of ideas, the real world as opposed to the illusory appearance. Christian theologians combined these points of view, and embodied much of the philosophy of Plotinus. Dean Inge in his invaluable book on Plotinus, rightly emphasizes what Christianity owes to him. ‘Platonism’ he says, ‘is a part of the vital structure of Christian theology…There is an utter impossibility of excising Platonism from Christianity without tearing Christianity to pieces’ He (Dean Inge) points out that Saint Augustine speaks of Plato’s system as ‘the most bright in all philosophy’, and of Plotinus as a man in whom ‘Plato lived again’ and who, if he had lived a little later, would have ‘changed a few words and phrases and become Christian’. Thomas Aquinas, according to Dean Inge, is nearer to Plotinus than to the real Aristotle.\footnote{Ibid.}

It can be seen from the above passage just how important Plotinus is historically as an influence in moulding the Christianity of the Middle Ages and of Catholic theology.\footnote{Ibid.} However, it would be unfair to say that Plotinus’ views reflected the prevailing sombre mood that was to follow after the fall of Rome and in the early Middle Ages. This was for a later very different cast of man, as Russell notes, if not a touch cynically:

There is in the mysticism of Plotinus nothing morose or hostile to beauty. But he is the last religious teacher, for many centuries, of whom this can be said. Beauty, and all the pleasures

\footnote{Ibid.}
\footnote{Ibid.}
\footnote{Ibid. Dean William Ralph Inge (1860-1954) was a British theologian and writer, Anglican prelate, professor of divinity at Jesus College, Cambridge, Dean of St. Paul's Cathedral in London.}
\footnote{Ibid.}
Russell, echoing Kelly at the beginning of this Chapter, notes that theology was ‘almost the sole surviving mental activity’ in the Middle Ages. He credits Plotinus’s neo-platonism with stopping it from becoming purely superstitious by preserving ancient Greek intellectual doctrines and that it made possible the ascension of scholastic philosophy. However he warns of the subjectivism encouraged by Plotinus’s philosophy as he explains:

Subjectivism was referred to in the previous Chapter in terms of sole reference to one’s own standards and not those objectively outside of one’s self. More particularly it could be said to be the extrapolation of Platonic and neo-platonic ideology of the world within as opposed to the world without. Suffice it to say at this point that, the world from this time was about to enter into a highly subjective era with an obsessive regard for the inner divine rather than what actually makes the world tick (or evolve) – a Platonic stance rather than an Aristotelian one – a return to a more objective stance would have to wait for the Renaissance. Religion and its leaders would come to prominence in this highly subjective era.

However, Plotinus was not principally a religious leader so it is necessary to turn to some of the first influential religious leaders in the Middle Ages to appropriate Plotinus’ (and Plato’s) ideas - namely Origen of Alexandria and Saint Augustine of Hippo - to understand the religious mood that came to prevail in the Middle Ages.
3.3 Origen of Alexandria (185-254CE)

Periodic persecution of Christians during the reign of emperors Severus, Maximian and Decius, and numerous Germanic barbaric invasions, punctuated the life of Origen until his death during the reign of the Emperor Gaius.\textsuperscript{121}

However, to take hold in Rome, with the Roman Empire’s penchant for orderliness, Christianity needed to move away from the undisciplined and vague mystical gnostic movements that had largely defined it up to that point and be based on a more sound philosophical footing. Origen had the answers. Indeed, Moore credits Origen as:

\begin{quote}
[t]he first true philosophical thinker to turn his hand not only to a refutation of the mystical Gnosticism which was prevalent during his time but also to offer a more rigorous and philosophically respectable system of Christian thinking than the mythological speculations offered by the many mystical Gnostic sects.\textsuperscript{122}
\end{quote}

Moreover, Moore says of Origen that he was the Christian Church’s first ‘systematic and philosophical theologian’, employing Hellenistic philosophy not to merely moralise or engage in apologetics (as Clement of Alexandria and other of Origen’s theological predecessors appear to have done), but to advance, using his ‘On First Principles’ a complete system of Christian thought.\textsuperscript{123}

In his \textit{On First Principles}, Origen espouses three important Christian themes: the trinity, the Fall, and the restoration of souls.\textsuperscript{124} While we have seen Plato’s influence on the more secular thinking of Plotinus in late Rome, we now see Plato’s influence on religious thinking. Origen’s notion of the Fall and the restoration of souls will now be discussed as they reflect the evolutionary components \textit{historicism} and \textit{final cause teleology} (as precursor to \textit{path dependence}).

Origen’s notion of the \textit{Fall} predates St Augustine’s notion soon to be discussed. Although the latter’s conceptions of the \textit{Fall} are more widely known, Moore explains that in Origen’s scheme a collective of a finite number of rational beings or logika were created and that:

\begin{itemize}
  \item \textsuperscript{121} Edward Moore, ‘Origin of Alexandria (185-254CE)’ \textit{Internet Encyclopaedia of Philosophy} 2003 <http://www.iep.utm.edu/origen-of-alexandria/>.
  \item \textsuperscript{122} Ibid.
  \item \textsuperscript{123} Ibid.
  \item \textsuperscript{124} Ibid.
\end{itemize}
These souls were originally created in close proximity to God, with the intention that they should explore the divine mysteries in a state of endless contemplation. They grew weary of this intense contemplation, however, and lapsed, falling away from God and into an existence on their own terms, apart from the divine presence and the wisdom to be found there. This fall was not, it must be understood, the result of any inherent imperfection in the creatures of God, rather, it was the result of a misuse of the greatest gift of God to His creation: freedom. The only rational creature who escaped the fall and remained with God is the “soul of Christ.”

Origen’s notion of *restoration of souls* is one that eschews the fatalistic view that was embraced in more dominant modes of Christian thought throughout the rest of the Middle Ages (i.e. a belief that lost souls would endure eternal suffering) that will soon be discussed. For Origen this was not the case, as Moore explains:

Origen did not believe in the eternal suffering of sinners in hell. For him, all souls, including the devil himself, will eventually achieve salvation, even if it takes innumerable ages to do so; for Origen believed that God’s love is so powerful as to soften even the hardest heart, and that the human intellect – being the image of God – will never freely choose oblivion over proximity to God, the font of Wisdom Himself. Certain critics of Origen have claimed that this teaching undermines his otherwise firm insistence on free will, for these critics argue, the souls must maintain the freedom to ultimately reject or accept God, or else free will becomes a mere illusion. What escapes these critics is the fact that Origen’s conception of free will is not our own; he considered freedom in the Platonic sense of the ability to choose the good. Since evil is not the polar opposite of good, but rather simply the absence of good – and thus having no real existence – then to ‘choose’ evil is not to make a conscious decision, but to act in ignorance of the measure of all rational decision, i.e., the good. Origen was unable to conceive of a God who would create souls that were capable of dissolving into the oblivion of evil (non-being) for all eternity.

Origen’s more positive conception of the Fall – that people have no innate evil within them, only ignorance - would reflect the attitude towards the human condition at the time of the Enlightenment with the rise of humanism and its faith in knowledge as will be discussed in Chapter 4. However, as soon will be discussed, Augustine’s more pessimistic version was to prevail throughout the Middle Ages.

Therefore, Origen employed at least two important components of evolution in his theology: *historicism* and *final cause teleology* (as precursor to *path dependence*). His *historicism*, like Plato’s, suggests devolution, but not of society from an idealised past, but on an individual scale at the level of the soul as it grew ‘weary’ over time. Origen’s *final cause teleology* ultimately suggests a happy ending for humankind with a tendency for individual souls, innately attracted to the divine, to return home to God.

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125 Ibid.
126 Ibid.
Origen may have influenced the uptake of Christianity in Rome, and without having to resort to apologetics as some of his contemporaries had done, but his theological doctrines were not to have as much impact on the rest of the Middle Ages as those of the Church Fathers who followed him. His *historicism* was the same as theirs (devolution) but without the belief in humankind’s inherent sinfulness, and his *final cause teleology* was much more optimistic, pointing to a happy ending for all rather than eternal damnation for all but the arbitrarily chosen. In a sense, with his upbeat views, Origen was a man ahead of his time (a prototypical Renaissance Man) but the times in which he lived, or rather the times that soon followed with the shock of the fall of Rome, required a different religious narrative to make sense of these disappointing events and gain political traction in the very different world which was now coming into being. Bad news sells. Good news does not. Enter Saint Augustine.

### 3.4 Saint Augustine (354-430CE)

Origen may have put early Christianity on a more philosophical footing and made it more savoury for ancient Rome, but something more was needed for Christianity to endure politically beyond ancient Rome and particularly its fall. This would be achieved by a theological doctrine that would take away the power of the individual and effectively transfer it to the ruling elite to restore order out of the chaos. This is arguably Augustine’s most lasting achievement (whether he intended it or not), until the time of the *Reformation* when power, or personal autonomy, would be restored to the individual in their approach to his or her faith. As Elaine Pagels explains:

> Many Christian converts of the first four centuries regarded the proclamation of...the moral freedom to rule oneself as virtually synonymous with "the gospel." Yet with Augustine this message changed. The work from Augustine's later years, radically breaking with many of his predecessors, effectively transformed the teaching of the Christian faith. Instead of the freedom of the will and humanity's original royal dignity, Augustine emphasizes the bondage of the will by depicting humanity as sick, suffering, and helpless, irreparably damaged by the Fall. For that "original sin," Augustine insists, involved nothing else than Adam's prideful attempt to establish his own autonomous self-government. Astonishingly, Augustine's radical views prevailed, eclipsing for future generations of Western Christians the consensus of the first three centuries of Christian tradition.127

Russell describes Augustine as the first in a long line of philosophers in the Middle Ages whose purely speculative views were influenced by the necessity of such views

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agreeing with Scripture. He also suggests the marriage of Platonism and Christianity was more complete from this time onwards, notwithstanding the influence of Plato on Augustine’s predecessors such as Origen. Speaking of this influence, Russell asserts:

[T]his cannot be said of earlier Christian philosophers e.g. Origen; in Origen, Christianity and Platonism lie side by side, and do not interpenetrate. In St Augustine, on the other hand, original thinking in pure philosophy is stimulated by the fact that Platonism, in certain respects, is not in harmony with Genesis.

Russell gives an example of this the idea of creation *ex nihilo* or creation from nothing, a principle taught in the Old Testament, but which was alien to Platonic and Aristotelian Greek thought which could not imagine that pre-existing matter to which God gives form as creation out of nothing was possible. Russell notes that the Christian mystics such as the Gnostics had trouble following the orthodoxy of creation *ex nihilo* preferring to follow the Greek view of God and the world being one rather than made up of discrete entities; or rather, *pantheism*, later to be fully developed by Spinoza; Augustine, on the other hand, was ‘not so troubled and Genesis’s explicit doctrine of creation of *ex nihilo* was enough for him.’

Augustine’s strict adherence to scripture put him at odds with other theologians during Rome’s last days and its fall at the hands of the Visigoth Alaric in 410. Up to then, apologists led by such figures as Eusebius subscribed to a materialist view of Christian progress; that the rise of the Roman Empire was happily coincident with the Christ’s birth and the Roman Empire’s embrace of Christianity. Claiming to use scripture and his own reason, Augustine debunks this view. As Theodor Mommsen notes:

Eusebius’ idea was taken up by some of the most prominent theologians of the fourth and early fifth centuries, both in the eastern and the western parts of the Church. This is shown by the interpretations which John Chrysostom, Ambrose, Jerome, Cyril of Alexandria and Theodoret of Cyprus gave in their various commentaries on Psalm 72 and Isaiah (2, 4), and we may add, on the passage in Psalm 46 (v. 9), which reads: "He maketh wars to cease unto the end of the earth." Like Eusebius all the writers just mentioned explained these passages in terms of the Pax Romana and its earthly achievements, and it seems that of the great theologians of the fourth century only Athanasius and Basil expounded them in a strictly spiritual sense. When Augustine wrote his Enarrations on the Psalms, he replaced the explanations of the above passages with interpretations wholly different and entirely his own.

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128 Russell, above n20, 329.
129 Ibid 330.
130 Ibid.
131 Ibid.
In Augustine’s view, contrary to his predecessors, peace had not been achieved as for Augustine the only peace that mattered was that which ‘through divine grace, man finds in himself by his complete submission to the will of God’\(^\text{133}\) which was not possible while wars were still being prosecuted.

We have already seen that Plato’s historicism was of a negative bent, with society being in a state of degeneration and decay. Augustine’s historicism took negativity to another level with his notion of the Fall applicable to all of humankind. Furthermore, his historicism and the Fall was not just scripturally based on the Genesis creation story, but also ‘backed up’ by an extensive (no doubt selective) study of history. As Mommsen explains, St Augustine:

> [c]ommissioned his younger friend Orosius to write an entire history of the world from a point of view which is best described by Orosius himself in the dedication to Augustine of his Seven books of Histories against the Pagans: "You bade me to discover from all the available data of histories and annals, whatever instances past ages have afforded of the burdens of war, the ravages of diseases, the horrors of famine, terrible earthquakes, extraordinary floods, dreadful eruptions of fire, thunderbolts and hailstorms, and also instances of the cruel miseries caused by murders and crimes against man's better self." Orosius proved himself indeed "the true compiler of the evils of the world," as Petrarch (Familiares, 15, 9, 10) was to characterize him scornfully many centuries later. But in spite, or perhaps because, of their admitted prejudices and their preconceived ideas, Augustine's and Orosius's systematic expositions of the old apologist conceptions of world history in general and of Roman history in particular were to determine the historical outlook of most western writers to the time of the Italian Renaissance.\(^\text{134}\)

The apologists referred to above, with their notion of material Christian progress, were engaging in a form of optimistic eschatology or religious final cause teleology which was not unlike the type of secular progress teleology to be embraced later following the Renaissance. Augustine was not having any of this, as can be seen from the passages above. His teleology is really one that anticipates divine predestination which was to be made more explicit in the later Middle Ages. As Mommsen observes:

> How deeply Augustine was concerned with the question of the philosophical or rather, from his point of view, the theological interpretation of the meaning and course of history, is shown by those chapters of The City of God in which he discussed the problems of the origin of the world and the uniqueness of its creation. He rejected the view that this world is eternal and without beginnings, and he stated that it was definitely created in time and will come to an end in another definite moment in time, a moment known to God alone.\(^\text{135}\)

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\(^{133}\) Ibid.

\(^{134}\) Ibid 352-3.

\(^{135}\) Ibid 353-4.
This raises some very interesting questions about time and, for the purpose of our investigation, and the concept of evolution as it relates to the question of creationism. As mentioned in Chapter 2, Heraclitus can be credited with the linear ‘arrow of time’ notion of temporality rather than the cyclical conception of it that also obtained in Ancient Greece (most notably with his near contemporary Pythagoras). In the above passage, it is suggested that Augustine considered the world to be created in time, but applying the doctrine of creation ex nihilo, time was created when the world was created; God did not precede from His own creation as this would mean He is in time; however, He is not – He stands outside of time and all time is present to Him at once.

In attempting to say what time is, Russell says that Augustine suggests ‘the only thing about time that is is that its past, present and future are subjective experiences which present themselves to the present state of mind, that is ‘a present of things past (memory), a present of things present (sight), and a present of things future (expectation)’; thus, time for Augustine is subjective: it is in the human mind which expects, considers and remembers’.136 Not surprisingly, Russell credits Augustine with having developed ‘a very admirable relativistic theory of time.’137

If time is all in the mind, then all is subjective and there is no independent reality. If we invert the celebrated Sartrean phrase ‘existence proceeds essence’, we get essence proceeds existence which is at the heart of the meaning of subjectivism, a phenomenon which came to subsequently define the Middle Ages as mentioned earlier. As Jewish philosopher Martin Buber, on the question of man’s wonder about himself, contrasting the subjectivism of Augustine with Aristotle’s objectivism, explains:

The Aristotelian man wonders at man among the rest, but only as part of a quite astonishing world. The Augustinian man wonders at that in man which cannot be understood as a part of the world, as a thing among things; and where that former wondering has already passed into methodological philosophising, the Augustinian wondering manifests itself in its true depth and uncanniness. It is not philosophy, but if affects all future philosophy. In the post Augustinian west it is not the contemplation of nature, as with the Greeks, but faith which builds a new house in the cosmos for the solitary soul.138

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136 Ibid 331.
137 Ibid.
Augustine’s most influential intellectual theories including his celebrated notions of *predestination* and *original sin* (or the Fall as previously discussed) are summed up rather cynically by Russell as follows:

St Augustine taught that Adam, before the Fall, had had free will, and could have abstained from sin. But as he and Eve ate the apple, corruption entered into them, and descended to all their posterity, none of whom can, of their own power, abstain from sin. Only God’s grace enables men to be virtuous. Since we all inherit Adam’s sin, we all deserve damnation. All who die unbaptised, even infants, will go to hell and suffer unending torment. We have no reason to complain of this, since we are all wicked… But by God’s free grace certain people, among those who have been baptised, are chosen to go to heaven; these are the elect. They do not go to heaven because they are good; we are all totally depraved, except in so far as God’s grace, which can be given why some are saved and the rest damned; this is due to God’s grace which is only bestowed on the elect, enables us to be otherwise. No reason can be given why some are saved and the rest damned; this is due to God’s unmotived choice. Damnation proves God’s justice; salvation, His mercy. Both equally display His goodness.139

Russell refers to this as a ‘ferocious doctrine’ and that ‘a great deal of what is most ferocious in the medieval Church is traceable to his (Augustine’s) gloomy sense of universal guilt’.140 Russell, of course, is well known for his celebrated atheism during his lifetime as much as his erudition as a philosopher, and he is obviously being polemical here, but Augustine’s influence on western history is undeniable. Renowned theological scholar, Elaine Pagels, observes that, until his death in 430, Augustine achieved a position of ‘extraordinary power and influence in the Roman World’ and that ‘Far beyond his lifetime, even for a millennium and a half, the influence of Augustine's teaching throughout western Christendom has surpassed that of any other Church Father's.141 Pagels goes on to suggest why this may have been so:

Acknowledging that there are many reasons for this, I suggest as primary among them the following: It is Augustine's theology of the Fall that made the uneasily forged alliance between the Catholic churches and imperial power palatable-not only justifiable, but necessary-for the majority of Catholic Christians. Augustine's doctrine, of course, went far beyond mere expedience. Serious believers concerned with the deeper questions of theology, as well as those concerned only with political advantage, could find in Augustine's theological legacy ways of making sense out of a situation in which church and state had become inextricably interdependent. The eventual triumph of Augustine's theology required, however, the capitulation of all who held to the classical proclamation concerning human freedom, once regarded by many as the heart of the Christian gospel. By the beginning of the fifth century those who still held to such archaic traditions-notably including those the Catholics called "Donatists" and "Pelagians"-themselves came to be condemned as heretics. Augustine's theory of Adam's Fall, once espoused in simpler forms only by marginal groups of Christians, now moved, together with the imperially supported Catholic church that proclaimed it, into the center of western history.142

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139 Russell, above n20, 339.
140 Ibid 340.
141 Pagels, above n127, 99
142 Ibid
We can see from the above passage how Augustine’s conception would complement the power structure of the ruling polity of his time which we will shortly discuss. His influence would also be felt on the intellectual movements of the Middle Ages that followed a few centuries later, most notably *Scholasticism*, to which we now turn.

### 3.5 Scholasticism

Scholasticism owes its roots to the Holy Roman Empire which was founded in 800 when the pope crowned the Frank Charlemagne emperor after conquering most of Germany.\(^\text{143}\)

Charlemagne, though illiterate, was instrumental in founding schools of learning through such important figures as Alcuin.\(^\text{144}\) Thomas Aquinas (1225-1274), one of the greatest of the scholastic philosophers, was a legacy of these schools and, contrary to the Church Fathers before him, succeeded in persuading the Church that Aristotle’s system was preferable to Plato’s as the basis of Christian Philosophy.\(^\text{145}\) Nevertheless, many of the central tenets of Augustine’s theory including those influenced by Platonism, are preserved in Aquinas’ system, namely: creation *ex nihilo*,\(^\text{146}\) original sin, predestination, election by God of the saved, and eternal damnation of the unbaptised.\(^\text{147}\)

Aquinas’ celebrated project of bringing faith and reason together, namely arriving at religious belief not just by faith but by reason, Russell criticises as being not true to the principles of philosophy. He notes that ‘unlike Socrates who was prepared to go wherever the argument lead him, Aquinas’ conclusions are ready-made and use reasoning to support these conclusions in a manner that is more a case of special pleading than philosophical pursuit of the truth.’\(^\text{148}\)

Although it is possible today to see Aquinas’ project as philosophically flawed, it undoubtedly influenced religious thinking – putting it on an even stronger footing than Augustine’s platonic basis – for centuries to come. And, of course, Aquinas deserves

\(^{143}\) Ibid 366  
\(^{144}\) Ibid 368-9  
\(^{145}\) Ibid 419  
\(^{146}\) Ibid 423.  
\(^{147}\) Ibid 425.  
\(^{148}\) Ibid 427.
much more credit than this and his reasoning, though flawed, is perhaps not as vacuous as Russell suggests. Aquinas’ celebrated fourfold scheme of the laws elevates the role of reason in discerning what the Natural Law is to more than taking something based on an article of faith but rather, in ways that would be echoed by Kant in the Enlightenment in constructing his moral categorical imperative as it involves the use of ‘practical reason’. As Augusto Zimmermann explains:

The precepts of natural law are said by Aquinas to be apprehended by ‘practical reason’, or that reason which is directed to action and which apprehends first all the good as the end of action.

As to the parts of Aquinas’ system that are Aristotelian – in particular his first cause argument - Aquinas attempts to base his scheme on Aristotle’s arguments for the existence of God, all of which presume the impossibility of the infinite regress (i.e. the celebrated argument that there has to be a first cause – God – otherwise there is an infinite regress of possible causes prior to him which of course is impossible). However, Russell notes (drawing on his skills as a mathematician as well as a philosopher) that there are some things which the infinite regress argument does not apply to and gives the example of positive and negative integers that have a clear starting point: +1 and – 1 respectively.

Refutable or not, the idea of a first cause is neither a necessary nor sufficient condition for any form of evolutionary process, and an infinite regress argument is irrelevant. For example, on the question of how the cosmos has evolved, the open-ended Static State Universe Theory accommodates theories of evolution just as happily as its main rival, the Big Bang Theory with its discrete beginning.

Nevertheless, for Aquinas, the question of how the universe came into being is a theological one, not a physical one. Just as the modern-day physicist who champions the Big Bang theory advocates a first cause (in physics jargon ‘a singularity’) with no apparent serious attempt to explain what caused that, Aquinas does the same, except his ‘first cause’ is God. This is beyond the realm of reason (as arguably the concept of a ‘singularity’ is in physics) and is in the realm of theology or metaphysics (as again

149 The Divine Law, the Revealed Law, the Natural Law and the Human Law from Aquinas’s Summa Theologiae (Christian Classics, 1981).
151 Ibid 426.
the physicist’s concept of a singularity arguably is). For Aquinas, reason can quite comfortably be deployed to explain everything that follows after the first cause, or rather the nature of change. This is not unlike the view not unpopular today among scientists of the Christian faith that God is the first cause but that a theory of evolution explains what happens next.152

As Aquinas himself said:

There are some things that are by their very nature the substance of faith, as to say of God that He is three and one... about which it is forbidden to think otherwise... There are other things that relate to the faith only incidentally... and, with respect to these, Christian authors have different opinions, interpreting the Sacred Scripture in various ways. Thus with respect to the origin of the world, there is one point that is of the substance of faith, viz., to know that it began by creation... But the manner and the order according to which creation took place concerns the faith only incidentally.153

This compromise of theology or metaphysics as first cause and the idea of evolution to explain change is explained by William Carroll as follows:

Aquinas saw no contradiction in the notion of an eternal created universe. He thought that it was a matter of biblical revelation that the world is not eternal. He also thought that reason alone could not conclude whether the world had a temporal beginning. But even if the universe were not to have had a temporal beginning, it still would depend upon God for its very being, its existence. The root sense of creation does not concern temporal origination; rather it affirms metaphysical dependence. For Aquinas, there is no conflict between the doctrine of creation and any physical theory. Theories in the natural sciences account for change. Whether the changes described are cosmological or biological, unending or finite, they remain processes. Creation accounts for the existence of things, not for changes in things.154

However, while Aquinas’ view might have been a precursor to ‘the compromise view’ embraced by some modern-day scientists who believe in a Christian God as first cause and evolution to explain all subsequent change, he did not advocate a deistic view in which God simply withdrew from the scene after the work of creation was done. For Aquinas, God is ever present in his creation and the existence and nature of creatures and things are due to His imbuing these entities with such qualities. As Carroll explains:

God's omnipotence does not challenge the possibility of real causality for creatures, including that particular causality, free will, which is characteristic of human beings. Aquinas would reject any notion of divine withdrawal from the world so as to leave room, so to speak, for the actions of creatures. Aquinas does not think that God "allows" or "permits" creatures to behave the way

152 Francis Collins, for example, eminent biologist and leader of the world’s first human genome mapping concept.
153 Thomas Aquinas In II Sent., dist. 12, q. 3, a. 1.
they do. Similarly, Aquinas would reject a process theology which denies God's immutability and His omnipotence (as well as His knowledge of the future) so that God would be said to be evolving or changing with the universe and everything in it. For Aquinas such views fail to do justice either to God or to creation. Creatures are what they are (including those which are free), precisely because God is present to them as cause. Were God to withdraw, all that exists would cease to be. Creaturely freedom and the integrity of nature, in general, are guaranteed by God's creative causality.\footnote{Ibid.}

Aquinas’ account of creation was, like many Thomistic ideas, inspired by Augustine. For Augustine, the act of creation \textit{ex nihilo} was only one of the modes of creation that he posited; he also believed, like Aquinas, that God was at work in the continuing process of change. As Alister McGrath explains:

Augustine does not limit God’s creative action to the primordial act of origination. God is, he insists, still working within the world, directing its continuing development and unfolding its potential. There are two “moments” in the creation: a primary act of origination and a continuing process of providential guidance. Creation is thus not a completed past event. This two-fold focus on the creation allows us to read Genesis in a way that affirms that God created everything from nothing, in an instant. However, it also helps us affirm that the universe has been created with the intended capacity to develop, under God’s sovereign guidance. For Augustine, God created a universe that was deliberately designed to develop and evolve. The blueprint for that evolution is not arbitrary but is programmed into the very fabric of creation. God’s providence superintends the continuing unfolding of the created order.\footnote{Adaptation of ‘Augustine of Hippo on Creation and Evolution’, Ch 9 of ‘The Passion Intellect’ Alister McGrath 2010 cited at <http://www.faithinterface.com.au/science-christianity/st-augustine-on-creation-and-evolution>.

Jean Porter suggests that the fact that God created the world \textit{ex nihilo} as the uncaused causer of everything and the view that everything that now exists must be attributable, directly or indirectly, to God’s creativity does not necessarily imply any particular account of the way He creates and sustains the world and:

Nor, more specifically, does the doctrine of creation rule out any role for any secondary causes in the actual coming to be and development of the world as we now experience it. When I learned as a child that God made me, it would never have occurred to me (past a certain age, anyway), that my mother and father had no hand in the process. By the same token, a defence of the doctrine of creation need not be incompatible with a view according to which the original creation contained within it principles of potentialities for further development, which only unfold over time. For this reason, the scholastic doctrine of creation need not commit us to creationism, in the sense of the distinctly modern view according to which the creation narrative of Genesis is to be taken more or less as a descriptive narrative of the process of creation.\footnote{Jean Porter, \textit{Nature as Reason, A Thomistic Theory of Natural Law} (William B Eerdmans Publishing Co., 2005) 84-5.}

As we shall see, creationism and other examples of literalism in biblical interpretation is a rarely recent phenomenon, arguably beginning with Luther and the \textit{Reformation}. The Scholastics and influential theologians before them such as the abovementioned
St Augustine and St Jerome before him (whose *Vulgate* or common Latin translation of the Bible was the chief text in the Western Church until the Reformation, and in the Roman Catholic Church until the Second Vatican Council of 1962-5)\(^\text{158}\) were not tied to such a narrow approach. As Alex Jensen explains:

> The commonly agreed principles of medieval exegesis were the acceptance of allegorical interpretation as a critical tool and an appeal to the rule of faith, that is, the Church’s magisterium (teaching office), in case of doubt….Although the degree to which allegorical interpretation was to be employed may have been disputed, its basic legitimacy was virtually universally agreed. In short, on the basis of the hermeneutical assumptions of late antiquity, medieval interpreters were able to make sense of biblical and other texts, and this basic attitude would not be challenged until the Reformation.\(^\text{159}\)

Thus, it can be seen that the theology of Augustine and Aquinas *do* leave room in their thinking for ideas about evolution, as least insofar as their accounts of the creation and change of the physical world is concerned. Evolution does not require a beginning *per se* – it is only concerned with change from a point in the process, not the very first point. As we have seen, modern exegetes have rescued Augustine and Aquinas from fundamentalists who insist on proven beginnings and denounce modern theories of evolution.

However, it is not because of their creation accounts that it is submitted that Augustine’s and Aquinas’ views are essentially hostile to ideas about evolution (which we have seen they are not, and even appear to accommodate evolutionary ideas). It is the use of their *idealism* and negative *historicism* and *final cause teleology* that, insofar as the human condition is concerned, it is tainted by an innate tendency from the very beginning to devolve – triggered by the original sin in the Garden of Eden with a final outcome ultimately determined by God. This does not comport with a view of spontaneous human evolution.

There is nothing in evolutionary thinking that is consistent with ideas such as *the Fall* – this notion is based on an *historicism* viewed through a lens distorted by a certain *idealism* (i.e. one’s particular interpretation of the Scriptures). Aquinas’ Aristotelian *teleological* argument for the existence of God, namely that all things serve a purpose, even lifeless things, suggests the existence of an agency of a being outside of


\(^{159}\) Ibid 52.
themselves vesting them with some purpose.\textsuperscript{160} Basically, things cannot just be, nor be without a purpose or ‘end’. But this \textit{final cause teleology} is incompatible with the notion of evolution if it is considered to be a process of ongoing change and development of things that do just happen to ‘be’ without any purpose or end, although their overall direction is certainly likely to be discernible, if only dimly, as \textit{path dependent} (but certainly not pre-determined).\textsuperscript{161}

Moreover, Aquinas’s celebrated natural law theory can be arguably linked to his essentially anti-evolutionary thinking. Humans’ ways are flawed, including their laws, which are subject to a higher authority, \textit{the Divine}, the unchanging perpetually good. There is nothing good in humans, or the way they change, apart from what God has put in them, nor can they evolve to a higher level of goodness, tainted as they are by \textit{original sin} and forever condemned to decline since the Fall. Their efforts, including their laws, must be measured against, and must not offend, a Divine standard.\textsuperscript{162}

While there is no doubt men like Augustine and Aquinas genuinely held sincere beliefs, this state of affairs, thoroughly antithetical to the idea of the spontaneous evolution of society and human destiny as they were, were very convenient for the ruling elitists of their time (whatever their beliefs), and complemented the \textit{descending}

\textsuperscript{160} Ibid 421.
\textsuperscript{161} It is highly unlikely that ‘blind chance’ simply rules the day in evolution as modern day materialists such as Richard Dawkins assert. In William Stoeger's discussion of chance and purpose in biology, he suggests the natural sciences discover an order and a certain directedness which inheres in physical reality: “in the laws, regularities, and evolving conditions as they function together to constitute the processes and relationships which emerge at each stage of cosmic history” and “that pattern must have some sufficient cause in nature itself.” Although “chance events are frequent and important in biological evolution, rendering its actual course indeterminate or unpredictable in exact outcome from any particular stage, these events and their short- and long-term effects — whether they be of point mutations at the level of molecular DNA, or the impact of a meteorite — are always within a context of regularities, constraints, and possibilities.” Therefore, referring to these events as “pure chance” or “to assert blithely that evolution proceeds by purely chance events is much less than a precise description of this source of unpredictability in biological evolution.” Furthermore, ”if there were no end-directed or end-seeking behaviour in physical reality, there would be no regularities, functions, or structures about which we could formulate laws of nature.” Although contemporary natural sciences seek to discover efficient causes without reference to purposes (final causes), ”any ordering of efficient causes and their effects implicitly acknowledges and presupposes that the efficient causes and the processes which embody them are directed towards the realization of certain specific types of ends. Efficient causes always have certain specifiable effects.” William R. Stoeger, ”The Immanent Directionality of the Evolutionary Process, and its Relationship to Teleology,” in Robert J. Russell, William R. Stoeger, and Francisco Ayala (eds) \textit{Evolutionary and Molecular Biology: Scientific Perspectives on Divine Action} (University of Notre Dame Press, 1998) 169, 172, 179-80, 187.
\textsuperscript{162} As we shall see, Luther was no less pious than Aquinas and his thinking is equally anti-evolutionary, but his attitude towards law is positivist on his account of his separation of worldly concerns from the Divine.
theory of government referred to above (since one only had invoke the power of God to legitimise one’s power) and enabled them to hold onto their privileged positions in ways Plato’s aristocratic kin could have only dreamed of. The most obvious beneficiary of such a mindset was the papacy.

3.6 Rise of the Papacy and the Reformation’s Challenge to Catholic Hegemony

Berman summarises the circumstances surrounding the rise of the papacy, the ‘papal revolution’, in the 11th century as follows:

In 1075, after some twenty-five years of agitation and propaganda by the papal party, Pope Gregory VII declared the political and legal supremacy of the papacy over the entire Western Church and the complete independence of the clergy from secular control. Gregory also asserted the ultimate supremacy of the Pope in secular matters, including the authority to depose emperors and kings. Increasingly these events have been recognized as constituting the Papal Revolution.163

Russell notes a number of factors which contributed to this hegemony, mainly involving the assimilation of a number of practices, including:

[T]he power and the separateness of the priesthood was taken from the East, but were gradually strengthened by methods of government, in the Church, which owed much to the practice of the Roman Empire. The Old Testament, the mystery religions, Greek philosophy, and Roman methods of administration were all blended into the Catholic Church, and combined to give it a strength which no earlier social organisation had equalled.164

This led to the papacy having enormous power and influence including being able to command from their subjects tribute and indulgences. However, this was not to last. A number of factors weakened the moral authority of the Catholic Church and it is beyond the scope of this thesis to go into them here but one particular factor, the rise of Lutheranism was to ensure the permanent division of church and State in the West; the papacy still continued in existence but from the time of the Reformation it was never to have the same power again.

The Reformation is widely considered to have been launched in 1517 by a singular incident: a German priest Martin Luther (1483-1546) nailing a copy of his ninety-five point thesis to the door of the castle church of Wittenberg of Saxony. Under licence from Pope Leo X, letters of indulgence were being sold in Germany which promised

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163 Berman above n 92, 897.
164 Russell, above n20, 440.
the purchaser access to the spiritual treasury of mercy accumulated by the saints on which his soul could draw to shorten the period suffered in Purgatory; this particular occasion being especially brazen as the ‘vendors’ had not even bothered to emphasize the need for any soul-searching penitence before taking up these indulgences.165

John Hale sums up the doctrine of the Lutherans thus:

Their basis was the all-sufficiency of the Bible as a guide to belief. Luther disputed the view that the popes had the power from God to declare that certain beliefs, inspired in theologically learned men, reflected the working of the Holy Ghost within the historic body of the Church and were therefore doctrinally correct, whereas others (the Immaculate Conception of the Virgin for instance) might be important as guides to devotion, but were not beliefs binding on the faithful.166

Hale notes the challenge to Catholic hegemony was ‘helped by the humanistic vogue for studying the ancient world in terms of the texts written in classical times and prising them loose from later inventions and commentaries’.167 The believer was led to doubt these commentaries and inventions. As Hale continues:

Apart from the gospels’ baptism and communion, the subsequently evolved sacramental apparatus – confirmation, marriage (of a sacrament as opposed to a contract) confession and penance, extreme unction, ordination – fell away, and with it the need for the miracle-aiding caste of priests that had kept it in place. And without them, the whole Catholic hierarchy, from pope to barefoot friar, became unnecessary. What also fell away – and with it the cogency of the indulgence system, for instance – was the Catholic insistence on the spiritual efficacy of the penances and charitable works. For Luther, God was moved to offer his grace, his forgiveness to a man born to sin only in his response to the intensity of individual faith in his mercy. Man’s justification of a wish to be saved at the Day of Judgement was reliant on what he had offered God in his heart.168

This simple faith-based approach would also mean a literalist approach to biblical interpretation in many areas, one being notably the idea of creation. Where Augustine and Aquinas were, as has already been noted, practised exegetes when it came to the bible and its account of creation, Luther was not so compromising and preferred to take the biblical account at its word. As Paul Bartz notes:

Luther often cited the creation account as an example of the clarity of Scripture. He accepted the Mosaic authorship of Genesis and that Genesis is the very word of God without qualification. It was his conclusion that the world had not been in existence for more than ‘6,000 years’, but he stated the philosophers (the evolutionary writers) would never accept that since they work on the basis of human reason which ‘is blind, deaf, senseless, godless and sacrilegious in its dealing with all God’s words and works ...’169

166 Ibid 116-117.
167 Ibid 117.
168 Ibid 117.
Although it is arguable that a significant legacy of Luther’s Reformation is the extreme religious movements of Christianity that have persisted to this day with their literal interpretation of the Bible as ‘the inerrant word of God’, the far greater, but more indirect, legacy of the Reformation was the rise of personal autonomy. By making religious faith a personal matter, unmediated by the clergy, the individual could now have power over his or her own destiny, not the Church. This effectively meant that humankind’s fate was in divine hands rather than in the Church’s and a person’s destiny depended on his or her direct relationship with the divine.

However, since the divine is no longer a body corporate (a la the Church) able to govern human affairs (except in the minds of men), this left a power vacuum with the Church now effectively neutered from governing the lives of others in practical, real and tangible ways as it had done for centuries. But someone has to govern if society is not to descend into chaos. Hence, the State now becomes an obvious candidate to fill that power vacuum. As Russell explains:

Glorification of the State begins, so far as modern times are concerned, with the Reformation…[p]hilosophers of the Middle Ages, with few exceptions, put the Church above the State. Luther, finding support in Protestant princes, began the opposite practice…. 170

Moreover, for legal theory, there was now a seismic shift following the Reformation that would see the victory of legal positivism over natural law that had defined the previous centuries. As Berman notes:

The Lutheran Reformation, and the revolution of the German principalities which embodied it, broke the Roman Catholic dualism of ecclesiastical and secular law by deregularising the church. Where Lutheranism succeeded, the church came to be conceived as invisible, apolitical, alegal; and the only sovereignty, the only law (in the political sense), was that of the secular kingdom or principality. It was just before this time, in fact that Machiavelli had used the word ‘state’ in a new way to signify the purely secular social order. The Lutheran reformers were in a sense Machiavellians: they were sceptical of man’s power to create human law which reflect eternal law, and they explicitly denied that it was the task of the church to develop human law. This Lutheran skepticism made possible the emergence of a theory of law – legal positivism – which treats the law of the state as morally neutral, a means, not an end, a device for manifesting the policy of the sovereign and for securing obedience to it. 171

What was it about Luther’s religious and political worldview that could lead to such a conclusion? According to Zimmermann:

170 Ibid 669.
Luther believed in the total discontinuity between God and humans; a discontinuity that makes it impossible for people to provide a rational account of morality by reference to God’s law alone. Only faith, declared Luther, can bridge the great gulf between humans and their creator. As a result, Lutheran jurisprudence has largely remained in the shadows of legal positivism. By teaching as did Luther that, in a political sense, only the positive law of the state is actual law, Lutheranism undermines any attempt to base political thinking on the foundations of natural law philosophy.172

The removal of the church from the political sphere and legal positivism left room for others to fill the power vacuum such as monarchs and states as will be discussed in the next chapter. For this we can thank Luther, as H. Patrick Glenn observes:

Without Luther, it has been said, there would have been no Louis XIV, and if the statement is no doubt exaggerated, the Reformation fundamentally shifted conceptions of the respective roles of Church and temporal authority. The movement to *sola scriptum* was a severe restraint on religious tradition, with a corresponding shift in allegiance away from a particular, Catholic canon law and in favor of what are perceived to be non-religious legal traditions. These attitudes clearly persist today. They are perhaps most evidently found in the individualistic definitions of religion rejecting ongoing normative authority as essential to religion, which have been recently articulated by the United States and Canadian Supreme Courts.173

According to Berman, secularisation and the positivist theory of law are only one side of the story of the contribution of the Lutheran Reformation in the Western legal tradition and that:

The other side is equally important: by freeing law from the theological doctrine and from ecclesiastical influence, the Reformation enabled it to undergo a ‘new and brilliant development’ and….The key to the renewal of the law in the West from the sixteenth century onwards was the Lutheran Concept of the power of the individual, by God’s grace, to change nature and to create new social relations through the exercise of his will. The Lutheran concept of the individual will become central to the development of the modern law of property and contract… Old rules were recast in a new ensemble. Nature became property. Economic relations became contract. Conscience became will and intent.174

172 Zimmermann, above n150, 17.
173 H. Patrick Glenn, ‘Tradition in Religion and Law’, (2009-10) (25)(2) Journal of Law and Religion 503, 516-7. However, Glenn also goes onto insist that the oppressive canon law Luther opposed by challenging the Catholic tradition was only restrained and was revived in a different guise in some Protestant traditions when he explains: Luther's resistance to Catholic tradition only brought about, however, its restraint. In religion, Luther objected to use of his name for a theological movement, "poor, stinking maggot-fodder that I am," but the beliefs he inspired have generated a large, global denomination. The sources of Catholic legal tradition were restrained, but much of the content of the law resurfaced in temporal ordinances in Protestant jurisdictions, including Nordic countries. There was also a certain return to pre-eleventh century canons….as a means of restraining or overcoming later Catholic law. And there appears to have been, in practical legal life in many northern European Protestant jurisdictions, ongoing use of what remained of canon law once its most objectionable features had been removed. Luther thus resisted, and restrained, a particular tradition; but neither overcame it nor the others which were invoked in its place. These other legal traditions emerged, moreover, reinforced by this impetus from Protestant Christianity': ibid 517-518.
174 Berman, above n171, 30.
Therefore, personal autonomy is arguably the greatest legacy of the Reformation and the genesis of the modern State. This is where ideas about evolution can take hold. Evolution of society is no longer seen as a dead end or a declining one way (backwards) street as had been the view of the neo-platonic Augustine, nor absolutely dictated in eschatological fashion in the manner of the more Aristotelian Aquinas. New possibilities arise. God is still in the wings but He no longer dictates through the avowed mouthpiece of the Church. This has the empowering effect of people believing their fate lies in their own hands. In short, there is now separation of Church and State which makes the idea of evolution and human flourishing (rather than inevitable human degradation) seem possible.

Further, the rise of the Luther-inspired Calvinism was an important precursor for the social contract theories which were to follow in the seventeenth and eighteenth centuries with their most celebrated proponents Hobbes, Locke and Rousseau. As Zimmermann notes:

The Franco-Swiss lawyer John Calvin (1509-1564) stands alongside Luther as the great reformer in Christianity. His theological system envisaged by him provided ‘the religious basis for the modern concepts of social contract and government consent of the people’. In the 17th century, during the constitutional struggle of parliamentary forces against absolute monarchy in England, a civil war was waged by the English Calvinists called Puritans, who wished to restore the so-called ‘ancient rights and liberties of the English subject’ after two centuries of Tudor-Stuart absolutism. Their revolutionary ideas ‘laid the foundation for the English and the American law of civil rights and civil liberties as expressed in the respective constitutions of these two countries: freedom of speech and press, free exercise of religion, the privilege against self-incrimination, the independence of the jury from judicial dictation, the right not to be imprisoned without cause, and many other such rights and freedoms’…Calvinism also inspired the Puritans who migrated to the English colonies in North America to further develop representative government, and constitute federal arrangements for the political communities.175

Social Contract theory will be discussed in the next chapter but it is important to note here the Reformation’s contribution in that regard. Although, as mentioned, the Reformation opened the gates to ideas about evolution, they were not deployed in the period that followed in the Renaissance as we shall see in the next Chapter with social contract theories which, rather than being theories to genuinely explain social evolution, tended to be grand schemes conceiving of societies ahistorically and all apiece.

175 Zimmermann, above n150, 19.
3.7 Conclusion

Plato’s ideas about evolution including his notion of inevitable social decay and degeneration informed by his historicism and idealism lived on through the Middle Ages through the influence of Plotinus and the neo-platonists in the 3rd century. These in turn influenced Augustine in the 5th century whose notions of the Fall, and predestination broadened the scope of the Platonic idea of social decay and degeneration to all of humankind (i.e. the original sinner Adam’s descendants). Aquinas in the 13th century embraced the Augustinian notions of the Fall and predestination but also employed the philosophy of Aristotle in an attempt to base Christianity on reason as well as faith. Aristotle’s evolutionary idea of final cause teleology (ie the precursor to path dependence) was applied within the limiting context of Catholicism – hence, an individual’s destiny ‘belonged’ to God. The evolutionary component of dialectic also obtained in this era with opposing forces of good and evil informing the medieval worldview.

It was Martin Luther who most effectively challenged, and ultimately defeated, Catholic hegemony, with his notion of personal autonomy in matters of faith thus ushering in the Reformation and setting up the groundwork for the Renaissance. Legal theory had been predominantly imbued with a natural law flavour as law was seen to be subject to higher transcendental principles (cosmic ones in ancient times and religious ones in the Middle Ages). However, although the rise of the state (discussed in the next chapter) was to lay the groundwork for legal positivism, the seeds were also sown during the Reformation with Luther’s literal construction of the Bible (his ‘biblicism’) that was to become an all too familiar habit in western legal theory even to the present day with its prevailing literalism.
CHAPTER 4

THE IMPACT OF IDEAS ABOUT EVOLUTION ON SOCIAL, POLITICAL AND LEGAL THEORY FROM THE RATIONALISTS OF THE RENAISSANCE TO THE ROMANTICS

4.0 Introduction

Rationalism was the intellectual offspring of the Renaissance (also known as the Enlightenment or the ‘Age of Reason’) from the 17th century onwards. In the political sphere, the State had replaced God as the ultimate sovereign. Conceived along purely Rationalist lines, one of the earliest examples was Machiavelli’s notion of state with religion’s role being reduced to purely instrumental terms of appeasing and controlling the masses. Following this, Hobbes and Locke conceived of more fully developed models of the state along Rationalist lines. Both men, despite their own personal religiosity (even the rather pious Locke), rejected the Middle Ages mindset of human fate as being sealed by God as well as the doctrine of original sin, instead replacing these notions with unscripted personal autonomy and the inevitability of human progress – a secular inversion of the Fall.

With the rise of the State, a certain form of legal positivism was on the rise. The mythic values in Ancient times and religious values in the Middle Ages by which natural law was informed were now pushed to the margins. Replacing them were secular values for natural law (that law is informed by non-divine innate reason). Ultimately, however, state-made law was there to be observed and obeyed based on having simply been posited, not whether it was based on reason. Thus, laws were seen as simply what the state decreed rather than a reflection of transcendent natural values. Ideas about evolution had no place in Renaissance Rationalism in an era when it was believed (and preferred) that everything, including states, was to be created anew without consulting history as a guide.

Such rationalist views were challenged in the 19th century by the rise of Romanticism, a movement which also believed in progress but sought (or rather yearned for) a narrative that would explain the past and present. Romantics would therefore seek to discern in history forces at work (primarily secular ones) to explain its course, the most
famous being Hegel’s thesis-antithesis-synthesis notion and his attempted divination of the ‘world-spirt’ or Weltgeist. Change or evolution of society was now itself the subject of study in a form of unscientific metaphysical historicism. In an attempt to break with metaphysics, ‘scientific’ studies of social history would soon be undertaken under the banner of a whole new social science (‘Sociology’). This movement contributed to the development of Marxism and Social Darwinism, to be discussed in the next two chapters.

4.1 The Rise of Rationalism

The Reformation’s challenge to Catholic hegemony and enhancement of individual autonomy brought with it the rise of a way of thinking that had commenced in the Middle Ages with Aquinas’ mode of reasoning underpinning his conceptions of natural law and religious faith as noted in the previous chapter. This way of thinking, or practical reason, evolved from being considered as a divine quality in all humans (a view that was to widely persist well into the 19th century with such notable common law jurists as William Blackstone as we shall see later in the next Chapter) to something simply innate in human beings.176

Indeed, it was a man of religious conviction who was arguably the first since antiquity to advance this notion of secular natural reason informing natural law values, which what was for its time, a very ‘bold’ idea - namely Dutch philosopher Hugo Grotius (1583-1645).

As Zimmermann notes, natural law, for Grotius, is not simply good because it is the Will of God, but because certain things, in themselves, are intrinsically or objectively good.177 After referring to one of Grotius’ celebrated quotes that the natural law ‘would have a degree of validity even if we were to concede what cannot be conceded without the utmost wickedness, that there is no God, or that affairs of men are of no concern to him’.178 Zimmermann suggests ‘This brief remark is said to have opened up the

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176 Although it should be noted that the idea that reason is innate in human beings, and not God given, was not new since this was also believed in the ancient world. In a sense, practical reason returned to these ancient secular roots in the Renaissance.

177 Zimmermann, above n150, 35.

178 Ibid 36.
possibility of an entirely rationalistic approach to the natural law, which indeed became extremely influential in modern conceptualisations of natural law.¹⁷⁹

It was soon after Grotius’s notion of reason *sans* God, that we arrive at the pinnacle of secular reasoning with the rationalism of Immanuel Kant (1724-1804CE).

Kant’s celebrated categorical imperative to *Act only on that maxim through which you can at the same time will that it should become a universal law*, according to Zimmermann, ‘falls squarely in line with the Enlightenment tradition of individual autonomy’.¹⁸⁰ The spirit of Rationalism, of which Kant is its exemplar, not only denied reason as a gift from God, but denied it any sort of logical basis other than simply being a product of an individual’s autonomy and his or her innate rationality. There was no transcendental principle, no history, nothing to inform this principle of autonomous rationality – everything from first principles as if nothing had gone before – the very essence of the apolitical, value free, scientific approach of rationalism.

Here, we find little use being made of the ideas about, or the ideas that informed, evolution that obtained in antiquity and the Middle Ages as previously discussed, namely *historicism, idealism, dialectic*, and *final cause teleology* (as precursor to *path dependence*). This is because the past trends in the development of a thing or idea, the primary concern of *historicism*, is irrelevant when considering that thing or idea from first principles. By the same token, it is futile to talk about *dialectic*, or the opposing forces that inform the discernment of past trends if one is not concerned with the study of a thing’s history, let alone trends. This leaves *idealism*, and *final cause teleology*. As we have seen, *idealism* can inform *historicism* and the study of past trends to give it a narrative (e.g. in the Middle Ages, a religious narrative of *the Fall*). However, in the Renaissance and the Rationalist movement in particular, *idealism* as an idea in itself, not just as an accompaniment to *historicism*, was to inform Kantian and Cartesian thinking with Kant’s celebrated phenomenology and *noumena* (‘things in themselves’) and Descartes’s famous *cogito ergo sum* (‘I think therefore I am’). Although it is not within the scope of this thesis to discuss Cartesian and Kantian forms of *idealism*, Sartre notes how these forms of *idealism* affected the way these men

¹⁷⁹ Ibid.
¹⁸⁰ Ibid 37.
thought about a particular aspect of change, namely *time* – that is, as an intellectual abstraction and not in any practical sense. After discussing the fairly non-contentious notion of the impossibility of there being a definable ‘instant’ of time and the equally elusive concepts of ‘before’ and ‘after’ in his seminal work *Being and Nothingness*, Sartre observes:

There remains the possibility that this relation before-and-after can exist only for a witness who establishes it. The difficulty is that if this witness can be simultaneously in A and in B, it is because he himself is temporal, and the problem will be raised anew for him. Or rather, on the contrary, he can transcend time by a gift of temporal ubiquity which is equivalent to non-temporality. This is the solution at which both Descartes and Kant stopped. For them temporal unity, at the heart of which is revealed the synthetic before-after, is conferred on the multiplicity of instants by a being who himself escapes temporality. Both of them start from a presupposition of a time which would be a form of division and which itself dissolves in pure multiplicity. Since the unity of time cannot be furnished by time itself, both philosophers put an extra-temporal being in charge of it: God and his continuous creation with Descartes (the “I think” (Ich denke) and its forms of synthetic unity with Kant. For Descartes, time is unified by its material content, which is maintained in existence by a perpetual ex nihilo; for Kant, on the other hand, the concepts of pure understanding apply to the very form of time. In both cases, it is a temporal (“God” or “I”) which is charged with providing the non-temporals (instants).  

Such conceptions of time are incompatible with the evolutionary ideas of *universal flux* and *historicism* for which, as has been noted in Chapter 1, time flows constantly and along a continuum bound up with the changing being under investigation and its embeddedness in the world. Kant’s categorical imperative is in an ideal realm and not of this world. It is not to be found in the flow of time as is the case with things-in-the-world. What you will to be a maxim today should hold good for tomorrow (as it should have for yesterday). Categorical imperatives do not change with time’s flow so are effectively *outside* of time. Descartes’ timeless thinking self is the same as it ever was and ever will be – it knows that *it* just is, existing in some ideal realm whereas the existence of time like everything else that is ‘in-the-world’, cannot (unlike the thinking self) be proven to exist, so is not the subject of Descartes’ epistemological enquiry. Time, change and evolution (the nature and study of change) do not belong in these intellectual schemes, nor in the ideal construct of the perfectly rational autonomous individual whose view is by necessity not just from nowhere but also from no-*when*.

The construction of a civil legal code all apiece is also driven by a similar sentiment based on *rationalist idealism* as if history did not matter and all can be worked out

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from first principles. As will be discussed in the next Chapter, Savigny was a jurist who embodied an attitude counter to this legal rationalism, employing evolutionary ideas to do so.

The notion of final cause teleology (as precursor to path dependence) was an evolutionary idea that gained traction in the Rationalist phase of the Renaissance as the religious eschatology of the Middle Ages came to be replaced by the secular notion of progress. This idea was borne out by the optimism of an age that had emerged from the strictures of religious dogma. Hans Kelsen describes this optimism in his posthumously published book bearing the somewhat lengthy title Secular Religion: a Polemic Against the Misinterpretation of Modern Social Philosophy, Science, and Politics as ‘New Religions’:

The development of modern science is the result of its emancipation from religion and theology. This emancipation is particularly important to social science and especially to historical science, for in these areas of thought theology serves definite political interests, and submission to it is incompatible with an objective science of society and history. If any criterion distinguishes modern times from the Middle Ages it is - in Western civilization – the existence of objective and independent science. A retrogression of science to metaphysics and theology means the return to the spirit of the Middle Ages. The literature against which this book is written seriously endangers the existence of an objective and independent science and therefore the spirit of modern times.182

As the reader will have gathered from the title of Kelsen’s book and the last sentence of the above passage, science itself was to become subject to the charge of being a ‘secular religion’ at the time of the Enlightenment. According to the writers whom Kelsen attacks, the Aristotelian final cause teleology that was incorporated into religion in the Middle Ages as eschatology (or ‘the eschaton’), was replaced in Enlightenment secular thinking with an equally ‘religious’ counterpart, namely progress. Ian Stewart describes this charge which is made by Eric Voegelin, one of the most prominent of Kelsen’s targets, and Kelsen’s response to him, as follows:

For Voegelin, then, ‘Enlightened’ outlooks are ‘secular religions’ because they attempt to ‘secularise’ the eschaton. They too envisage progress toward a final stage of humanity - only immanently, ie in merely material terms. What is transcendent, and most of all the eschaton, is surreptitiously reproduced within the immanent. Voegelin endeavours to identify such reproduction in both likely and highly unlikely quarters - most prominently Hobbes, Hume, Kant,

182 Hereafter, SR: published in 2012 by Springer Verlag for the Hans KelsenInstitut (which holds most of Kelsen's papers and maintains a free online database of works by and on Kelsen); edited by Robert Walter (a founding Director of the Institut, who died in 2010), Clemens labloner (one of the current Directors) and Klaus Zeleny (Secretary of the Institut), 4 cited in Ian Stewart, ‘Kelsen, the Enlightenment and Modern Premodernists’ (2012) 37 Australian Journal of Legal Philosophy 251, 253.
Saint Simon, Proudhon, Comte, Marx and Nietzsche… Comte and Marx, Kelsen observes, are
certainly materialists and do envisage progress toward a better state of society. But their
anticipations, he insists, do not involve religious salvation or retribution, nor the 'soul' or moral
judgement. Nor do they involve finality, but rather - and especially for Marx - an indefinite
continuation of society in a different, albeit preferable, form. The eschaton is an 'irruption of the
supernatural into empirical reality' whereas, in science, any prediction of a future state is an
observation in terms of causal law. According to enlightened doctrine, the future state of
mankind, the result of progress, is not to be brought about by divine interference or by any kind
of suprahuman power, but by man himself, by his own will directed by his own reason. Progress
is not a supernatural, but a natural process. It takes place exclusively in this world, without any
end of it being predicted. Unlike the eschaton, this does not involve ideas of salvation or
retribution. In sum, Kelsen says: 'A "secularized" eschatology is the negation of eschatology.'

Although it is beyond the scope of this thesis to analyse in depth and provide considered
comment on the views of Kelsen or the writers he critiques on whether science and its
idea of progress is a secular religion, it is clear from Kelsen’s comments above that his
view is a teleological one, albeit not a view informed by religious supernatural forces.
However, although this is teleology in only a weak sense that it is not end-directed and
inevitable beyond the power of the individual, it certainly favours the view that there
is a tendency towards a ‘better’ state (by use of the word ‘progress’) through the use of
science and individual effort. A more cautious appraisal than Kelsen’s would be that
society’s path dependence (an alternative, less ‘committed’ term to final cause teleology as was discussed in Chapter 1) is towards more ‘complexity’ rather than
material progress, as ‘progress’ is a value-laden unscientific term freely used by Rationalists. Although not informed by supernatural forces, the term ‘progress’,
without more, is still nonetheless informed by a form of secular idealism which is just
as other-worldly and strange as religious supernatural forces.

Kelsen, of course, was not a man of the Enlightenment; he was a man of the twentieth
century. However, it is submitted that his form of rationalism is a vestige of
Renaissance Rationalism, which is partly shown by his attitude towards secular
progress discussed above, and even more so by his highly ambitious project of putting
legal theory on a completely scientific footing with his pure theory of law. It will be
submitted that although legal theory owes much to Hans Kelsen, it is generally agreed
that, much like Auguste Comte before him in the social sciences (discussed in the next
Chapter), his enterprise was doomed. Of course, just as sociology still owes much to
Comte (of which he is its ‘father’), legal theory owes much to Kelsen due to his

of Legal Philosophy 251, 255-6.
rigorous analytical techniques. However, it will be argued in the following Chapter that in both these men’s methodologies there is virtually no serious employment of ideas about evolution – about past trends, about change, about studying the process and its components such as those discussed in this thesis. As will be discussed, some branches of science matured, some did not – those that did realised that in areas such as the social sciences a different methodology was required, an interpretative approach that would employ rather than reject ideas about evolution. Also to be discussed (in Chapter 9) is how more recently, the same realisation has dawned on legal theory, this realisation perhaps being delayed by brilliant minds such as Kelsen’s promising the impossible, and of course failing to deliver on that, but nevertheless leaving some valuable tools behind to make a scientific approach nonetheless possible in legal theory (albeit with an emphasis on ideas about evolution which Kelsen rejected).

4.2 The Ascendancy of the State

Although the Ancient world experienced a number of different models of secular statehood, from aristocratic Athenian autocracy to Athenian democracy in Ancient Greece and from republicanism to imperialism in ancient Rome, statehood was limited in the Middle Ages with the ascendancy of papal authority and the concentration of power in the hands of one individual purportedly divinely sanctioned.

Nevertheless, following the Reformation and during the early stages of the Renaissance, a certain model of statehood was proposed by Niccolo Machiavelli that could not have been more dramatic in its refutation of the Church as the ruling head of state.

Niccolo Machiavelli (1469-1527CE)

The subject of separation of powers, church, executive, legislature and judiciary and its role in the evolving idea of statehood is touched on later in this thesis, but here will be discussed the emergence (or re-emergence if one looks back to the ancient world) of the state as a secular entity. And nothing more secular had ever been proposed than Machiavelli’s state model recommended to the Medici dictatorship’s recently
One should not get the impression that Machiavelli saw the role of religion as totally redundant in his scheme; on the contrary, he saw it as very useful to achieve one’s ends in managing and administering a state or as ‘social cement.’

Even though Machiavelli has become a byword for the type of means-justifying-the-ends strategies he sets out in *The Prince*, it would be unfair to him not to acknowledge other contributions he made to political philosophy, particularly his less sensational but perhaps more considered work *The Discourses*. Indeed, Russell pays Machiavelli the ultimate compliment by suggesting the seeds of the idea of liberty and checks and balances that informs modern democracies can be found in *The Discourses*, not just in classical antiquity as is usually thought. As Russell notes:

> The tone of the Discourses, which is nominally a commentary on Livy, is very different. There are whole chapters which seem almost as if they had been written by Montesquieu; most of the book could have been read with approval by an eighteenth century liberal. The doctrine of checks and balances is set forth explicitly. Princes, nobles, and people should have a part in the Constitution; ‘then these three powers will keep each other reciprocally in check.’

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185 *The Prince* was first circulated in 1513.
186 Kelly, above n75, 172.
187 Russell, above n20, 467.
188 *The Discourses*, written in 1517 was published in 1531.
189 Russell, above n20, 468.
190 Russell also suggests ‘It is interesting to observe how the political thought of the Greeks and Romans, in their republican days, acquired an actuality in the fifteenth century which it had not had in Greece since Alexander or in Rome since Augustus. The Neo-platonists, the Arabs, and the Schoolmen took a passionate interest in the metaphysics of Plato and Aristotle, but none at all in their political writings, because the political systems of the age of the City States had completely disappeared. The growth of City States in Italy synchronised with the revival of learning, and … for humanists to profit by the political theories of republican Greeks and Romans. The love of ‘liberty’, and the theory of checks and balances, came to the Renaissance from antiquity, and to modern times largely from the Renaissance, though also directly from antiquity. This aspect of Machiavelli is at least important as the more famous ‘immoral’ doctrines of *The Prince*: ibid 469.
However, the above compliment is not intended by Russell to diminish the implications and influence of Machiavelli’s advice in *The Prince*, noting this advice is really about means to achieving the ends of political success being chosen only for their effectiveness, without regard to the goodness or badness of the ends\textsuperscript{191} and that:

Machiavelli’s political thinking, like that of most of the ancients, is in one respect somewhat shallow. He is occupied with great lawgivers, such as Lycurgus and Solon, who are supposed to create a community all in one piece, with little regard to what has gone before. The conception of a community as an organic growth, which the statesman can only affect to a limited extent, is in the main modern, and has been greatly supplemented by the theory of evolution. This conception is not to be found in Machiavelli any more than Plato.\textsuperscript{192}

This approach which Russell ascribes to Machiavelli of failing to consider what has gone before – a virtual disregard for the idea of evolution in statehood and political theory - is also evident in other political thinkers following the Renaissance in the 17th and 18th Century and is in keeping with the Rationalist spirit of the Renaissance. The organic conception of which Russell speaks in the above passage can be found in the later Romantic political thinking which was effectively a counter reaction to Rationalist political models. Both Rationalist and Romantic political thinking will be discussed throughout the rest of this Chapter as well as their tendency to be evolutionist (or not) and the resultant impact on legal theory. Rationalist political thinking is arguably best exemplified by the social contract theories of Hobbes and Locke, and Romantic political theory by Rousseau’s social contract theory and Hegel’s organic notions of State (which will also be discussed further in the next Chapter).

4.3 The Social Contract Theorists

Social contract theory begins in earnest with the familiar trio Hobbes, Locke and Rousseau in the 17th and 18th centuries. However, the concept of a state being formed by some sort of accord of its citizens had been posited in express terms long before then and even before Hobbes, Locke and Rousseau. Kelly notes there were a number of social contract theorists in the Middle Ages from whom later social contract theorists took their cue.\textsuperscript{193}

\textsuperscript{191} Ibid.
\textsuperscript{192} Ibid 471.
\textsuperscript{193}Kelly above n75, 169-71. Here, Kelly charts these early social contract theories in some detail before describing them as ones which:

[take] up again the theme first made explicit at the end of the eleventh century by Manegold of Lautenbach, namely, the foundation of temporal government in some sort of agreement. In the late fourteenth century John Wycliffe ascribed the
Speaking of these early social contract theories, Kelly notes:

[S]ocial contract theory did not accord with other ancient perceptions. It could, indeed, be got into harmony with Aristotle’s (and Aquinas’s) human being tending by his nature to civic existence by saying that, while man’s instinct was political, it found realisation by the mechanism of contract. But it was quite at odds with a theocratic view of government, one which saw kings as divinely appointed, and their subjects as divinely commanded to obey them, in other words that which held government to be of God rather than human contrivance.  

Kelly describes these embryonic social contract theories as democratic and people-centred and, coming mainly from Germanic traditions, they were also occasionally evident in the Graeco-Roman world (i.e. in republican Rome and pre-Alexandrian Greece). Moreover, he asserts that they fall into two categories: one that later German theorists would refer to as ‘contracts of union’ where individuals previously unconnected by any civic tie come together to form a society and ‘contracts of subjection’ where an additional element is added with a ruler or ruling body being constituted to which the members of society subject themselves to the ruler or ruling body for protection.  

Furthermore, at the time of these early social contract theories, theocratic government was often the prevailing form of government and these theories were unlikely to become a reality, much less an actual basis for government. It was predominantly in the seventeenth century, and in England in particular, that social contract theory was

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introduction of civil government (civile dominium) to what he called the ritus gentium (which seems to mean the usage of all nations), and in coercive power to custom and agreement backed by the rational approval of the people… In the earlier fifteenth, the German cardinal Nicholas of Cusa… was a supporter of the conciliar movement, he attributes the institution ultimately indeed to God, but brought proximately into operation by an ‘elective accord of spontaneous submission’; all authority arises only from the agreement and common consent of the subject……A few decades later, about 1477, the Dutch cleric Wessel of Groningen writes that the subject’s duty of obedience to the ruler is not absolute, but more in the nature of a contractual obligation to him… At around the same date, English lawyer Sir John Fortescue in his Governance of England imagined an originally wild condition of mankind; from which however, when manners softened and virtue increased, ‘great communities’ arose, ‘willing to be united and made a body politic called a Kingdom and leaving a head to govern it’; they chose a king, in process he called an ‘incorporation and institution of uniting themselves into a kingdom’. In the early sixteenth century, the Italian Marius Salamonius visualised the state (civitas) as a kind of civil partnership… which comes into being through mutual agreements… ‘In Spain, the sixteenth century saw late flowering of scholastic thought in the work of several jurist-clerics … These, too, present the state as the product of a mutual agreement to confer power on a ruler. Francisco de Vitoria (c.1485-1546), the earliest of them, is close to Aristotle and St Thomas in presenting the state not as a consequence of a human act of will, but as a natural growth founded on man’s instinct to associate… Luis de Molina (1535-1600), on the other hand, while acknowledging the divine origin of the state’s power, wrote that men came together of their own free will to form the state; and although they did not create its power themselves, the voluntary union was a necessary condition without which it could not materialise. Francisco de Suarez (1548-1617) also saw the act of association as conscious rather than merely instinctual: men by common consent, he wrote, came together into a body politic for mutual aid towards a single political end, and with common governance… In England in 1594, the Anglican Richard Hooker published his Laws of Ecclesiastical Polity… in which, again, a contractarian rather than a natural-instinct basis is ascribed to the state.

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194 Ibid 209.
195 Ibid
advanced to address issues of constitutional conflict – a century that produced social contract theory’s most famous proponents: Thomas Hobbes and John Locke.196

**Thomas Hobbes (1588-1679CE)**

In the seventeenth century, the ‘contract of subjection’ theme referred to by Kelly above is fully realised in Hobbes’ social contract theory. As we have seen, social contract theories were not entirely new, having a pedigree going back to antiquity (e.g. Epicurus’s/Lucretius’s social contract theory previously discussed) and there were social contract theories in the Middle Ages as noted above. However, Hobbes is credited with offering the first completely worked up theory of the supposed basis of the state and motives underpinning it197 or as the first philosopher to derive ruler legitimacy, not from God’s authority, but directly from a covenant between citizens.198

Hobbes conjectured about humankind’s original state of nature as the supposed basis for his model of society, namely:

[a] state of war, a war of every man against every man in which there is no industry, agriculture, commerce, no knowledge of the face of the earth; no account of time; no arts; no letters; no society; and, which is worst of all, continual fear of danger of violent death; and the life of man solitary, poor, nasty, brutish and short.199

This oft-quoted phrase from Hobbes’s *Leviathan*, is not always clearly understood. Anthony Kenny suggests that Hobbes is not saying here that people in their natural state are inherently wicked or flawed (the *original sin* thesis) but rather, in the absence of laws, there can be no sin, and in the absence of a sovereign, no law,200 or as Hobbes himself said in another of his oft-quoted phrases:

Where there is no common power, there is no law; where no law, no injustice. Force and fraud are in war two cardinal virtues.201

On what does Hobbes base his state of nature thesis? No empirical evidence is offered up for this in *Leviathan* (or anywhere else) despite the fact that Hobbes is credited as being a thorough-going empiricist in his time.202 Is this mere armchair theorising?

196 Ibid 208
197 Ibid 212
198 Anthony Kenny *A New History of Western Philosophy* (Oxford University Press 2010) 716
200 Kenny, above n198, 713.
201 Hobbes, above n199, 85.
202 Russell, above n20, 501.
Russell suggests that this state of nature is not posited by Hobbes as an actual historical event but rather an explanatory myth to say why people do and should submit to limitations on their personal freedom which is entailed by their submission to authority.203

Nevertheless, Kelly suggests that Hobbes’ starting point for the original state of nature portrays a potent psychological human trait: that is, fear and a yearning for the protection of a strong ruler. Not surprisingly, with such limited aspirations, what is called for is a state that protects rather than one which nourishes and allows human flourishing - the ruler effectively has unbridled power with only one obligation: to protect or provide security.204 In return, complete submission of subjects is expected in Hobbes’ model, but at a price. As Kelly explains:

In general, Hobbes’s Leviathan came to afford a plausible model of absolute government, a type of which later ages, into our own time, were able to show all too many examples: dictatorships for which, at any rate according to modern Western notions about the minimum civil rights of the individual nothing could be said except that they provided a sort of peace, a sort of security, even if an arbitrary police power and the prison camp were its modes.205

Hobbes’s model is a secular form of autocracy, as opposed to previous autocracies usually being established by divine sanction in the form of monarchs or popes. According to Kelly:

Hobbes makes a perfunctory reference to God as the superior of the mortal ruler, but essentially his state is the utilitarian invention of man consciously devising for himself a structure which affords him protection. ‘From his political and legal theory’, wrote Friedman, ‘emerges modern man, self-centred, individualistic, materialistic, irreligious, in pursuit of organised power.’206 207

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203 Ibid 505.
204 Kelly, above n75, 215.
205 Ibid 214.
206 Ibid 213. The reference to Friedman’s quote is from Wolfgang Friedman, Legal Theory (Columbia University Press; 5th ed., 1967) 122.
207 We have already noted earlier contracts of subjection in western history than Hobbes’, but perhaps one of the most well-known secular contracts of subjection that long pre-dates Hobbes, is actually to be found in Biblical history in 1 Samuel, Chapter 8 and 9. In Chapter 8, a king (Saul) is appointed to rule over the Israelites, but this is at the request of the Israelites rather than automatic divine sanction of a ruler and his offspring (as had been the case with Saul’s ‘predecessors’ Moses, Joshua and the ‘Judges’ previously appointed by God, the last judge being Samuel). This was because the Israelites were not happy for Samuel’s sons to become the new rulers or ‘Judges’. In Chapter 9, Saul is anointed king of Israel once the Lord had pointed out to Samuel the anointed one who is to be his successor. God, as before, directly appoints a ruler over the Israelites but this is different to the previous appointments of rulers as this time the Israelite people (or rather the male elders in a manner not unlike the democratic meetings of men in Ancient Athens) have requested ‘a king to rule over them’. The fact that God allegedly points out to Samuel the future monarch is a way to provide some legitimacy to the appointment of this future ruler but the source of the new king’s authority ultimately derives from the Israelite people, making a covenant among themselves in the fashion of a popular vote to elect a government. The entire episode resembles a transition from an absolute monarchy to a crude prototype.
Hobbes’ legal theory was informed by the Rationalist Enlightenment tradition of reason. It is arguable that there is a mixture of natural law and legal positivism in his legal theory. For Hobbes, laws should accord with man’s reason; they are not merely something that are posited by the state in vain. However, at the same time, laws now become a creation of the state and must be followed, but are nevertheless imbued with a purpose, to underpin the model of statehood proposed. Being a contract of subjection, subjects willingly submit to laws promulgated in Hobbes’ scheme, but not all laws as a command theory legal positivist would maintain, since laws that no longer serve the function of the state as protector are not ‘good’ laws. If one were trying to place Hobbes on a spectrum of natural law at one end and legal positivism at the other, he would almost certainly be at the legal positivism end, but in company with ‘soft’ positivists such as Hart who maintain that ‘bad’ laws are still laws but not to be obeyed, or that there should be a minimum content of morality in laws (in the case of Hobbes, the right to self-preservation). Murphy has even suggested Hobbes’ legal theory is more akin to the natural law of Aquinas than the legal positivism of Austin. As he explains:

Although Hobbes's account of goods differs radically from Aquinas's, the structure of Hobbes's natural law is quite similar to Aquinas's. Consider the following question: How would Aquinas have proceeded in giving an account of natural law if self-preservation were the good that trumped all others? Clearly, the primary precept of that system of laws would be that self-preservation is to be sought; any secondary precepts would prescribe actions that are instrumentally valuable toward the attaining of the goal of self-preservation. And this is the kind of account we find in Leviathan: "A LAW OF NATURE, (Lex Naturalis,) is a Precept, or generall (sic) Rule, found out by Reason, by which a man is forbidden to do, that which is destructive of his life, or taketh away the means of preserving the same; and to omit, that, by which he thinketh it may be best preserved."208

Returning to the two types of social contract identified by Kelly, ‘contracts of subjection’ and ‘contracts of union’, while it has been seen that Hobbes’s theory is a classic contract of subjection, Locke’s theory, while certainly exhibiting those elements, can also be described in spirit as also very much a contract of union.

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John Locke (1632-1704CE)

Whereas Thomas Hobbes wrote *Leviathan* in 1651 during Cromwell’s ascension to power following the beheading of Charles I and was considered by some as a form of flattery of Cromwell’s military dictatorship, Locke’s theory of state, on the other hand, was concerned with a very different political program providing the philosophical underpinnings for the *Glorious Revolution* of 1688 that ended the Stuart dynasty (a dynasty which favoured the view of the divine right of kings). This established a new settlement based on a contract between ruler and ruled (a contract of union – unlike a contract of subjection where the ruler is not party to such a contract) and which had a quasi-constitutional basis. Thus, the constitutional monarchy model underpinned by parliamentary sovereignty and government under law was born.

Like Hobbes, Locke’s model of society was based on humankind in a supposed original state of nature, but Kelly suggests that Locke’s state of nature more resembled Pufendorf’s than Hobbes’s, and that man ‘Living subject to the law of nature, which was accessible to him through his reason, he was bound not to injure the life, liberty or property of others, and conversely might, in pre-civil society, avenge for himself any encroachments on his own rights in those areas.’

But was such theorising about humankind in a state of nature anything new? Russell suggests Locke’s ‘state of nature’ and ‘law of nature’ in the main is not original but a repetition of medieval scholastic doctrines and that:

The view of the state of nature of natural law which Locke accepted from his predecessors cannot be freed from its theological basis; where it survives without this, as in much modern liberalism, it is destitute of clear logical foundation. The belief in a happy ‘state of nature’ is derived partly from the biblical narrative of the age of the patriarchs, partly from the classical myth of the golden age. The general belief in the badness of the remote past only came with the doctrine of evolution.

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209 Kelly, above n75, 212.
211 ‘[S]amuel Pufendorf (1632-94), professor of law at Heidelberg and afterwards at Lund in Sweden, the most highly regarded German jurist of his time [rejected] the idea that man’s original disposition is savage, and his condition one of war with all his neighbours, [and] visualised humans, in the moment before the formation of a political society, as having (much as Aristotle had said) a natural tendency to associate, and as understanding that the law of nature forbade them to injure one another’. Kelly above n75, 214-215.
212 Ibid 216.
213 Russell, above n20, 568.
214 Ibid 569. What is interesting to note in this passage is the suggestion to the effect that the ‘doctrine’ of evolution ended notions of an idealised past in western thinking. This will be discussed in Chapter 7.
Although Locke’s original state of nature may indeed have had a theological basis, it is submitted that an important difference in Locke’s conception to that of his religious predecessors was that man is a ‘blank slate’ rather than a preordained sinner, so this lack of negative inevitability puts a more optimistic face on Locke’s state of nature.

Indeed, Locke’s notion of rights being ‘independent of, and antecedent to, the state’\(^{215}\) comes from his belief that these rights are ‘God-given and inalienable.’\(^{216}\) It is no secret that he is not entirely secular in his views – only in his refutation of the *original sin* and *predestination* doctrines – he shares the Enlightenment view that a person is born a blank slate and his or her future is what he or she makes of it, but credits God with our natural abilities, talents and rights. Moreover, as noted above, his view that rights come before the law make unequivocal his stance on natural law. Although Locke had not really stumbled upon anything new in preferring natural rights in a model of society, his influence has been undeniable. As Kenny explains:

> Locke’s system is not original and is not consistent, as many critics were to later point out. It combines uneasily elements from medieval theories of natural law and post-Renaissance theories of voluntary confederation. Nonetheless, it was very influential, and its influence continued among people who had ceased to believe in theories of the state of nature and the natural law that underpinned them. The Founding Fathers of the United States drew heavily on [Locke’s] Second Treatise to argue that King George III, no less than the Stuart monarchs, had by arbitrary government and unrepresented taxation, forfeited his claim to rule and made himself the enemy of his American subjects.\(^{217}\)

However, actual laws that have been inspired by Locke such as the US Constitution have not always reflected, in their interpretation and application, Locke’s natural law ethos as there have been periods in its history when the US Supreme Court have chosen to decide that rights under the Constitution are alienable as opposed to being inalienable as Locke would have had it.\(^{218}\) Thus, while Locke’s social contract theoretically is imbued with natural law, in practice that is not always the case. By contrast, Hobbes’s social contract model does not even appear to theoretically, much less practically, aspire to transcendental higher law. As Kelly notes:

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\(^{215}\) Zimmermann, above n150, 31.

\(^{216}\) Ibid.

\(^{217}\) Kenny, above n198, 720.

Hobbes’s system…was free of any trace of any higher law; the ‘natural law’ which features in his Leviathan is not a transcendental ethical standard; on the contrary, it is simply the body of prudential maxims suggested by the observation of, and the desire to improve, the bestial condition of man in in the original state of nature which Hobbes supposed for him.219

Nevertheless, as was submitted above, at least a minimum content of natural law appears to inhere in Hobbes’ legal theory in that blind obedience to the state is not what Hobbes envisaged notwithstanding the emphasis on subjection to state rule. For Hobbes, subjection is not to be in vain – it has a purpose, namely the protection of the state, and if this is not forthcoming obedience is brought into question. At the end of the day, however, no matter how eloquently one might argue that there is some natural law to be found in Hobbes’s scheme, its practical enforcement would be all but non-existent in a society constructed along purely Hobbesian lines, since someone with that much power vested in them is unlikely to take much notice of dissenters.220

Another (and perhaps the most important) feature of Locke’s scheme respecting of individual rights that is lacking in Hobbes’s scheme is that while the latter does not entail a contract between subjects and ruler but only between the subjects themselves (giving the ruler unlimited authority, justifying a Cromwellian totalitarian state), in Locke’s doctrine, the government is a party to the social contract, and can be justly resisted if it fails to fulfil its part of the bargain.221 Of course, we see this play out with popular elections and democratically elected governments – a ruler or ruling party who has overstepped the mark in Locke’s model can be removed, but there is no mechanism for that in Hobbes’ scheme, short of a coup or some violent means as has been the chosen (and often only) method of ending the reign of undesirable dictators and absolute monarchs.

Both Hobbes and Locke were influenced by the scientific mood of their age and this is evident in their optimism (i.e. the rationalist’s creed of progress as noted above) and reflected in their approach to constructing their respective political models. Indeed, Locke’s model of society was an exemplar of the Rationalist approach, appealing to

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219 Kelly, above n75, 224.
220 One might argue that even in Nazi Germany, Jewish citizens could have argued along Hobbesian lines that their threat to their right to self-preservation and security would mean that the ruler had lost their legitimacy and should be deposed. It is highly doubtful if anyone actually ran such an argument at the time against the Nazi regime but one can be fairly certain as to how such argument would have been received.
221 Russell, above n20, 573.
reason in a vacuum as if nothing had gone before. Lois Schwoerer notes that Locke’s theoretical body of work was:

[c]ast in the non-historical idiom of reason and natural rights. Even as a young scholar, Locke had specifically rejected using history, remarking that "nearest examples have the greatest influence" in persuasive argument.222

However, the temper of the times was to change in the eighteenth century, with the Romantic era, which was a backlash to the overly rationalistic approach that the rise of the sciences had inspired. The rest of this Chapter will discuss two figures who exemplified the ‘Romantic Era’ and who took a different view of the state than Hobbes and Locke had - a view which did not ignore ideas of evolution and which proved to be a launching pad for these ideas in later western political, social and legal theory. These two figures were Jacques Jean Rousseau and Georg Hegel to whom we now turn.

4.4 The Romantic Era

Rousseau (1712-1778)

To understand Rousseau, one has to understand the Enlightenment of which he was to become a counterpoint. Kelly describes the phenomenon of the Enlightenment thus:

[The Enlightenment] was a shared mood or temper, an attitude to the world in which the dominant note was one of profound scepticism towards traditional systems of authority and orthodoxy (especially those of religion), and a strong faith in the power of human reason and intelligence to make unlimited advances in the sciences and techniques conducive to human welfare… the ultimate ancestry of the Enlightenment must be traced from ….: the Renaissance, the Reformation, the scientific revolution in the era of Bacon, Galileo, and Newton, the empirical philosophy of Locke and Descartes, all were steps on the way to it.223

As we have seen, Hobbes’s and Locke’s political models would appear to tick all the above boxes: a refutation of traditional religious orthodoxy and a strong faith in the power of human reason and intelligence to advance human welfare. However, not everyone was of this mind at this time. Kelly describes an important parallel school of thought that was unfolding around this time, Romanticism, and its principal founder Rousseau who he says:

223 Kelly, above n75, 250.
[was] the first important rebel against the formalised, classicizing, and (as it was easy to represent it) somewhat dehumanized conventions of manners, of art, and of literature which we associate with the pre-revolutionary eighteenth century world; the periwig, the minuet, the alexandrine couplet, the endless recycling of themes from Greek and Roman antiquity. In enthroning in their place ‘nature’ and ‘feeling’ – by which he meant what was fresh, wild, primitive, spontaneous, not amenable to mere rational appraisal, in everything from manners to landscapes – he inaugurated a whole aesthetic movement, not even now extinct, which a latter age called Romantic. He struck a chord on the frontiers of the emotion and the intellect; the preference, which he made fashionable, for what had grown free-range rather than under cultivation, for the spontaneous rather than the artificial, lent a sort of authority to whatever had a quality of the pristine and the unforced and the original; but incidentally, too, tended to exempt what could be passionately felt, and passionately expressed, from the scrutiny of reason.224

Kelly notes, unlike Hobbes and Locke, Rousseau’s theory had its justification not just in ‘a bargain to exchange simple submission for simple protection’ based on a ‘limited and revocable trust’, but rather something ‘more worrying’, namely a ‘quasi-chemical effect’ so the individual does not submit their autonomy to a personal sovereign nor a determinate assembly but to a ‘mysterious construct called the ‘general will.’’225

In the hands of a dictator, the concept of ‘general will’ becomes a powerful means for facilitating abuse. As Kenny explains:

It is precisely the difficulty of determining what the general will prescribes that made the notion of the general will such a powerful tool in the hands of demagogues. Robespierre at the height of the French revolutionary terror could claim that he was expressing the general will, and forcing citizens to be free. Who was in a position to contradict him? The conditions Rousseau had laid down for the general will’s expression were that every citizen should be fully informed and that no two citizens should be allowed to combine with each other. The first condition could never be fulfilled outside a community of gods, and the second condition of its nature demands a total tyranny of force.226

Nevertheless, a more nuanced understanding of Rousseau’s notion of ‘general will’ as something that follows a moral tradition rather than a pure abstraction, might lead one to a different conclusion. As Patrick Riley explains:

One could, of course, arrive at an adequate understanding of volonte generale and particuliere without knowing anything of the history of those notions in Pascal, Malebranche, Leibniz, and Montesqueieu. And yet it seems clear that if one knows this history one may avoid making certain claims about Rousseau which one would not make if one were more fully informed. Thus a recent interpreter of Rousseau holds that "as a term Rousseau's general will can obscure his non-individualist meaning, for the word will suggests the natural ego of a deliberative individual."

But one would be less likely to make this claim if one saw that Rousseau belongs firmly to a moral tradition in which will is essential ("to deprive your will of all freedom is to deprive your actions of all morality"), and in which "generalizing" will does not necessarily produce "nonindividualism."227

224 Ibid 253.
225 Ibid 257.
226 Kenny, above n198, 724.
The reason why Rousseau is placed in the company of other contractarians such as Hobbes and Locke is his prescription of a political procedure combined with personal autonomy to describe a model of society and inform their notions of justice. However, what distinguishes Rousseau from the likes of Hobbes and Locke were his genuine reservations about the efficacy of a political procedure that took individuals for rational beings without a history when a study of history is necessary to divine the general will, the main currency of Rousseau’s social contract. As we have seen, history for Hobbes and Locke mattered nought in espousing their social contact theories. This is not to say that Hobbes’ and Locke’s visions were ‘outdated’ and had been superseded by Rousseau’s social contract theory– they were just different, the former having born of the purely Rationalist tradition. Indeed, it is often the case that the theories of modern day contractarians bear more resemblance to those of Hobbes and Locke than Rousseau.

Rousseau saw that it was necessary to take history into account in prescribing a model for society – autonomous citizens do not appear in a vacuum as their existence presupposes institutional arrangements that are rightly ordered, but such institutional arrangements presuppose autonomous individuals capable of constructing them. This was recognised by Rousseau but not by social contractarians in the Rationalist tradition.

We have seen that Hobbes’ legal theory has been charged with being positivist but at the same time perhaps having a minimum content of natural law, and we have seen that Locke is celebrated for his natural law stance, having always believed in transcendent natural human rights to inform his model of society. Was Rousseau a positivist, given his conception of the general will, when will is usually associated with command theory legal positivism? Many distinguished scholars have argued Rousseau was a positivist, however, David Williams has argued the opposite and maintains Rousseau believed a form of natural justice informed the general will. As he explains:

Rousseau says little explicitly about Justice. T. K. Seung correctly notes that Rousseau never gave “an ontological account of moral principles and the general will.” Yet if we read closely enough, there are enough pieces of a metaphysical puzzle to put one together. The most important

228 As Hobbes and Locke’s theories are based on a supposed ‘ahistorical’ rational autonomous being as arguably John Rawls ‘veil of ignorance’ model of society is.
229 This creates a ‘chicken or the egg’ argument – which came first rational citizens or rational society?
ontological feature of such a concept is whether or not it is transcendent. "What is good and conformable to order is so by the nature of things and independently of human conventions.... No doubt there is a universal justice emanating from reason alone." That Justice might be something other than conventional is confirmed by many passages including his obvious passionate and heartfelt reactions to injustice—for example, "My moral being would have to be annihilated for me to lose interest in justice. The sight of injustice and wickedness still makes my blood boil with anger." Rousseau says elsewhere that the principles of right and wrong are "engraved in the human heart in indelible characters." In the Lettres Morales he tells us, "[T]here is, at the bottom of all souls, an innate principle of justice and of moral truth [which is] prior to all national prejudices, to all maxims of education."230

While Rousseau was cognisant of history in his view of society, politics and law, he did not engage in any systematic study of history to inform his views to mark him out as truly evolutionary thinker. One who did and whose name has become synonymous with historicism was Georg Hegel.

**Georg Hegel (1770-1831CE)**

Rousseau influenced later thinkers with his notion of ‘general will’, most notably Hegel. As Kenny notes:

Rousseau’s notion of the general will was taken up by Kant and Hegel. Kant sought to give it a non-mythical form as a universal consensus of moral agents each legislating universal laws for themselves and for all others. Hegel transformed it into freedom of the world-spirit expressing itself in the history of mankind.231

Up to the time of Hegel in the mid-19th century, Enlightenment thinkers (with the exception of Rousseau) had viewed history and posited their social contract models as if nothing had gone before. What separated Rousseau from his predecessors such as Hobbes and Locke is that his model of society has a more evolutionary dynamic quality (albeit a mystical one as we have seen above) rather than being static. For better or worse, the mood and temper of the times of Rousseauian society’s general will is hardly likely to be static but amenable to change. The implications of this is that history must be seen as something not just disjointed and a meaningless sequence of events but something which exhibits trends as it is to these that we must look to discern society’s ever changing general will. Hegel picked up on this necessity to study historical trends to gauge the changing or evolving mood or spirit in society (‘world spirit’ or Weltgeist). He was also scathing of his Rationalist contemporaries for their analysis of reason as something static, including Kant’s, asserting that the latter had

231 Ibid.
forgotten that mankind develops, and with it our social heritage; that what we are pleased to call reason is in fact nothing but the product of this social heritage, of the historical development of the social group we live in, namely the nation.232

Conceiving of the world as if nothing had gone before was perhaps a way of ignoring a painful past as much as a matter of misguided logic. Hegel was mindful of the unpalatableness of much of history driven mainly by individual self-interest, but saw it was still necessary to study such history in order to see how it informs the present, especially considering that not all self-interest is egotistical. As Kenny explains:

There seems a vast difference, Hegel realised, between his thesis of the evolution of the spirit into ever greater freedom and self-consciousness, and the dismal spectacle presented by actual history. He accepted that nothing seemed to happen in the world except as the result of the self-interested actions of individuals; and was willing to describe history as the slaughterhouse in which the happiness of peoples, the wisdom of states, and the virtues of individuals are sacrificed. But the gloom, he maintained, is not justified; for the self-interested actions of individuals are the only means by which the ideal destiny of the world can be realised. ‘The ideal provides the warp, and human passions provide the woof, of the web of history’. Human actions are performed in social contexts, and self-interest need not be egoistic. One can find self-fulfilment in the performance of social roles: my love of my family and in my profession contribute to my happiness without being forms of selfishness. Conversely, social institutions are not a restraint on my freedom; they expand my freedom by giving a wider scope to my possibilities of actions. This is true of the family, and it is also true also of what Hegel calls ‘civil society’ – voluntary organisations such as clubs and businesses. It is true above all of the state, which provides the widest scope for freedom of action, while at the same time furthering the purposes of the world-spirit (Weltgeist).233

Although Rousseau is linked with Hegel rather than the Rationalists, Hegel was no kinder to his fellow Romantic than the Rationalists and was the first to expose Rousseau’s notion of general will as susceptible to a quality of arbitrariness on account of its tendency to be just what the prevailing mindsets are at a given time. For Rousseau, Hegel maintained, the content of this evolving general will is less important than the fact that there is simply blind consensus or ‘loyalty’. As Arthur Ripstein explains:

Hegel's point is that the arbitrary will is arbitrary because there is no rational constraint on its content. To put the point less opaque, it is arbitrary not because it cannot stand in any systematic and organizing relation to its content, but because its structure as will is independent of any particular content it might have. That means that any content it might have will be arbitrary from its point of view as will. It might just as well embrace a radically different content and still maintain its claim to rationality. Its status as will is supposed to endow its content with rationality, but cannot, because it could do the same for any content. As a result, the arbitrary will on its own cannot explain the nature of freedom or happiness. Applied to Rousseau then, the

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232 Popper, above n54, 252.
233 Kenny, above n198, 725.
argument is that the content of the general will is arbitrary in relation to the structure that is supposed to give it its claim as right. The same structure could incorporate a different content while retaining its claim, which suggests that the content is beside the point- "arbitrary" in Hegel's phrase. Although Rousseau supposes that the general will must be tied to the character of a particular people, Hegel's point is that that content remains arbitrary in relation to the structure that is supposed to explain its claim. Neither formal features of generality nor community acceptance resolve the problem of arbitrariness because each could equally well have taken any other content. To be sure, Rousseau talks at length about the specific mechanism for giving the general will its content and devotes a careful discussion to issues of which bodies should be charged with answering which questions. But this is all still structural and still depends for its content on acceptance by the citizens. Thus, from Hegel's point of view, it remains utterly arbitrary.234

Hegel’s solution to the general will being arbitrary lies in his faith in the rationality of institutions which have evolved over time to achieve their particular purpose. Or as Ripstein puts it:

The novel part of Hegel's solution focuses on necessary historical development. Hegel supposes that the only way we can see the state as the realization of freedom is to see the history leading up to it as a sort of Bildungsroman of Spirit's false starts on the road to freedom. Various other principles for the state have developed-the family in the ancient orient and civil society in Rome, to take two prominent examples. But these, we now see, are inadequate because they are incomplete. The point of Hegel's description of this development is not to show the etiology of the state in anything like causal terms, but rather to show how we can find our own substantive freedom in the development of history as a whole. The institutions with which world history ends are not simply mutually supporting (in the sense that they can all be endorsed at once); they also serve to make sense of earlier, less adequate forms of social life.235

Russell notes that Hegel from his early interest in mysticism retained a belief in the unreality of separateness,236 which seems to distinguish him from other men of his age who took a more atomistic view of things, but Hegel instead saw the whole as a complex system, like an organism.237 Although the idea of a state being like an organism was not exactly new (one only has to think of Hobbes’s *Leviathan*), Hegel’s organic notions of state were to influence later totalitarian states as will be discussed in the following chapters.

Arguably, however, Hegel’s greatest legacy on evolutionary thought was his brand of dialectic, that history unfolds as a series of opposing forces in the Weltgeist – a thesis, followed by an antithesis, which combine to form a synthesis, which then becomes a new thesis, and so on. This has become a core staple of introductory philosophy.

236 Russell, above n20, 662.
237 Ibid.
courses everywhere and, as will be discussed in the following chapters, has profoundly influenced western political, economic, social and legal theory.

Applying his particular brand of dialectic to historicism, Hegel’s dialectical historicism yielded the first systematic method of studying historical trends as has been noted above. However, it was hardly scientific even for its day, notwithstanding its pretentious-sounding name. Popper, renowned for his strident criticism of Hegel, opines:

Hegel’s fame was made by those who prefer a quick initiation into the deeper secrets of this world than the laborious technicalities of science, which after all, may only disappoint them by its lack of power to unveil all mysteries. For they soon found out that nothing could be applied with such ease to any problem whatsoever, and at the same time with such impressive (though only apparent) difficulty, and with such quick and sure and imposing success, nothing could be used as cheaply and with so little scientific training and knowledge, and nothing would give such a spectacular scientific air, as did Hegelian dialectics, the mystery method that replaced ‘barren formal logic.’

Indeed, the only compliment Popper is willing to pay to Hegel, after dismissing him as thinking up nothing new except his dialectic (which he says he borrowed heavily from Heraclitus) is essentially the idea that ‘history matters’, when he says:

I found only one idea which was important and which might be claimed to be implicit in Hegel’s philosophy. It is the idea, which leads Hegel to attack abstract rationalism and intellectualism which does not appreciate the indebtedness of reason to tradition. It is a certain awareness of the fact (which, however, Hegel forgets in his Logic) that men cannot start with a blank, creating a world of thought from nothing; but that their thoughts are, largely the product of an intellectual inheritance.

Nevertheless, although undoubtedly seriously impoverished as a sound intellectual theory in any sphere - scientific, political, philosophical or legal - Popper acknowledges the impact of Hegelianism on later times when he notes:

Hegel’s influence ….is still very powerful in moral and social philosophy in the social and political sciences ….In politics this is shown by the fact that the Marxist extreme left wing, as well as the conservative centre, and the fascist extreme right, all base their political philosophies on Hegel; the left wing replaces the war of nations which appears in Hegel’s historicist scheme by the war of classes, the extreme right replaces it with the war of races; both follow him more or less consciously.

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238 Popper, above n541, 243.
239 Ibid 271.
240 It must of course be remembered that Popper wrote the above passage in 1945 and had witnessed the rise of Nazi Germany and Soviet Russia, which were no doubt the models he had in mind for his ‘extreme right’ and ‘extreme left’ respectively. Nevertheless, from the perspective of the 21st century reader, it is submitted that this suggested bifurcation of Hegelian influence is still largely correct. As will be discussed in the next Chapter, Marx took Hegel’s theory and gave it a twist in giving rise to his
A strong indictment indeed, but if we accept it we see Hegel’s conception of the state is not new but has a pedigree going back to ancient Greece. As Popper explains:

Hegel’s radical collectivism depends on Frederick Wilhelm III, King of Prussia in the critical period during and after the French Revolution. Their doctrine is that the state is everything, and the individual nothing; for he owes everything to the state, his physical as well as his spiritual existence. This is the message of Plato, of Frederick Wilhelm’s Prussianism, and of Hegel. Hegel writes ‘The State is the Divine Idea as it exists on earth, and consider that, if it is difficult to comprehend Nature, it is infinitely harder to grasp the Essence of the State…The State is the march of God through the world.’

Hegel’s Platonism is obvious in his belief in an ideal form, in this case the ideal State. However, Hegel’s attitude towards evolution is decidedly un-platonic since he views the State as progressing, and not in a state of degeneration and decay as Plato did. Plato’s Republic, though based on an ideal society, is not the product of dialectical forces but rather a conscious attempt at centralised planning and social engineering under the auspices of a Philosopher King (were there such a man) with a view to keeping the utopia, once reached, in a state of arrested development to preserve its goodness. Hegel’s dialectical historicism on the other hand is more optimistic and Aristotelian with the State striving towards its true nature or spirit. As Popper explains:

[un]like Plato, Hegel does not teach that the trend of development of the world in flux is a descent, away from the Idea, towards decay. Like Speusippus and Aristotle, Hegel teaches that the general trend is rather towards the Idea; it is progress. In Hegel’s world, as in Heraclitus’s, everything is in flux; and the essences, originally introduced by Plato in order to obtain something stable, are not exempted. But this flux is not decay. Hegel’s historicism is optimistic. His essences and Spirits are, like Plato’s souls, self-moving; they are self-developing, or using more fashionable terms, they are ‘emerging’ and ‘self-creating’. And they propel themselves in the direction of an Aristotelian ‘final cause’, or as Hegel puts it towards a ‘self-realisimg and self-realised final cause in itself.’ This final cause or end of the development of the essences is what Hegel calls ‘The absolute Idea’ or the ‘The Idea.’

Thus, there is teleology in Hegel’s thinking, but his ‘absolute Idea’ or ‘The Idea’ is not quite the final cause that Aristotle would have in mind – rather it is something more nuanced, rather than a mere striving towards its essence, which is where the evolutionary idea of dialectical historicism comes in. As Popper explains:

We can say that Hegel’s state of flux is in a state of ‘emergent’ or ‘creative evolution’; each of its stages contains the preceding ones, from which it originates; and each stage supersedes all

celebrated theory of dialectical materialism in which the war of classes for control of the means of production stands in for Hegel’s more abstract ‘world spirit.’

241 Popper, above n54, 246.
242 Ibid 250-1.
previous stages, approaching nearer to perfection. The general law of development is thus one of progress; but… not of a simple and straightforward, but of a ‘dialectic’ progress.243

Indeed, rather than Aristotle, Hegel channels Heraclitus, believing like the latter, that war is the father and king of all things, and importantly for his theory of evolution, the dialectical process is based on Heraclitus’s two ideas of a war of opposites and a unity or identity of opposites.244

Perhaps a stronger resemblance to Plato’s scheme can be found in Hegel’s scheme in whom it purports to serve - Plato’s scheme is primarily self-serving since he was an aristocrat and the Republic preferences aristocrats. Hegel is not necessarily an aristocrat himself but his employer, Kaiser Frederick Wilhelm, was; hence, the analogy Popper draws in the passage above to Kaiser Frederick Wilhelm’s conception of the State and Plato’s. But it is probably not unfair to say Hegel, by his political choices and career, is a conservative elitist which Plato, Kaiser Frederick Wilhelm, and indeed all aristocrats by nature are. (This of course is ironic, as many radicals embrace Hegelianism as we shall see in the following chapters). If Plato is the godfather of conservative elitism, Hegel is, even if only unwittingly, its godson in the modern age.

As far as legal theory is concerned, the anti-evolutionary stance of the Rationalist phase of the Enlightenment was to lead to an analytical approach to jurisprudence. As has been noted, Kelsen’s pure theory of law is a rationalist approach to jurisprudence as was that taken by those legal positivists who regarded law atomistically, as being simply there and posited by the State.

On the other hand, following the Romantic Era of the Enlightenment and its evolutionary approach, as we shall see in the next chapter, an entirely new branch of legal theory known as historicist jurisprudence beginning with Savigny and German historicist jurisprudence as will be discussed in the next chapter. This approach to jurisprudence takes a less atomistic view of the law, as not something simply ‘there’ and posited by the State, but as a process embedded in society, co-evolving with it to further society’s purposes. This is arguably Hegel’s main legacy, who inspired German historicist jurisprudence. Also, Hegel’s well known link to process-oriented

243 Ibid 251.
244 Ibid 252.
sociological jurisprudence and Marxist thought will also be discussed in Chapter 5 and 6 respectively. In Chapter 9, we will see how a process-oriented approach to jurisprudence is employed in systems theory.

Indeed, for better or worse, as far as the idea of evolution is concerned in social, economic, political and legal theory, all roads appear to lead from Hegel as will be discussed in the following Chapters. However, before embarking on a discussion of these influences, it is worth noting that not all commentators see Hegel’s legacy as dialectical historicism and organic notions of state and precious little else.

For instance, Carl Shaw has mounted a brave defence of one of history’s most controversial if not influential figures. While he shares Popper’s view that Hegel’s contribution of dialectical historicism and attitude that ‘history matters’ have been an important legacy in Hegel’s thought as a counter to his Rationalist contemporaries who appeared to be blind to it, Shaw also suggests this approach leads to a closer examination of the evolving institutions or bureaucracies that are needed to uphold the rule of law rather than the Rationalists’ empty notions of a perfectly rational autonomous individual being likely to, and entrusted to, uphold the rule of law all by himself when history shows otherwise.245 As he explains:

Hegel’s theory of bureaucratic activity, formulated by the categories of practical philosophy, is based on his evaluation of modern civil society. The quintessence of his theory is that bureaucracy is a new means of sustaining the constitution. Put in a philosophic way, bureaucracy embodies the principle of individualization of abstract legal norms in the modern constitutional state. …Hegel's effort is more realistic and prudent than other diagnoses of the predicaments of modernity, especially the aporia of the critique-of-instrumental-reason thesis. Hegel's liberal theory of bureaucracy overcomes the traditional dichotomy of politics and administration. Its ideal, Rechtsstaat (the state based on laws) is a constitutionalist concept of politics-supremacy of the principle of the rule of law. But unlike neo- Kantian liberals, Hegel endowed liberalism with a historicist, or contextual, dimension. Based on the idea of freedom realized through history, liberal constitutionalism is a politics of immanent reform of current practices (Smith 1989c). Norms and circumstances are in an unending process of mutual adjustment because present practices are continuously modified within the framework of norms. It is politics of mediation between civil society and the state (which are relatively autonomous toward each other) through the practical judgement of state officials' handling situations in which norms are challenged or in need of new interpretations.246

245 Indeed, Popper could have added a third item to his list of Hegel’s legacies: the importance of the development of institutions and their role in supporting the rule of law.
4.5 Conclusion

The Renaissance saw a seismic change in the way the western world viewed itself, installing the supposedly perfectly rational autonomous individual centre stage in constructing models of society or secular states that would replace the papal states of the Middle Ages and challenge and ultimately overthrow the absolute monarchies that persisted thereafter to replace them with more democratic models such as a republic or a constitutional monarchy.

The rationalist phase of the Renaissance corresponded to the rise of science and saw *idealism* take on a secular rather than theocratic form in the guise of scientific and mathematical intellectual abstractions sitting outside of reality as a way of considering everything anew on first principles, bereft of a history. Hobbes’s and Locke’s social contract theories were based on such thinking but a parallel intellectual movement arose, *Romanticism*, which challenged the ideal abstraction view of the world and required society to be viewed historically and in a ‘real world’ context. Rousseau and Hegel are seen as the major exponents of this movement, particularly Hegel with his systematic approach to studying history and the forces at work within it. Thus, he single-handedly put evolutionary thinking back on the table and reinstated the evolutionary components discussed in Chapter 1, namely *historicism* and *dialectic* with his *dialectical historicism*.

The only evolutionary component discussed in Chapter 1 which had been entertained in the Rationalist phase of the Enlightenment (and which was retained in the Romantic phase) was *final cause teleology* (as precursor to *path* dependence) but as inevitable ‘progress’ unlike the eschatology before it in the Middle Ages. The anti-evolutionary rationalist phase of the Enlightenment was to later inspire an analytical approach to jurisprudence best exemplified by Kelsen. The evolutionary Romantic Era was to inspire a more process-oriented view of jurisprudence culminating in *historicist jurisprudence*, *sociological jurisprudence* and a *systems theory* approach to jurisprudence.
CHAPTER 5

GERMAN HISTORICISM, HISTORICAL JURISPRUDENCE, SOCIOLOGY AND SOCIOLOGICAL JURISPRUDENCE

5.0 Introduction

The legacy of the German Romantic movement, and in particular Hegel, significantly influenced western evolutionary thought in the fields of economic, political, social and legal theory from the 19th century onwards. On the other hand, echoes of the Rationalist Spirit of the Enlightenment could also be discerned in these fields post 19th century. This chapter discusses how romantic Hegelian ideas about evolution led to German Legal Historicism, sociology and sociological jurisprudence but also how the Rationalist spirit of the Enlightenment influenced sociology and, to a lesser extent, sociological jurisprudence.

From the 19th century onwards, there was a perceived need to pay close attention to the social context in the study of history to discern its trends and its evolution rather than view it as a mere sequence of unconnected significant events and persons – ie the usual suspects: battles and monarchs. Indeed, evolution by its very nature is a continuous process rather than a disjointed series of events, so historical studies became more historicist in their focus.

Hegel’s immediate successors were scholars of the German Historical School of the 19th century and, in legal theory, the German Legal Historicism exemplified by Carl von Savigny. Similar to the Hegelian concept of a Weltgeist (‘world spirit’), a Volksgeist (‘people spirit’ or ‘national spirit’) permeated this school’s thinking. Therefore, the idea of evolution was co-opted to discern the spirit of (German) society over time and how its laws had evolved to suit it (or were rejected if they did not).

However, in the 19th century, a competing view of society was also emerging that hearkened back to the Rationalist spirit of the Renaissance and was positivist and purported to be empirically based. This led to historical studies of society being placed on a supposedly scientific basis and its first explicit proponent, Auguste Comte, is
hailed as the father of sociology, although as will be discussed, Max Weber and Emile Durkheim are often considered sociology’s true fathers, as well as Karl Marx, (the latter will be discussed in Chapter 6 on account of his stronger influence on economics than on sociology) due to Comte’s highly suspect methods and ultimately very unscientific religiosity.

As for legal theory in the realm of an historicist approach to the study of society and this new social science (sociology), sociological jurisprudence first becomes a reality in the late 19th century with Roscoe Pound. Pound’s approach to the study of law was also empirically based, although limited to the study of statutes and cases rather than broader sociological phenomena, so had purely pragmatic instrumental goals rather than descriptive ones - thus, it effectively died as serious sociological jurisprudence when it was succeeded by its even more pragmatic instrumental and methodologically insular progeny American legal realism.

Classical sociological influences on legal theory, in the sense of describing society in terms of ‘grand narratives’, which is perhaps the most defining feature of classical sociology, was to become all but non-existent by the late 20th century. Indeed, it will be submitted that classical sociology and classical sociological jurisprudence only really survive today in ‘niche’ schools such as Marxism and Marxist jurisprudence and the latter’s many derivatives (feminist jurisprudence, critical legal theory, etc.), and Social Darwinism, which will be discussed in the next two Chapters as well as the role ideas about evolution play in those schools of thought.
5.1 German Historicism and German Legal Historicism

As discussed in the previous Chapter, the turn to historical thinking ushered in by the Romantic movement was a reaction to the rationalism of the Enlightenment. In Germany, the reaction was political as the very real, as opposed to merely intellectual, impact of the French Revolution and the occupation of Germany by Napoleon were very concrete products for them of French Enlightenment thinking. As David Rabban notes, when discussing the confidence major thinkers of the French Enlightenment had in human reason’s ability to gradually discover universal and timeless values governed by general, often mechanistic laws:

Contemporary Germans directly challenged these fundamental ideas of the French Enlightenment. Denying the possibility of universal laws governing human experience, they emphasized the individuality and diversity of different cultures. In contrast to philosophical speculation about the rational and the universal, they sought explanations in the organic growth of each distinctive culture, rooted in language and extending to all aspects of national life. Attitudes toward medieval Europe well illustrated these differences. Whereas the French Enlightenment dismissed this period as a primitive, even barbaric, era that devalued rational thought, German thinkers embraced it as part of the continuous unity of their culture. Germans perceived the French Revolution and the extension of French rule over Europe as the tragic political and military consequences of Enlightenment thought, attempts to impose universalism, as understood by the French, on the rest of the Continent.247

Thus, rationalist thinking about reality gave way to a more historicist way of seeing the world, as being governed not by universal truths but rather its evolving history and culture, or as some came to describe it, its ‘spirit’.

Hegel’s ‘world spirit’ and Savigny’s ‘national spirit’

As has been discussed in Chapter 4, Hegel conceived of a dialectical process taking place in what he described as a Weltgeist or ‘World Spirit’ as a means of interpreting history as an unfolding continuum informed by opposing forces rather than a disjointed sequence of significant events and persons. This notion of a communal spirit, arguably the hallmark of the Romantic movement and German romanticism in particular, was taken up by Carl von Savigny in his study of legal history with his notion of a Volksgeist or ‘national spirit’. Unlike Hegel’s conception, Savigny did not employ a dialectical process to interpret legal history but, like Hegel, he sought to interpret

247 David Rabban, Law’s History, American Legal Thought and the Transatlantic Turn to History (Cambridge University Press, 2013) 90.
history (or in Savingy’s case, legal history), as an evolutionary process. As Zimmermann explains:

It was Savigny who brought the idea of evolution to the ‘science’ of law in Germany. Savigny came on the scene at a moment when German thinkers of the Hegelian type desired to demonstrate and share in the process of evolution. He felt that a sense of history or evolution was a necessary element of the study of law. Savigny believed that law is formed by the silent operating forces of custom and popular consent. He protested against codification, which he thought imprisoned the evolution of law in an iron cage; and against natural law, which he contended prevented people from securing the free flood of their thought. For him, the appreciation of history is the only safeguard against ‘a certain self-deception’ that sees one’s values as something that apply to everyone.248

This final sentence in the above passage is what gives Savigny’s approach a distinctly Hegelian flavour and puts him firmly in the company of the Romantics – his theory is imbued with a notion of feeling or ‘spirit’, or, as Zimmermann explains:

By emphasising the historical limitations of the law, Savigny argued that laws are grounded in a form of popular consciousness (Volksgeist) which evolves over time in order to reflect the living, organic growth of the law in accordance with the ‘spirit of the community’. The legal codes of the 18th century were framed on the assumption that a group of people by the exercise of reason can create a complete system of laws valid for all time and places. Savigny, by contrast, believed that ‘each nation has some peculiarities and custom and attitude which cannot be learned from their written codes or treatises or even wholly from their judicial decisions’. His Volksgeist theory is therefore incompatible with a universal law of nature which was the same for all nations.249

The last point in the abovementioned quote above illustrates the hostile attitude of the Romanticists to natural law and its claim to universal or transcendent values. This made their orientation towards their legal theory positivist, not unlike the sociologists who followed them, although the latter purported to base their theories of society on an empirical footing rather than the metaphysical notion of ‘spirit’ as is discussed later in this thesis.

Of course, the Romanticists’ concept of a ‘national mind’ as an absolute standard for laws250 is not unlike the natural law proponents’ claim to some universal or transcendent value being an absolute standard for laws, except the Romanticist stance can be defended as positivist on the basis that the will of the national mind is something that can be discerned and therefore tells us what the law ‘is’ as products of the national will, as opposed to the natural lawyer’s claim that a universal or transcendent value

248 Zimmermann, above n150, 127-8.
249 Ibid 128.
tells us what the natural law is and thus what positive law *ought* to be. Moreover, the national will is not judged by reference to any universal standard of what is good or bad; it just happens to be what the prevailing ‘spirit’ or social consensus *is* at a particular time in history, no matter how sinister that might be (with the obvious implication that a wicked or evil totalitarian regime is defensible if society wills it).

However, this was not to say that Savigny considered law as a product of *external* will, as a command-theory positivist would maintain. The law making ‘will’ here, being aligned with communal spirit, is an internal one. As Carleton Kemp Allen has noted:

> If the relation between the State and the individual is regarded as nothing more than that of superior to inferior, the sovereign will, as expressed in legislation, may be arbitrary, despotic, and irrational. It need possess no social or moral content: that is a consideration lying outside its validity as law. It is merely the exercise of power, and the end to which power is directed to its authority as a command. Such was the Hobbesian view, and the danger which it threatened largely inspired Savigny’s distrust of legislation. The conception of law as being imposed by external will, instead of growing of its own strength, was repellant to his whole theory of legal evolution.251

Further, and crucially, although claimed to be a social fact as opposed to a universal value, the existence of any sort of national mind or communal spirit has never been empirically proven and has always been something of a chimera. As the celebrated jurist Rudolf Stammler has observed:

> [n]o proof has ever been, nor can ever be, given for the existence of a national mind, as a peculiar immaterial being. This mind whose animation constitutes the natural unity of a people is said to be a spiritual subject which lives outside of all human experience, and yet inspires the latter with the production of conscious contents. But as it is supposed to be the psychic essence of a natural object, namely of a definite individual nation, and hence must itself be a limited and finite thing, it is hard to understand how it can escape being subject to the laws which are valid for all conditioned experience. But as this claim has been put up regarding it – and for good or ill it had to be put up – it vanishes on closer inspection into the realm of social mythology.252

Notwithstanding its lack of empirical clarity, if nothing else, ‘national spirit’ still had certain instrumental uses for legal theory, as Stammler suggests:

> Nevertheless this juristic spiritualism, as a heuristic maxim, had a certain importance in its day. For in the belief in the reality of the national soul they had after all the idea of a higher unity embracing the content of all possible laws. Every particular law was conceived as an expression of the national mind behind it. The hypothesis of its real existence formed the uniting bond which embraced all particular rules and regulations of a given law, a bond which combined the historically changing particulars into a unity, and made it possible to treat all foreign laws in a similar way…253

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252 Stammler, above n250, 302.
253 Ibid 116-17.
Stammler was clearly optimistic about this approach for legal theory when he opined:

In this way the idea of a national mind existing in nature furnished a unitary method for the systematic treatment of law; and at the same time it incorporated it as a useful member in a more comprehensive and more far-reaching total conception. And now the sun of the Romantic faith has set. The “magic veil of poesy” is vanished. But the bond that fell with it has not yet been renewed. The cause formerly defended by the national soul is still awaiting its champion.254

Since the above passage was written, Hitler came to power and the Third Reich became a reality. This was probably not the national champion Stammler had in mind for unifying the national spirit and its laws, but unfortunately Hitler’s Third Reich was arguably one very real outcome of the national spirit experiment. Legal theorists since Hitler’s Germany generally no longer consider the notion of an evolving ‘national spirit’ as a useful metaphysical device for informing and guiding a nation’s laws.

Of course, the notion of ‘spirit’ has its foundations in the father of Romanticism, Rousseau, and his ‘general will’, discussed previously. As Stammler noted:

The object of his (Rousseau’s) investigation is simply to find the standard of social life according to the idea of law. The originality he exhibits in working out the problem leads him to state it in the manner of the Greek writers on the philosophy of law. It was in fact a mistake in method to bring in the nature of man in working out the problems of the law of nature. It is impossible to prove that man has definite native qualities for social life and certain a priori impulses guiding his impulses in social life (“Wirtshaafte and Recht”). All observations that can be made here are relative and of comparative universality only. And his purposive life cannot be determined in its actual manifestations as governed by universal impulses. On the assumption of such impulses we can never arrive at an absolute and fundamental idea of just social volition.255

And so it goes with Hegel and Savigny’s community ‘spirit’. Or perhaps the last word should go to Dietrich Bonhoeffer who noted the ultimately utilitarian focus of this notion as envisaged by qualitative thinking of Romanticism and Idealism meant such spirit had no independent existence. In Sanctorum Communio, his first work written at the tender age of 21, he opines perspicaciously that:

Objective spirit in a society is not affirmed as a value in itself, but only as a means to an end: it is an objective structure of purpose. The productivity of objective spirit is here directed to a system of means. If the society is dissolved, this system of means is left behind as materialised spirit, but has lost its inner meaning, since the aim is no longer there. An “instrument” whose purpose is no longer understood, or of no longer of interest, is dead, because the objective spirit which sustained it, and which was simply the means to an end, disappears when the end is lost sight of. A work of art, on the other hand, which bears fulfilment and understanding within itself, in its intention, rests in itself, because the objective spirit which sustained it was an end in itself, and has a life over and above the will of its members.256

254 Ibid 117.
255 Ibid 75-6.
However, what can be salvaged from Hegel and Savigny’s approaches to historical and legal studies, if not their metaphysical conceptions, is a hermeneutic approach to these studies that pays attention to social trends informing the present, regarding history as a truly continuous process and a truly evolutionary approach, rather than a non-evolutionary rationalist view of history as discrete events having little effect on the present. As Michael Freeman notes:

It must be admitted that the historical school had at least, if in a most confusing manner, grasped the important truth that law is not an abstract set of rules simply imposed on society, but is an integral part of that society having deep roots in the social and economic habits and attitudes of its past and present members.

Robert Gordon discusses the importance of the evolutionary idea of historicism to legal theory and the challenges it posed to the assumptions previously underpinning legal theory— that of a predictable static model of society with little or no desire to study or investigate the very thing that was to be the subject of the law - when he says:

The point is that these types of social investigation and historicist criticism are profoundly unsettling to the standard rationalizing modes because they suggest that the contributions of texts to contexts are as likely to be harmful or futile as beneficent or practical, for reasons that ordinary legal analysis seems to keep beyond its field of vision. Perhaps more disturbingly, they suggest that the legal text often may not be understood at all in terms of its instrumental relation to a social context, but only as a symbolic statement: a legitimating ideology, a utopian aspiration, or a cultural ritual designed to define boundaries between social cleanliness and defilement. In response, legal scholarship has developed theories of how law relates to society and to history that minimize these threats to its enterprise.

However, this and other types of response in legal theory to historicism is understandable when some of its most celebrated schools such as German legal historicism are renowned for being avidly metaphysical and unscientific. Nevertheless, once one unshackles oneself from romantic metaphysical notions of ‘general will’, community ‘spirit’ and the elusive ‘man in a state of nature’, investigation into social life can proceed on a more pragmatic and empirical basis. As Stammler explains ‘We must start from the idea of social co-operation as an object of a special kind, requiring an investigation of its own, and by critical analysis discover

259 Gordon gives four examples of the responsive modes given by legal theorists to historicism: ‘The first mode is denial that particular contexts of time and place are relevant to the enterprise of legal rationalization. The second is Cartesianism, the construction of drastically simplified models of social reality for use in legal analysis. The third is embrace of context, or assimilation, in such a way that social and historical contextualization seem to serve rather than to subvert legal rationality. The fourth is resignation in the face of social contingency and historical change.’ Ibid 1024-5.
the law immanent in it’. This statement harks back to the social contract theorists Hobbes and Locke who were not haunted by metaphysical notions of general will as Rousseau later was. Although, like Rousseau, Hobbes and Locke did base their theories on an imagined man in a ‘state of nature’. Stammler, contra Locke, asserts:

Accordingly, there are no innate rights of the individual which he brings with him, and which, along with the natural existence of man, belong to him as part of his very nature – rights which, upon his entrance into the sphere of law, he contributes to the common fund as an inviolable good, “inalienable and irrefragable as the stars.”

And then, contra Hobbes, Stammler suggests:

There is indeed a limit to the “power of the tyrant” and to the objective right of a legal sovereign, no matter who he be, a single individual, a number of individuals, or “the people”. But this limiting power of just law can never be derived and determined from the nature of man, but only from the idea of a legally ordered life in general. There can be no law of nature in the former sense of the word, but there may be methodological principles, implied in the nature of law.

Here, we see the nascent idea for the study of law based on social science methodology. As with Hegel and Savigny, attention is paid to historical development but, unlike them, law is not based on romantic metaphysical notions but rather, as Stammler put it, on ‘methodological principles,’ which can be used to divine the dialectic of the communal spirit if we express the notion of ‘spirit’ in more mundane terms such as competition between established authority and opposing social forces. Allen again:

In modern democratic communities, the formula ‘superior’ and ‘inferior’, or ‘sovereign’ and ‘subject’, expresses only one aspect, and that not the most important, of the relationship between State and individual. The notion of a social contract, so far as it contains the idea of a mutuality of rights and duties, between governor and governed – so far, too, as it expresses a compromise of individual liberty for the common weal- has not been without its lesson for the modern world; and in striving increasingly to realise this principle of mutuality, the nineteenth and twentieth centuries have reverted to the idealistic politics of the ancient world. The spirit which dominates modern doctrine is observable in the trend of legislation. At least in democratic countries, it is not a process solely of command and obedience, but of the action and reaction between constitutionally authorised initiative on the one hand and social forces on the other.

\[260\] Stammel, above n250, 76.
\[261\] Ibid.
\[262\] Ibid.
\[263\] Allen, above n251, 427.
5.2 Historical Jurisprudence in England and the United States

Henry Maine (1822-1888CE)

Meanwhile in England, as Freeman notes, ‘the historical approach, divested of its mystical adherence to the Volksgeist, made important advances in the pioneering hands of Henry Maine.’

Peter Stein notes that ‘Maine saw himself as a fighter of pure abstractions and a priori assumptions, such as the state of nature and the law nature. Speculations about man in the first ages of the world were useless, in his view…By contrast, he saw his own work as scientific, empirical and inductive.’

Maine was not immune from intuitive generalisations that are all but dismissed by today’s legal historians and anthropologists, particularly his notion that law passes through three consecutive phases: royal judgments, aristocracies as repositories of custom, and finally the Age of Codes. However, as Leopold Pospisil notes, ‘the empirical, systematic, and historical methods he employed to arrive at his conclusions, and in his striving for generalisations firmly based on the empirical evidence at his disposal…..(Maine) blazed a scientific trail into the field of law, a field hitherto dominated by philosophizing and speculative thought.”

Arguably, Maine’s most significant contribution to evolutionary legal theory was his notion of the legal evolution from status to contract which he explains as follows:

The movement of the progressive societies has been uniform in one respect. Through all its course it has been distinguished by the gradual dissolution of family dependency, and the growth of individual obligation in its place. The individual is steadily substituted for the Family, as the unit of which civil laws take account…Nor is it difficult to see what is the tie between man and man which replaces by degrees those forms of reciprocity in rights and duties which have their origin in the Family. It is Contract…The word Status may be usefully employed to construct a formula expressing the law of progress thus indicated…All the forms of Status taken notice of in the Law of Persons were derived from, and to some extent are still coloured by, the powers and privileges anciently residing in the Family. If then we employ Status…to signify these personal conditions only, and avoid applying the term to such conditions as are the immediate or remote result of agreement, we may say that the movement of the progressive societies has hitherto been a movement from Status to Contract.

264 Freeman, above n257, 908.
266 Freeman above n257, 909.
268 Quoted in Freeman, see above n257, 1102-1103.
Stein notes that Maine was clearly influenced by Savigny in his concern with the history of legal institutions and that in the same way Savigny opposed the view of law consisting of statutes made by a legislator, Maine fought the Benthamite view that law was the command of a legislator who was motivated purely by utilitarian principles. Another similarity with Savigny was that Maine’s *status to contract* endorsed Savigny’s *will theory* already discussed, which, as Stein explains was the aim of the law as, ‘the expression of the working out of the idea of individual self-determination…. to arrange for the fullest implementation of the individual’s will, through contracts, through testaments, through the fullest disposition of property and so on.’ Stein notes that:

The will theory had a similar sort of absolute character for nineteenth century lawyers to that which the doctrine of laissez faire had for nineteenth century economists. For awhile, the courts applied it to strike down anything which could be regarded as a restriction on freedom of contract, for example a covenant by which one party undertook not to compete with the other party after leaving their employment. On the other hand, standard form contracts made with public corporations or large companies were enforced to the letter, however onerous they might be, since they were treated as the product of voluntary agreement. The fact that the party bound had no choice but to accept the terms offered, if he wanted the service, or if he wanted a job, was ignored. Differences in bargaining power were irrelevant.

Stein further notes that in the United States, social legislation was declared invalid on the same grounds, for example (no fault) workmen’s compensation and truck acts which prohibited contracts allowing employers to pay their staff in company produce rather than in cash, ‘all were struck down as being opposed to the great law of evolution from status to contract.

**Francis Wharton (1820-1889CE)**

Although this Chapter will later discuss American jurisprudence and its positivist sociological bent made famous by the Harvard school, *historical jurisprudence* inspired by the work of Savigny and Maine received strong support among US legal scholars on questions of legal education and legal reform. As Rabban notes:

The most fundamental consensus among these scholars was that historical research into the entire development of current law is a prerequisite to understanding and, ultimately, to restating it. They believed that history reveals ambiguities, anomalies, gratuitous technicalities, and false

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269 Stein, above n265, 89.
270 Ibid 114.
271 Ibid.
272 Ibid 114-5.
theories in current law that should be eliminated through legal reform. Primarily interested in the history of Anglo-American law, they were eager to explore any insights the histories of other legal systems could provide into their own. They believed that an enormous amount of preliminary historical research was needed before a systematic restatement of current law could be properly accomplished, and for this reason they often opposed codification as historically premature. They viewed the historical study of law as a science, which, like other sciences, needed to be housed within research universities staffed by full-time professors and attended by full-time students.273

Rabban refers to a number of US legal scholars of this bent, perhaps the most well-known being Oliver Wendell Holmes junior whose historicism, coupled with his Social Darwinism will be discussed in Chapter 7. However, worthy of discussion here and who was very much in the tradition of the historical jurisprudence school, also referred to by Rabban, was Francis Wharton. Stephen Siegel describes Wharton thus:

In his various legal treatises, Wharton invariably recounted the dynamic and rapid changes in fundamental legal concepts and doctrines brought about by constant advances in Western civilization's scientific knowledge, social organization and moral understanding. For Wharton, conduct was distinguishable into right and wrong. But, in large measure, right conduct was a matter of time and place. Law properly varied over time and across cultures.274

What is interesting about Wharton, unlike Savigny and Maine previously discussed, is his natural law bent and blending this idea with evolution. As Siegel explains:

Coincident with these beliefs, Wharton conceived a classical jurisprudence that was truly evolutionary, though non-Darwinian. There may be some debate as to whether Wharton's treatises were classical or proto-classical. Wharton's treatises are more discursive than the most paradigmatic classical treatises. In discussing legal topics, Wharton frequently was attentive to the public policy and moral basis of legal principles and doctrine.275

Wharton saw law’s evolution as ultimately directed towards moral goals and that law coevolves with public morality. Siegel describes this thinking as follows:

As a consequence of these beliefs, Wharton concludes that "law, like all other sciences, is the subject of evolution." He depicts this evolution as largely the product of "judicial legislation" that is only guided by precedent. For Wharton, precedents are "prophecies more or less precise as to future law, and not absolute arbiters of what that law shall be." They "are only binding . . . so far as they are consistent with the conscience of the community and the need of the times." Yet, Wharton is sure that this "judicial legislation" is "not open to the objection of arbitrariness." Somehow, national law is, at one and the same time, judge-made, continually evolving (though relatively stable), and normatively correct. Thus, at the core of Wharton's jurisprudence lies a need to explain how evolving secular law constantly instantiates evolving moral reality.276

273 Rabban, above n247, 31.
275 Ibid 429.
Wharton couples his natural law approach or normative jurisprudence of law co-evolving with morality to historical jurisprudence. While historical jurisprudence, and German legal historicism in particular, has been charged with being a positivist and purely descriptive theory of law - the development of law being based on a purely contingent social fact (i.e. the prevailing people’s spirit or Volksgeist) – for Wharton, historical jurisprudence, together with ideas about evolution and faculty psychology, was his main inspiration for his normativism in his legal theory. As Siegel explains:

Wharton's explanation of how law can be both humanly made yet normatively apposite needs decoding. It needs to be read in the context of contemporary ideas and belief systems. Evolution and faculty psychology (particularly the notion of moral sense) were among the ideas from which Wharton drew. More fundamentally, however, Wharton's comments ... are an expression of a particular mode of legal thought that flourished in the nineteenth century: historical jurisprudence.277

The methods of the historical school, even if we include those of the more down to earth Maine, is not what we would regard today as ‘true’ sociology. They did not employ rigorous empirical methods, but rather ‘speculative thought’ (of which Maine was also guilty with his intuitive generalisations, even though his methods arguably pointed in the direction of sociology proper). Nevertheless, the historical school did give a nod to law as social narrative in a given social context, and made possible what would be later regarded as ‘real’ sociology and sociological jurisprudence. As Freeman has noted ‘The historical school of jurisprudence emphasised the dynamics of legal development and showed how law was closely related to its social context. All of these have contributed to the growth of sociological jurisprudence.’278

5.3 Sociology

Towards the end of the Romantic era, the pendulum swung back to more Rationalist approaches in the social sciences in the mid-19th century following a period of heavy industrialisation in the west on the back of numerous discoveries and developments in the physical sciences. There followed a period of many decades of the social sciences trying desperately to emulate the physical sciences – some positively cringeworthy (e.g. Social Darwinism discussed in Chapter 7) and others well intentioned, but hardly

277 Ibid 432-3.
278 Freeman, above n257, 660.
what could be described as empirical in the sense that the physical sciences are considered to be. A prime example of this was the methodology of Auguste Comte.

**Auguste Comte (1798-1857CE)**

Freeman credits Comte with ‘the first serious attempt’ to apply the scientific method to social phenomena279 and if not the founder of sociology as a separate discipline, he was nevertheless the one to coin that term.280

Of Comte, Kelly writes that he was:

[op]ne of the many thinkers of his time who were impressed, firstly, by the huge strides which had been made by the physical sciences since the seventeenth century, and which led his age generally into a blind confidence in the capacity of science to effect limitless improvements in man’s condition; and secondly, by a social transformation brought about by the industrial revolution, itself in some degree a product of the scientific revolution.281

This led Comte to advance the idea of scientific positivism in studies of society. As Zimmermann explains:

The general belief in the exclusive value is what Comte basically called ‘positivism’. Comte possessed an unshakeable faith in the idea that social progress was achievable by a science-based manipulation of human society. As such, he despised metaphysics and advanced the view that empirical science would lead society to its higher levels of progress and economic development. Comte thus advocated a comprehensive theory of social science (and progress), which entirely rested on the empirical method of the natural sciences.282

However, as the above quotes suggest, Comte’s method was one born of blind confidence of the science of his time rather than a separate rigorous scientific approach, or at least one that could be described as consistent and sustained. As Freeman, after outlining Comte’s approach as one involving four means of social investigation (observation, experiment, comparison and the historical method), notes:

Unfortunately, Comte did not remain true to his own scientific approach, and in his later years deserted the empirical method for sweeping *a priori* affirmations, such as his view that there were invariable natural laws operating in the field of social activity. He laid down that mankind inevitably passes through three stages, *viz.*, the theological (where phenomena are explained in terms of superior beings), the metaphysical (where abstract entities like nature are held responsible) and the scientific or positive (at which stage man is content to observe phenomena). Such was his final dogmatism that he was led to formulate an authoritarian concept of the character of “positive society”, and also to put forward a new Religion of Humanity, with an elaborate ritual aimed at achieving an effective means of social cohesion.283

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279 Ibid.
280 Ibid.
281 Kelly, above n75, 331.
282 Zimmermann, above n150, 107.
283 Freeman, above n257, 661.
Although celebrated for having coined the phrase ‘sociology’, Comte is not, like some of his contemporaries or near-contemporaries, unanimously regarded as one of its founding fathers. Such an appellation is usually given by contemporary sociologists as the ‘familiar trinity’ Marx, Weber, Durkheim.\(^{284}\)\(^{285}\) Marx (discussed more fully in Chapter 6) is considered a key figure in classical social theory due to his having in common with Weber and Durkheim an evolutionary approach that, rather than relying on simplistic and ultimately unprovable scientific propositions to describe society (a la Comte), employs an approach sociologist Alan Hunt refers to as problematisation, namely an attempt to examine and describe the configuration of economic, political and legal relations that were taking shape during the course of history in the nineteenth century. While Weber and Durkheim conceived of problematisation within the perspective of the liberal capitalism tradition (the concern that the capacity to rule should be exercised without transgressing power limits that preserved the expanded economic and political realms won in the transition from monarchical to parliamentary sovereignty), Marx famously broke with this tradition having much more radical evolutionary views and developed his own social program (which is why he will be discussed in a separate chapter in this thesis).\(^{286}\)

Alan Hunt describes the method of problematisation as follows:

> Problematisation as a methodological strategy involves a commitment to challenging the ‘taken-for-granted’ nature of the ‘problem’ of law in different historical periods. One important implication of this approach is that it intentionally avoids any attempt to produce a chronological ‘history’ of the treatment of the law in the social science. How did classical social theory constitute law in relation to its object of inquiry? This question must be approached in a way that does not involve the implication that law necessarily formed a primary or even explicit focus of attention for the individual theorists.\(^{287}\)

Hunt notes that classical social theorists found it less and less feasible to regard law as a ‘natural phenomenon,’ a central tenet of natural law theory, grounded on the presumption on a social order based on a taken-for-granted set of institutions and values constitutive of the human condition, whether articulated in theological form (innate sinner) or in secular terms (e.g. Hobbesian brute), requiring the imposition of


\(^{285}\) R.W Connell also discusses the confusion as to who was the ‘founding father’ of sociology even among sociologists in the classical period in his article ‘Why Is Classical Theory Classical?’ (1997) 102(6) American Journal of Sociology 1511.

\(^{286}\) Hunt, above n284, 13.

\(^{287}\) Ibid 14-5.
social order and the requirement of an absolute sovereign to impose order. This vision, explains Hunt:

[...]

came increasingly into conflict with the challenges imposed by the capitalist economic order ... The most profound impact of these developments, even outstripping the social dislocations they caused, was the primacy of economic markets that required nothing less than a radical separation of an economic from a political sphere. But the self-regulating market could never achieve full self-regulation, and continued to require inputs from the political system to sustain and protect the market order. Law was the primary mechanism for this linkage of the economic and the political orders…laissez faire was itself enforced by the state 288

Thus, the classical social theorists not only differed from the Historical school in adopting a more rigorous scientific approach to the latter in charting the evolution of the law rather than such metaphysical devices as ‘community spirit’ or ‘people spirit’, they also represented the very aspect of the Enlightenment that the Historical School rebelled against – rationalism. However, the classical social theorists did share the Historical School’s aversion to the rationalists’ anti-evolutionary stance of a complete disregard of what had gone before. On the other hand, like the rationalists, the classical social theorists were more forward looking, having been inspired by the Industrial Revolution of the nineteenth century, and believed in ‘progress’. As Hunt explains:

The emergence of law as a sociological investigation rests on the implicit view that legal systems are essentially constructed, social creations (not natural orders) and thus presuppose an instrumental conception of law. In line with the Enlightenment vision of ‘progress’ understood as a project that gives effect to an ever expanding realm of the human capacity to control its conditions of existence, law comes to be understood as a primary steering mechanism for societies, marked by a complex interdependence, a task that can no longer be fulfilled by ‘direct rule’ through the political system. A persistent line of thought within legal theory has counterposed a divide between law as autonomous and law as dependent on society; this has in many accounts been presented as the core distinction between the internal perspective of legal positivism and the external perspective of the socially informed approach to law. 289

Although Hunt suggests in the above passage that a sociological approach to legal theory rejects natural law theory, such approach similarly rejects legal positivism to the extent that it merely conceives of law as a discrete entity, devoid of any social context, and merely posited by some authority in power rather than emerging from the social fabric. However, as will be discussed later in this Chapter, sociological jurisprudence is arguably still positivist, like its ancestor the Historical School as discussed above but in a difference sense – that is, as law as a social fact rather than as a mere command or an expression of will or spirit. More Hart, less Austin.

288 Ibid 16.
289 Ibid 16-7.
The discussion now turns to two of the so-called ‘familiar trilogy’ of sociology’s founders, namely Max Weber and Emile Durkheim.

**Max Weber (1864-1920CE)**

Freeman credits Max Weber, a trained lawyer, as the first to try to develop a systematic sociology of law and although his early writings resemble those of the German Historical school, he later reacted against this approach.²⁹⁰ He also rejected the analytical approach much beloved by Comte, which he saw as a doomed enterprise in the realm of the study of society, in favour of an interpretative approach which he pioneered in the social sciences and which, as will be seen through the remainder of this Chapter, has become the preferred scientific approach among modern sociologists.

Weber described the interpretative approach in the following terms:

> Interpretative sociology considers the individual and his action as the basic unit, as its ‘atom’ – if the disputable comparison for once may be permitted. In this approach, the individual is also the upper limit and the sole carrier of meaningful conduct...In general, for sociology, such concepts as ‘state’, ‘association’, ‘feudalism’, and the like, designate certain categories of human interaction. Hence, it is the task of sociology to reduce these concepts to ‘understandable’ actions, that is, without exception, to the actions of participating men.”²⁹¹

Weber’s notion of ‘understanding’ (*verstehen*) was inspired by the tradition of hermeneutics which had come to prominence in Germany at that time. As George Ritzer and Doug Goodman explain:

> Weber’s thoughts on *verstehen* were relatively common among German historians of his day and were derived from the field known as *hermeneutics* … Hermeneutics was a special approach to understanding and interpretation of published writings. Its goal was to understand the thinking of the author as well as the basic structure of the text. Weber and others (for example, Wilhelm Dilthey) sought to extend the idea from the understanding of texts to the idea of social life.²⁹²

For Weber, *verstehen* was not feeling or intuition or ‘soft, irrational, subjective research methodology’ as his critics would often suggest but rather a rational procedure of study.²⁹³ Applied to society as a whole, Freeman describes Weber’s scientific approach thus:

²⁹⁰ Freeman, above n257, 662-3.
²⁹³ Ibid 201-2.
His primary concern was to understand the development and characteristics of Western society, the most distinctive feature of which in its developed form was capitalism. This led him in two directions: first, into historical and comparative studies of the world’s major civilisations; secondly, into studies of the origins of capitalist development and “rationalism”. The existence of rational legal order is a critical feature of capitalist society. Weber emphasised the “rational” quality of legal institutions in modern Western societies. He saw law as passing through stages ranging from charismatic legal revelation through what he called “law prophets” to a “systematic elaboration of law and professionalised administration of justice by persons who have received their legal training in a learned and a formally logical manner.”

Ultimately, in Weber’s view, in this final stage of the law described above, the rational society demands that the individual is answerable to the law only, not some arbitrary power. As Zimmermann explains:

The idea of impersonal order as a legally circumscribed structure of power is a fundamental element of Weberian interpretation of the rule law. According to Max Weber, the ‘rational-legal’ context of the rule of law implies ‘that the person who obeys authority does so, as it is usually stated, in his capacity as a member of the corporate group and what he obeys is only the law.’

Weber’s evolutionary idea, unlike his German historicist predecessors, is that the study of the development of the evolving individual within a social context rather than the evolving community or people spirit (which subsumes individual motivations into an organic whole and effectively ignores individual autonomy) is the key to the study of society. However, both employ the idea of social evolution to inform their worldview.

**Emile Durkheim (1858-1917CE)**

While Weber primarily focused on capitalism in his approach to sociology and law as its handmaiden assisting in its rational evolution, Durkheim ascribes to law a more direct role in society formation and social bonds between individuals. Freeman describes Durkheim’s thesis of law as ‘the measuring rod of any society’ which ‘reproduces the principal form of social solidarity’ and describes it thus:

According to Durkheim there are two basic types of societal cohesion (what he called solidarity): mechanical solidarity to be found in homogenous societies and organic solidarity which was found in more heterogeneous and differentiated modern societies which rest on functional interdependence produced by the division of labour. Linked to these forms of integration are two types of law, viz., repressive and restitutive. In a society based on mechanical solidarity, law is essentially penal. With increased differentiation, societal reaction to crime becomes a less significant feature of the legal system, and restitutive sanction becomes the main way of resolving disputes.

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294 Freeman, above n257, 663.
295 Zimmermann, above n150, 94.
296 Freeman, above n150, 94.
297 Ibid 667.
Durkheim’s theory relies heavily on the role of morality in shaping society and the law rather than Weberian rationality. As Zimmermann explains:

At the heart of Durkheim’s sociological analysis was a deep concern for matters of law and morality. For him, society cannot exist without moral bonds, although moral ideas, so he thought, are neither innate in the individual nor deduced from abstract first principles. Rather, morality is solely inspired and determined by the empirical conditions of social life in particular times and places. Morality provides the normative framework that is necessary for the formation of stable social relationships, expressing the requirements of living together in particular environments.298

In essence, Durkheim’s is an organic theory of state, placing the collective over the individual, at least in terms of explaining the way society develops and works. Individual motivations and actions are virtually ignored as something that can be looked at to examine how society functions. Durkheim does not rely on a metaphysical device such as ‘community spirit’ as the romantics did. His approach is decidedly more empirical in focussing on actual social facts rather than some imagined force, and shares the same evolutionary idea as the romantics in conceiving of society as a whole and with a tendency to grow organically. As Zimmermann notes:

According to him (Durkheim), our lives are shaped by social facts that are ‘external to the individual’. The concept of law is defined as a social fact in terms of social ideas and practices. Law is therefore a social phenomenon to be observed in accordance with the organic changes in the nature of society; changes that are not attributable to the conscious acts of the individual citizens. On the contrary, Durkheim believes the evolution of law is not caused by changes in political values and/or beliefs or through any legal theories but by an evolving process in the organic structure of societies over a long period of time, changes over which individuals in that society have very little control.299

Durkheim drew the analogy of the role of law in society to the role of the nervous system in the body.300 Zimmermann warns of the dangers of such a theory, noting:

Durkheim’s positivist view of society seems to ignore individual action and treat all individuals not as the agents and creators of the social facts, but instead as ‘carriers’ or recipients of these facts. This kind of sociology, of course, has very obvious anti-liberal and anti-democratic implications. It is no wonder that Durkheim’s sociological analysis ultimately led to the development of a theory of corporatist politics which was taken over by later fascist dictatorships in the 20th century.301

298 Zimmermann, above n150, 109.
299 Ibid.
300 Ibid 110.
301 Ibid.
5.4 Sociological jurisprudence

The abstractness of legal positivism and natural law appeared to ignore the social context from which law had quite clearly arisen, a fact that jurists such as Savigny had noted as mentioned above. However, rather than focus on law’s social aspects in a more metaphysical sense as Savigny had done, there was a desire and a drive, in light of the information that was being gleaned from the emerging modern social sciences at this time, to reclaim for law its obvious role as a social tool. This is what distinguishes sociological jurisprudence from other branches of jurisprudence as well as, as will be seen, its use of ideas about evolution.

The study of law as a distinct branch of the social sciences, or sociological jurisprudence is usually considered to have arisen in the late 19th and early 20th centuries with the work of Roscoe Pound and Oliver Wendell Homes Junior.

Roscoe Pound (1870-1964)

US jurists were concerned with how law came not so much to explain society or how society came to explain law but rather the role law had in controlling society, particularly in a newly formed and quickly expanding one like the United States, especially in terms of material wealth. Freeman credits Roscoe Pound as being the most influential figure of American sociological jurisprudence and opines that:

For Pound, jurisprudence is not so much a social science as a technology and the analogy of engineering is applied to social problems. He is concerned primarily with the effects of law on society and to a lesser extent with questions about social determination of law. Emphasis is laid on the need to accumulate factual information and statistics and to this end Pound put forward a practical programme, in which the establishment of an adequately equipped Ministry of Justice looms large. Little attention is paid to conceptual thinking. The creative role of the judiciary, on the other hand, is in the forefront, as is the need for a new legal technique directed to social needs. The call is for a new functional approach to law.\(^{302}\)

This approach represents a rupture with the European approach to sociological jurisprudence discussed above; rather than seeking to discern social trends, it eschews ideas about social evolution in that it is primarily concerned with the here and now in order to treat law purely instrumentally. Law must have a function, a purpose; it matters not so much what it is, or how it came to be, but what it can do. Pound saw

\(^{302}\) Freeman, above n257, 673.
law’s primary role as reconciling conflicting interests of the society and the individual, and in order to do that he attempted to classify individual interests and categorise them. However, rather than doing purely sociological research, Pound confined himself to studying the claims in legal proceedings and legislative proposals rather than broader social phenomena to get a sense of individual and social wants and needs. Freeman suggests, while noting that subsequent reputable scientific research has never proved that Pound’s categories actually exist, nevertheless Pound’s ‘findings’ are at the very least common sense inferences deduced from different branches of the legal system itself, symbolising the social purpose of the community. However, it is submitted by the writer that perhaps even this much should not be conceded because Freeman himself earlier points out that Pound’s methodological approach does not take into account the distortions brought about by the fact that costs discourage litigation, the paucity of case law in some areas (Freeman cites English social security case law as an example), and the fact that the law sometimes does not reflect the interests in the sense of what people want (i.e. when measured by the nature and number of claims made) but what may be good for them regardless of their actual desires, such as the penal system.

To the more important question of how values identified by Pound are prioritised, it has been suggested that Pound’s answer is that every society has certain basic assumptions upon which its ordering rests. Indeed, this notion of certain basic assumptions has been sometimes perceived as natural law creeping in through the back door.

Thus, Pound’s legacy to jurisprudence situated in a social context (rather as pure abstraction like other branches of jurisprudence) is not as a legal historicist in the mould of Savigny, but in making a conscious effort to use the history of law in a purely instrumental sense as a means of social engineering rather than attempting to discern trends. As Kelly explains:

The central idea of the theory of social interests which he now advanced was that lawmaking, legislative or (within obvious limits) judicial, should be seen as a kind of ‘social engineering’ –

303 Ibid.
304 Ibid 674.
305 Ibid 675.
306 Ibid 674.
307 Ibid 675.
a famous phrase, and it must be said, a characteristic piece of American imagery, its deliberately unpretentious evocation of blue overalls and functional workshop contrasting with the elaborate abstractions of European jurists: ‘For jurisprudence, for the science that has to do with the machiner of social control or social engineering through the force of politically organised society, it is no less true that individual interests are capable of statement in terms of social interests and get their significance for the science from this fact.’308

Kelly observes that the engineering metaphor is explained by Pound in terms of getting those interests into well-oiled synchronism, with wear and waste minimised.309 As Pound himself put it:

Looked at functionally, the law is an attempt to reconcile, to harmonise, to compromise these overlapping or conflicting interests, either through securing them directly or immediately, or through securing certain individual interests … so as to give to the greatest number of interests, or interests that weigh most in our civilisation, with the least sacrifice of other interests … I venture to think of problems of eliminating friction and precluding waste in human enjoyment of the goods of existence, and of the legal order as a system of social engineering whereby these ends are achieved.310

While it is tempting to place Pound in the school of American legal realism, with which Oliver Wendell Holmes Junior is most frequently associated, Pound’s method is not based entirely on the pragmatism of that school. His method is based on the consensus-conflict approach that characterises classical sociology whereas the realists, on the other hand, believed the Poundian approach of identifying and categorising various individual and social interests overly theoretical and preferred to focus on particular social problems of the day and the practical success of suggested solutions.

Although Pound’s system resembles the approach of the American realists, he is nonetheless considered to be part of the classical school of Sociology. Although the realists don’t quite fit into this basket, they have been described as belonging to the same stage of sociology as the classical theorists, in the sense that they had a ‘grand narrative’. As Freeman explains:

Selznick, a leading sociologist, has pin-pointed three stages in the sociology of law. Pound, together with his continental progenitors, belong to the first stage, wherein the pioneer, the prophet in the wilderness communicates his perspective. So, Pound identified the task of the lawyer as ‘social engineer’, formulated a programme of action, attempted to gear individual and social needs to the values of Western democratic society. The early Realist writings convey similar orientation… Holmes too, was a generaliser, a purveyor of ‘grand theory’: he provides the theoretical context for an understanding of law in society. But he did little empirical research, though such work was undertaken by contemporaries. Their writings are characterised by a concern for substantive legal problems rather than the workings of legal institution, and by a

308 Kelly, above n75, 363-4.
309 Ibid 364.
penchant for law reform, doubtless inherited from Pound and the Realists. Furthermore, the initiative for this empirical research was taken by lawyers, not sociologists, and often by practitioners rather than jurists. Perhaps as a result, conclusions and implications were framed in grandiose terms.311

The Poundian tradition would continue with Oliver Wendell Holmes Junior who also saw law as having a purpose, although, as mentioned above, Holmes’ name is usually linked to the slightly different beast American Legal Realism. Also, Holmes is mentioned in Chapter 7 of this thesis on account of his Social Darwinism which is much less frequently commented on than his realism. Suffice it to say here, however, Pound and Holmes were men of their time in the part of the world in which they found themselves in. Although they were on opposite sides of the world to, and separated by almost a century from, European rationalist Enlightenment thinkers, they shared more in common with them than their European contemporaries in that Pound and Holmes arguably represented the rationalist bent of the Enlightenment rather than the Romantic one, or in other words, Kant rather than Hegel.

*Leon Petrazycki (1867-1931) and Eugen Ehrlich (1862-1922)*

Worth mentioning here are two lesser known contemporaries of Durkheim and Weber, but also important to sociological jurisprudence, especially with respect to their use of ideas about evolution in their theories, namely Eugen Ehrlich and Leon Petrazycki. Their theories were not so much based on describing law in society following a sociological inquiry into modernity as Weber and Durkheim had done (although they certainly did that) but more in the spirit of Pound they also employed the social sciences in order to develop and improve the science of law and focus on its use and purpose.312 Also, and even more significantly, whereas Durkheim and Weber, and even Pound, had discussed the law as something separate to society and state-based, albeit moulded by social forces, Ehrlich and Petrazycki, independently of each other, concluded in their separate theories that law was something broader than state-based law and existed independently of any outside authority.313

Reza Banakar notes that Ehrlich presented a concept of law based on the distinction between judicial decisions and statutory enactments on the one hand and *living law* on

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311 Freeman, above n257, 855.
312 Banakar and Travers, above n284, Reza Banakar, ‘Sociological Jurisprudence’, 35.
313 Ibid.
the other, which Ehrlich defined as ‘the law that dominates life itself, even though it has not been printed in legal propositions’. 314

Petrazycki threw down the gauntlet to the legal positivists of his day, the late 19th century and early 20th century legal scholars. This group maintained that law only meant something ‘posited’ by a state authority and defined law in terms of coercion of the state, or a command backed by force and perceived law and its societal effects in terms of the operations of the formal judicial agencies and institutions as the courts. 315

But, as Banakar explains:

These decisions were of secondary importance to Petrazycki who was at pains to explain that the actual foundations of legal order lay not in positive law, but in intuitive law, ie in ‘those legal experiences which contain no references to outside authorities’. The functions and operations of the formal agencies and institutions of the law represented by the actions of courts, juries, judges, lawyers and so on, captured only violations of the law, reflecting pathological instances of conflicts and legal transgressions. For Petrazycki, to confuse the pathology of the law with the law proper amounted to ignoring the full potential of the law. 316

Using his notion of intuitive law, Petrazycki was able to develop a legal typology based on its mutual relationship with official law. 317 Whereas Petrazycki’s notion of unofficial legal intuition is linked to individual introspection, 318 Ehrlich’s similar scheme of living law is more norm-based. 319 Banakar describes Ehrlich’s scheme and the approach that bore it as follows:

According to Ehrlich no amount of legislation, official enforcement and coercion could by itself transform a rule into ‘law’ understood in the social sense of the word. For Ehrlich, who formulated his views with the help of observation and through his empirical study of the habits and customs of numerous ethnocultural groups constituting the Austrio-Hungarian Empire of the day, the state was not a source of (legal) order in human society, because order could not be established through coercion alone and the thought of compulsion by the courts did not enter the minds of ordinary men when conducting their everyday business. The order of law, therefore,

315 Ibid 37.
316 Ibid.
317 This is summarised by Adam Podgorecki in the following terms:

1. **Positive official law** (law used by the courts and upheld by the states)
2. **Positive unofficial law** (eg a mediator or unofficial agency resolving a conflict with reference to positive law or normative facts)
3. **Intuitive official law** (eg a decision of English courts on the basis of equity); and
4. **Intuitive unofficial law** (people’s spontaneous behaviour guided by their legal intuitions rather than by statutes or other normative facts).


318 Banakar, above n312, 41.
319 Ibid 43.
was not to be found in the law books but in how social life was *de facto* organised by social networks and groups. Ehrlich focussed on the rules of conduct that people in actual fact obeyed and, thus, in effect governed social behaviour and brought order to social life. He argued that the efficacy, legitimacy and validity of these rules were functions of their acceptance rather than coercion. Ehrlich named these rules, which were based on social behaviour rather than compulsive norms of state, ‘living law’, and argued that they were generated as part of the inner orderings of ‘associations’ or formal and informal social groupings of various kinds.\footnote{320}

Banakar notes that Ehrlich’s broad concept of what a law is has often been criticised as tending towards the absurdity that all rules of conduct could be described as law.\footnote{321} However, to meet the objection that Ehrlich’s theory could include as ‘laws’ laws that are not laws at all, Banakar notes that this contradiction does not just come about by social theorising, but also in the operations of the formal law itself when in some circumstances it will recognise the customs and practices of certain groups as valid (e.g. terms implied in contract law by ‘custom and usage’) – thus, he maintains the contradiction ought more properly to be called an ‘empirically observable paradox’ rather than an analytical error.\footnote{322} \footnote{323}

Suri Ratnapala has noted that Ehrlich took an *evolutionary* view of the emergence and growth of society and its laws in developing his theory\footnote{324} and, clearly influenced by such a view, like Petrazycki, developed a whole new concept of law which was not just based not on juristic principles like legal scholars before them (or who took for granted that law was state-based law as sociologists Durkheim and Weber had).

Ratnapala also pays Ehrlich the generous compliment that he demonstrated, better than any other sociologist in law, the difference between the law in the books and the *living law*\footnote{325} but also notes that Ehrlich underestimated the effect of norms for decision and state law in shaping the *living law*.\footnote{326} This point is a particularly apt one, since sociologists from the *German Historical School* through to the classical sociology

\footnote{320} Ibid 43-4.\footnote{321} Ibid 44.\footnote{322} Ibid 45.\footnote{323} Banakar also notes that Ehrlich’s broad concept of law can also be understood as a product of the ethnic and cultural diversity of Czernowitz in the Bukowina where Ehrlich lived, and where he could observe (as Ehrlich put it) ‘nine tribes: Armenians, Germans, Jews, Rumanians, Russians (Lipowanians), Ruthenians, Slovaks (often taken for Poles), Hungarians, Gypsies’ living side by side, and he also regarded the attempts of the politicians in Vienna to enforce their laws on the functioning normative order of this culturally diverse, yet harmonious, social group as socially detrimental. Ibid. \footnote{324} Suri Ratnapala, *Jurisprudence* (Cambridge University Press, 2009) 203.\footnote{325} Ibid 207.\footnote{326} Ibid. Ratnapala also points out here that this was probably not surprising given Ehrlich was writing before the era of extensive legislation and economic intervention in the economic and social life of communities.
trinity of Durkheim, Weber and Marx, and later to more integrationist sociologists such as Ehrlich and Petrazycki just discussed, generally all took a fairly one-way view of the effect of society on law – mainly that social forces shaped the law and rarely the other way around.

In biological terms, such a feedback loop can be readily observed. To give one example, that of molluscs and their seemingly trivial impact on their natural environment. If the mollusc were a law (part of the living law, if you will), the thinkers we have discussed in this Chapter thus far would probably readily concede that the evolution of a law in its environment would have been influenced by its environment in the same way that the evolving mollusc would have been influenced by and adapted to its natural environment. But what about the mollusc’s effect on the evolution of the environment itself? The most our thinkers would probably concede, drawing the law analogy again, is that just as the broken shells of the mollusc would contribute to the quality of the sediment found in the environment so that it will always be ‘sandy’, laws may affect the social landscape insofar as the prevailing social mood is concerned (such as the fact that voluminous legislation might bring on officious and petty attitudes, the ‘sand’ of the social landscape). However, enough sediment can lead to increased downward pressure on the earth’s crust with resulting earthquakes and volcanoes leading to substantial terraforming and even climate change. Would our thinkers concede this much vis a vis the effect of law on society? Could laws affect society so dramatically so as to change the entire social landscape? A new generation of sociologist branded systems theorists would probably say yes, as they see laws and society shaping each other in an endless feedback loop, as we will see in the discussion in Chapter 9.

5.5 Conclusion

The legacy of the German Romantic movement, and in particular Hegel, changed western thinking forever from the 19th century onwards. There was now a perceived need to pay close attention to the social context in the study of history rather than a mere sequence of unconnected significant events and persons.

The Hegelian approach directly employed the idea of evolution which by its very nature is a continuous process rather than a disjointed series of events. Hegel’s
immediate successor were scholars of the German Historical School of the 19th century and the German Historical School of Jurisprudence exemplified by Carl von Savigny. Similar to the Hegelian concept of a Weltgeist (‘world spirit’), a Volksgeist (‘people spirit’ or ‘national spirit’) permeated this school’s thinking so the idea of evolution was co-opted to discern the life of the spirit of (German) society over time and how its laws had evolved to suit it (or were rejected if they did not). This notion was inseparable from the idea of an organic state, also a Hegelian concept.

In England, Henry Maine also employed a historicist approach that was similar to Savigny’s but he did not rely on a guiding ‘spirit’. Nevertheless, his evolutionary idea of status to contract was no more empirically based than Savigny’s.

In the 19th century, a competing view of society was emerging that was positivist and purported to be empirically based. This led to historical studies of society being placed on a supposedly scientific basis and its first explicit proponent, Auguste Comte, is hailed as the father of sociology, although Weber and Durkheim are sociology’s true fathers, as is Marx, (the latter being more fully discussed in Chapter 6) due to Comte’s highly suspect methods and ultimately very unscientific religiosity.

Sociological jurisprudence first becomes a reality in the late 19th century with Roscoe Pound whose approach to the study of law is also empirically based, although limited to the study of statutes and cases rather than broader sociological phenomena and has purely pragmatic instrumental goals rather than descriptive ones – and it effectively died as serious sociology with its even more pragmatic instrumental and methodologically insular progeny American legal realism.

One thing is clear, sociology and sociological jurisprudence with their attempts to study law with purely analytical scientific methods that have sometimes (and rarely, if ever, successfully one might add) been used in the social sciences have helped us to illuminate what law is not rather than what it is. Donald Kelley summarises the Nomos of these historicist and sociological approaches to law as an attempt to identify the myths we live by rather than as a Physis that explains the principles of our existence in teleological terms as follows:
While the story of Nomos from a twentieth century perspective is cumulative, it can hardly be represented as a simple enlightenment or improvement. An accumulation or erudition and criticism there certainly was; but there was also the addition of new prejudices and new cultural and ideological constructs, or fictions, that served the needs, interests, and illusions of society. Jurists have insisted on the ‘scientific’ character of their enterprise, but in a long view better understood in what Hans Blumenberg has called ‘work on myth’. Modern legal scholars have rejected the misconceptions of the medieval doctors of law, but then have gone on to substitute their own idealisations of the ancient phases of their common tradition, while the rational jurists of the seventeenth century affected, in quasi-Cartesian fashion, to extricate legal philosophy from antique learning altogether. Then, in the nineteenth century, the Historical School tried to restore all the old myths, this time in the guise of critical historical scholarship, if not conservative social policy. My own offering can itself be only further ‘work on myth’ for this is the general predicament of all historians, and in case (as Blumenberg suggests) the ‘end of myth’ is the grandest, the most persistent, and (for historical understanding) the most illusory of all myths.

But what of evolutionary ideas based on more materialist notions such as economics or the natural sciences such as biology or the behaviour of information systems? Did these end the myths or merely perpetuate them? To these we will now turn.

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6.0 Introduction

The previous chapter explored, inter alia, how Hegelian evolutionary ideas influenced social and legal theory with the rise of German Historicism and German Legal Historicism respectively. However, arguably the greatest impact of Hegel’s evolutionary ideas was by those that influenced the theories of Karl Marx. Marx employed the Hegelian evolutionary ideas of historicism and dialectic (i.e. Hegel’s dialectical historicism) not in a metaphysical sense as Hegel had done but in a more concrete sense in a theory which he called dialectical materialism: an opposition between the interests of those who hold the means of production (the bourgeoisie) to those who do not (the proletariat).

In this chapter, we will explore Classical Marxist theory and also moderate incarnations of Marxist theory which are reflected in intellectual thought such as critical theory and its legal cousin critical legal studies (CLS). CLS aims to put the spotlight on social dominance issues that still persist in the application of the rule of law (even if only unconsciously) and suggests constructive suggestions for its improvement rather than insist, as classical Marxists do, that as a tool of oppression the rule of law should simply be done away with.

The chapter will conclude by examining postmodernism and its emphasis on the role of language in legal theory.
6. 1. Karl Marx – Political and Economic Theory

Alice Er-Soon Tay and Eugene Kamenka note that when Marx died in London in March 1883, just eleven people attended his funeral, and yet in the late twentieth century, more than one third of the world’s population was governed in his name.328

Marx was a materialist, but unlike his 18th century materialist predecessors such as Diderot and Feuerbach, he was not prepared to conceive of the world and man in purely mechanical terms with no scope for an explanation of development; his critique of Feuerbach’s thesis of ‘man as machine’, for instance, was that if that were so, man could only do what he was made to do and not develop in any way.329

Marx’s principle of development was to be found in the evolutionary idea of the Hegelian dialectic, which he was attracted to by its showing that phenomena do not exist in isolation but must be studied in their movement and development, and in depicting society as full of contradictions. At the same time, however, Marx rejected Hegel’s idealism (opposing forces in a ‘world spirit’ or Weltgeist) and substituted it with his theory of dialectical materialism (opposing economic forces with control over the means production).330

Where Marx also differed from Hegel was that the latter viewed the role of philosophy up to his time as merely interpreting the World whereas Marx believed the role of philosophy should be to change it.331 Hegel was a social conservative whose discussion of the state Marx saw as ignoring the social context of human relationships in its attempt to rationalise the existing social organisation.332 Further, Marx rejected Hegel’s notion of mediation of state and individual by political representation and the latter’s belief that the delegates of civil society in a representative society enjoy that status as legitimisers of particular interests of society. Marx held the more cynical view that they enjoy that status simply because they are the members of a particular political institution which, Marx stated ‘…despite their claim to universality and generality,

329 Freeman, above n257, 953.
330 Ibid 954.
331 Ibid 955.
332 Ibid.
only mask the particularistic, egoistic interest of civil society.\textsuperscript{333} To Hegel, the bureaucracy was the ‘universal class’; to Marx, on the other hand, the bureaucracy was illusory and merely used the name of the general interest to further its own interest, or were granted an ‘institutional licence for sectional interests.’\textsuperscript{334}

Freeman notes that the basic premise underlying the Marxian conception of history is that the ‘nature of individuals depends on the material conditions determining their production’ and what individuals are ‘coincides with their production, both with what they produce, and how they produce’.\textsuperscript{335} Marx also asserted ‘Self-creation through labour’ is the ‘primary factor in history and concepts – political, philosophical or religious – through which men interpret this activity [are] secondary.’\textsuperscript{336} The means of production therefore lies at the heart of Marx’s materialist evolutionary theory.

Marx’s theory is primarily justified by an appeal to evolutionary theory. As Paul Blackledge explains:

\begin{quote}
Marxist social theory requires a sophisticated evolutionary component to underpin its revolutionary political theory. For such a political theory will be strengthened if it is constructed within parameters that are contextualised by the historical evolution of the forces of production. Moreover, through its incorporation of an evolutionary component Marxism is better able to ensure that history is understood by more than just a series of particular and unique events, but reveals a certain directionality.\textsuperscript{337}
\end{quote}

Marx’s evolutionary thinking was not just influenced by Hegel but also by Darwin, discussed in the next chapter. If there was any doubt that Marx had exorcised Hegelian metaphysics from his materialist brand of historicism, his inspiration from Darwin would appear to settle the matter. As Max Eastman explains:

\begin{quote}
Darwin’s achievement was to banish the ethico-deific out of biology, establish the fact of evolution upon a scientific basis, and point out a dominating principle of investigation and matter-of-fact explanation. And Marx made almost exactly the same contribution to the general science of history. He put in place of moralistic and religious and poetic and patriotic eloquences, a matter-of-fact principle of explanation,…and he established – or at least first adequately emphasized – the fact that there has been an evolution, not only in the political forms of society, but its economic structure.\textsuperscript{338}
\end{quote}

\textsuperscript{333} Ibid.
\textsuperscript{334} Ibid 956.
\textsuperscript{335} Ibid.
\textsuperscript{336} Ibid.
\textsuperscript{337} Paul Blackledge, ‘Historical Materialism: From Social Evolution to Revolutionary Politics’ in Paul Blackledge and Graeme Kirkpatrick (eds), \textit{Historical Materialism and Social Evolution} Palgrave (Macmillan, New York, 2002) 32.
Indeed, as history shows, Marx’s political theory did not remain just that – a theory – but had a transformative power in a way no other political theory has ever achieved. The Russian Revolution was a product of Marx’s political theory and those of many other communist countries since. An important aspect of Marx’s political theory in this respect was its component of Darwinian evolution. Richard Overy observes that, for Communist Russia, Darwinian evolution:

> [g]ave the revolution an irresistible air of legitimacy. Communism was understood to be the most progressive and highly developed stage of history, and hence, by definition, ethically superior to all other forms of society. Soviet morality, according to Lenin, was determined by the historical struggle of the proletariat. What was moral was anything that served the interests of the class struggle; what was immoral was anything that hindered the historical march to communism. This formulation gave unlimited opportunity for the [leadership of the] communist party, as the vanguard of the revolutionary struggle, to determine what forms of actions and thoughts were most appropriate for the current state of historical development.339

Indeed, Marxism (and its conception of evolution), was not only the inspiration for communism but also arguably provided the impetus for anti-Semitism that fuelled national socialism in Germany. Marx, although a Jew, was unabashedly anti-Semitic and racist, often using the terms ‘dirty Jew’ and ‘Jewish Nigger’ to deride his political enemies and he once commented about the German socialist Ferdinand Lassalle that:

> It is not perfectly clear to me that, as the shape of his head and the growth of his hair indicates, he is descended from the Negroes who joined in Moses’ flight from Egypt (unless his mother or grandmother on the father’s side was crossed with a nigger). This union of Jew and German on a Negro base was bound to produce an extraordinary hybrid.340

Furthermore, in On the Jewish Question, Marx endorsed Bruno Bauer, an anti-Semitic leader of the Hegelian left, who had demanded that Jews abandon Judaism immediately, asserting that ‘the money-Jew’ was the ‘universal anti-social element of the present time’ and that ‘to make the Jew impossible’ it was necessary to abolish the ‘preconditions’, the ‘very possibility’ of the kind of money activities which produced him, before concluding that both Jew and Judaism would have to ‘disappear before the world could abolish the Jewish attitude to money.’341

Of course, Marx was dead in 1883 long before the rise of the Third Reich and his target was primarily the Jews’ capitalistic nature which he despised, not their ethnicity per

341 Zimmermann, above n150, 185.
As a later socialist theory, national socialism arguably had its roots in *Marxism* and as both Marxists and Germany’s National Socialists opposed capitalists, they shared a common enemy in the Jew. Further, the Nazis could rationalise their enmity towards the Jews on an economic basis as well as a racial one. In a certain sense, as Zimmermann points out, the modern theoretical anti-Semitism so clear in Nazism may be a derivative of Marxism.\(^{342}\) Paul Johnson also notes:

> Anti-semitism seems to have made its headway at a time when the determinist type of social philosopher was using the Darwin principle of Natural Selection to evolve ‘laws’ to explain the colossal changes brought about by industrialism, the rise of the megalopolis and the alienation of huge, rootless proletarians. Christianity was content with a solitary hate-figure to explain evil: Satan. But modern secular faiths needed human devils, and whole categories of them. The enemy, to be plausible, had to be an entire class or race. Marx’s invention of the ‘bourgeoisie’ was the most comprehensive of these hate-theories and it has continued to provide a foundation for all paranoid revolutionary movements, whether fascist-nationalist or Communist-internationalist. Modern theoretical anti-Semitism was a derivative of Marxism, involving a selection (for reasons of national, political or economic convenience) of a particular section of the bourgeoisie as the subject of attack.\(^{343}\)

Indeed, Stephanie Courtois speaks of ‘socio-political eugenics’ in communism, a form of Social Darwinism, being practised in Lenin’s Russia such that:

> As master of the knowledge of the evolution of social species, Lenin decided who should disappear by virtue of having been condemned to the dustbin of history. From the moment a decision had been made on a ‘scientific basis’ …that the bourgeoisie represented a stage of humanity that had been surpassed, its liquidation as a class and the liquidation of the individuals who actually or supposedly belonged to it could be justified.\(^{344}\)

### 6.2 Karl Marx - Legal Theory

It must be remembered Hegel was not the only influence on Marx’s theory of *historical materialism* or, more specifically, Marx’s *dialectical materialism*. After noting the historical fact that Marx, who had trained to become a lawyer, attended Savigny’s Berlin lectures, Zimmermann observes:

> Coming from a historicist-relativist perspective, Savigny argued that law was part only of history, not a branch of applied ethics. He also considered that property was not a fundamental right of the individual. ‘By the possession of a thing’, he wrote, ‘we always conceive the condition, in which not only one’s own dealing with the thing is physically possible, but every other person’s dealing with it is capable of being excluded.’ And yet, he argued, the great bulk of humanity would have lived in societies in which possession of the land has been communal.

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\(^{342}\) Ibid.


and conditional. In other words, humanity would have spent most of its recorded history practising some form of communal ownership.\textsuperscript{345}

Thus, Zimmermann suggests Savigny’s work comprised a whole \textit{historicist} determination of property which provided an indispensable basis for Marx’s \textit{dialectical materialism} and the development of property relations.\textsuperscript{346} Nevertheless, Savigny’s influence on Marx was limited. Marx was not interested in further development of law as Savigny had been, nor had Marx the respect for the law as did the more conservative Savigny. As Zimmermann explains:

Marx was openly receptive to the insights of Savigny’s Historical School into the sociological nature of both law and of property, because he knew that only when history displaced natural law was it possible for him to ‘move from the necessary stages of the history of production’ to the understanding that a mode of production was shaped totally by historical forces.\textsuperscript{347}

Savigny was opposed to the concept of natural law and saw law as reflecting the community ‘spirit’, with the result that laws are contingent on prevailing social standards. Marx shared Savigny’s opposition to natural law but his radicalism took him a lot further; he was not simply a legal positivist as Savigny was (linking law to the ‘social fact’ or general ‘will’ of the guiding community spirit), but critical of law \textit{per se}, and saw it as a bourgeois tool of oppression. This is a conclusion the more conservative Savigny would have never reached from his \textit{historicism}.

Marx’s historical method employs the idea of evolution in similar terms as Hegel (by use of \textit{dialectic} in his concept of \textit{dialectical materialism}) and Savigny (in the treatment of property in his \textit{historical materialism}). However, unlike his predecessors, Marx does not take the integrity of the political and legal system as independent entities for granted. Instead, he saw the whole system and its historical development as corrupt with the legal system being purely in the service of the ruling class. As Kelly explains:

The classic Marxist view of the legal order of any state, as has been seen, is that it expresses, and subserves, the interest of the dominant class; apparently impartial values like the rule of law, or equality before the law, are mere cosmetic pretences disguising this reality; but when classes finally disappear altogether, as they are supposed to do on the realisation of perfect communism, then law and the state will be redundant and will wither away.\textsuperscript{348}

Law reform is not possible under Marx’s conception of law. As Mark Murphy notes:

\textsuperscript{345} Zimmermann, above n150, 189.
\textsuperscript{346} Ibid 190.
\textsuperscript{348} Kelly, above n75, 371.
[i]t is hard to see how legislative deliberation for the common good would be possible… On Marx’s view, there can be no hope for law that is for the common good…[U]ntil revolution abolishes economic class distinctions, law will inevitably fail to be for the common good, and thus the task of the legislator is doomed to failure.349

However, the legal system would still be required before the anticipated utopia arrived, to accelerate its gestation period. The old structures, including legal systems would have to be (and indeed were in communist Russia) appropriated to ensure the complete and rapid transition of capitalist society to communist society. As Kelly explains:

In the years immediately after the Russian Revolution in 1917, however, it was quickly understood that something like a legal order would have to be maintained, particularly when, in 1921, the new ‘Economic Policy’ was introduced in order to meet the production crisis which had resulted from radical nationalisations in the first era of revolution. This policy (usually called NEP) was a compromise between communism and private enterprise, which was permitted to survive in certain areas. Traditional patterns of relations, of the kind expressed through law, could not be dispensed with overnight. The official theory used for explaining this perpetuation of bourgeois forms that the new legal order was indeed the interest of the dominant class; but this of course was now the proletariat. And this legal order would be operated in the light of that class’s overriding objectives and destiny.350

Or as lawyer Pyotr Stuchka (1865-1932), the People’s Commissar for Justice of the first revolutionary government rather aptly put it: ‘bourgeoisie law minus the bourgeoisie.’351

The NEP was abandoned in the 1920s along with the elimination of the final remnants of private enterprise; however there persisted an administrative and bureaucratic apparatus that Kelly describes bore ‘disquieting superficial resemblances to bourgeois structures’ once it became clear to ruling sections of the Soviet Union that, in their view, even ‘an undiluted communist regime’ would need some regular ‘administration of things’ nor could it be ‘allowed to fall into a state of disrepair as long as the Soviet Union was encircled by states based on a hostile ideology.’352

This purely instrumental view of the law and its complete disconnect from the issue of ‘human rights’ is reflected in and underpinned by Marx’s view of human nature. In On the Jewish Question, Marx stated:

350 Kelly, above n75, 372.
351 Ibid.
352 Ibid.
To understand this negation of rights by Marx, it is necessary to understand Marx’s epistemology of human nature. Russell describes it thus:

In Marx’s view, all sensation or perception is an interaction between subject and object; the bare object, apart from the activity of the percipient, is a mere raw material, which is transformed in the process of becoming known. Knowledge in the old sense of passive contemplation is an unreal abstraction; the process that really takes place is one of handling things. The question whether objective truth belongs to human thinking is not a question of theory but a practical question,’ he says. ‘The Truth, ie the reality and power, of a thought which is isolated from practice, is a purely scholastic question…Philosophers have only interpreted the world in various ways, but the real task is to alter it.’

Russell suggests the way to interpret Marx is that the process which philosophers have called the pursuit of knowledge is not one in which the object is constant while all adaptation is on the part of the knower, but on the contrary, both object and subject, both knower and the thing known, are in a continual process of mutual adaptation.

This dialectical process is also Hegelian as has already been noted and it is a riposte to rationalist enlightenment thinking which sees man as knower and subject as separate to the thing known or object with no real mutual relation between the two. But for Marx, it is matter not the spirit which is the driving force of this dialectic and man’s relation to matter in terms of productive forces are at the heart of Marx’s understanding of human nature. If man is not a separate subject in the rationalist sense, he has no rights. From here, it is a short step from this type of evolutionary thinking to see how human rights can be compromised and subsumed by the State as will now be discussed.

6.3 Classical Marxism and Totalitarianism

Loss of Individual autonomy

The rights of the individual would not seem to count anymore in Marx’s organicist or collectivist notion of humanity, of subjects who are bound and essentially defined by their productive relations with one another into various ‘classes’. In this conception,

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353 Cited in Zimmermann, above n150, 192.
354 Russell, above n20, 707.
355 Ibid 708.
what is deemed useful is what is useful to society, often at the expense of the individual. Moreover, the question of what is useful for society is an entirely subjective one. If a capitalist system has its economic elites who seem to wield a disproportionate amount of power, a communist one also has its elites, albeit of a different stamp – political or bureaucratic elites – who determine policy and what is good for the collective. Individual autonomy disappears as the individual is simply subsumed into the whole.\footnote{In such a society, as O’Brien said to Winston in George Orwell’s \textit{1984}, ‘if you want a picture of the future, imagine a boot stamping on a human face – for ever’. George Orwell, \textit{1984} (Penguin Books, first published 1949, 2000) 280.}

Moreover, the strongly teleological nature of Marx’s theory with its ultimate aim of a classless society means that what is deemed good for society is that which will help achieve this ultimate goal. Russell describes Marx’s ‘readiness to believe in progress as a universal law’ and its association with ethics (or lack thereof) thus:

This readiness characterises the nineteenth century, and existed in Marx as much as his contemporaries. It is only because of the belief in the inevitability of progress that Marx thought it possible to dispense with ethical considerations. If socialism was coming, it must be an improvement. He would have readily admitted that it would not seem to be an improvement to landowners or capitalists, but that only showed that they were out of harmony with the dialectical movement of the time. Marx professed himself an atheist, but retained a cosmic optimism which only atheism could justify.\footnote{Russell, above n20, 711.}

This ‘progress’ would be sought at any price. Thus, in 1891 Lenin refused to participate in aid efforts to assist thousands of starving peasants justifying his decision on the basis that the famine would have positive effects ‘in destroying the out-dated peasant economy, would bring about the next state more rapidly, and usher in socialism, the state that necessarily followed capitalism. Famine would also destroy faith and not only in the Tsar, but in God, too.’\footnote{Aleksej Beliakov, \textit{Yumost Vozhdy} (‘The Adolescence of the Leader’) (Molodaya Gvardila, 1958) 80-2.}

\begin{center}
\textit{Was Marx a Totalitarian?}
\end{center}

Since Marx died long before much of this came to pass, many apologists have sought to sanitise his reputation as being not as extreme as his political successors. However, Marx once argued that ‘the present generation resembles Jews whom Moses led through the wilderness. It must not only conquer a new world, it must also perish in
order to make room for the people who are fit for the new world’.359 Furthermore, speaking of the Revolutionary Terror during the French Revolution, Marx said ‘there was only one means to curtail, simplify and localise the bloody agony of the old society and the bloody birth-pangs of the new, only one means – revolutionary terror.’360 As Paul Johnson notes:

That Marx, once established in power, would have been capable of great violence and cruelty seems certain. But of course he was never in a position to carry out large-scale revolution, violent or otherwise, and his pent-up rage therefore passed into his books, which always have a tone of intransigence and extremism. Many passages give the impression that they have actually been written in a state of fury. In due course, Lenin, Stalin and Mao Tse-tung practised, on an enormous scale, the violence which Marx felt in his heart and which his works exude.361

Thus, Marx did not merely craft an extreme idea that was later acted upon and abused; he was wholeheartedly for its implementation as evidenced by some of his comments and written invective. It is submitted it is erroneous to believe there are two types of communism – the communism of Marx and the communism of Lenin, Stalin and Mao Tse-tung – ideologically, it is all one, leading to inevitable negative consequences for individual autonomy and dignity: namely, a classless utopia (or dystopia) at any price.

**Is Classical Marxism Dead?**

On the face of it, Marxism seems benign, even beneficial, with its strong emphasis on social justice. With its many supporters then and today, particularly among intellectuals worldwide, Marxism with its Hegelian pedigree has always represented something as a Trojan Horse for the totalitarianism it spawned. Thus, Popper, writing in the late 1940’s and early 1950s when the Soviet Union was at the height of its power observed:

The most cherished ideas of the humanitarians were often loudly acclaimed by their deadliest enemies, who in this way penetrated into the humanitarian camp under the guise of allies, causing disunion and thorough confusion. This strategy has often been highly successful, as is shown by the fact that many genuine humanitarians still revere Plato’s idea of ‘justice’, the medieval idea of ‘Christian’ authoritarianism, Rousseau’s idea of the ‘general will’, or Fichte and Hegel’s ideas of ‘national freedom’. Yet this method of penetrating dividing and confusing the humanitarian camp and of building up a largely unwitting and therefore doubly effective intellectual fifth column achieved its greatest success only after Hegelianism had established itself as the basis of a truly humanitarian movement: of Marxism, so far the purest, the most developed and the most dangerous form of historicism.362

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362 Popper, above n54, 293.
Marxism and its Hegelian evolutionary idea of dialectic spawned Lenin’s and later Stalin’s Russia. Even as its worst excesses were starting to become news to the outside world, Soviet Russia still had the support of many western intellectuals at the time Popper wrote the above passage, committed as they were to the Marxist ideology. However, none but the most extreme Marxists clung onto the Marxist ideology by the time of the fall of the Berlin Wall and Soviet Russia.

Nevertheless, the uncompromising Marxists, including some of the ‘old guard’ in today’s Russia either with short memories or in a state of denial who yearn for their country’s communist past, still hold out some hope that after more than 70 years of brutal oppression that their ‘Messiah’ will still come and deliver the long-awaited utopia, even if they do not live long enough to see it. As Michael Green points out:

> Whatever the pogroms of Lenin, Trotsky, Stalin; whatever the revelations of the Gulag Archipelago and the terrifying brutality of the Soviet concentration camps; whatever the rapes of a Hungary, a Czechoslovakia, an Afghanistan, the faith of the committed Communist persists. All personal judgment is obscured in the name of faith; faith is absolutely essential if everything is not to come tumbling around his ears...Logically of course, there is no reason why a modern Communist should bother to work for a utopia in which he will never share: this is one of the surds in Communism. But he is inspired by the vision, attracted by the prospect, stimulated by the struggle and warmed by the companionship. The millennial utopia held out by Communism,...is both a pale imitation of and unconsciously inspired by the Christian teaching of the Kingdom of God.

The resemblance to religion is striking amongst pure Marxism. The eschatology of Marxist ideology not only appeals to those of lower classes who believe the ideology could better their lot, but also so to, and perhaps, especially to, ‘rootless’ intellectuals in search of a secular religion. As Glendon, Condon, and Osakwe comment:

> As a world secular religion, Marxism has its dialectic which is akin to Calvinist predestination. Like other creeds, Marxism has its sacred text, its saints, as well as its holy city. If Marx is its Messiah, Lenin is its St Paul. As is true of many other world religions, Marxism too has witnessed a luxuriant proliferation of sects and sub-sects – the deviationists, the revisionists, the fundamentalists, the modernizers, and so on.... But after all these analogies have been made, what remains to be emphasized is how different Marxism is from other religions. Unlike Christianity, for instance, its appeal has always been first to the intellectuals. Christianity was resisted by the ancient philosophers, who regarded it as an aberration of the lower classes; it spread upwards. Marxism, on the contrary, has been carried out by the intellectuals to the proletarians and peasants. To intellectuals it has appealed as no other doctrine has because it integrated for them most fully

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363 Ibid.
discordant psychological motives. In Marxism, one finds for the first time a combination of the language of science and the language of myth – a union of logic and mysticism.\textsuperscript{365}

On the other hand, Michael Head lists a number of positives that came out of the post-revolution era prior to the rise of Stalin in 1924:

\begin{quote}
[t]he early Soviet regime advanced several worthwhile features:
It sought active popular participation in political and legal life.
It was open and democratic in academic discussion.
It sought to create social equality as the only true guarantee of human rights.
It not only extended formal legal equality, and abortion rights, to women but also endeavoured to genuinely free them from their double oppression by transforming the conditions of social life.
In relation to misconduct, it sought to ameliorate the underlying social causes and address any mental health problems of the individual involved, instead of criminalising and punishing.
\[\ldots\] Indeed, the economic and social polarisation produced by the present hegemony of the market presents a challenge to re-examine and draw lessons.\textsuperscript{366}
\end{quote}

These positives would lead to a number of other more moderate theories inspired by \textit{Marxism} that would add to the public discourse and debate of social phenomena in different and arguably more beneficial ways than \textit{classical Marxism} as practised in Stalin’s Russia and other regimes such as North Korea. To these we now turn.

\subsection*{6.4 Other Marxist theories}

\textit{Marxism} in its most extreme form, or rather ‘Classical Marxism’, is deterministic; at its core is the belief that the class war has an inevitable outcome with the proletariat coming to power as if by osmosis and the state withering away once class structure has broken down completely. However, as can be seen from comments made earlier in this chapter, this would require action and not just thinking, not just describing and interpreting the world, but changing it. Perhaps if more of the early Marxists had been predominantly theorisers rather than men of action (i.e. more like Marx than Lenin), 20\textsuperscript{th} century history might have taken a more benign path than it did (especially if one considers national socialism had, as noted previously, its roots in action-oriented \textit{Marxism}).

The following is a discussion of more moderate non-deterministic \textit{Marxist} theories as well as evolutionary aspects about those theories which have informed political and legal theory to the present day.

\textsuperscript{365} Mary Ann Glendon, Micheal Gordon and Christoper Osakwe, \textit{Comparative Legal Traditions} (West Publishing, 1985) 676.

Hegelian Marxism

The inclusion of the evolutionary idea of dialectic in Marxism was, as has been noted, inspired by Hegel. Marx’s Das Kapital has received the most attention from Marx scholars, but his Economic and Philosphic Manuscripts of 1944 were arguably more influenced by Hegelian subjectivism than Das Kapital. However, these were largely unknown to Marxist thinkers until their rediscovery and publication in 1932. Nevertheless, as early as the 1920’s, Georg Lukacs published his History and Class Consciousness which emphasised the subjective side of Marx’s theory thus anticipating the Manuscripts’ philosophical implications a decade before their revival.367

Indeed, Lukacs was a key figure of Hegelian Marxism and introduced two concepts of the theory: reification and class consciousness.368 Although reification is derived from Marx’s concept of commodity fetishism (i.e. the process by which commodities and the market are granted independent objective existence by actors in capitalist society),369 it broadens this notion to all society: the state, the law, and the economic sector (not just the latter as in Marx’s theory).370 As Lukacs explains:

Man in capitalist society confronts a reality ‘made’ by himself (as a class) which appears to him to be a natural phenomenon alien to himself; he is wholly at the mercy of its ‘laws’; his activity is confined to the exploitation of the inexorable fulfilment of certain individual laws for his own (egoistic) interests. But even while ‘acting’ he remains, in the nature of the case, the object and not the subject of the events.371

Thus, man is not only alienated from the economic goods he produces by his labours as Marx asserted, but he is, according to Lukacs, in a capitalist system, similarly alienated from almost all of society’s goods: its norms, its laws, its political conventions, etc. even though his labour goes into producing these things in the same way as economic goods. He is effectively made into a thing, objectified, dehumanised – or in a word, reified.

368 Ibid.
369 Ibid.
370 Ibid.
Lukacs’ notion of *class consciousness* (the belief systems shared by a particular social class) links this phenomenon with one’s objective economic position and the real, psychological thoughts of men about their lives’ which necessarily implies, in a capitalist system, a prior state of *false* consciousness – that is the failure of classes in capitalist systems to have a clear sense of their true class interests (e.g. the *proletariat* being unaware of the extent of their exploitation under capitalism).  

Unlike the *Marxists* of the classical or economic determinist stamp (i.e. those who saw the inevitability of the *proletariat* winning the day), Lukacs employs the evolutionary idea of *dialectic* in a more nuanced way so that it is more than just the playing out of opposing economic forces, as it is in *Classical Marxism*, but rather an ongoing *relationship among structures*. These structures constitute primarily, (but not solely,) capitalism, idea systems (especially class consciousness), individual thought, and, ultimately, individual action. As Ritzer points out: ‘(Lukacs’) theoretical perspective provides an important bridge between the economic determinists and more modern Marxists’.  

Thus, reality is not absolutely determined by economics but it is explained by the existence of various structures, the economy being one of them.

**Critical Theory**

Another key figure in Hegelian Marxism and an ardent opponent of the economic determinists (describing them as ‘deterministic, fatalistic and mechanistic’) was Antonio Gramsci. Gramsci uses the Hegelian idea of hegemony and defines it as *cultural* leadership exercised by the ruling class, contrasting it with coercion ‘exercised by legislative or executive powers, or expressed though police intervention.’ It can be seen here as a different use of the evolutionary idea of *dialectic* as one that focuses on cultural forces rather than just the familiar duo of economic forces and coercive aspects of state domination as forming part of the Marxist dialectical relationship.

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372 Ritzer above n367, 280  
373 Ibid.  
374 Ibid 281-2.  
375 Ibid 282.
Lukacs’ and Gramsci’s ideas were to inspire a strand of Marxist theory called *critical theory* which is a movement of radical theory that has survived to the present day.

*Critical theory* primarily criticises various aspects of social and intellectual life. It has been suggested that *critical theory* is chiefly the product of a group of German *neo-Marxists* who were dissatisfied with the then-current state of *Marxist* theory, particularly its economic determinism, and was a movement founded in Frankfurt, Germany on February 23, 1923 with the formation of the Institute of Social Research (to become known as ‘the Frankfurt School’).376

The Frankfurt School began life critiquing *Marxist* theories on the basis of their economic determinism and obsessive focus on economic theory rather than their paying attention to other factors, particularly cultural factors, and ended up focussing almost entirely on the cultural realm rather than economics.377 The evolutionary idea of *dialectic* was still employed but with the cultural realm now being a part (and more often than not the most significant part) of the *dialectical* relationships being studied in society.

The Frankfurt School criticises the positivist claim that the study of society is amenable to one form of scientific study (i.e. scientific positivism), effectively reducing the individual actors in society as passive entities subject to natural forces. This is a significant break with earlier *Marxist* theory and the structuralist and analytic *Marxists*, not to mention Marx himself who was highly positivistic as was Lenin and later Stalin with their pseudo-scientific positivist credo that a classless society is the best, and only, form of economic society.

On a similar note, the Frankfurt School critiqued all of contemporary sociology and its ‘scientism’ – a movement that made the scientific method in the study of society an end in itself – as well as sociology’s acceptance of the status quo and its lack of criticism of, and lack of aspiration to, transcend society’s contemporary structure. The Frankfurt School saw contemporary sociology as surrendering its obligation to help people oppressed by society; furthermore, it charged contemporary sociology with the failure to properly focus on the individual, making sociology simply ‘an integral part

376 Ibid 282-3.
377 Ibid 283.
of society instead of being a means of critique and a ferment of renewal’ (ie a part of the problem rather than part of the solution).\textsuperscript{378}

The Frankfurt School thus critiqued modern society generally with its tendency towards domination through processes and culture. Many critical theorists are also inspired by Max Weber and his formal rationality versus reason thesis whereby the former is said to be mere technocracy for efficiency’s sake at all costs whereas the latter is focused on other goals such as human wellbeing and justice. Indeed, as George Friedman has noted ‘Auschwitz was a rational place, but not a reasonable one.’\textsuperscript{379} A prime example of this critique is Herbert Marcuse’s ‘one dimensional man’ thesis of technology being never neutral in the modern world but a means to dominate and pacify at the cultural level (he cited TV as an example) to strip an individual of their means to think critically and negatively about society.\textsuperscript{380} This would therefore neutralise any real threat posed by the individual’s capacity to reason to society’s principle aim of economic rationality.

Broadening on Marcuse’s theme is the Frankfurt School’s critique of culture whereby the Weberian thesis is also employed to suggest that the tendency to colonise culture in order to dominate it is in effect rationalised so whole industries arise in this respect (e.g. TV networks).\textsuperscript{381} However, recent critical theorists such as Douglas Kellner have maintained that these dominance tendencies are not just confined to capitalists but apply to a range of disparate groups, economic, political, social, etc. all competing with each other in an ongoing struggle for power.\textsuperscript{382}

6.5 Critical Legal Theory

The Marxist approach of the critical theorists can also be found in critical legal studies or CLS. As a movement, it has been suggested that the CLS movement began in the United States in 1977 following a series of conferences initiated and attended by the likes of Abel, Howitz, Kennedy, Trubek and Unger. These were legal scholars who were dissatisfied with the Law and Society Association which they accused of being

\textsuperscript{378} Ibid.
\textsuperscript{379} Cited in Ritzer above n\textsuperscript{367}, 284.
\textsuperscript{380} Ibid 285.
\textsuperscript{381} Ibid.
\textsuperscript{382} Ibid 285-286.
too closely aligned with empiricism and behaviourism. While CLS in a sense continues the program commenced by American realism, discussed in the previous chapter, there is an important difference, as Freeman explains:

The Realists are firmly within the camp of liberalism: the CLS is more radical an attempt to escape the ‘cripplng choice’ between liberalism and Marxism. Like the Realists, CLS rejects formalism, but the Realists saw reasoning as autonomous or distinct and CLS scholars certainly reject the enterprise of presenting a value-free model of the law. A major difference between critical and orthodox (including for these purposes Realist) legal thought is then that, although the latter rejects formalism, it maintains the existence of a viable distinction between legal reasoning and political debate. Critical legal thought does not countenance this distinction. Crits believe there is no distinctive mode of legal reasoning. Law is politics. It does not have an existence outside of ideological battles within society.

Like the critical theorists previously discussed, critical legal theorists view institutions of society as a tool of the elitists, in particular, legal institutions. The evolutionary idea of dialectic has often been used in CLS to describe the opposing forces in society and society’s nuances, rather than the more homogenised view of society taken by some liberal theorists which is that of society being composed of more or less uniform rational actors. As Freeman explains:

One of the principal advances of CLS is to demonstrate the need to integrate legal theory within social theory. Drawing on Habermas, Marcuse, Mannheim, Gramsci, critical legal theorists have attempted to introduce into discourse about law the insights and models of analysis of social theory, in particular the relativity of truth to any given social or historical group. In this view, reality is not a product of nature, but is socially constructed. Social arrangements are not unproblematic, inexorable givens: what we see as the social order is merely where ‘the struggle between individuals was halted and truce lines drawn up.

However, Freeman notes that CLS in its original ‘70’s incarnation is effectively over – that ‘Like a meteor the Crits appeared, shone brightly for a short time and have gone’, the reasons for the demise being the movement’s failure to live up to the promise of a transformative approach to law, an exaggeration of the indeterminacy of law and also perhaps that the views of some of its proponents such as Unger and his ‘reconstructive liberalism’ discussed below were simply not that ‘critical.’

However, the Marxist dialectical theme of the CLS of the struggle between groups in society and in particular the oppression and exploitation by the elitists of a less powerful group, lives on in other movements spawned by CLS; not oppression of

383 Freeman, above n257, 1,040.
384 Ibid 1,040-1.
385 Ibid 1051.
386 Ibid 1055.
‘classes’ defined by their economic standing in the community as classical Marxists would insist, but other groups, be they females, a racial minority, homosexuals, etc. Freeman gives this the term outsider jurisprudence and notes that this is but one of the legacies of CLS – examples of others being Unger’s reconstructive liberalism, Habermas’ procedural rationality, and finally, linguistic theory in legal theory. These four movements will now be discussed, as well as the relationship they bear to the evolutionary idea of Marx’s dialectic.

**Outsider Jurisprudence and Feminist Jurisprudence**

There have been a number of schools of jurisprudence which have substituted the notion of the oppressed economic class with other oppressed groups, eg gender (feminist jurisprudence), race (e.g. Latercit) and sexual preference (‘queer theory’). Francisco Valdes in discussing Latcrit describes outsider jurisprudence and its emergence from CLS thus:

During the mid-to late 1980s, various new strands of jurisprudence arose from within the legal academy of the United States that, intellectually, were connected to ‘critical’ or ‘realist’ jurisprudential traditions. These various strands of ‘perspective’ jurisprudence sought to interject ‘missing voices’ into socio-legal discourse and contemporary policy-making. Focused on ‘identity’ critiques of established law and theory, these various strands of perspective jurisprudence focused on the ways in which ‘gender’ and ‘race’ or ‘ethnicity’ are embedded in the legal doctrines and regimes that govern society. Many of these ‘perspectives’ were specifically identified with ‘outsider’ groups – that is, social groups defined by social constructs like race and gender, which have been used historically by dominant ‘in-groups’ to create privilege and wealth for themselves through the exploitation of the ‘out-groups’ they controlled in part by law.

Perhaps the most long-lived and significant movement in CLS is feminist jurisprudence which has employed the evolutionary idea of Hegelian dialectic to argue that societies have often been based on a patriarchal power structure preferencing the interests of men in terms of property rights, employment opportunities, participation in political life, and basically almost every aspect of social, political and economic life. Zimmermann notes that the brand of feminism known as radical feminism has drawn much inspiration from Marxist theory with the thesis that gender plays as strong a role in the determination of the legal system as economic structure and class.

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387 Ibid 1,055-6
389 Zimmermann, above n150, 234. Of course, radical or second wave feminism is to be distinguished from first wave and third wave feminism which do not rely so much on the dialectical opposition of
**Reconstructive Liberalism**

Roberto Unger, as mentioned above, was at the centre of the core group who founded CLS in the 70s. However, since the effective demise of CLS as a movement, although Unger’s later scholarly work still follows the CLS program of providing a critique of the current legal system, it has departed from its more radical approach of suggesting replacing the system with something entirely new to simply suggesting ways of augmenting or improving it. As Freeman observes:

Out of [critical legal theorising] has come understanding of the status quo and, just occasionally, blueprints for different social orderings. A notable example is found in the writings of Roberto Unger. In his article entitled ‘The Critical Legal Studies Movement’ he offers, what he calls, ‘a structure of no structure’. He describes his program as ‘super-liberalism’, ‘the building of a social world less alien to a self that can always violate the generative rules of its own mental or social constructs and put other rules and other constructs in their place’. This represents an effort to make ‘social life’ resemble what ‘politics’ is like in liberal democracies, ‘a series of conflicts and deals among more or less transitory and fragmentary groups.’

This process of social reconstruction, Unger defines as follows:

The social ideal of the relation of law to social life … can be translated into a program for the reconstruction of the state and the rest of the large scale institutional structure of society. They can be taken as the basis for a vision of transformed personal relations.

Unger’s aim is to eliminate some of the power imbalances in modern democracies that favour special interest groups who have disproportionate power in the democratic process. Hardly anyone would argue that this is not a worthy goal, but the means proposed by Unger, the State, of attaining it, may be problematic. As Zimmermann observes:

The basic goal of Unger’s [program] is to interfere in personal relations so that more appropriate levels of socio-political transformation can be achieved. In arguing that people can only control their destiny by means of the control of the state machinery, Unger claims that the state is the only force with enough power to promote the level of social transformation he requires. Only the state, he writes, can be powerful enough to bring about the ‘occasions and the means to challenge and revise every aspect of the basic institutional structure of society.’

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391 Freeman above n257, 1,052-3.
392 Unger above n390, 586.
393 Zimmermann, above n150, 229.
Also along these lines, Ratnapala suggests Unger’s superliberal society’s economy would need government to manage the allocation of resources for producing the means of existence and that this is a return to socialist command and control. This, Ratnapala notes, in obvious tongue-in-cheek understatement, ‘has already been tried unsuccessfully.’  

Unger’s scheme is highly ideological and like other ideologies, it seems to ultimately rest more on faith than on reason – in this case, the faith in the correctness of one’s own views. Who will lead Unger’s government? Ratnapala (again with tongue firmly in cheek and channelling Plato’s Republic) when posing the question of how such government would be constituted, asks if they are elected, ‘how can we be sure that noble critical scholars are elected?’

Jefferson Powell notes Unger’s Politics: A Work in Constructive Social Theory is written in quasi-religious language and in a way that demands the same authority as the Bible in traditional Jewish and Christian thought. As Powell explains:

Politics aims to present a world view with all-embracing descriptive and normative force, to persuade the reader to accept Unger's message, and by doing so to enter his movement and denounce other visions as idolatrous and in error. Unger presents us with a gospel and calls on us to accept it.

394 Ratnapala, above n324, 223.
395 Ibid.
396 Roberto Unger, Politics: A Work in Constructive Social Theory (Cambridge University Press, 1987).
398 Ibid 1015.
399 Ibid 1016.
Expanding on this theological theme, Powell notes:

The account of the universe in *Politics* retains the [Judeo-Christian] doctrine of creation’s traditional themes, but gives them a dramatic twist. In the Ungerian universe, the creative actor is humanity individually and collectively, and the agency of creation is the human imaginative will. The world is radically contingent because we can imagine it is different. Unger’s epistemological starting point is that we can understand something only by subjecting it to our imagination, comparing it to what it is not and bending it to our transformative powers of fantasy and re conception…..Knowledge is thus an active function of human assertion, of imposing the mind’s choices on the things to be understood. This is equally true of all forms of human thought and inquiry. Social and political debate rests on people’s ‘capacity to invent and to judge social ideals’. Law ultimately rests on the imaginative creation of ideals of human association…

And if law is a product of seemingly arbitrary human imagination (and ultimately, will), how is this any different to totalitarianism? Unger would reply that his scheme is designed to eliminate arbitrariness. However, as Ratnapala asks, in addition to how governments would be elected as noted above, how can elections be kept free of pressure groups, how stable would such a political system be, before finally noting that while designing Utopian systems is easy, achieving them in the world of real people is not.

**Procedural Rationality**

Jurgen Habermas’s theory of *procedural rationality* and its cornerstone, the *discourse principle*, is in essence a belief that giving proper voice to the people in the democratic system of government will enhance the integrity of the system and guard it against the disproportionate amount of power enjoyed by special interest groups in much the same way as Unger’s principle of social reconstruction is intended. As Freeman explains, the *discourse principle* provides as valid ‘only those [legal] norms …to which *all persons possibly affected* would agree as participants in rational discourses’ and further ‘the only law that counts as legitimate is one that could be rationally accepted by all citizens in a discursive process of opinion and will-formation.’

Ironically, the later Habermas has attracted criticism for his approach on the basis that the earlier more critical Habermas would have attacked it. However, James Tully, gives credit to Habermas’ model as a tool to critically analyse current methods in

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400 Ibid 1016-7.
401 Ratnapala, above n324, 223.
402 Freeman, above n257, 694 quoting Habermas.
political discourse that lead to law and policy making (including Habermas’ model itself), even if the model is not accepted uncritically on its own merits, when he states:

Consequently, an idealisation of a set of rules of validation cannot play the quasi-transcendental role assigned to it in this theory. The (conditional) roles of ideals and norms of judgments should be reconceived in light of what we learn about reasoning together, mutual understanding, and agreement from working through these and other examples. This is not a rejection of Habermas’ immensely important clarification of the procedures for the intersubjective validation of deontological norms of cooperation among free and equal individuals by testing the norms’ universality. It is to do, for his model, what he and the Frankfurt School have done for instrumental reason: to temper its comprehensive aspirations, point out its limits, and restore it to its proper place in our diverse polity, as one conditional form of reflection among many.403

There is also the further point that not all citizens are politically engaged and might not want or care for their voices to be heard, as happens in countries where voting is optional. The model assumes all citizens are politically aware and active rather than just simply apathetic.

**CLS’s Future**

While both Unger and Habermas hail from a tradition of CLS, their influence in more recent decades from the 80’s onwards is on suggesting programs of systemic design, like the ideas discussed above. In that sense they are more conservative than their CLS contemporaries who have retained a more radical approach either hanging on to the all but dead movement of critical theory in its pure form or branching into other fields such as *outsider jurisprudence* or, as will be discussed next, *postmodern jurisprudence* based on linguistic theory.

Furthermore, although Unger’s and Habermas’s theories for systemic design are perhaps easy enough targets to critique, their work does represent more than just naked critique which the earlier proponents of the CLS movement were noted for. Unger and Habermas are more modern proponents of the CLS movement in that their theories represent alternative models of jurisprudence (even if one does not agree with them). At least they are trying. As David Jabbari notes:

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The notable characteristic of these modern critical legal theories is their aim to move beyond criticism to the construction of novel conceptions of law which demonstrate the capacity of law both to effect and regulate significant social change. Unlike their predecessors, these modern theorists attempt to show that programmes of social change may be engineered by developing the potential for such change that lies within existing legal rules and doctrines, and not by other non-legal means.404

It is submitted that CLS’s most important continuing role is to look for other explanations for why the law does not operate perfectly fairly or predictably. CLS is right to question the assumptions often taken for granted, but is it asking the right questions? Is it time to ask different questions? An example is in the consideration of how legal reasoning takes place. Rather than ascribing decision makers with specific agendas due to their particular social backgrounds or particular political views as proponents of radical CLS would, it is possible to look at the variability of their legal reasoning as being due to their separate individual ways of thinking or cognition which will vary from decision-maker to decision-maker. Thomas Morawetz talks of legal reasoning in terms of ‘deliberative practices’ in the law when he suggests:

When we discuss deliberative practices, the necessary focus of attention is the individual, with her personal ways of assimilating experiences, making judgments, and offering justifications. Given the heterogeneous character of justification, it should be clear that the individual has many kinds of belief. Some are universal, others idiosyncratic; some are controversial, others not; some are essential to her modes of thinking, while others are ones she would easily abandon. All aspects of the individual's thinking are a function of her personal history and capacities. She may believe, for example, in the free market, in individual responsibility, in personal corrigeability, and in limited government. These beliefs will be rooted in her personal "take" on history, economics, psychology, and so on. The facts that she is a woman, black, and relatively privileged in terms of wealth and education—if such is indeed the case—will be important in determining some of her beliefs, but largely irrelevant to other beliefs. Her personal history may create unique perspectives on some issues that often distinguish women's or blacks' points of view. None of this can be known apart from her individual history and no pigeon-holing of her in terms of ethnic group or gender will tell us what ways of thinking she has or "should have." Moreover, we underestimate the individual if we disregard her capacity to recognize, anticipate, and respond to the alternative ways of thinking of others—her capacity to see herself as a participant in a diverse and complex deliberative practice.405

Thus, a decision maker’s beliefs, political persuasion, race, etc. may be a factor in their legal reasoning but not the only factor and not necessarily something that is pushing any particular ‘agenda’.

6.6 Postmodern Jurisprudence Based on Linguistic Theory

The term postmodernism came to prominence in the mid-1980s following publication of *The Postmodern Condition* in 1984 by Jean-Francis Lyotard (1924-1998) who, along with Michel Foucault (1926-1984) and Jacques Derrida (1930-2004), are arguably the postmodern philosophers who have had the most influence on recent CLS.406

According to Jonathan Crowe, the often-elusive concept of postmodernism is perhaps best explained by contrasting it with the term modernism which he describes as ‘a term used in philosophy to capture the idea that human knowledge is moving progressively closer to discovering absolute truths about the nature of the world and our place within it.’407

Lyotard defines postmodernism as an ‘incredulity towards meta-narratives.’408 A meta-narrative or ‘grand narrative’ implies some sort of purpose towards which everything is ultimately directed or measured by. Or as Crowe explains:

A metanarrative is an overarching framework or theory that provides a yardstick for designating particular narratives or worldviews as true or false. In other words, its role is ‘legitimate knowledge’ by situating it within the modernist project.409

Postmodernism has also been linked with nihilism, which is to consider one value as valid as another, since there are no ‘true’ values. Joseph Singer identifies nihilism in legal thinking as the work of critical legal theorists. As he explains:

The issues raised by the Critical Legal Studies movement have brought nihilism to center stage. Those of us associated with Critical Legal Studies believe that law is not apolitical and objective: Lawyers, judges, and scholars make highly controversial political choices, but use the ideology of legal reasoning to make our institutions appear natural and our rules appear neutral. This view of the legal system raises the possibility that there are no rational, objective criteria that can govern how we describe that system, or how we choose governmental institutions, or how we make legal decisions. Critical Legal Studies thus raises the specter of nihilism.410

408 Ibid 99.
409 Ibid.
Language plays a key role in this relativity of values. Lyotard, drawing on Wittgenstein’s concept of language games, places a heavy emphasis on the role of language in giving rise to narratives, so that different communities may view the world in different ways, depending on the way concepts are linked together by local conventions on the use of language.\textsuperscript{411}

Lyotard also drew on Wittgenstein’s theory to make the point that narratives are a product of the power structures within a particular community, which was also a central theme in the work of Foucault.\textsuperscript{412} Crowe notes that this theme is taken up further in Lyotard’s later work \textit{The Differend} (published in 1988) where he asserts that language games are not only used to dominate the public discourse but to prevent people operating under a different set of linguistic conventions to have their viewpoints heard.\textsuperscript{413} Crowe provides an excellent example of this with the person who with no legal training is required to defend herself in legal proceedings. Such a person, he suggests, in a situation which he describes as a differend:

\begin{quote}
[m]ight seek to justify her behaviour by raising considerations that, although they would be persuasive in other contexts, do not fall within the categories of argument recognised by law. Even though the proceedings are conducted in her native language, she may still be unable to make her viewpoint heard.\textsuperscript{414}
\end{quote}

This theme is explored in Derrida’s \textit{Force of Law: The Mystical Foundation of Authority} where he observes that law posits a system of general rules that apply to a range of cases, where justice on the other hand involves responding to particular situations – thus law is ‘the element of calculation’ and ‘Justice is incalculable.’\textsuperscript{415}

Derrida applies his celebrated indeterminacy of language thesis in order to present law as ‘the ordeal of the undecidable’ since although law claims to be general and objective, it is ultimately held hostage to the indeterminacy of language and the

\begin{footnotes}
\textsuperscript{411} Ibid 99.
\textsuperscript{412} Ibid 99-100.
\textsuperscript{413} Ibid 100. Jean-Francois Lyotard, \textit{The Differend} (University of Minnesota Press, 1988) 3-14
\textsuperscript{414} Ibid. As any practising lawyer knows who has attended court and watched a self-represented person attempt to present their case, they often labour with the rules and are frequently told what they are saying is not relevant or cannot be taken into account. Here, the dominant power in the public discourse is the justice system itself, seeking to imposing a set of rules that are only really clear to the initiated (the judges and lawyers) in order to conduct the court business more ‘efficiently’, but leaving a question mark over whether the justice system is in fact ‘just’.
\textsuperscript{415} Jacques Derrida, ‘Force of Law: The Mystical Foundation of Authority’ in Drucllla Cornell, Michael Rosenfeld and David Grey Carlson (eds.) \textit{Deconstruction and the Possibility of Justice} (Routledge, 1992) 16
\end{footnotes}
particular needs of the case, so that the ‘instant’ of decision where the judge purportedly applies the general rules is a ‘madness’ that ‘must rend time and defy dialectics.’

Crowe suggests that postmodernism could earn itself the tag of not being an offshoot of CLS but rather inherent conservatism, since if all values are socially constructed then the only values are those in existing narratives and to embrace these is to affirm the prevailing distributions of power. On the other hand, Crowe also notes that Derrida’s deconstructionism basically enables theorists to expose the ways that social power structures arbitrarily privilege some narratives at the expense of others and promises to draw attention to Lyotard’s differends by exposing the perspectives that are silenced or ignored within dominant metanarratives — and this is essentially a radical stance.

The writer submits that there is a further matter that links postmodernism and inherent conservatism or classicism (in the legal theory sense) and that is in the way these movements embrace (or rather do not embrace) evolutionary thinking. We have seen that classical modes of thought in politics and legal theory are built around grand narratives, or rather assumptions that some things are essentially unchanging and universal. Hence the rule of law exists to serve an ideally rational society unaffected by historical forces. Postmodernism in some sense also takes an anti-evolutionary stance with its central theme of no absolute truths, values or metanarratives. If one truth or value is as good as another and there are many narratives in society, then is there much use in engaging in historicism or dialectic to assess these truths, values or the usefulness of the narrative under consideration since one is as good as another? The purpose of engaging in a study of a history of a thing or the dialectical forces surrounding its emergence is to weigh up its usefulness as opposed to other truths, values or narratives, yet postmodernism does not appear to be concerned with such a weighing up exercise. Furthermore, postmodernism shares another anti-evolutionary

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416 Ibid 26. The writer prefers to consider the moment of judicial decision as, in the parlance of physics, the collapsing of the wave function of a number of infinite possibilities or ‘decisions’ prior to that moment. If different language games are applied, different possibilities present themselves but if the language employed in this case has cut off those other possibilities, which legal language is often designed to do, the act of making a decision using the limited language game of legal discourse is like the act of making an observation of sub-atomic particles, so only one of the possibilities can become the thing observed.

417 Ibid 104.
feature with classical legal theory, and that is its obsession with language. *Postmodernism* holds that the meaning of language is so uncertain and unfixed that it can be deconstructed to mean anything. Classical legal theory usually assumes the meaning of language is fixed so that text can be interpreted literally. Both *postmodernism* and classical legal theory have no use for the evolutionary idea of *historicism* when it comes to language to determine how its meaning might have evolved.

As seen above, CLS has been linked to *postmodernism*. However, we have seen that CLS clearly makes use of evolutionary ideas, whereas *postmodernism* does not. This is because CLS is in the business of questioning the law’s assumptions with an eye to history and different social forces at work to assess the fairness of the operation and application of the *rule of law* in a legal system. With CLS, there might not be such a thing as overarching universal values but at least they are weighed, based on historical experience and is willing to call foul on things not considered fair, charges of raising the spectre of nihilism notwithstanding. With *postmodernism*, values are not weighed so what history regards as important is of no account.

### 6.7 Conclusion

Karl Marx based his theory of *dialectical materialism* on Hegel’s *dialectical historicism*, although he eschewed the metaphysics of Hegel’s theory by basing his *dialectic* and *historicism* on the unfolding narrative of the economic means of production in the hands of the opposing classes the bourgeoisie and the proletariat. Marx’s theory was to go on and resonate throughout the ages, most notably in the political sphere with the rise and fall of Communist Russia and other communist nations which persist to date. Less influential than *classical Marxism* but still significant in political and legal theory have been more moderate incarnations of *Marxist* theory which have made use of the evolutionary ideas of *dialectic* and *historicism* to suggest various unfolding sub-narratives in society between opposing groups, not limited to economic class, but other situations between dominant and subservient groups based on race, gender, sexual preference, etc. *Critical Legal Theory* aims to explain how this has brought about the fashioning and utilisation of the *rule of law* by the dominant group to advantage themselves over a subservient group. Modern *Critical Legal Theorists* such as Unger and Habermas have proposed positive
programs for change in the political and legal sphere to try and correct these imbalances, although their critics have accused their visions as being too naïve, based as they are on assumptions about the level of engagement of the community and even elitism.

Finally *postmodernism* continues the move away from classical legal theories by insisting that truths and values are constructed and determined largely by the language used although its focus on the total indeterminacy of language and failure to weigh one value against another in a sense makes it anti-evolutionary in the same way classical theories are, although instead of insisting some truths and values are universal and unchanging (as classical theories do), the view of *postmodernism* is that history is no guide to what truths and values may be considered important, but simply how they are constructed in the present moment by the particular language that is employed.

In the next two chapters, we turn to very different traditions in Western thinking to *Marxism*, libertarianism and classical liberalism, to chart how those movements have employed evolutionary thinking in its extreme and more moderate forms.
CHAPTER 7
SOCIAL DARWINISM AND ITS IMPACT ON SOCIAL, ECONOMIC, POLITICAL AND LEGAL THEORY

7.0 Introduction

At the time Marxist theory was gaining impetus in the 19th century, a parallel strand of evolutionary economic and political thought was continuing to unfold, having its roots in the Scottish Enlightenment in the 18th century (discussed in the next chapter), and which inspired, and was later inspired by, Darwin’s theory of biological evolution in the 19th century and its key component, selective adaptation. While the tradition begun by the Scottish Enlightenment would utilise the Darwinian notion of selective adaptation to supplement their models of evolution to suggest a spontaneous ordering of the market place, another darker tradition emerged in the 19th century which would utilise this notion to suggest that strong individuals, organisations or polities should be seen to have a natural right to thrive and prosper while their weaker counterparts deserved to perish in a movement known as Social Darwinism.

This and the following chapter will discuss Darwin’s theory of evolution and its appropriation for economic, political and social ends and the effect that this has had on legal theory. In this chapter, Social Darwinism will be discussed and its role, coupled with legal positivism and German legal historicism, in the rise of Nazi Germany. In the following chapter will be discussed the less extreme tradition in classical liberalism that began with the Scottish Enlightenment and which, as mentioned, both inspired as was inspired by Darwin’s evolutionary theory but went in a different direction to Social Darwinism to postulate theories based on spontaneous economic, political and legal development.
7.1 Charles Darwin (1809-1882CE)

Charles Darwin introduced his theory of biological evolution to the world in 1859 with his *Origin of the Species*.\(^{418}\) It is conventional wisdom that Darwin lacked the excesses of some of his followers who later applied his theory to society to justify racism and other measures to favour the ‘fit’ over the ‘unfit’ in the same way that strong species prevail over the weak. Zimmermann notes that in Darwin’s book *Descent of Man*\(^{419}\) published 12 years after the *Origin of the Species*:

Because Darwin posited in that book that human beings have developed over millennia from lower life through natural selection, responding to environmental stimuli, some went further to believe that it must follow from this that the difference human races have been developed at different rates, at different degrees, since their evolution has occurred in response to differing environmental stimuli.\(^{420}\)

However, the views of Darwin’s followers were not that dissimilar to Darwin’s. Darwin, extrapolating on this notion of the evolution of races, himself opined:

> At some future period, not very distant as measured by centuries, the civilised races of man will almost certainly exterminate, and replace, the savage races throughout the world. At the same time the anthropomorphous apes will no doubt be exterminated. The break between man and his nearest allies will then be wider, for it will intervene between man in a more civilised state, as we may hope, even than the Caucasian, and some ape as low as a baboon, instead of as now between the negro or Australian and the gorilla.\(^{421}\)

And in case there is still any doubt about whether Darwin himself was a *Social Darwinist*, a further Darwin quote which appears in the conclusion to *Descent of Man* arguably removes all trace:

> Man, like any other animal, has no doubt advanced to his present condition through a struggle for existence consequent on his rapid multiplication, and if he is to advance still higher must remain subject to severe struggle. Otherwise he would soon sink into indolence, and the more highly-gifted men would not be more successful in the battle of life than the less gifted. Hence our natural rate of increase, though leading to many and obvious evils, must not be greatly diminished by any means. There should be open competition for all men, and the most able should not be prevented by laws or customs from succeeding best and rearing the largest number of offspring.\(^{422}\)

\(^{418}\) Charles Darwin, *The Origin of the Species*, 1859. However, it is well known that his theory was more or less fully developed about 20 years earlier than that as Darwin was reluctant to cause social and religious controversy, but with the impending release of very similar theory by the biologist Alfred Wallace, he let his theory see the light of the day at the same time, lest he be seen as a copyist.


\(^{420}\) Zimmermann, above n150, 105.

\(^{421}\) Darwin, above n419, 178.

\(^{422}\) Ibid 403.
7.2 Social Darwinism

The movement known as Social Darwinism involves a certain conception of Darwin’s theory of evolution as applied to the social sciences. With this movement, the Darwinian notion of selective adaptation is seen as simply direct competition between the ‘fit’ and the ‘unfit’ with the former prevailing, rather than the more nuanced view, as will be discussed in the following chapter, of the notion being about more than just direct competition but also context and cooperation to determine adaptive fitness (or survival of the fit, not necessarily the fittest).

Herbert Spencer (1820-1903CE)

Arguably, the Social Darwinism movement’s chief proponent is Herbert Spencer who coined the term ‘survival of the fittest’ and directly applied Darwin’s theories to social, political and especially economic theory. His teachings were perhaps most influential in the United States as will be discussed later in this Chapter, but to understand Spencer and his worldview, it is worthwhile to reflect for a moment on his personal life.

Spencer’s material and scientific leanings can be understood from his educational background – he had no education in the arts or the humanities, and never earned a university degree; he started his working life as a civil engineer for a railway in 1837 to 1846. After being appointed editor of The Economist in 1848, his intellectual activities culminated in his first major work Social Statistics and his love of statistics was to figure significantly throughout his work for the rest of his life. At the time of writing Social Statistics, Spencer suffered insomnia and ongoing mental and physical problems which stayed with him for life with numerous nervous breakdowns. In 1853, a significant inheritance allowed him to become a man of leisure and quit work altogether, instead putting all his efforts into his scholarly work which increased considerably from this point onwards. Spencer’s reputation in England soon spread far afield so that Richard Hofstadter would claim ‘In the three decades after the Civil

423 Ritzer, above n367, 38.
424 Ibid.
425 Ibid.
426 Ibid.
War it was impossible to be active in the field of intellectual work without mastering Spencer.427

Thus, it appears that Spencer had managed to attract something of a cult status for his unconventional views, not unlike Hegel in his time for his as we saw in Chapter 5. However, unlike Hegel, Spencer’s status was not to become more and more influential, but rather the opposite. Ritzer suggests a significant factor in this was the rather startling fact that Spencer rarely, if at all, read anyone else’s works, unless to simply confirm his own ideas.428 In fact, Spencer’s preference of intuition over what he described as ‘determined effort’ leading to ‘perversion of thought’ is not dissimilar to Comte’s approach of ‘cerebral hygiene’ of being wilfully ignorant of the available literature. However, it is also interesting to note that just as Comte ultimately discredited much of his own work with his attempt to establish a ‘religion of humanity’, Spencer arguably did the same towards the end of his life with outrageous ideas and unsubstantiated assertions about the evolution of the world, and sociologists came to reject Spencer’s work in favour of more careful scholarship and empirical research.429 Perhaps the most damning indictment of Spencer comes from his main source of inspiration, Darwin himself, who said of Spencer ‘If he had trained himself to observe more, even at the expense of…some loss of thinking power, he would have been a wonderful man.’430

Spencer is best known for his economic theory. However, a darker side of his is not so often referred to, namely his positive attitude towards something approaching eugenics. Although this attitude was not exactly front and centre of his theories, as it was in Nazi Germany, it was certainly there for all to see and, if they were so minded, to draw inspiration from. After all, Spencer did once say:

> Fostering the good-for-nothing at the expense of the good, is an extreme cruelty. It is a deliberate stirring-up of miseries for future generations. There is no greater curse to posterity than that of bequeathing to them an increasing population of imbeciles and idlers and criminals…The whole effort of nature is to get rid of such, to clear the world of them, and make room for better…If they are not sufficiently complete to live, they die, and it is best they should die.431

428 Ritzer, above n367, 39.
429 Ibid.
It is more likely than not, of course, Spencer was expressing such sentiments to reinforce his opposition to various welfare programs in Britain at the time such as the poor laws which he believed were a form of state intervention that hindered ‘the operation of that beneficent (sic) but server (sic?) discipline by which the incompetent, the idle, the weak and the imprudent are eliminated from society, along with their unfortunate widows and orphans’. Furthermore, unlike the Nazis, Spencer opposed war. A central plank of his theory of social evolution is societies evolve progressively from militant to industrial societies, where he held, Ritzer notes, ‘warfare ceases to be functional and only serves to impede further evolution. Industrial society promotes friendship, altruism, elaborate specialisation and recognition for its achievements rather than the characteristics one is born with, and voluntary cooperation among highly disciplined individuals.’ Hardly the sentiments of a dictator.

7.3 The Influence of Biological Evolution in Britain and United States

Also in Britain at this time was a legal scholar, Henry Maine (1822-1888), whose legal historicism we have already seen. Henry Maine is particularly significant here, however, as his evolutionary theory about history differed from his predecessors such as Hegel and Savigny in that he did not rely on metaphysical devices such as a Weltgeist or Volksgeist nor limit his study of history to just the history of ideas. Instead, he preferred and adopted a more empirical and materialist approach, which was largely inspired by his contemporary Darwin and his theory of biological evolution. As John Kelly notes:

[Maine’s] first and most famous book Ancient Law (1861), was written in the era in which the principal intellectual excitement had been provided by the recently published masterpiece of the biologist Charles Darwin, The Origin of the Species (1859), and thus to some extent reflects the current interest in evolution; another, remoter influence has been identified in the Hegelian philosophy of history…which perhaps suggested to him the idea of uniform principles of development. At any rate, Ancient Law proposed something like an evolutionary theory of law, complete with a pattern of growth to which all systems, though geographically or chronologically so distant from one another as to exclude the possibility of extraneous inspiration, could be shown to conform.434

433 Ritzer above n367, 37.
434 Kelly, above n75, 325-6.
Maine might have been influenced by Darwin’s empiricism in describing an evolutionary theory free of the metaphysical ‘baggage’ common to the Hegelian approach but as the above passage notes, Hegel’s approach was also part of Maine’s scheme, just not its insistence on a driving ‘spirit’ or any other ‘extraneous inspiration’.

The component of Darwin theory’s which has so far been the main subject of this Chapter, selective adaptation, was not given much oxygen in Maine’s theory; that fell to Spencer as has already been discussed. Moreover, it was to attract enormous attention across the Atlantic in the United States where government intervention in commercial affairs was virtually unheard of since this new country had not known the Dickensian horrors for the working class as Britain had, so it could naively continue to pursue the laissez faire economic policies for which Britain had lost its appetite following the excesses of the Industrial Revolution.

The self-confidence, self-reliance (and self-acceptance) of a still young United States of America moving out of the shadow of Europe can perhaps be summed up by the following passage of Henry David Thoreau in his Walden:

Some are dinning in our ears that we Americans, and moderns generally, are intellectual dwarfs compared with the Ancients and even Elizabethan men. But what is that to the purpose? A living dog is better than a dead lion. Shall a man go and hang himself if he belongs to the race of pygmies, and not be the biggest pygmy that he can. Let everyone mind his own business and endeavour to what he can.435

The main conduit for Social Darwinism in the United States was Spencer. His intellectual shortcomings and questionable theories towards the end of his life are discussed above and his influence was all but over after massive social problems, a major depression and a World War by 1939. However, his influence in the late 19th century and the turn of the 20th century in the United States before these major events is undeniable.

Ritzer notes that early American sociologists, unlike their conservative European counterparts, were political liberals and their liberalism had two main elements. First, it operated with a belief in the freedom and welfare of the individual being more influenced by Spencer’s orientation than Comte’s collective position. Second, many

sociologists associated with Spencer’s orientation adopted an evolutionary view of social progress, although they were divided as to how this was achieved with some arguing that government should take steps to achieve social reform with others taking the opposite view, a laissez faire approach with minimum government intervention.436 While these two positions seem wide apart, they share one thing in common – the belief that the system works or will work through reform, namely an optimistic position that does not challenge capitalism and has faith in the ultimate possibility of class harmony and co-operation as opposed to the Marxist view of class struggle and a criticism of capitalism (discussed in the previous Chapter). Hence, under either liberalist view, exploitation, domestic and international imperialism and social inequality were all able to be cheerfully rationalised away.437

As for legal theory in the US, Social Darwinism’s influence can be seen on one of that country’s most notable jurists of all time, Oliver Wendell Holmes Junior.

**Oliver Wendell Holmes Junior (1841-1935CE)**

As Zimmermann notes, what Darwinism implied for American jurisprudence was revealed by Oliver Wendell Holmes.438 Holmes famed realism was largely informed by Darwin’s theory of evolution. As Zimmermann points out:

Under the influence of Darwinism, Holmes conceived of an idea of legal realism that reduced law to a mere tool for identifying and manipulating the social factors. Holmes’ legal realism primarily interpreted the law in terms of predictions of how courts determine legal disputes…For Holmes, law has no reference point and so it is not the product of logic or morality; law is basically a process reflecting society’s adaptation to the evolving world.439

Holmes described his evolutionary legal theory as follows:

The customs, beliefs, or needs of a primitive time establish a rule or a formula. In the course of centuries, the custom, belief or necessity disappears, but the rule remains. The reason which gave rise to the rule has been forgotten, and ingenious minds set themselves to account how it is to be accounted for. Some ground of policy is thought of, which seems to explain it and to reconcile it with the present state of things; and then the rule adapts it to the new reasons which have been found for it, and enters on a new career. The old form receives a new content, and in time even the form modifies itself to fit the meaning which it has been received.440

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436 Ritzer, above n367, 192.
437 Ibid.
438 Zimmermann, above n150, 115.
439 Ibid 116.
440 Cited in Ratnapala, above n324, 98-99.
How do rules adapt? The answer to this question rests with the power wielded by the laws’ promoters, or as Holmes himself put it:

Legislation should easily and quickly modify itself in accordance with the will of the supreme de facto power in the community...The more powerful interests must be more or less reflected in legislation, which like every other device of man or beast, must tend in the long run to aid the survival of the fittest...[It] is no sufficient condemnation of legislation that it favours one class at the expense of another; for much of all legislation does that ...[Legislation] is necessarily made a means by which a body, having the power, but burdens which are disagreeable to them on the shoulders of somebody else.441

Was Holmes a Social Darwinist? Apparently not if one goes by his judgments, in particular his famous dissent in *Lochner v New York* where he criticised the majority who tried to justify their decision by free market capitalism. Holmes said that in that case although this was ‘an economic theory which a large part of the country does entertain ...[the] Fourteenth Amendment does not enact Herbert Spencer’s Social Statistics.’442 On this point, however, Duxbury suggests:

Holmes introduced Spencer into his judgment for the purpose of coining a pithy aphorism rather than specifically to take a stand against Social Darwinism. Holmes in fact claimed to admire the work of Spencer as much as he did that of Darwin, and even during his years as a Supreme Court Judge, he continued to subscribe to an essentially Social Darwinist view of the world. If he differed from Spencer, it was insofar as he believed economic freedom to be as much a privilege of the working classes as it was of the middle classes. Indeed, it was for precisely this reason that he objected to the judicial use of Social Darwinism to strike down legislation which served the cause of the employee.443

Indeed, another way of viewing Holmes’ interest in Spencer and Darwin is that he draws from these sources to form a purely descriptive view of the law rather than a normative one. Many of his comments, such as his famous quote about the legislative process being an ‘unprincipled battlefield’ by which judges ‘should not deprive the victors of their spoils’444 is arguably more of a sigh of resignation by him about how things simply are rather than expressing any preference for how they ought to be. Indeed, the appellation ‘legal realist’ usually applied to Holmes frames him as a describer rather than a purveyor of norms.

442 *Lochner v New York* 198 US 45 (1905) 76 (Holmes J dissenting).
Social Darwinism in England and the United States generally in the 19th and early 20th century may be considered as being obsessed with a descriptive approach to the social sciences rather than attempting to seek any normative basis. Nevertheless, Social Darwinism had a benign impact on British and US economic, social and political theory compared to in Nazi Germany which arguably did seek to employ Social Darwinism to imbue the social sciences with norms, albeit ones based on its infamous racial ideology.

7.4 The Rise of Nazi Germany

If Social Darwinism can be linked to Nazi Germany’s racial ideology, this is surely its darkest legacy. Of course, Social Darwinism would not have been the sole inspiration for Nazism; the bedrock of this ideology was already well and truly in place before Social Darwinism could have had an impact and can be traced back to Hegel and even Savigny. Although neither of these two men can be wholly blamed either for the phenomenon that became national socialism in the form it took in Hitler’s Germany, they both contributed to its rise – indeed made it intellectually possible – with their conception of society as an organic whole and the focus on the ‘spirit’ of the national polity. Marx also had an organic conception of society and his brand of socialism was a crucial scaffold for Nazi ideology as was discussed in the previous chapter.

Indeed, on the role of socialism in the rise of Nazi Germany, Zimmermann observes:

The intellectual forerunners of Nazism were socialists who believed that capitalism favoured the ‘unproductive classes’ of industrialists and speculators at the expense of the ‘honest working man’. They thought that capitalism should be gradually eliminated, because it lowered the birth-rate of the working class, ‘the best of the nation’.

Hitler himself, although implacably opposed to Marxism in his speeches and writings, was nevertheless unequivocal about his socialist leanings when he said:

We are socialists. We are enemies of today’s capitalistic system for the exploitation of the economically weak, with its unfair salaries, with its unseemly evaluation of a human being according to wealth and property instead of responsibility and performance, and we are determined to destroy this system under all conditions.

445 Zimmermann, above n150, 137.
446 Adolf Hitler, public speech, Munich 1 May 1927.
However, as is well known, much more than socialism informed Hitler’s worldview. His nationalism and special superior status credited to the German race, the *Volk*, was very much part of the German cultural wallpaper at that time and was not only lauded by Germany’s artists such as poets and writers Goethe, Schiller and Holderlin not to mention a no less celebrated composer than Richard Wagner, but it also had a respectable philosophical grounding from Hegel and even jurisprudential authority by Savigny. Moreover, many of the aforementioned artists made no secret of their anti-Semitism, perhaps most notoriously Richard Wagner, as a complement to their attitude of German Aryan racial superiority. However, as an attitude, even a philosophy, anti-Semitism needed something to give it more traction in order for it to be translated into official policy and executive action – something scientifically positivist to justify extreme anti-Semitic policy and laws, ultimately leading to the ‘final solution’. After all, it was generally considered in Germany that the German Aryan race was superior to others, and the Jews in particular were weak and an impediment to the former’s progress. In a survival of the fittest contest, it was widely believed that the German Aryan race would and should prevail, with the intervention of policy and law if need be.

The ultimate justification for the Nazis was to be found in Darwin’s theory of biological evolution and in particular *Social Darwinism*.

The leading scientist in Germany to introduce and propagate the idea of Darwinian evolution was Ernst Haeckel (1834-1919). This Haeckel did with a 500 page two volume work *General Morphology* setting out his biological theory and evolutionary worldview. By today’s scholarly standards, this work would have been instantly dismissed as that of a crackpot. However, with official recognition of his works and standing by persons of no less stature than Kaiser Wilhelm II (who had a political alliance with Baron Von Bismarck) and with personal conjecture and political views that were in keeping with the Prussian and then German Zeitgeist in an embryonic science that was yet to develop a proper rigorous methodology, Haeckel was treated with great reverence and respect professionally and personally. Of Haeckel’s two volume tome, John Cornell writes:

[they] were a mere fragmentation of a theory of everything, a grandiose proposal for the universal relevance of Darwinism ranging from the finer details of embryology to excursions into the
formation of the liberal nation state. Beyond this lay the promotion of the superiority of the Germanic peoples – all the more superior for being united within one nation state – and the need to combat Christianity, the priesthood and its gaseous God. Haeckel called his evolutionary philosophy monism, in his view, it was the only variable explanatory principle of science. The nation state, according to Haeckel, was comparable to an evolutionary biological organism, struggling toward progress and constrained by [evolutionary] natural laws. Only the fittest racial types would survive and prevail, and the fittest race must be on its guard against disease and deterioration. Haeckel, a devotee of Goethe, combined a curious blend of evolution and German ‘natural philosophy’, which lent a powerful notion of teleology, or sense of inherent goals and purpose, to his interpretation of Darwin’s theory. Evolution, according to this view, was driven relentlessly onwards and upwards by an inexorable propensity towards the complexity and genius of human beings as the pinnacle of nature. Haeckel’s blend of natural philosophy and evolution survives to this day among professional biologists.447

As can be seen from the above passage, Haeckel’s approach of blending natural philosophy with evolution, the teleological notion of progress aided by the principle of selective adaptation, is something many professional biologists still do believe in. However, Haeckel’s idea of progress is a very different one to today’s professional biologists in that Haeckel did not flinch at the immoral conclusions one could draw from the idea of selective adaptation taken to its extreme, that ‘inferior races would sooner or later succumb in the struggle for existence … (and that) …. while Europeans were destined to spread across the globe, the lower races were doomed to perish.’448

Haeckel was even more strident in his attitude towards morality (or rather his perception of the non-necessity of it) with his comments to the effect that it was a hindrance rather than a help to society and best done away with. Or in his words:

We can only see ‘moral order’ and ‘design’ in it when we ignore the triumph of immoral forces and the aimless features of the organism. Might goes before right as long as organic life exists.449

But there was one further ingredient that was to go into Haeckel’s worldview, without which, world history would have turned out quite differently. And that was his belief in and assertion of German superiority, or rather his racism, which he justifies in a survival of the fittest contest, not just extermination of the physically weak, on which we have seen he was patently clear, but also, by implication, extermination of anyone perceived to be weak or slowing down the evolutionary process of the German race. In a word, Jews. As Ted Benton points out:

Haeckel’s monist religion of nature became closely aligned in these later years with the Volkish tradition in Germany, whose assertion of racial identity and romantic ideology or unity with

448 Mike Hawkins, Social Darwinism in European and American Thought, 1860-1945 (Cambridge University Press, 1997) 139.
449 Ernst Haeckel, The Evolution of Man, Vol II (Watts, 1910) 748.
nature, understood in a territorial/nationalistic sense, were to become very much later a not insignificant source of Nazi ideology. Haeckel himself, by advocating Aryan superiority and racial eugenics, served to lend the weight of scientific authority to the most reactionary currents in the German culture of the period. 450

Hitler was the most ardent and influential exponent of Haeckel’s biological theories. Rather than the ‘accident of history’ as many have suggested he was, an evil anomaly in another otherwise rational modern western society, he is in many ways a logical result of the pernicious intellectual thought pervasive among the German intelligentsia and elites at that time who had embraced Social Darwinism. If one studies his rhetoric carefully in his writings and many public speeches throughout his political career, his language is littered with phrases such as ‘struggle for life’ and ‘struggle for existence’ and even ‘natural selection’ and the title of his Mein Kampf employs the familiar term ‘struggle’ in keeping with these sentiments. 451 Mein Kampf, written while in prison, and dictated to his cellmate and then loyal lieutenant Adolf Eichmann (later famed for the infamous ‘Eichmann defence’ of just following orders at the Nuremberg trials of 1946) shortly after the failed ‘Beer Hall Putsch’ of 1923, was a clear signal to the world of Hitler’s blueprint for aggression long before the outbreak of World War II and contains some of the clearest expressions of this most insidious evolutionary ideology with statements like the following:

The stronger must dominate and not blend with the weaker, thus sacrificing his own progress. Only the born weakling can view this as cruel, but he after all is only a weak and limited man; for if this law did not prevail, any conceivable higher evolution of organic living beings would be unthinkable. 452

Hitler has been universally regarded as one of the most immoral men that ever-lived or someone who simply had no morals whatsoever (i.e. amoral). However, as Zimmermann notes ‘Hitler was moral, not amoral.’ 453 While this statement at first blush seems to defy all conventional wisdom about Hitler, it actually demonstrates a deeper understanding of how morality works than to simply deem people who do bad things as immoral. A person’s morality can be subjective; what is moral for him or her or the particular cohort of which he or she is part, may be very different to what is moral to another, or indeed, the rest of the world. Hitler was practising a type of

451 Zimmermann, above n150, 146.
452 Adolf Hitler, Mein Kampf (Hutchinson, first published 1925-6, 1974 ed.) 395.
453 Zimmermann, above n150, 148.
morality which had slowly evolved and had come to significantly inform a powerful worldview among the intelligentsia and the elites in Germany at that time. As Zimmermann explains ‘[h]is morality was based on a particular understanding of biological evolution, coupled with his ardent desire to further improve the evolution of the so-called Aryan or German race.’

**Legal Theory in Nazi Germany**

Hitler’s views of biological evolution were not only consistent with the predominant scientific views at the time, such as the highly influential Haeckel, as already mentioned. His views were also consistent with the evolutionary view of legal theory taken by the *German Historical School* whose chief exponent was Carl von Savigny. Savigny, in the Romantic tradition, was opposed to the rationalist Enlightenment notion of individual autonomy in favour of the view as an individual being above all a member of a social body in the same way that each age of the nation represents the continuation and development of all its past ages. And it is in this context that Savigny analyses law as having to adapt to the evolving needs of society. As Zimmermann explains:

> Savigny likened such development to the development of the law in light of the evolution of the social body as a truly living organism. Such a legal growth, he concluded, is slow and derives its strength from the inner powers of the *Volksgeist* or the spirit of the people. The evolution of the law, then, is a continuous process of organic evolution, which develops itself both naturally and unconsciously, from one age or another, so that the law can be regarded not so much as the product of reason, but of a natural progression that is neither to be accelerated nor entirely obstructed by the intervention of the legislator.

However, had he had lived to witness the unfolding of the Third Reich, it is doubtful Savigny would have given his imprimatur to that regime as his very ideal of the gradual progression of the law was violated by the sudden proliferation of laws during Hitler’s rule. Indeed, insofar as the Nazi laws attempted to cover an entire field (racial matters) it could be argued that they were a form of codification, and as we saw in the previous chapter, Savigny had opposed codification after the Napoleonic laws. His opposition to the uniform code to the Germanic Confederation was primarily on the basis of this scheme being imposed top down and he felt it did not reflect the people’s public consciousness in the same way the law, as it had developed to that point of time, had.

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454 Ibid.
455 Ibid. 157-8.
If it could be argued, however, that the Nazi laws were a true reflection of the public consciousness, or Volksgeist, Savigny’s theory could have been used against him had he sought to oppose Nazi laws (that is if he had lived to see them enacted) – the only way out for Savigny would be for him to maintain the Nazi regime did not reflect the ‘proper’ Volksgeist. And yet, despite the conscientious objection of a significant minority, the exodus of a number of Jews and other concerned citizens from Germany at the time, opposing political parties prior to Hitler’s coming to power and his imposition of absolute rule, the Volksgeist in Germany from the perspective of the German populace and certainly that from the rest of the world who were subject to propaganda such as the images of the Nuremberg rallies, the 1936 Olympics, and the like, pro-Nazism arguably was the Volksgeist of Germany at the time. Would Savigny have shared this view? Of course, we will never know.

Whatever Savigny would have thought of Nazi Germany, Zimmermann nevertheless suggests that German legal historicism, which Savigny had pioneered, with its emphasis on the sociological implications of a nationally organically grown legal system and the necessity of every legal system to respect the particular social habits of a people, ultimately became the driving force for the racial myth in Germany. Furthermore, in respect of the view that the specific law of each particular nation was historically determined and ultimately destined to be replaced by any future generations, Zimmermann notes:

> It did not take too long, however, for such ideas of the legal historical movement to actually degenerate into a form of legal and moral relativism. The call to historical exploration of the law led not only to the development of historical jurisprudence, but also to the view that the law is entirely historical and unable to grasp anything that is eternal or universal.

Taking this to its logical extreme, Zimmermann points out:

> The final result is not just positivism but legal nihilism. The only standards which remain are those of a strictly subjective character. Such standards indeed have no other support but the particular choices of people, those who are in power in particular.

The legislators and judiciary, being men of the law and under the shadow of German legal historicism and the giant figure of Savigny in particular, would have seen it their role to make and apply the laws in accordance with the Volksgeist. Whether they

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456 Ibid 158.
457 Ibid 158.
458 Ibid.
supported the Nazi regime or not, they would have had to concede the moral relativist nature of this concept and act on the basis of ‘just giving the people what they want’. If this meant laws promoting German racial superiority, then so be it.

However, it is well known that the protests of those involved in the Nazi regime after it had collapsed was that they ‘had just been following orders’, or ‘acting under fear’ were not always taken at face value as many were wholeheartedly taken in by Nazi ideology. German lawyers particularly so. As Zimmermann notes:

The German legal community generally welcomed Hitler’s appointment as Chancellor. In October 1933, in their annual convention at Leipzig, with their right arms raised in the Nazi salute, 10,000 Germans swore that ‘by the sole of the German people [they] will strive to follow the course of our Fuhrer to the end of [their] days’.459

Judges, generally speaking, were even more supportive of the Nazi regime. Even before the Nazis came to power, judges aligned themselves with them in the last days of the Weimar Republic in the contest for political power, lauding Hitler and advancing openly anti-Semitic sentiments in their judicial opinions.460 Although many judges were ousted from office when the Nazis came to power on account of their Jewish pedigree or being deemed to be otherwise ‘undesirable’, only one judge resigned out of disapproval during the entire course of the Third Reich.461 The judiciary also took a proactive role in supporting the new regime with the newly formed Federation of Judges declaring its unconditional support of, and cooperation with, the Nazi leadership in the revision of German law462 and some judges went so far as to propose some of the most notorious Nazi policies. Noteworthy among them was Justice Erich Schultz of the German Supreme Court who personally proposed enactments of criminal penalties for ‘betrayal of the race … that is…the interbreeding of Germans with members of certain races named by law’.463

While the legal profession and judiciary were helping to enable the enactment and application of the Nazis’ legal policies, they were being given a philosophical underpinning by university law professors, the most notable of whom was Carl Schmitt. Schmitt theorised, in the obtuse style beloved of continental philosophers of

459 Ibid 167.
460 Ibid.
461 Ibid 168.
462 Ibid.
463 Ibid.
that era (and indeed since), to provide a justifiable basis for some of the Nazis’ worst excesses. The following is an extract of his concept of ‘enmity’ (or ‘demonising the other’):

The political enemy need not be morally evil or aesthetically ugly; he need not appear as an economic competitor; and it may even be advantage to do business with him. But he is the other, the stranger; and it is enough he is, in an especially intensive existential sense, someone different and alien, so that, in the event of a conflict, he represents the negation of one’s own being, and for that reason must be resisted and fought in order to protect one’s self–like (seinmassig) lifestyle.464

Carl Schmitt, although a respected legal scholar, made no secret as to who he regarded as ‘the other’, cheerfully organising and chairing a conference in 1933 on ‘Jews in the Field of Law and Economics’465 where at the opening session, Schmitt declared, in very unscholarly terms: ‘The Jews relationship to our intellectual work is parasitical, tactical and commercial … Being shrewd and quick, he knows how to say the right thing at the right time. That is his instinct as a parasite and a born trader’. Elsewhere, after the Jewish intellectuals had been expelled from or left the country, he mused ‘Intellectuals like these we can do without … Germany has spit them out for all time.’466

Hans Kelsen, one of the most celebrated legal positivists of all time, also (albeit indirectly) contributed to ‘legitimising’ the Nazi Regime notwithstanding his being forced from his post as Law Dean of the University of Cologne in 1933 by that same Regime.467 Although Kelsen had departed the scene, ultimately to the United States in 1940, Kelsen’s stature as a legal theorist and his narrow legal positivism may have not only removed any theoretical basis for opposing Nazi laws but may have even conferred on these laws a considerable degree of legitimacy.468 As Zimmermann explains:

Arguably, in proposing a rigid separation of ‘is’ and ‘ought’ to legal analysis, Kelsen’s legal positivism promoted the expulsion of ethics and metaphysics from legal analysis, which ultimately offers no theoretical resource for the legal profession to resist the intrinsic arbitrariness of the Nazi regime.469

465 Zimmermann, above n150, 175.
466 Carl Schmidt, ‘Die Deutschen Intellektuellen’ (1933) 126 Westdeutscher Beobachter 1.
467 Zimmermann, above n150, 159.
468 Ibid 159-160.
469 Ibid 160.
Legal positivism played a significant role in the failure of judges and lawyers to stand up against the Nazi injustices. These judges and lawyers, Seitzer and Thornhill note:

[t]ended to emphasize the close relation between legal analysis and the natural sciences. They argued that the evolution of law should be viewed as following purely positive patterns, and that law should be constructed as an internally and systematically consistent unity of principles and norms, relatively closed against normative purposive, or directly politicized external input. Legal prescriptions, in consequence, should be viewed as nothing more than the inner juridical facts, constructs formed by the law itself to facilitate its own application. On these grounds, they concluded that the validity of law depended on its status as an internally consistent set of rules, and it could not be reconstructed or interpreted on the basis of moral prescriptions.470

Legal positivism was not the only reason for the failure of the legal profession to resist the brutality and oppression of the Nazi regime. Nazi jurisprudence was also inspired by a legal movement called Freirechtsbewegung (‘Free Law Movement’).471 This movement arose out of Savigny’s legal historicist approach and in particular Eugen Ehrlich’s ‘living law’ theory, discussed in Chapter 5, and was part of the romantic reaction against excessive literal adherence by the German legal profession to the letter of the law.472 This legal theory could not appear on the surface to be any more different to the type of legal positivism Nazism is best known for, but ironically, it was used just as effectively to perpetuate Nazi injustices as a means of interpreting the law, in particular those that existed before Nazi laws were enacted, to ensure that they accorded with the Nazi Volksgeist. As Zimmermann explains:

Under Nazi rule…the legal system was interpreted as a progressive order of community life and evolution, so that legal formulations became vague and couched in metaphorical language more befitting the prophet or the stump orator than the legislator or the lawyer.473

There thus evolved ‘guiding principles’ such as the principle of the leadership of the leader (‘Fuhrerprinzip’) which was used to justify Hitler’s leadership and edicts.474 So where legal positivism sought to apply the letter of the law, the free law movement aimed to read into it a purpose that complemented with Nazi ideology. Both were jurisprudential handmaidens of the Nazi Regime (albeit attaining their common goal by different routes). It could be argued that both legal theories are essentially positivist in character, in the sense that neither approach appeals to universal or transcendent

471 Zimmermann, above n150, 163.
472 Ibid.
473 Ibid 164.
474 Ibid.
values as natural law typically does: legal positivism to no particular value but the strict letter of the law and the free law movement to a value contingent on the collective will, or rather the will as determined by whoever wielded the power at the time supposedly divining and giving effect to that will – in other words, a social fact.

To sum up Nazi Germany, it is not only astonishing for the number of people it brutalised, robbed, displaced and exterminated but also for the number and the calibre of professionals who supported it. It is perhaps not so astonishing when one considers how the intellectual and philosophical and legal climate had been developing and leading up to this point since the mid-19th century as noted previously. Whether or not Darwin was a racist himself was probably of little importance; his theory of evolution was the vital scientific ingredient to be thrown into this heady ideological mix. This mix already had an evolutionary notion of Volksgeist grafted onto it; however, being a metaphysical concept, the notion of a community ‘spirit’ could not entirely win over the entire intellectual community who needed something more to be finally convinced, or at least to be confident that, acting on this ideology would have an empirical basis. With Darwin’s theory of evolution, the racial myth of German superiority could be posited as a scientific fact – the Germans were a stronger race, the Jews weaker, nature favoured the strong over the weak, ergo the strong would prevail. Law and policy were required to reflect this biological fact – which was also a moral imperative - that the fit must survive and the unfit must perish.

German scientists, legal scholars and philosophers (not to mention their overseas supporters and sympathisers) on the whole avidly supported the Nazi Regime. Rarely in all of human history have so many professionals of different disciplines been on the same page as during the Third Reich.

7.5 Conclusion

Evolution has had a chequered history in classical liberal and libertarian thought in political, economic and legal theory. On the one hand, libertarianism has, inspired by Darwin’s theory, conceived of evolution in a narrow sense a la Social Darwinism with a teleological worldview of things evolving via the mechanism of selective adaptation limited to a notion of competition or survival of the fittest with a perceived quality having the upper hand (whether racial, economic or political) in achieving a preferred
outcome (i.e. racial purity, economic efficiency or conservativism respectively). On the other hand, evolution has also been conceived in less teleological terms with the mechanism of *selective adaptation* being considered as having a wider import than a mere binary *dialectic* of competition but involving adaptation to context and cooperation as well as competition with no predetermined or preferred outcome but rather one that is more or less spontaneous. This chapter has focused on *Social Darwinism* and the more libertarian conception of the notion of selective adaptation beginning with Herbert Spencer and culminating in Nazi Germany. In the next chapter, we will see that more recent theories of evolution have shown a link with the classical liberal Scottish Enlightenment tradition, particularly the idea of the spontaneous character of evolution and how order arises spontaneously.
CHAPTER 8

IDEAS ABOUT EVOLUTION IN CLASSICAL LIBERALISM AND THEIR IMPACT ON SOCIAL, ECONOMIC, POLITICAL AND LEGAL THEORY

8.0 Introduction

Like the previous chapter, this Chapter will also examine Darwin’s theory and its evolutionary component selective adaptation. However such a survey will be from the perspective of shared human rights in the classical liberal tradition rather than the highly individualistic ‘might is right’ notion of rights as we saw in the previous chapter with Social Darwinism. As will be discussed in this chapter, this type of evolutionary theory had its roots in the Scottish Enlightenment with Adam Smith who was to introduce the idea of ‘spontaneous order’ with his notion of a free market place, an idea that arguably was given its clearest expression in the 20th century by Friedrich Hayek with his notion of ‘spontaneous order’ which is the cornerstone of systems theory discussed in the next chapter. This Chapter will also examine some other evolutionary theories in economics and legal theory such as the Law and Economics movement and other recent theories that defy categorisation but nonetheless make thought provoking use of the Darwinian notion of selective adaptation.

8.1 Classical Liberal Evolutionary Economics

There are economic theories which drew on an evolutionary tradition long before Darwin’s theory of biological evolution, and it was this tradition that arguably influenced not only Darwin but also classical liberal theory. The evolutionary tradition in legal theory in common law jurisdictions had also long been alive and well with the development and study of judicial precedents. According to Suri Ratnapala:

It is not widely appreciated that the recent blossoming of the evolutionary theory of culture has a distinguished pedigree that pre-dated Darwin’s breakthrough, and indeed, provided Darwin with the intellectual tools that helped him cover the idea of natural selection. The work of these pre-Darwin scholars is particularly significant in legal theory as they drew their greatest inspiration from the shining example of the common law and proceeded to establish a solid foundation for evolutionary jurisprudence.475

475 Ratnapala, above n324, 268.
This particular evolutionary tradition, although arising out of the rationalist tradition of the Enlightenment rather than the romantic tradition as we shall see, does not owe its pedigree to the social contract theorists of that era even though these theories have a ‘quasi-evolutionary’ quality about them, attempting as they do to explain how society arose and its members came to organise themselves. This is because, as Ratnapala suggests, social contract theorists such a Locke and Hobbes, who were also rationalists, thought that law began only with the establishment of political sovereignty authority by the social contract which brought society into existence and not from what came before and that laws are only valid if designed and authorised by a Supreme legislature (‘the argument from design’). In this scheme, custom has no legal force nor is it valid law without the authority of a sovereign parliament.476

Thus, the rationalist thinking that began with the likes of Hobbes and Locke and came to epitomise the Enlightenment sees law as only that which is enacted and little or no attention (in the case of custom) is paid to what has gone before. In such a scheme, it is not possible to conceive of the law in evolutionary terms unless custom and the development of judge made law is also given due regard. The German historicists certainly took this approach but as has been noted in previous chapters, the guiding principle for them was largely teleological metaphysics (a ‘spirit’) rather than an empirical basis. Rationalists such as Hobbes and Locke were empiricists but their outlook was not one that could lend itself to any evolutionary ideas about the development of law.

Even though in the tradition of German Historicism there is a lot of looking backwards, there is a limit to how much one can look forwards which is an also important aspect of evolutionary thinking. Once the lawmakers and legal experts take over the law, popular consciousness ceases to be a significant source of law. As Ratnapala notes:

The major difference between the German historical school and the evolutionary theory is this. The Volksgeist as the source of law eventually runs out of steam. In evolutionary theory, law continues to be shaped by endogenous bottom-up pressures even after the arrival of the jurists and the legislators.477

476 Ibid 270.  
477 Ibid 277.
Therefore, not only does the German historicist approach come with metaphysical baggage, it is questionable whether it is even a ‘true’ evolutionary theory (although it does employ the evolutionary idea of dialectic as we have seen in Chapter 5 and the Volksgeist, whether one takes it seriously or not, informs dialectic). If evolutionary thought is not soundly rooted in the romantic tradition, how does it arise from the rationalist tradition? This is where we turn to the Scottish Enlightenment.

8.2 The Scottish Enlightenment

In discussing the genesis of pre-Darwinian evolution in western thinking, Ratnapala refers to the emergence of an alternative approach in the rationalist tradition to the argument from design, namely, ‘accumulation from design’, which took root in England and Scotland, home to much common law and custom, approximately 100 years before Darwin’s breakthrough theory, during the ‘Scottish Enlightenment.’

Two key figures of the Scottish Enlightenment were David Hume and Adam Smith.

David Hume (1711-1776CE)

David Hume is celebrated for his scepticism about cause and effect in his epistemology which also informed his social theory. According to Ratnapala:

This theory of knowledge (the basis of our knowledge is nothing more than custom or accumulated experience) led Hume to his view that social institutions grew out of convention or custom and were not the result of design or agreement. Conventions were formed not by reason but by accumulation of experience. Hume rejected the social contract theory concerning the establishment of law and society. He argued that law and society could not have been established by a promise, as the institution of a promise was itself based on convention. In short the social contract theorists were guilty of putting the cart before the horse!479

Hume, along with other figures of the Scottish Enlightenment, are part of the tradition of classical liberalism which have employed the idea of evolution in their social, economic, political and legal theory. Social Darwinism, on the other hand, is usually linked to free market conservatives who are often labelled ‘libertarians’. David Boaz describes libertarianism as ‘a species of (classical) liberalism, an advocacy of individual liberty, free markets and limited government rooted in a commitment to

478 Ibid 271.
479 Ibid 273.
self-ownership, imprescriptible rights, and the moral autonomy of the individual, or in other words, a considerable emphasis on self-interest. This definition could apply to the next figure we will discuss, Adam Smith, and indeed many have considered him to be such, but as we will see, there are things that don’t quite put him in the libertarian camp on account of his attitude towards shared human rights beyond mere self-interest.

**Adam Smith (1723-1790CE)**

Adam Smith’s celebrated ‘invisible hand’ is a widely embraced and popular notion in conservative economics. It is arguably the catchcry of conservative social, economic, political and legal theory embraced by classical liberals of all stripes, including (and especially) libertarians. Like Social Darwinism, Smith’s theory is also completely based on an evolutionary idea. However, to properly understand Smith’s evolutionary idea, one has to grapple with the philosophical basis for his ‘invisible hand’ thesis as espoused in his very popular *Wealth of Nations*, by referring to his less read but equally important work *Theory of Moral Sentiments*. Referring to *Theory of Moral Sentiments*, Ratnapala describes Smith’s philosophy thus:

> The starting point of Smith’s philosophy is the concept of the ‘original passions of human nature’. One of these passions is fellow feeling or sympathy. Though man is selfish by nature, ‘there are evidently some principles in his nature which interest him in the fortune of others, and render their happiness necessary to him, though he derives nothing from it except the pleasure of seeing it.’ Sympathy is the origin of the ideas of beneficence and justice. The absence of beneficence or sense of justice in a person evokes disapprobation. However, it is only unjust conduct that inspires the stronger feeling of resentment and leads to the demand for retribution.

Ratnapala notes Smith could have been, but was not, more reductionist in his search for the origin of rules, much like the modern game theorists who attribute cooperation to ‘tit for tat’ strategies, and suggests Smith deserves credit for noticing cooperation is an outgrowth not only of the instinct of retribution but also the instinct of sympathy.

In *Theory of Moral Sentiments*, Smith distinguishes between the two competing worldviews ‘natural harmony’ and the ‘man of system’. On the ‘man of system’ worldview, Smith comments that such a man:

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483 Ratnapala, above n324, 274.
484 Ibid 275.
[s]eems to imagine that he can arrange the different members of a great society with as much ease as the hand arranges the different pieces upon a chess-board; he does not consider that the pieces on the chess board have no other principle of motion besides that which the hand impresses upon them; but that, in the great chess-board of human society, every single piece has a principle of motion of its own, altogether different from that which the legislature might choose to impress upon it. If those two principles coincide and act in the same direction, the game of human society will go on easily and harmoniously, and is very likely to be happy and successful. If they are opposite or different, the game will go on miserably, and the society must be at all times in the highest degree of disorder.485

The ‘hand’ referred to in the above passage is the exact opposite to the ‘invisible hand’ referred to in the *Wealth of Nations*. But this serves to illustrate what the exact opposite to ‘man of system’, namely ‘natural harmony’ is, a form of *spontaneous order* which was an important precursor to the celebrated ‘invisible hand’. As Crowe explains:

Smith did not think that there is *really* an invisible hand organising the economy. The invisible hand is an illusion. In reality… the economy organises itself. The market is the cumulative result of many individuals pursuing their own objectives. It is a form of *spontaneous order*.486

This notion of spontaneous order in economic theory and also legal theory is given its clearest explication by Austrian-born Friedrich Hayek, discussed below. However, it is worth first mentioning one other school of economic theory and its relationship to evolutionary theory and legal theory: *The Law and Economics* movement.

### 8.3 Law and Economics – the efficiency hypothesis

Evolutionary thinking in law has also been based on an equation of legal reasoning and rational choice guided by cost-benefit calculation which came to be known as *the Law and Economics* movement. Kenton Yee explains this movement as follows:

Natural evolution and selection does not only occur in a biological setting. Any system is evolutionary if it has the following four ingredients: a collection of individuals; each ranked by a fitness criterion; fitness-prefering selective reproduction; and a possibility of mutations to introduce a degree of unpredictability. The common law has these four ingredients. (Common law) precedents are the ‘individuals’ that undergo Darwinian evolution. A precedent’s ‘efficiency’ is its ability to avoid litigation. This is because efficiency improves ‘Kaldor-Hicks’ efficiency. A law suit will proceed only if the expected gain to the plaintiff if the existing precedent is overturned, net of the litigation expenses, exceeds the expected harm to the defendant. Otherwise, either the potential plaintiff will rationally walk away or the parties will rationally agree to settle out of court. This means that only unfit precedents will attract litigant pairs, and less-fit precedents are more likely to attract an opposing party pair that would increase their collective expected wealth by undergoing litigation. In contrast, more fit precedents strike a better knife edge balance between the interests of opposing parties who would otherwise seek litigation.487

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486 Crowe, above n406, 08.
487 Kenton K Yee, *Common Law Efficiency under Haphazard Adjudication* (Columbia University, 2005) 4-5.
Perhaps the best-known proponent of the *Law and Economics Movement* is Richard Posner. Posner explains the movement in much simpler terms:

The doctrinal luxuriance of common law is seen to be superficial once the essentially economic nature of the common law is understood. A few principles, such as cost-benefit analysis, the prevention of free-riding, decision under uncertainty, risk aversion, and the promotion of mutually beneficial exchanges, can explain most doctrines and decisions.\(^{488}\)

Martina Eckhardt concedes that the efficiency hypothesis as postulated by Richard Posner\(^{489}\) utilizes evolutionary ideas, but notes:

The well-known and broadly discussed hypothesis that judge-made legal change tends to enhance the proportion of legal rules that promote economic efficiency entails a statement about the direction of judge-made legal change over time. It implies that the court system should be able to perfectly mimic competitive markets.\(^{490}\)

Moreover, for Eckhardt, the selection mechanism favoured by Posner (i.e. efficiency), is problematic in that it fails to tell the whole story and the increased tendency to litigate a rule is not a reliable indicator of its inefficiency, as she explains:

This efficiency hypothesis has drawn a lot of attention and a number of objections have been raised. They mainly concern the specification of the selection environment that is necessary to render the term "efficiency" meaningful, and the common goods characteristic of efficient legal rules. Since both litigants as well as judges are assumed to maximize their individual utility, a suboptimal production of efficient legal rules is to be expected as individual actors take into account only those costs and benefits which directly accrue to them. Thus, it is not that convincing that inefficient legal rules are brought to court more often than efficient ones since this would imply different incentives for individual actors for taking legal action. It seems just as plausible that efficient legal rules are contested more often than inefficient ones due to their distributive effects, if certain actors are systematically burdened by an efficient legal rule, and if the costs of taking an action are relatively small compared to the potential gains.\(^{491}\)

Thus, Eckhardt concludes the efficiency hypothesis has had its day in evolutionary economics when she opines:

\[\text{[t]he efficiency thesis of judge-made legal change cannot be supported from an evolutionary economics point of view. Nevertheless, the law and economics approach to judge-made legal change provides a good starting point for further elaboration. In contrast to the standard neoclassical model, it takes legal rules not as given, but explicitly deals with their generation and dissemination.}\] \(^{492}\)


\(^{490}\) Ibid.

\(^{491}\) Ibid.

\(^{492}\) Ibid 452.
As will be seen the next chapter, Eckhardt uses a *systems theory* approach in her own model and alloys evolutionary economics to legal change.

### 8.4 Friedrich Hayek – Spontaneous Order

Hayek was a prolific writer and commentator on such varied topics as law, economics, philosophy and sociology and his work was shaped by Scottish Enlightenment thinkers such as David Hume and Adam Smith.\(^{493}\)

Zimmermann notes the influence of Smith on Hayek’s theory is evident in Hayek’s idea that the principal means of enhancing our social condition is by improving the ‘rules of the game’ which are generated spontaneously and not by society’s legislator\(^{494}\) and that:

> This insight inspired Hayek to develop an idea of the spontaneous order that ‘is not the product of deliberate design, but instead emerges as an unintended outcome from the mutual adjustments of individuals who are left free to pursue their own purposes, based on their own knowledge, within the constraints of a framework of general rules of conduct, rules that typically specify what they may not do, instead of telling them what they have to do’.\(^{495}\)

Hayek’s theory of *spontaneous order* is based on his notions of cosmos and taxis which are respectively, rules (nomoi) not tailored to any specific objective, and rules both specific and end-oriented. The former are nomos (the law of liberty) and the latter are taxis (the rule of an organisation laid down by authority).\(^{496}\) In Hayek’s words, the distinction between nomos and taxis:

> [l]ies in the fact that the former are derived from the conditions of a spontaneous order which man has not made, while the latter serve the deliberate building of an organisation serving specific purposes. The former are discovered either in the sense that they merely articulate already observed practices or in the sense that they are found to be required complements of the already established rules if the order which rests on them is to operate smoothly and efficiently. They would never have been discovered if the existence of a spontaneous order of actions had not set the judges their peculiar task, and they are therefore rightly considered as something existing independently of a particular human will, while the rules of organisation aiming at particular results will be free inventions of the designing mind of the organiser.\(^{497}\)

Freedom is only possible in a legal system that resembles a cosmos as the laws emerge more spontaneously from social consensus; that allowing laws to evolve over a period

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\(^{493}\) Zimmermann, above n150, 267.

\(^{494}\) Ibid 268.

\(^{495}\) Ibid.

\(^{496}\) Ibid.

of time means people are not being arbitrarily controlled by others. In a cosmos people only need accept the general rules which are drawn spontaneously from society itself, rather than from a small group of individuals holding positions of power.\footnote{Ibid.}

Hayek’s \textit{spontaneous order} was to open the door to a more explicit and methodological theory of evolution in the social context, namely \textit{systems theory}. More of Hayek’s \textit{spontaneous order} and \textit{systems theory} will be discussed in the next chapter.

\textbf{8.5 Other Evolutionary Liberal Economic theories}

The following are some suggestions from academic commentators how the Darwinian concept of \textit{selective adaptation} might be used in legal theory. These perspectives are both classical liberal and libertarian, but offer alternatives to the narrow conception of \textit{selective adaptation} offered by \textit{Social Darwinism}.

An interesting approach is proposed by Jan Smits, which emphasises the ability of laws to adapt to their context rather than simply being seen as outcompeting other laws on the grounds of some arbitrary notion of their fitness (e.g. their efficiency as previously discussed). In developing his model, he firstly sets out three major premises of Darwin’s theory as follows:

First, there must be variation in species (otherwise some species could not better survive than others); second, the variation must concern variation in fitness (understood as the ability to survive and reproduce, some species being more able to adapt themselves to changing circumstances than others); third the characteristics constituent for the fitness of the species must be inherited, meaning they must be able to move from one generation to the next. This means that the heritable favourable traits become more common in future generations, while the non-favourable traits become less common, allowing adaptation of the species as such. Only with these three constituents, a ‘struggle for life’ in the Darwinian sense can originate.\footnote{Jan M Smits, ‘Applied Evolutionary Theory: Explaining Legal Change in Transnational and European Private Law’ (2008) 9 \textit{German Law Journal} 479.}

Discussing the application of the law to the first Darwinian principle, Smits explains:

The first requirement for natural selection is variation in species. The equivalent of this requirement in law is the existence of diverse national (and sometimes European) legal rules to solve identical problems. In private law, we have various rules on, e.g., the bindingness of an offer, on tort liability and on transfer of property. These rules mainly evolved in national (socio-economic and cultural) environments. They sometimes relate to essential differences between jurisdictions that reflect differing views of society (such as differing levels of solidarity, of duties to help others, levels of social security, etc.).\footnote{Ibid 481.}
Therefore, in considering law from a Darwinian perspective, it is necessary to study the laws that exist in different jurisdictions to address the same problem, and their different social contexts (in this case the different nations of Europe) from which they have arisen. This approach is therefore suggestive of a context-sensitive principle at work in considering the notion of selective adaptation rather than some universal principle of perceived fitness (e.g. efficiency). The second Darwinian principle mentioned above Smits explains as follows:

Second, these rules are also likely to vary in fitness. Many of the present day rules in the various European countries are the result of a long evolution during which these rules were adapted to the environment they had to operate in. According to evolutionary theory, other rules that once existed in these countries must have been eliminated in this process of natural selection and any change of the environment in the future would - again - lead to adaptation of the present rules. Some rules may become extinct while others become more important. Legal history shows telling examples of this process. Thus, the rule on laesio enormis and the numerus clausus of contracts in Roman law had to go because they no longer fit the economic environment after the Middle Ages. Rules on animal trials were abolished because of new societal insights. And also the rule that only men could vote for Parliament had to be replaced because of a changing societal and political environment.501

The history of the social contexts in which the various laws have developed needs to be studied to understand how those laws came to be, and how they superseded laws less ‘fit’ than them. This will usually be on the basis that the more ‘fit’ laws adapt to the changing social context. As to the third Darwinian principle mentioned above, Smits explains:

The third requirement for natural selection (the characteristics constituent for the fitness of the species must be inherited) is more problematic in the context of law. This is because of the simple fact that descendants taking over the genes of their predecessors do not exist. Rules do not procreate in the literal sense of the word. But one can think of an analogy with genes. In evolutionary economics, Nelson and Winter have used routines as playing the same role in firms as genes do in organisms. The routines of a firm establish a stable identity of the firm that endures over time and - just like genes - program its behaviour. As long as the routine is profitable, firms stick to it. The same analogy can be used in law. Rules are not just rules: they are learnt by students and applied in practice. Normally, agents (in our case: the legal actors) will not deviate from these rules because of considerations of legal certainty and equality. In this sense, the practice of application is being transferred from one generation to another. And just like genes in biological organisms, these rules may gradually change under influence of a changing environment (society).502

Even though laws are not transmitted from one generation to the other as genes are, their adoption by subsequent generations is analogous to gene transmission. Indeed, in

501 Ibid.
502 Ibid.
common law jurisdictions, the doctrine of *stare decisis* ensures the passing down of laws and legal principles from one generation to another.

It is submitted that what distinguishes Smits’ scheme from other Darwinian conceptions of law, such as *Social Darwinism*, is that it promises to be more descriptive and methodological in that it reveals itself through serious study of comparative legal systems and their respective social histories to ascertain how law adapts to society. Darwinian conceptions that focus simplistically on competition being the only form of adaptation tend to be more binary and ideological in their outlook (ie one law competes with another and one outlasts the other based on a perceived or even preferred measure of fitness such as economic efficiency).

While Jan Smits’ model *seems* to be a novel approach to Darwinism, it actually isn’t. It is because *Social Darwinism* has impoverished the notion of Darwinism so much that it sounds new at all. Indeed, prior to *Social Darwinism* and even Darwin himself, there was a form of ‘Darwinism’ that more closely resembled the above approach to which we have seen above with notions of evolution entertained around the time of the Scottish Enlightenment.

To rescue it from the efficiency hypothesis, Bart du Laing proposes a *biological* approach to evolutionary economics which he maintains can also be applied to evolutionary legal theory, namely a human behaviour-based theory called *dual inheritance theory*. After describing this theory as one which looks at the evolution of individual human behaviour from the perspective of genetic and cultural evolution - or ‘nature *and* nurture’ rather than ‘nature versus nurture’ as the driving force of evolution - he suggests:

First, evolutionary analysis in law has to take into account the regulating behaviour itself. After all, law not only affects human behavior, it also, in a way, is human behavior. What does this have to do with dual inheritance theory? Well, one way of approaching legal systems or systems of rules in general - but perhaps a very different way than the ones preferred by other "evolutionary" approaches to law - is to regard them as manifestations of large-scale cooperative behavior involving the production of a public good.504

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504 Ibid 499.
Laing sees this approach as also applicable to contract law, finding parallels in human behaviour as seen through the lens of a biologist and a rational human actor entering into contractual relations with another when he observes:

Contracting behavior itself can be seen - at least in its archetypical case - as an instance of small-scale dyadic cooperative behavior. A lot about contracts thus is likely to be adequately explained from an evolutionary point of view on the basis of reciprocal altruism and the mechanisms that are known to sustain it in dyadic interactions. For example, this could be the case for so-called "relational contracts" and the fact that they are largely self-regulating. Here evolutionary theory could be seen as helping to determinate the relative importance of law.\textsuperscript{505}

Thus, the centrepiece of Laing’s scheme is co-operation rather than competition as a measure of fitness. Social Darwinism's obsession with competition is actually a serious misreading of what actually happens in biological evolution which arguably is 9 parts cooperation and only 1 part competition. A simple illustration is what happens in the life of bacteria, the most ubiquitous lifeform on the planet. While a few strains make a killing (literally) in invading and destroying their hosts, by far the majority of microbe species make a perfectly good living in a symbiotic relationship with their hosts, to such an extent that their number usually far outweighs the number of cells of the host and the host would not survive without them.

From the two examples given above, it can be seen that evolutionary theory has variants. To be fair, Social Darwinism is one type of variant, but not as Social Darwinists would suppose, the only one. And its application would appear to be very limited as we have seen, or even outright dangerous. Jack Vromen describes at least three types of evolutionary theory in the economic sphere: firstly, the 'biological metaphor' and Universal Darwinism. Secondly, ‘the Continuity thesis’ where ongoing economic processes are made possible by prior non-economic evolutionary processes and continue to be affected by the latter as well as concurrent non-economic processes. Thirdly, a ‘Layered Ontology’ which maintains that there are a number of related levels of organization in the economic sphere which are in turn realized at lower levels of organization at which evolutionary processes might occur concurrently.\textsuperscript{506}

\textsuperscript{505} Ibid 500.
Laing notes that Vromen and other researchers have raised the possibility of these approaches complimenting each other rather than being mutually exclusive. He suggests his dual inheritance theory bridges that gap, and opines:

I believe that the work of Boyd and Richerson and other dual inheritance theorists shows that a flexibly conceived "generalized Darwinism" -focusing on population thinking rather than on natural selection per se - can go hand in hand with an acceptance of (some version of) the "continuity thesis". Rendered in the language of dual inheritance theory, the latter manages to address both cultural evolution and the evolution of culture and human cultural capacities within one and the same evolutionary theoretical framework. Furthermore, this approach appears capable of accommodating, at least in principle, Vromen's third cluster of related issues, namely the question of a layered ontology, involving multiple levels of organization and the upward and downward causal relationships between them. 507

In Chapter 10 of this thesis, the writer will propose his own version of evolutionary theory as it might apply to legal theory. Before doing so, it is necessary to look more closely at Hayek’s notion of spontaneous order and systems theory which will be discussed in the next chapter. It is submitted that only a full understanding of these ideas can arm one with a sound evolutionary theory.

8.6 Conclusion

While Social Darwinism is perhaps the most well-known appropriation of Darwin’s theory by the social sciences, it employs a very narrow conception of the Darwinian notion of selective adaptation and as we saw in the previous chapter, is not only a poor descriptive theory in the social sciences but can also lead to considerable mischief. We saw in this Chapter that not all western evolutionary theory in the social sciences have had as an impoverished notion of selective adaptation as Social Darwinism. Beginning with the Scottish Enlightenment, which predated Darwin, we saw Adam Smith’s notion of spontaneous order which anticipated the later and more fully developed similar notion by Friedrich Hayek. In between these developments, other evolutionary economic theories were to emerge such as the Law and Economics movement. This, like Social Darwinism, employed a more narrow view of the notion of selective adaptation, limiting the selective factor to economic efficiency but at least is not so overtly ideological as Social Darwinism or self-interested which is why it still has some use in evolutionary theory even today in explaining the rationale behind policy, even legal policy, legislative and judicial, given the ubiquity of economics as a policy driver

in modern western democracies. Nevertheless, more nuanced theories have been advanced, as we saw in this Chapter, in respect to evolutionary economics and how this might play into law making given the complexities of the modern world and there being more factors in play than just economic ones. Continuing in this vein, we now turn to *systems theory*, the topic of the next chapter which picks up on the notion of *spontaneous order* and the multi-various factors that create and inform the evolution of legal systems and their laws.
CHAPTER 9

IDEAS ABOUT EVOLUTION IN SYSTEMS THEORY AND THEIR IMPACT ON SOCIAL, ECONOMIC, POLITICAL AND LEGAL THEORY

9.0 Introduction

*Systems theory* is a culmination or synthesis of ideas about evolution and evolutionary components discussed so far, and is therefore the *evolution* of ideas about evolution. It is arguably the most sophisticated approach to the use of ideas about evolution in social, political, economic and legal theory since it is closer to a ‘pure’ more empirical evolutionary theory as developed in mathematics and science than ideas about evolution that have defined other movements whose scientism has merely masked its insidious ideology (e.g. *Social Darwinism*). This Chapter will survey *systems theory* and its application to social, political, economic and, in particular, legal theory as the logical next step in the empirical and scientific study of evolution begun by Darwin and the notion of *spontaneous order* that had its roots in the Scottish Enlightenment.

9.1 Evolution as a Science

Although components of evolutionary thinking such as *historicism* and *dialectic* have been around in western thinking for centuries, the only first really serious attempt to put evolution on a scientific footing came with Darwin’s version of *selective adaptation*. It was not long before the social sciences sought to emulate this approach with some of these ‘scientific’ approaches perhaps better described as metaphorical rather than scientifically methodical. As Calliess, Freiling and Renner note:

Evolution as a descriptive concept is used in a variety of disciplines. Building upon the analysis of species evolution as a biological phenomenon by Lamarck and in the seminal work of Darwin, has soon crossed disciplinary boundaries and has spread to fields as diverse as theology, cosmology, stellar astronomy and – in the realm of social sciences – sociology, political science, law, business and economics. This development has been mainly triggered by the emergence of empirical scientific methods in the 19th century which has fundamentally transformed the style of argumentation and the production of knowledge in all academic disciplines. Therefore, it can be very difficult to recognise to what extent the terminology of evolution is used in a merely metaphorical way and to what extent it is actually employed as an analytical framework of research.  

508 Calliess, Freiling and Renner, above n7, 397.
In the previous chapters, we have seen the quasi-empirical or quasi-scientific evolutionary approaches employed in the fields of political, economic and social theory with the works of Auguste Comte and in Marxism and Social Darwinism. These fields have since learned to use various tools in adopting more rigorous scientific approaches. One such tool is the interpretative approach to research in sociology rather than an analytical approach as was discussed in Chapter 5. Another is systems theory. Indeed, in legal theory, this concept seems to enable a richer understanding of the nature of law and its role in the wider social context. This wider appreciation of the nature and social purpose of law is reflected by Calliess, Freiling and Renner when they explain:

In systems theory terminology, law is a communicative system that consists of all communications marked by the binary code legal/illegal. As such it is a functional subsystem of society which in turn is defined as the totality of all communications. In relation to society as a whole, law fulfils a unique function: “the stabilisation of normative expectations”... This function is what on the one hand distinguishes law from every other social system and on the other.

Ultimately, systems theory strips the notion of evolution of the ideological baggage of various political and social agendas. Arguably such agendas even inhered in the so-called analytical approach to jurisprudence with it black-and-white way of looking at the world and law’s limited nature as a ‘command’, ‘social fact’, or a product of ‘general will’ in the tradition of legal positivism, or alternatively in the natural law tradition, something reflecting eternal transcendental principles such as divine values or secular reason. While masquerading as objectivity, these conceptions all the while subconsciously expressed the lawmaker’s or jurist’s worldview and desires. Thus, bad science and metaphysics are co-opted to accord with a particular ideology, usually in all sincerity as the beholder has complete faith in it and really believes it is the road to jurisprudential salvation. But legal theory is not religion. The key to the evolutionary idea of systems theory is that the phenomenon under consideration (be it society, economics, politics or law) is always seen as a process, not a static thing, always contextualised and not merely existing in a vacuum. Jan Smits, emphasizing the process nature of law and its evolving contextuality, observes:

If natural selection is indeed the main factor steering the development of organisms, the question is whether the development of law can also be seen as guided by this evolutionary process. On
first sight, this view may seem mistaken as law is usually seen as either given by some authority (like a legislator or a court) or as derived from some transcendental nature (like in natural law thinking). But this argument is mistaken: what the evolutionary perspective has to offer is an external account of how law develops. It does not inform us about the contents of law, but only explains why the law develops as it does. This evolutionary perspective was already applied in the 19th century by, inter alia, Friedrich Von Savigny and Henry Sumner Maine but it gradually disappeared behind a horizon of more positivist and transcendental accounts of legal development. However ... looking at law as a spontaneous order of which the development is dependent on both external and internal factors can sometimes be surprisingly insightful.  

Whereas static things don’t move, are predictable, and can be controlled and made to do what one wants, processes have a spontaneous developmental life of their own. In systems theory, this law-as-process approach to legal theory is more fully realised. Law is not viewed as just a passive phenomenon but is rather part of the positive feedback loop that results from law being not only product of, but also prime mover of, social, economic and political reality. Law as a system, a process, like other processes, man-made or natural, has a life of its own. One can make a law to achieve a certain purpose, but like fire, it can turn on the maker with unintended effects. Its implications beyond the legal system in which it has been forged, interpreted, decided and enforced need to be carefully considered as every politician who tries to advance a piece of populist legislation for political ends discovers when faced with inevitable social, economic, or (from the opposing camp) political backlash.

**Evolutionary Epistemology and Spontaneous Order**

Once one has conceived of law as a process, one can apply the rules of systems theory to it. However, before discussing systems theory, it is important to mention its precursors, which were also based on a process-view of the law. The most obvious one is spontaneous order as has already been mentioned, but there is also a further concept which is closely alloyed to spontaneous order, evolutionary epistemology which is the study of how information evolves as well as how it orders itself.

**Answering the Postmodern Challenge**

Professor Suri Ratnapala appeals to the concepts evolutionary epistemology and spontaneous order to address the challenge that postmodernism raises for our current

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understanding of knowledge – that is, as we discussed in Chapter 5, its role in suggesting the indeterminacy of the law by insisting on there being no objective knowledge or truths on which law can be based or even understood (if one accepts the postmodernists’ thesis of the indeterminacy of language). But does postmodernism have the last word in legal theory? Summing up the debate that has subsisted to date among legal scholars (whom he describes as a ‘quarrelsome bunch’), Ratnapala suggests that until they were rocked by the postmodern critique of reality in the closing decades of the 20th century which questioned the possibility of objective knowledge, legal scholars were generally united on the question of whether there is an objective reality, effectively taking it for granted that there was, but with markedly different conceptions of the nature of that reality. In the one corner, one finds the liberal theorists who believe that ‘impersonal rules and negative freedoms emancipate the individual’ whereas in the other corner, there are the critical legal scholars who believe that ‘these notions alienate individuals from society and defeat their genuine aspirations. The postmodern critique forces jurists to question whether there is a reality on which these opposing camps can base their suppositions about social life or, rather, their meta-narratives (in the case of liberal theorists, the meta-narrative of inalienable rights and the pursuit of liberty and in the case of the critical legal theorists, the meta-narrative of power imbalance and exploitation).

**Evolutionary Epistemology**

One particular idea about evolution, ‘evolutionary epistemology’ may provide an answer to the postmodern critique – not to challenge its claim that perfect knowledge is impossible, but to deny that all knowledge is merely a matter of personal taste, rhetoric, convention or authority. Although knowledge can never be perfect it can improve as it evolves and have enhanced objective value. Ratnapala employs the idea of evolutionary epistemology to advance a view of evolution of knowledge as follows:

512 Ibid.
513 Ibid 176.
[I] espouse a theoretical approach modelled on the basic Darwinian theme of natural selection which, in my view, re-centres the whole debate concerning the nature of knowledge in a way which exposes the inadequacy of the postmodern critique. This approach is grounded in evolutionary epistemology developed with the philosophy of science by Karl Popper, Donald T Campbell, Konrad Lorenz, Peter Munz et al, and within political economy by F A Hayek. Evolutionary epistemology postulates the thesis that the growth of knowledge in human communities is continuous with biological evolution and is governed by the same process of blind variation and selective retention. Like postmodernist critical theory, evolutionary epistemology affirms the utility of searching for the origins or ultimate foundations of knowledge. However, unlike postmodernism, evolutionary epistemology affirms the possibility of knowledge, though never perfect knowledge. It does so by redirecting the enquiry away from the origin of knowledge and towards the processes of the growth of knowledge.514

Ratnapala describes his evolutionary theory not as a fully developed theory of law as such, but rather a ‘research program within a nascent school of thought. Hence it represents a start rather than a consummation of a philosophical inquiry.’ 515 Karl Popper’s views have an important role in the development of this approach, not those he held at the time of his celebrated falsification thesis, but rather some years later when he began to appreciate the extent to which biology lent support to his general thesis, that the growth of knowledge and biological evolution followed a common path, such that ‘biological evolution is growth of knowledge’.516 As Ratnapala explains:

The emergence of the most primitive life forms and the most sophisticated scientific theories result from the same laws. From amoeba to Einstein, the same process is at work. This realisation led Popper to declare that ‘the main task of the theory of knowledge is to understand it is continuous with animal knowledge; and to understand also its discontinuity - if any - from animal knowledge.’ 517

While Ratnapala credits Popper as founder of evolutionary epistemology, he suggests D T Campbell was the first to apply it in his 1974 essay of the same name, 518 noting:

Campbell’s thesis is that ‘a blind-variation-and-selective-retention process is fundamental to all inductive achievements, to all genuine increases in knowledge, to all increases in fit of system to environment.’ He finds this thesis substantiated at every observed level of knowledge retention, from the non-mnemonic problem solving of unicellular organisms to the activities of scientists. 519

514 Ibid.
515 Ibid 177.
517 Ibid 188-9.
518 Ibid 189.
519 Ibid 190.
Relationship with Hayek’s Spontaneous Order

In the social sciences, the dominant tendency has been to treat all cultural institutions, especially the law, as feats of deliberate social engineering. While in organic evolution, complexity is seen as evidence against design (unless one is a creationist or believes in intelligent design), in relation to culture complexity is seen as evidence for design.520 Ratnapala notes that Hayek was aware of this paradox and reminded us:

[I]t is because it was not dependent on organisation but grew up as spontaneous order that the structure of modern society has attained the degree of complexity which it possesses and which far exceeds any that could have been achieved by deliberate organisation.521

In support of this statement, Hayek raised two major arguments against design theories of culture. The first is reason is not antecedent to culture, or, as he explains:

The belief that cultural institutions including customary law were constructed by human minds presupposes the prior existence of reason capable of generating such designs. From the evolutionary perspective, this does not seem possible.522

The other Hayekian argument is the synoptic delusion - the idea that in the same way we are able to design cities, road systems, efficient machinery, organisations like armies, football clubs, universities and government departments, we are also able to design with equal success things like moral systems, legal systems and economic systems. The term Hayek applied to this attitude of all successful institutions with design was constructivist rationalism.523

The reason why some institutions are not amenable to design is that there can never be perfect knowledge of all components of the system by one all-seeing, all-knowing authority. Nor is there any specific purpose in this type of institution. A sporting team, for example, has a known purpose – one person can know everything there is to know about the team and the members can agree to be controlled in a certain way to achieve an end result.524 However, a society of people is different in the sense that it is essentially purposeless (in the sense that each society member has their own agenda to

520 Ibid 195.
522 Ratnapala, above n511, 195.
524 Ratnapala above n511, 196.
pursue and although their interests may overlap with those of the community, they are primarily pursuing their own interests). No one person knows all the workings of society at the various levels of community and any attempt to impose uniform control across all these levels would cause disunity rather than unity.

However, this does not mean society descends into chaos with individuals becoming increasingly unfocussed without some central authority to command and control them; on the contrary, the opposite occurs. According to Ratnapala:

Thus, by recognising the social order as a spontaneous system and by observing its selectively retained laws, human beings extend their knowledge. This is the foundation of culture.525

How does legislation fit into the spontaneous order? A complete code is obviously inimical to a spontaneous order as it attempts to, at a piece, embody an entire legal system as if nothing had gone before, whereas judge-made law or ‘common law’ is organic and arises spontaneously. However, legislation can still complement the spontaneous order and play a valuable role in its unfolding. As Ratnapala explains:

The grown law is often, to one extent or another, codified or judicially formalised. However, the changing natural and cultural environment cause adjustments leading to new regularities of behaviour upon which members base their expectations. Some of these changes are caused by legislation which rescind or otherwise interfere with grown law. The new regularities and the altered expectations they generate often invite more legislative interventions. Thus, even in the age of legislation, laws in the broader sense continue to grow. In ‘civil law’ systems, the absorption of social rules into the formal legal order takes place primarily through the legislative process with the judges playing a secondary role. In the common law countries, the courts continue to perform their traditional function of articulating the law as it emerges endogenously. It is evident, therefore, that legislation or deliberately made law is very much part of the cultural environment which selects the social rules that constitute law in the primary sense.526

The fact that the social order is a dynamic self-ordering system does not mean societies have no need for deliberate law-making; on the contrary, rejecting legislation deprives us of one of the great advantages of being human. According to Ratnapala, the need for legislation is easily explained by two facts of evolution that are easily forgotten.527 The first is the fact that present entities represent adaptations to past environment, and that ‘while other species can only change behaviour through random variation and selective retention over many generations, humankind can bring about immediate behavioural change by articulation and dissemination of new rules’. Ratnapala also

525 Ratnapala, above n511, 199.
526 Ibid.
527 Ibid 200.
notes that ‘In the common law paradigm, rules emerge in the course of time, when doubts about new (adaptive) practices arise in the form of disputes. However, where there is a need to enact a rule immediately, the legislative option is available’.528 The second is that surviving biological and cultural entities are imperfect sources of environmental information, so that not every species that has survived is adapted to its environment; indeed, ‘there may be a substantial time lag before the environment takes its toll on the maladapted species’. In human species, Ratnapala continues, although their ‘mental and verbal skills can create entire systems of artificial knowledge to insulate them from criticism’ (he cites witchcraft, superstition and magic as examples), such systems, although once having ‘had survival value, for example, by improving the cohesion of small bands struggling against great odds….become vestigial and hindrances to progress’. Yet, Ratnapala notes, for the human species, ‘practices built on false theories can be refuted or replaced by new rules of conduct’ in order to ‘abandon or modify their custom before they perish with them’. Therefore, since ‘courts do not have the legislative authority to reverse, radically change, or rescind grown law, although they appear to do just that from time to time…when the evolutionary legal process is seen to be taking us in an undesirable direction, legislation in the only practical solution’.529

There are, however, limits to legislation’s role in the spontaneous order, namely the generality principle – that laws directed at achieving particular ends, though appropriate to organisations whose purposes are known, have no place in a spontaneous order.530 Ratnapala suggests the generality principle promotes the growth of knowledge in two ways. First, ‘a general rule serves as a theory of the environment which can be examined, criticised or refuted’, unlike the ‘patternless legislative interventions in the affairs of individuals’.531 Second, ‘general rules, being less intrusive and more predictable than ad hoc projections of authority promote the free play of elements of the spontaneous order contributing to adaptive efficiency’.532

528 Ibid.
529 Ibid 200-1.
531 Ibid 201.
Furthermore, Ratnapala has a compelling answer to critics of his evolutionary approach who would insist that it has no normative content (and is hence relativistic or amoral) and that it bears no measurable outcomes, which is:

Evolutionary theory does not assert that what survives is always good, only what survives fits, or at least is not incompatible with its ecology. However, the suggestion that the evolution process need not be respected owing to its amoral nature is flawed in at least two respects. First, if evolutionary theory is correct, then the moral standards which we seek to uphold are themselves evolutionary products. If we accept evolutionary theory, we may speculate that social species were naturally selected and that communities that learned to co-operate, to respect basic rights and to engage in charity were selected over those that did not. Hence the argument involves begging the question. Second, if evolutionary theory is correct, the evolutionary process is inexorable though the outcomes it produces are not predetermined. Since the outcomes are not predetermined, we may influence them. By understanding the process of evolution and the limitations which is places upon us, we may be able to promote more successfully the survival of the things that matter to us, including our moral values.533

The possibility that evolutionary legal theory can have normative content and be more than just a descriptive theory will be explored further in the next chapter.

9.2 Systems Theory in Sociology

Before turning to systems theory’s application as an evolutionary idea in legal theory, it is necessary to turn to systems theory’s application in sociology, which is its precursor.

In discussing the gains for sociology from systems theory, George Ritzer, referring to the work of whom he describes as arguably the first systems theorist Walter Buckley,534 outlines the nature of this approach as follows:

First, because systems theory is derived from the hard sciences and because it is, at least in the eyes of its proponents, applicable to all behavioural and social sciences, it promises a common vocabulary to unify those sciences. Second, systems theory is multi-leveled and can be applied equally well to the largest scale and the smallest scale, to the most objective and to the most subjective, aspects of the social world. Third, systems theory is interested in the varied relationships of the many aspects of the social world and thus operates against piecemeal analysis of the social world. The argument of systems theory is that the intricate relationship of parts cannot be treated out of the context of the whole. Systems theorists reject the idea that society should be treated as unified social facts. Instead, the focus is on relationships or processes at various levels within the social system.535

533 Ibid 204.
535 Ritzer, above n367, 331-2.
Even though Buckley may have been the first systems theorist in sociology, Talcott Parsons whose work informed much of that of Niklas Luhmann, discussed below, is one of its more influential figures.

**Talcott Parsons (1924-1959CE)**

Talcott Parsons’ name is usually linked with the movement *structural functionalism* to describe *systems theory*. Parsons’ four functional imperatives which he deemed necessary for all systems in his celebrated ‘AGIL’ scheme (Adaptation, Goal Attainment, Integration and Latency) are:

*Adaptation:* A system must cope with external situational exigencies. It must adapt to its environment and adapt the environment to its needs.

*Goal attainment:* A system must define and achieve its primary goals.

*Integration:* A system must regulate the interrelationship of its component parts. It also must manage the relationship among the other three functional imperatives (A,G,L).

*Latency (pattern maintenance):* A system must furnish, maintain, and renew both the motivation of individuals and the cultural patterns that create and sustain that motivation.\(^536\)

This scheme was developed by Parsons for what he described as four different types of ‘action’ systems: the behavioural organism (the action system that handles the Adaptation function by adjusting to and transforming the external world); the personality system (which performs the Goal Attainment function by defining system goals and mobilizing resources to attain them); the social system (which copes with the Integration function by controlling its component parts); and the cultural system (performs the Latency function by providing actors with the norms and values that motivate them for action).\(^537\)

Critics of Talcott’s four functional imperatives/four action systems model accused the model of being too static and unable to deal with social change.\(^538\) In response to these criticisms, in 1966, Parsons allowed biology to shape his theory and developed what he called a ‘paradigm of social change’ with its centrepiece the notion of *the process of differentiation* – Parsons assumed society is composed of a series of subsystems which differ both in structure and functional significance for larger society and as

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\(^{536}\) Ibid 242.

\(^{537}\) Ibid.

\(^{538}\) Ibid 250.
society evolves, new subsystems are differentiated into ones that are more adaptive than earlier subsystems.\textsuperscript{539}

Parsons described this process of adaptive upgrading thus:

If differentiation is to yield a balanced, more evolved system, each newly differentiated substructure … must have increased adaptive capacity for performing its primary function, as compared to the performance of that function in the previous, more diffuse structure… We may call this process the adaptive upgrading aspect of the evolutionary change cycle.\textsuperscript{540}

There are three stages of evolution in Parsons’ scheme: primitive, intermediate and modern (the transition from \textit{primitive} to \textit{intermediate} being due to language, the transition from intermediate to \textit{modern} being due to the institutionalised codes of normative order).\textsuperscript{541} Ritzer questions the bona fides of Parson’s scheme as a genuine theory of evolution, asserting:

Parsons turned to evolutionary theory, at least in part, because he was accused of being unable to deal with social change. However, his analysis of evolution is not in terms of process; rather, it is an attempt to ‘order structural types and relate them sequentially’. This is comparative structural analysis, not really a study of the processes of social change. Thus, even when he was supposed to be looking at change, Parsons remained committed to the study of structure and functions.\textsuperscript{542}

It would therefore seem that Talcott Parson’s main legacy was his \textit{structural functionalism} rather than a full exposition of systems theory, but he had certainly made an early significant contribution to this important growing field of intellectual study and inspired those who were to come. One such person who also contributed to the application of systems theory in legal theory was Niklas Luhmann who will be discussed next.

\textbf{9.3 Systems Theory in Legal Theory}

Perhaps due to the conservative nature of the legal profession, it is usually one of the last disciplines to get on board with innovative intellectual movements occurring in other fields. We saw an example of this in Chapter 5 with the methodology used in \textit{sociological jurisprudence} in the wake of sociology and in Chapter 8 with the rise of

\textsuperscript{539} Ibid.
\textsuperscript{540} Ibid.
\textsuperscript{541} Talcott Parsons, \textit{Societies} (Prentice Hall, 1966) 22.
\textsuperscript{542} Ritzer, above n367, 251.
the Law and Economics movement adopting, somewhat belatedly, the outdated techniques used in neoclassical economics. The same might be said of the uptake of systems theory, whose main proponent in legal theory as well as in sociology was Niklas Luhmann.

**Niklas Luhmann (1927-1998CE)**

Luhmann, a qualified lawyer turned sociologist, has been credited with being the most prominent systems theorist in sociology having developed an approach that combined the structural functionalism of his mentor, Talcott Parsons, with general systems theory. He also introduced concepts from cognitive biology, cybernetics, and phenomenology.\(^{543}\)

Although Luhmann was inspired by Parsons, he saw two problems with Parsons’ approach. First, it lacked self-reference whereas in Luhmann’s view, society’s ability to refer to itself is necessary for our understanding of society as a system. Second, Parsons did not recognise contingency with the result that he could not adequately analyse modern society as it is since he did not see that it could be otherwise.\(^{544}\) An instance of this is Parson’s AGIL model described above - Parsons takes it to be a fact, whereas Luhmann believes it is better understood as a model of possibilities. For example, the AGIL scheme shows that the Adaptive and the Goal Attainment subsystems can be related in various ways, so the aim of the analysis Luhmann suggests should be to understand why the system produced a relationship between these two subsystems at a given point in time *rather* than see them as mutually exclusive entities as Parsons did.\(^{545}\) The key to understanding Luhmann’s notion of ‘system’ can be found in his distinction between a system and its environment and that the difference between the two is basically one of complexity, the system always being within but *less* than its environment.\(^{546}\)

Systems aim to reduce complexity by selection and this is contingent as one could always select differently – for example a car manufacturer in its dealings with a

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\(^{543}\) Ibid 335.

\(^{544}\) Ibid.

\(^{545}\) Ibid

\(^{546}\) Ibid
supplier selects factors such as quality and price leaving out broader issues in the environment such as the political climate of the supplier’s geopolitical region, even though such contingency means risk as one of these broader environmental issues might end up being relevant (e.g. if civil war broke out and put the supplier out of business).547 Nevertheless, complexity must necessarily be reduced since a system can never be as complex as its environment.

In contingent selecting there is always a risk of leaving out something that is important, so in response to this (in Luhmann’s scheme) systems develop new systems and establish relations between the various subsystems in order to deal effectively with their environment, lest they be overwhelmed by the complexity of that environment.548 Returning to the example of the car manufacturer, to avoid being overwhelmed by the political complexity of the environments in which their suppliers operate, a car manufacturer may create a subsystem or department responsible for keeping the manufacturer appraised of political disruptions that may affect supply and for sourcing alternatives.549

**Autopoiesis**

Luhmann is best known for his thinking on autopoiesis, a term that Luhmann used to describe systems as diverse as the economy, the political system, the legal system, the scientific system, and bureaucracies among others.550 Autopoietic systems produce the basic elements that comprise them, are self-organising (they organise their own boundaries and they organise their internal structures), are self-referential, and are closed.551 As Freeman explains:

In most biological systems, the initial properties of a member of one generation are controlled by properties of members of the preceding generation. Since an autopoietic system can only use its own elements, it ‘constitutes the elements of which it consists through the elements of which
is consists’. Such a system is operationally closed: ‘closure consists in the fact that all operations always reproduce the system.’

For Luhmann, law is also an autopoietic system and is operationally closed, so is distinguished from its environment as a set of normative rather than cognitive expectations; and being normatively closed, only the legal system can bestow legally normative quality on its elements and thereby constitute its elements.

Freeman addresses the issue discussed above (but from the perspective of a legal system) of the system’s relationship with complexity – i.e. how a closed autopoietic legal system responds to developments from its larger social environment – and suggests Luhmann’s initial answer to this is that the legal system, though normatively closed, is in fact cognitively open. Luhmann later clarified this with his notion of structural coupling, a process of channelling extra-legal information into the legal system and vice versa. In addition, communication is the basis and subject matter of the system; it is the ‘domain’ in which the differentiation of the legal system becomes possible, but Luhmann stresses that ‘this does not require a communication of the legal system to the society as a relation between sender and receiver. The legal system cannot communicate as a unity and the society has no address.’

Luhmann’s theory is, as one might expect, not without its critics. Ana Lourenco discusses four problems with Luhmann’s theory: the idea of binary coding, problems with the subjectivisation of systems, problems with the notion of structural coupling, and problems with the specification of an autopoietic system’s boundaries as follows:

Firstly, the idea of binary coding involves inconsistencies in the definition and quantity of codes governing particular subsystems (such as the economy), and corresponds to an excessive simplification of the functioning of communication - as if Luhmann's taste for dichotomies (open-close, system-environment) was in this case pushed too far. Secondly, the subjectivization of systems, together with the emphasis on communications as the sole elements of social systems, obscures the need to know something about the institutional framework to which

552 Freeman, above n257, 700.
553 Ibid 700-1.
554 Ibid 701.
555 Ibid.
556 Ibid.
communications are connected, and about the actors engaged in legal communications. Thirdly, the theory simplifies excessively the coupling between systems, which is denser and realised through many more mechanisms than the ones indicated by Luhmann, and to a certain degree neglects momentary events as mechanisms of connection between social subsystems. And fourthly, the theory does not go far in establishing how different forms of differentiation within a social subsystem might be articulated.\textsuperscript{557}

Lourenco suggests that these problems are fundamentally due to Luhmann's aim of constructing a general theory of autopoiesis that could apply to all social systems which causes the theory to reach a level of abstraction that prevents it from being applied at more particularised levels through which legal communication operates including those of institutions and practices.\textsuperscript{558} Nevertheless, Lourenco is optimistic about Luhmann’s theory and opines:

Despite these critiques, Luhmann's theory of autopoiesis represents a valuable contribution not only to particular fields of legal scholarship, but especially to interdisciplinary research. The theory of autopoiesis theorises the usually untheorised assumption of relative autonomy of law, behind which is the idea that 'legal theory must account for both the legal system's "peculiar internal structures" and the legal system's interrelation of subsystems of courts and legislature with its nonlegal environment'. Most fields of legal scholarship are challenged by communications from other social subsystems, and autopoietic theory may contribute to understand this on-going interaction. The theory of autopoiesis (and particularly the notion of structural coupling) also has highly relevant implications regarding interdisciplinary research: on the one hand, none of the social subsystems can claim its supremacy or aspire to colonise another, for each subsystem's survival depends on the maintenance of its autopoietic organization; on the other hand, the theory suggests caution in increasing law's openness to other social spheres, for law's openness will necessarily be limited by the specific mechanisms, procedures and practices through which it observes its environment.\textsuperscript{559}

In similar vein to Lourenco’s defence of Luhmann’s theory above on the basis of usefulness for multidisciplinary research, Klaus Ziegert argues that Luhmann was not really interested in theory building as such but in the enlightening potential of sociological methodology; that his approach can be better understood as a sociological methodology for theory building.\textsuperscript{560} Also, as Ziegert points out:

Niklas Luhmann is arguably the most radical, certainly the most ambitious, propagator of a scientific observation and description of law. Luhmann has explicit answers to the question as to how law can be observed and described as a phenomenon. But these answers are not simple and sociologists should not expect simple answers. Above all, these answers cannot be found in legal theory or legal doctrine, and not in sociological doctrine either. That is why Luhmann branches out to the philosophy of science and works out a unitary concept of scientific knowledge with evolution theory and the theory of distinctions as the crucial link between conventional natural science and social science approaches.\textsuperscript{561}

\textsuperscript{558} Ibid.
\textsuperscript{559} Ibid 42-3.
\textsuperscript{561} Ibid 56.
As we saw in Chapter 5, empirical research in the social sciences matured when it adopted a more interpretative approach rather than adhere to an analytical approach which is more suited to the physical sciences. Luhmann’s approach is a logical extension of that journey. As Ziegert notes:

Luhmann offers more than just a general theory in the conventional deductionist natural science paradigm. In a very particular way he moves on to what amounts – in methodological terms – to a thick description of society, including its law. Such a thick description of society is complex, because society is complex, and it is ‘thick’ because it follows up conceptually and situationally every detail that happened or happens in society as it happens. What Luhmann objected to in his criticism of empirical sociology was, in fact, only one particular branch of empirical research: quantitative variable-analysis. What he actually ventured into unwittingly, in distancing himself from this kind of empirical research, was the other branch: the content-rich, thick description used systematically in qualitative empirical research. In Luhmann’s version the conceptual groundwork is much denser and interwoven than envisaged by the pragmatist, an ultimately conceptually thin version of grounded theory.562

Hence, Luhmann does not think of ‘society’ as a distinct idea, a useless term as far as sociology is concerned, but rather as a system (which unlike the term ‘society’ can be defined accurately) and instead of asking the common question ‘how is social order possible’ asks ‘how is it that social systems make themselves possible.’563

Ziegert also pays Luhmann the ultimate compliment of ‘offering the most powerful and systematic theory yet devised for understanding the relationship between law and society.’564 For the currently emerging global perspective on law, he suggests that one of the main implications of Luhmann’s theory is that the ‘dazzling array’ of legal regimes, legal organisations and legal communications worldwide are really only the historical and local operations of a functional system which operates as widely as a global society communicates and the approach makes it possible to start research from the bottom up, and to look for law in the irritations it causes to families, businesses and political parties; or to look into the practice of lawyers sequestering what is ‘legal’ and who seek to protect the law against contamination with ‘social trash.’565 He also suggests Luhmann’s approach makes it possible to track legal decision-making from its opening stages of legal argument to the vital ‘quaestio juris’ and legal reasoning as an effort of construction and the selection of the requisite variety of legal operations.566

562 Ibid 56-7.
563 Ibid 59.
564 Ibid 75.
565 Ibid.
566 Ibid.
‘Most importantly’, however, Ziegert maintains:

[the approach makes it possible to trace the evolution and globalisation of law as conditioned by and conditioning the individualisation of humans and their individual rights, and the corresponding breaking-up of accustomed and deeply entrenched social structures. In doing so, the sociological mapping of society’s law picks up the theme of ‘living law’ again.]

Lourenco also sees some very practical applications of Luhmann’s theory, namely the very down to earth field of regulation and contract practice. As she explains:

As to regulation and its interaction with contract practice, three interrelated aspects of Luhmann's theory of autopoiesis should be highlighted: the affinities with legal pluralism and its decentralised view of regulation; the emergent concern for the responsiveness of regulation, and the rejection of a direct relationship between system and environment (which is not at all the same thing as a rejection of the idea that system and environment influence one another).

Lourenco also suggests that ‘Luhmann means to reject the idea of a straightforward linear understanding of that interaction, which is maintained within the context of mainstream law and economics and that from the latter perspective:

[the law is conceived of as a structure of incentives to which individuals respond. Legal rules assign rights and duties, create taxes and subsidies, impose specific procedures and penalise particular behaviours. Governments thus induce particular courses of action by using the law to manipulate the costs of transacting. The economic actor - who knows and honours legal rules and will calculate those costs and choose the efficient behaviour, meaning that which maximises his self-interest and thus conduces to the welfare of the society.]

The perspective on law as a surrogate for price has important implications, namely:

[First, it directs the attention of governments towards getting the law right, the major concern is with designing efficient legal rules; secondly, the efficiency of the law is measured in allocative terms, the allocation of resources set by the law will be measured against alternative states in order to ascertain whether there has been an increase in the welfare of particular individuals or of society as a whole; as a consequence, the law evolves through a linear process of adjustment and law is changed when another allocation of resources is found to be more efficient.]

However, this perspective is challenged by an autopoiesis of social systems perspective. According to Lourenco, from such perspective:

[Contracts do not straightforwardly respond to the incentives set by regulation, as they have to interpret or read them. Moreover, regulation is not the straightforward result of the institutionalization of efficient norms originated in business exchanges, as it also has to interpret and re-read the norms. Instead, contracts and regulation co-evolve, such co-evolution being

567 Ibid.
568 Lourenco, above n557, 43.
569 Ibid.
570 Ibid.
defined as 'the development of autonomous evolutionary mechanisms in closed systems and their reciprocal structural coupling'. Contracts and regulation coevolve in relations of structural coupling: contracts interpret and read their environment through their own internal communicative processes, that is, their own systems of shared meanings; the contractual interpretation thus reached is afterwards recognised, reread or decodified by the environment, whose regulatory elements in turn interpret, reread or recodify those perturbations or stimuli through their internal communication processes.\textsuperscript{571}

An important conclusion of this co-evolution of contracts and regulation can be drawn, namely:

\textit{[t]he relationship between contracts and regulation is not a linear one in the sense of involving an overarching causality of the type whenever rule A, then outcome B. Each subsystem is a source of disturbances or stimuli on its environment and vice versa. So, it may be that outcome B is aligned with regulation A, but this is not to be expected as a matter of fact.} \textsuperscript{572}

However, Lourenco does not suggest that autopoiesis rules out causation but rather ‘it assumes a complex causal relationship between sub-systems, thus rejecting the view of linear causation in favour of one based on mutual influence’ and that ‘the relationship between regulation and contracts is therefore a co-evolving or mutually constitutive one’ so that ‘a contract is seen not only as a structure for the governance of exchange, but that such a structure of governance has its own language or internal network of communications... a discrete communication system.’\textsuperscript{573}

The notion of co-evolution referred to by Lourenco above is not one that contemplates a one-for-one correspondence of evolution of elements in an autopoietic system such as the legal system and elements of another autopoietic system such as the economy – in other words, this co-evolution is asynchronous.\textsuperscript{574} For example, laws designed to eliminate anti-competitive conduct will not be the only thing that over time influences corporate behaviour as the laws will vie with other factors within the economic system such as market forces (the potential for profit of anti-competitive behaviour). And the corporate response to those laws will in turn inform what new laws are made, but again not directly as the evolution of anti-competitive laws will also be determined by

\textsuperscript{571} Ibid.
\textsuperscript{572} Ibid.
\textsuperscript{573} Ibid 45-7.
elements in the legal system such as other laws or legal principles (i.e. freedom to contract) or its own internal legal logic or legal reasoning which define the nature and scope of such laws. So laws targeting anti-competitive conduct do not co-evolve directly in step with market behaviour but one can still see that the question is ‘not merely what does law do to behaviour but what does behaviour do to law, and vice versa’\textsuperscript{575} and that ‘The process is a cycle of inter-systemic interaction, a dynamic of \textit{coevolution} between law and economy.’\textsuperscript{576}

An important adjunct of autopoiesis which captures this notion of asynchronous co-evolution is Gunther Teubner’s ‘reflexive law.’ Teubner’s reflexiveness provides a happy medium between formal rationality with its own internal logic blind to external factors (a closed system) and substantive rationality that makes a particular external factor its overriding purpose (an open system). Reflexiveness involves an approach that is autopoietic in that it involves legal rationality that must have its own internal logic but is cognisant of, though not completely open to, external factors. Or as Teubner explains:

Reflexive legal rationality requires the legal system to view itself as a system-in-an-environment and to take account of the limits of its own capacity as it attempts to regulate the functions and performances of other social subsystems. Thus, its relation to social science knowledge is characterized neither by "reception" nor by "separation." Instead, the relationship involves the "translation" of social knowledge from one social context to the other according to certain translation rules, i.e., specific legal criteria of selectivity. If it is true that law fulfils its integrative function by furthering reflexive processes in other social subsystems, the social knowledge required by the legal system is very specific and the need for model construction is much more limited than it would be in a comprehensive "planning" law. Reflexive law needs to utilize and develop only that knowledge necessary to the control of self-regulatory processes in different contexts. Thus, encompassing social policy models may be replaced by models of how to combine the insights of socio-legal analysis and the dynamics of interaction processes for social problem solving. If the analysis of this paper is correct, the generation of such models is an important next step in the evolutionary development of law.\textsuperscript{577}

The notion of autopoiesis is not a new notion. It has been with us since the ‘80’s. Luhmann and to a lesser extent Teubner are still considered its main proponents. It

\textsuperscript{575} Ibid 117.
\textsuperscript{576} Ibid.
\textsuperscript{577} Gunther Teubner, ‘Substantive and Reflexive Elements in Modern Law’ (1983) 17(2) \textit{Law & Society Review} 239, 242. This was in the early 1980’s and Teubner refers to what some had described as a crisis and a ‘rematerialization’ of the law with the coming of the welfare and regulatory state and its emphasis on \textit{substantive} rational law as an instrument for purposive, goal-oriented intervention more general and open-ended than the \textit{formal} rational law of the classical models of law and state inherited from the 19\textsuperscript{th} century which create and apply a body of universal rules, relying on a body of legal professionals who employ peculiarly legal reasoning to resolve specific conflicts: ibid240-2.
appears to have broken the spells of both formal rationality and substantive rationality. However, this should probably not come as any surprise. It was never correct to regard the law as pure abstraction, like mathematics, completely immune to social factors. But, then again, the law could never be regarded as just a social tool and it must enjoy a degree of independence or it would be liable to abuse. Autopoiesis has a fancy name couched in a lot of fancy language, but is really just common-sense that it took western society two millennia to discover.

9.4 Path Dependence

Another perspective alloying legal theory to systems theory is the use of legal paradigms and the evolutionary idea of path dependence. After identifying shortfalls in the law and economics efficiency hypothesis to determine the direction of legal change in terms of judge-made and statute law, Martina Eckhardt maintains:

To derive hypotheses about the direction of legal change, complexity has to be taken into account. For this, the concept of legal paradigms may prove helpful. Legal paradigms allow for integration on the one hand a model of human action, which includes cognitive creativity as an endogenous source of novelty and thus as a variation mechanism, and on the other hand the concept of path dependence, which serves as an additional selection and retention mechanism.

Eckhardt, as we have seen in Chapter 8, also alloys evolutionary legal theory with evolutionary economic theory as she explains:

Both the notion of paradigms and of path dependence have been developed in the economic analysis of technological change. Therefore, they allow drawing from the Legal Change from an Evolutionary Economics Perspective.

In the end, although nothing can ultimately throw a light on the tricky business of discerning legal change, complexity is at least a helpful tool as Eckhardt explains:

So far no consistent classification of the factors that cause path dependences through positive feedback effects has been developed. But it seems not to be controversial that sunk and switching costs due to set up and fixed costs and institution specific-investment, dynamic economies of

579 Ibid.
580 Ibid 454.
scale that result from network externalities and learning effects, and complementarities contribute to the persistence of a particular legal path. Furthermore, the complexity and genuine uncertainty that characterize the process of legal change foster path dependence, since the actors involved will rather base their decisions on routines than taking an optimization approach. Such routines are also part of the overall legal paradigm, since the positive and negative heuristics guide both the perception of the legal problem under consideration as well as the search for novel legal problem-solutions.\textsuperscript{581}

And, as with most good ideas in the social sciences, and no less so than in legal theory, hard data is required for the idea of complexity \textit{qua} legal paradigms and \textit{path dependence} to gain any real traction, so according to Eckhardt:

Although the notion of both legal paradigms and legal path dependences seems to be a fruitful approach to derive additional statements about the direction of legal change over time, more conceptual and empirical work is necessary to explore its contribution to a comprehensive theory of legal change.\textsuperscript{582}

Eckhardt suggests some areas for further empirical research might be the impact of bureaucracy in the implementation and application of laws and cross-jurisdictional studies which have thus far been largely neglected, with increased focus on institutional change and technological change on the effect of law.\textsuperscript{583}

\section*{9.5 Systems Theory and Law Reform}

Suri Ratnapala sees that the process of evolution itself within a system, if not providing guarantees of certainty, at least overcomes some of the problems caused by public choice theory when he maintains:

Legislative power, once born, often falls into the hands of individuals and groups who use it in their own political interests. The information that is used in self-interested law making is seriously limited. Legislation to achieve particular ends frequently takes the form of \textit{ad hoc} commands made by officials to whom discretionary power is delegated. Where the legislative power is enacted by assemblies that are periodically elected by the people, the potential for abuse is reduced. However, as public choice literature illustrates, the electoral process tends to become a marketplace where legislative power is bought and sold among politicians and voting groups…However, evolution time and time again surprises us by the unexpected and unintended break out of systems from their established pathways. Although the cost of directly changing the institutional environment remains high, the cost of exit has been falling in relative terms, owing to the globalisation process, liberalisation of international trade law and new technologies. Exit provides powerful feedback to the national governments and constituencies that elect them. Yet there is no reason for us to be passive observers, optimistically awaiting evolutionary corrections

\textsuperscript{581} Ibid 455.  
\textsuperscript{582} Ibid 456.  
\textsuperscript{583} Ibid 463.
that are impossible to predict. We could be proactive in constitutional design without pretending that we can fully command our destiny.\textsuperscript{584}

Public choice theory illustrates the ultimate parasitic relationship between the autopoietic legal system and the autopoietic political system in the Luhmannian sense. Once laws are enacted they are immune from the political process and are part of the closed legal system. However, it would be naïve to assume that laws are not informed by, nor do they owe their very existence to, the external political environment and those in Parliament who champion populist (eg ‘tough on crime’) laws for political advantage in a political game which can only be played in a closed political system and that must be played according to the rules of the external legal environment, or ‘legal system’. Provided the political game play is not illegal, it is immune from the legal system. The systems are thus immune from each other, but are still very much intertwined, or more correctly, in Luhmann’s words, \textit{structurally coupled}.

In such parasitic relationships that arise, one could argue that Ratnapala’s examples of globalisation, liberalisation of trade laws and new technologies could break the stronghold that certain political lobby groups have on Parliament (e.g. globalisation or liberalisation of international trading laws by increasing international competition and reducing a local competitor’s market, economic and hence political power), or new technologies such as the internet enabling the populace to be better informed and less vulnerable to populism and other forms of manipulation on political issues. Also, as Ratnapala suggests in the above quote, we do not need to just rely on evolution but that we should be proactive, for example by way of constitutional design (in the manner of Hayek’s notion of shaping the rules of the game), to command our destiny. But is it just the constitutional design or rules of the game that need to be fixed, or the very way they are conceived and constructed including the types of communication which inform these steps in the law-making process?

On the issue of communication, Jurgen Habermas discusses the concept of ‘lifeworld.’ To him, as Ritzer explains, the lifeworld represents an internal perspective: ‘Society is conceived from the perspective of the acting subject and the system represents the

\textsuperscript{584} Ratnapala, above n324, 290-1.
external viewpoint; therefore, there is only one society: lifeworld and system are simply two different ways of looking at society.\footnote{Ritzer, above n367, 538.}

Habermas maintains that ‘The fundamental problem of social theory is how to connect in a satisfactory way the two conceptual strategies indicated by the notions of ‘system’ and ‘lifeworld’ – these two conceptual strategies are ‘social integration’ and ‘system integration.’\footnote{Ibid 539.} As Ritzer explains:

> The perspective of social integration focuses on the life-world and the ways in which the action system is integrated through either normatively guaranteed or communicatively achieved consensus. Theorists who believe that society is integrated through social integration begin with communicative action and see society as the lifeworld. They adopt the internal perspective of the group members, and they employ a hermeneutic approach in order to be able to relate their understanding to that of the members of the lifeworld. The ongoing reproduction of society is seen as being a result of the actions undertaken by members of the life-world to maintain its symbolic structures. It is also seen from another perspective. Thus what is lost in this hermeneutic approach is the outsider’s viewpoint as well as a sense of the reproductive processes that are occurring at the system level. The perspective of system integration is focally concerned with the system and the way in which it is integrated through external control over individual decisions that are not subjectively coordinated. Those who adopt the external perspective of the observer, but this perspective prohibits them from really getting at the structural patterns that can be understood only hermeneutically from the internal perspective of members of the life-world.\footnote{Ibid 540.}

Habermas is concerned with the co-evolution of these two concepts towards increased rationality and complexity but at the same time maintains there is a differentiation or ‘de-coupling’ of the two notwithstanding a dialectical relationship between the system and life-world (they both limit and open up new possibilities for each other) - his main concern is how system in the modern world has come to colonise the lifeworld.\footnote{Jurgen Habermas, The Theory of Communicative Action, Vol 2 (Boston: Beacon Press, 1987) 152-3.}

The problem and the solutions appears to lie with ‘communication’. According to Habermas, the rationalization of the life-world involves growth in the rationality of communicative action but instead of language coordinating action, it is money and power that perform that function and life becomes monetarized and bureaucratized.\footnote{Ibid 540.}

Habermas sees that the hope for the future clearly lies in resistance to encroachments on the life-world and in the creation of a world in which system and life-world are in
harmony and serve to enrich one another to a historically unprecedented degree.\textsuperscript{590} He sees this being achieved through opening the flow of communication and information through his \textit{discourse principle} (i.e. Habermas’ ‘procedural rationality’) where all stakeholders should have an equal say. However, the \textit{discourse principle} assumes that if the rules of communication are made completely fair and equal among members of society, it assumes those members want to (and will) fully participate in the discourse but that is unlikely to be the case.

\textit{Earth Jurisprudence}

Although it is beyond the scope of this paper to provide a detailed discussion of the recent movement called ‘earth jurisprudence’, it is worth mentioning as an area of jurisprudence law reform that employs \textit{systems theory} and combines it with natural law theory.

Earth jurisprudence maintains that there is a ‘higher law’ or ‘Great Law’ in the sense of the ‘universal laws of nature’ which maintains the integrity of the natural environment which should inform and guide the law-making process. The natural environment is a complex system that self-regulates according to these ‘universal laws of nature’ and the aim of earth jurisprudence is to align human law or positivist law with the workings of this system.

Rather than ‘universal laws of nature’, Peter Burdon favours earth’s jurisprudence higher law or higher principle of ‘ecological integrity’ and explains:

\begin{quote}
Rather than describing the Great Law with reference to universal laws of nature, I contend that the focus of Earth Jurisprudence should be on the ecological integrity of the Earth community. This connection retains a strong connection between law and science, and focuses our attention on a verifiable standard that is directly relevant to human-Earth relationships. Ecological integrity originated as an ethical concept as part of Aldo Leopold's classic 'land ethic’, and has been recognised in legislative instruments such as the \textit{Clean Water Act US} (1972). As described by Laura Westra, the generic concept of integrity 'connotes a valuable whole, the state of being whole or undiminished, unimpaired, or in perfect condition’. Because of the extent of human exploitation of the environment, wild nature provides the paradigmatic example of ecological integrity.\textsuperscript{591}
\end{quote}

\textsuperscript{590} Ibid 283.

\textsuperscript{591} Peter Burdon, ‘A theory of earth jurisprudence’ (2012) 37 \textit{Australian Journal of Legal Philosophy} 28, 44.
Having argued that ecological integrity should be the ideal candidate to underpin Earth Jurisprudence, Burdon then describes this principle in terms of systems theory reminiscent of Luhmann:

Among the most important aspects of ecological integrity are first the autopoietic capacities of life to regenerate and evolve over time at a specific location. Thus, integrity provides a place-based analysis of the evolutionary and biogeographical process of an ecosystem. A second aspect is the requirements that are needed to maintain native ecosystems. Climatic conditions and other biophysical phenomena can also be analysed as interconnected ecological systems. A third aspect is that ecological integrity is both 'valued and valuable as it bridges the concerns of science and public policy.' To bridge this chasm, models such as the multimetric Index of Biological Integrity allows scientists to measure the extent to which systems deviate from verifiable integrity levels that are calibrated from a baseline condition of wild nature. Degradation or loss of integrity is thus any human-induced positive or negative divergence from this baseline standard. Finally, if given appropriate legal status, 'ecological integrity' recognises the intrinsic value of ecosystems and can help curve the excess of human development and exploitation of nature.592

Unlike Luhmann, however, the focus on systems theory for proponents of earth jurisprudence is on the natural environment rather than the legal system itself. While the subject matter of the jurisprudence is a complex system, that is not necessarily to say that jurisprudence itself is. However, it could be argued a necessary corollary of saying that where the subject matter of a particular branch of jurisprudence is a complex system, the integrity of the jurisprudence that governs it must at least exhibit system-like behaviour (i.e. as a secondary system) of the primary system which it governs and regulates (the natural environment). Of course, the primary system would to some extent govern how the secondary system behaves but systems theory applies to both. Burdon explains the connection between primary and secondary systems thus:

As should be evident from this overview, defining the Great Law with reference to ecological integrity does not purport to be static or able to render consistent application across jurisdiction. Instead, the role of ecological science in Earth Jurisprudence is to provide approximate descriptions of ecosystem data in such a way that can be interpreted and applied by human lawmakers. Put otherwise - Earth Jurisprudence retains the lawmaking authority of human beings. It seeks to provide 'reasons for action' and compel them to consciously align human law with the Great Law and ensure that ecological integrity is respected and ultimately protected.593

Earth jurisprudence is a movement that, like any other law reform movement informed by systems theory, reminds us of the process nature of law and the importance of considering law in context.

592 Ibid 44-5
593 Ibid.
As will be shown in the next chapter, no sensible law reform can be contemplated without proper regard for the broader systems in which the law operates and *systems theory* is at the core of a sound theory of evolutionary jurisprudence.

### 9.6 Conclusion

Principles of *systems theory* nascent in evolutionary ideas about *spontaneous order* have been made express in the realm of economics, politics, the social sciences and legal theory with the works of Talcott Parsons, Niklaus Luhmann, Gunther Teubner and more recently Suri Ratnapala and Klaus Ziegert. *Systems theory* is arguably the most explicit in the use of the idea of evolution in political, economic, social and legal theory of all intellectual disciplines since it is closer to the idea of ‘pure’ evolution than the eschatological or other teleological ideas of evolution that have defined other movements (i.e. *Marxism* and *Social Darwinism*).

Ultimately, *systems theory* strips the idea of evolution of the ideological baggage bequeathed to it by these other intellectual disciplines and studies the phenomenon under consideration (be it economics, politics, society or law) as a *process* with a tendency to have a spontaneous developmental life of its own – *spontaneous order* out of chaos, if you will. In jurisprudence, by positing law as a process, legal theory is liberated from the narrow focus of law as some sort of atomist ‘thing’; in systems theory, this law-as-process approach to legal theory, is more fully realised with law being viewed as not just a passive social fact but rather part of the positive feedback loop that results from law being not only product of, but also prime mover of, social, economic and political policy.

Law as a system, a process, like other processes, man-made or natural, has a life of its own. We should not seek to impose our will upon it to change it from the top-down, but make the necessary changes from the bottom-up to the generative rules and the communicative processes that inform the legislative process to help the evolutionary process go in the right direction, to follow its *path dependence*. This may even imply a value-based direction, given our values are also a product of our evolution.
Therefore, the challenge is to conceptualise a theory of evolutionary jurisprudence that is true to ideas about evolution and conforms to a conception of evolution that augurs well for the development of the law and legal systems that reflects society’s norms and values. This will be the business of the following and final chapter.
CHAPTER 10

EVOLUTIONARY LEGAL THEORY AS A DISTINCT BRANCH
OF JURISPRUDENCE

10.0 Introduction

This concluding Chapter will revisit the various ideas about evolution in western history that have been surveyed in this thesis, or rather the seven components of evolution identified in Chapter 1: universal flux, historicism, dialectic, selective adaptation, spontaneous order, path dependence and systems theory. It will then examine the problems evolutionary legal theory has had in gaining respectability as a theory of jurisprudence on account of some of the historical treatment of some of these ideas and what some commentators have said is necessary for that end to be achieved. This thesis will conclude by arguing western history’s hit-and-miss approach to ideas about evolution has posed a problem for theories about evolution, particularly evolutionary jurisprudence. It will be argued that a proper conception for evolution in legal theory involves the utilisation of every one of the abovementioned seven components and will then analyse a hypothetical proposed new law using a model for evolutionary jurisprudence that employs these seven components to assess the viability of such a law.

10.1 The Evolutionary Components So Far

This thesis has examined how ideas about evolution, more often than not underdone, wrongheaded, or just confused have influenced and informed western social, political, economic and in particular legal theory, for better or worse, from antiquity to the present date. We saw in Chapter 2 in antiquity, ‘evolution’ as a concept (to the extent it could be said that there was one back then) bore little resemblance to what we think of ‘evolution’ today, being limited to a recognition that things constantly change (or they don’t change, depending on which philosophers you spoke to) and that such change might be viewed through a particular historicist lens (such as Plato’s belief in ongoing social degeneration from an initial idealised perfect state). Change was sometimes viewed dialectically as a clash of opposing non-specific forces, such as ‘love and strife’ as Heraclitus believed which were often teleological (a precursor to
the idea of *path dependence*) such as Aristotle’s belief in things striving to realise their essence. Harmless enough, one would think, but such overly simplistic and subjective impressions were to do their fair share of the groundwork for totalitarian regimes in later times.

As we saw in Chapter 3, the Middle Ages did not add much to ideas about evolution, except to perhaps rebrand them in a religious context (so Plato’s *historicism* of social decline would be replaced by St Augustine’s equally pessimistic ideas of the *Fall* and *Original Sin*), and *dialectic* bore a religious flavour of good versus evil. And the upbeat *teleology* of Aristotle was replaced by a far more pessimistic *eschatology* of predestination and eternal damnation for the divinely disfavoured. One could hardly call these ideas evolutionary. Much like Plato’s retreat to conservatism and utter lack of faith in spontaneous change in the time he lived, people in the Middle Ages also lacked faith in spontaneous change or evolution given their jaundiced view of humankind as tainted by *Original Sin* and their unquestioned faith in a divinity who determined all things.

Emerging from the dark ages, the Renaissance era, as we saw in Chapter 4 had perhaps even less to say about evolution, wanting to forget its intellectually impoverished immediate past. The idea of constant change was of course embraced, optimistically, but *historicism* had no influence since in a world of wilful forgetting, this had neither place nor purpose. With a jettisoning of *historicism* goes *dialectic*. Which leaves *final cause teleology* or *path dependence*. The eschatology of the Middle Ages would be replaced with a more optimistic teleological idea: a blind faith in *progress*.

When all that is new ceases to be new anymore, old becomes the new *new*. Such was the case with the Romantic era and as we saw in Chapter 5, the ideas of *historicism* and *dialectic* were now given a more serious and methodological footing. The past mattered and so did the forces informing it, *so dialectical historicism* informed social and political theory thanks to Hegel and legal theory due to Savigny. However, these men were more or less agnostic on that other evolutionary idea, *path dependence*, not being renowned for their teleology even if those of a totalitarian bent who were to later embrace their theories were (and in not very nice ways).
The *dialectical historicism* of Hegel inspired a more materialist approach in economics with Marx’s *dialectical materialism*. And Marx as we saw in Chapter 6, was anything but agnostic about *path dependence* believing that a necessary end was in view and ought to be helped along: the victory of the proletariat and the withering away of the state.

Ideas about evolution up to this point were really only speculative and subjective. The only thing anyone could objectively verify is the self-evident fact that things do constantly change. Ideas about how history unfolds (*historicism*), the forces that drive it (*dialectic*) and its overall direction (*path dependence*) have been up to this point guesswork at best, or extreme prejudice at worst.

The missing ingredient that would give these ideas any chance at all of being objective had been hinted to at various times in western history but was firmly put on the map in the mid-19th century as we saw in Chapter 7. The answer to who wins the contest between opposing forces and how that contest historically unfolds had now been given a deceptive simple two-word answer: *selective adaptation*. Or fitness. Of course, although it wasn’t meant to be, this concept was used by some as the answer to the teleological question most people had simply stopped asking - where does it all end up? This gave a distorted answer –fitness morphed into fittest. This imported two value judgments: who is the fittest and what is to happen to the less fit? An ugly narrative soon appears and this was perhaps best exemplified by the movement known as *Social Darwinism* – a misconceived zero sum game for being in the world.

As discussed in Chapter 8, the answer to the teleological question was soon to come along with the notion of *spontaneous order*. Again, this idea was not new, and even predates the idea of *selective adaptation* as we saw in this chapter, but this notion and its cousins ‘order out of chaos’, ‘strange attractors’ etc. suggested not a specific end-directed teleology nor a completely random result either, but a *path dependence* along a path picked out spontaneously. No one has since nor probably ever will better than Hayek critique Soviet command style economies for their lack of spontaneity and their failure to allow economic knowledge to flow freely to nourish and inform the marketplace as the example par excellence of *spontaneous order* being thwarted.
As we saw in Chapter 9, the final piece of the puzzle came with the idea that a system (that is constantly changing, in a historical context, informed by opposing forces, resolving themselves in a manner determined by their adaptability and fitness, into a path dependent spontaneous order) never operates in a vacuum but in conjunction with other systems, so all the aforementioned ideas about evolution are meaningless without this last idea about evolution that touches on all the rest, namely systems theory. Many have written on this area, as we have seen, but none of these persons have become household names as at the time of writing. The area is still very new and really only represents intuitive common sense – such complete and utter common sense that perhaps no one should be celebrated for it. Also, no one can master all disciplines at once, as systems theory is concerned with all disciplines.

10.2 Problems with Evolutionary Legal Theories as a Branch of Jurisprudence

Given the hit-and-miss approach to evolution in western history and misuse of some of its key components as we have seen, particularly selective adaptation, it is no wonder legal theory has had trouble embracing it.

Mauro Zamboni describes evolutionary jurisprudence, as currently conceived, as a ‘mere relative of other members of the legal theory family’ rather than a fully-fledged member of that family. He also refers to the questionable pedigree of some of the concepts of evolutionary jurisprudence and their dubious proponents, in particular the direct links with Social Darwinism when he observes:

Mentioning “evolutionary theory” in a legal environment or to a legal audience always creates the same kind of general reaction as mentioning Carl Schmitt’s legal thinking: Most people will raise their eyebrows in skeptical disbelief. In both cases, the skeptical disbelief is somehow based on the presumption of some sort of association of these legal theoretical approaches to the idea of a natural selection as a basic mechanism for explaining and understanding the modern legal world. In other words, Schmitt and evolutionary theory are not popular among lawyers and legal thinkers because they are conceived of as an attempt to introduce into the legal world a sort of Social Darwinism ideology, just slightly modified superficially in order to satisfy specific formal features of the legal phenomena.

However, Zamboni does not believe such scepticism is justified which he maintains is mainly due to terminological confusion and a failure to properly apply an evolutionary approach to law as he explains:

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594Zamboni, above n 2, 515
595 Ibid 519-20.
For Schmitt, this skepticism most likely has a foundation. In the case of evolutionary theory, however, at least when dealing with the law and law-making in particular, this association is incorrect. This erroneous perception is mostly due to a deep terminological confusion and vague depiction shared by the legal audience, and therefore, it is necessary to provide certain readjustments as to what an “evolutionary approach to the law” is, especially when viewing it from the legal actors’ perspective in relation to legal theory.596

Hence the importance of a sound concept of evolution. The main obstacle for evolutionary theory’s acceptance, however according to Zamboni, is its perceived function as a purely descriptive theory lacking normative content when he says:

The reason is found in particular in the tendency of most evolutionary approaches to produce only descriptions of legal evolutions (also including predictions of possible future paths of development), while neglecting one fundamental component essential and invoked by legal actors: the normative component.597

10.3 What Must be Done

Adjustments are required to the theoretical conception of the evolutionary approach to law in order to make it viable. Apart from a sound concept of evolution, Zamboni points to three adjustments. The first is to address the common misconception of evolutionary theory being merely development of law over time (legal evolution) when it is more about a study of how law has evolved in a broader context, informed by matters external to the legal system (evolutionary theory and law). According to him:

The first readjustment a legal theoretical audience needs to consider making is that it is necessary to distinguish between a theory of legal evolution and evolutionary theory and law. Inside legal scholarship, a theory of legal evolution is a general label attached to all legal thinking aimed at discovering and explaining general patterns of continuity and change in the law. In this sense, the works of Henry James Sumner Maine, Oliver Wendell Holmes, or more recently of the economic approach, Peter Stein and Alan Watson, can be considered, for example, as presenting a theory of legal evolution. Among the different theories of legal evolution, one can find an approach defined as evolutionary theory and law, to whose scrutiny this work is limited. The approach of evolutionary theory and law, under whose roof several schools can be grouped, is characterized in general by its attention to points of change and stability in the law through the centuries and among various legal systems. “Evolutionary theory and law” distinguishes itself also for evaluating these aspects of the legal phenomenon from the point of view that Hart would define as typical of theories external to the law and its system: Luhmann’s sociological theory on law (as in Europe) and biological evolutionary theory as metaphor or analogy for explaining the evolution of the law (as in the United States).598

A challenge for evolutionary legal theory is overcoming the misconception that evolutionary theory is about taking an ‘evolutionist’ stance to investigating the law,

596 Ibid 520.
597 Ibid 516.
598 Ibid 520-3.
that is predicting the future course of the law based on its past legal evolution. This is a sort of structuralist approach with its own built-in teleology since such explanations have a sense of inevitability about them (e.g. contract law whose development is thought to have preferred economic interests over human rights over time and is destined to continue do so). On the other hand, evolutionary theory and law is more about examining the underlying components and externalities of the legal system rather than just the laws themselves in order to jump to conclusions. As Zamboni points out describing the second readjustment of evolutionary legal theory:

A second aspect legal scholars should also take into account, is namely that “evolutionary theory and law” is an evolutionary approach, in the sense of explaining changes in the law and legal system, but not necessarily also an “evolutionist” way of investigating the legal phenomenon. From an evolutionist perspective, which for instance can be attributed to Marxist legal theory or a majority of Law and Economics scholars, the central points of investigating changes in law are both the mechanisms of legal evolution and the directions to which the law or some of its parts (e.g. torts law) are bound. The “evolutionary theory and law” focuses its attention instead exclusively on the explanation of the mechanisms underlying the changes and continuities of a certain legal system (or part of it); this approach does not also explicitly designate the points of arrival to which such a system (or its parts) is somehow obliged to aim.599

The third readjustment that is necessary for the evolutionary approach is to examine not how specific laws such as statutes or judicial decisions have evolved but the legal concepts they speak to since this is the recognisable aspect of the law that can be studied over time. (As the writer will submit below, it is also an important way of introducing normative content into evolutionary legal theory). As Zambino explains:

Finally, there is a third aspect of the idea of an evolutionary approach to the law to which the legal discipline should pay particular attention. This aspect has to do with the very object of the investigation in this approach, namely the evolution of the component of the legal phenomenon under scrutiny. At least if seen from a legal perspective, evolutionary theory applies neither to a single statute, a single judicial decision nor more generally to a single legal rule. What is actually under the spotlight of an evolutionary approach in general is more “legal concepts.” The law-making cannot be identified by one single process leading to one single legal decision. It is more a question of several and usually chronologically asymmetrical processes leading to the production, often through several statutes and/or judicial law-making decisions, to a legal concept. The latter can be defined as a group (often scattered) of rules and normative regulations that aim, though their coordination and combination, at building an interaction responding to the criteria required by the rationality of the law. Depending on several factors (legal system under consideration, theoretical assumptions of the observer and so on), the legal rationality can demand various requirements in order to be termed a legal concept, to be grouped either according to formal criteria, e.g. with the idea of consistency or coherence, or according to substantive criteria, e.g. economic efficiency or justice.600

Understanding legal concepts is important to the evolutionary approach since it assists in understanding the way and why particular laws evolved. Zamboni again:

599 Ibid.
600 Ibid.
The explanation of how a legal act produces a new law is one of the central axioms of contemporary legal culture, and one of the major contributions of evolutionary theory. The insertion of the evolutionary approach (in its current version) into the world of legal thinking is very desirable in this regard, both as a theory of law applying and as a theory of law-making. As to the first, evolutionary theory still retains in both its European and American versions one of the fundamental aspects of the evolutionary theory as formulated by Darwin: evolutionary theory is a theory directed at explaining the present by looking at its past or, in other words, directed to answer the question of how we became what we are. The basic goal for each evolutionary theory is then to provide legal scholars, law-makers, and last but not least, judges with clearer knowledge as to the background of the actual legal concepts in a certain legal system.601

Zamboni gives as an example of this financial leasing which he says evolutionary theory can show how has been, as he puts it, ‘created, selected and stabilised’ as the most effective legal tool in promoting specific activities in the economic sphere thus providing commercial actors with a more extensive range of facilities.602

Continuing to use the example of financial leasing, Zamboni also refers to the contribution of evolutionary theory on changes in the relevant law, because by focusing on ‘creation, selection and stabilisation’ of a novel legal concept, evolutionary legal theory demonstrates how a particular change occurs in the legal system (e.g. how economic discourse prevails over legal discourse in making laws by showing the ways financial leasing managed to gradually penetrate into many legal systems of the fact that many legal cultures had no third space between the property rights and loans divide).603

More recently, Zamboni has suggested that consideration of legal concepts as opposed to focusing on legal rules is something that marks out evolutionary legal theory from other theories, particularly those of a more positivist bent. As he explains:

As to the final result of the law-making, the evolutionary approach to law does not focus its attention on single rules, either judicial decisions or statutes; instead, the targets are “legal categories” (or synonymously, legal concepts) such as, for instance, “good faith” or “the best interest of the child,” i.e. a group (often scattered) of rules and normative regulations that aim, through their coordination and combination, at building an interaction responding to the criteria required by the rationality of the law.604

602 Ibid.
603 Ibid.
Legal concepts have been described as the very stuff that makes up and holds together the legal system, rather like genes as the basic units of life and inheritance. As Simon Deakin and Fabio Carvalhal explain:

Concepts provide the means by which substantive rules are linked together to form the coherent whole of the legal order and, in turn, the mechanism by which continuity and hence, system congruence through time, are maintained when one rule succeeds another. Concepts thereby perform the evolutionary function of inheritance or stabilisation in a manner equivalent to that of genes in relation to living biological systems.605

The more traditional evolutionary view in law and economics is to see the aspect of the legal system that undergoes selection as the legal rule which is selected for based on whether it is upheld or struck down by courts of law, often based on one factor such as its economic efficiency. However, it is submitted that talking in terms of a legal concept rather than a legal rule being selected for is more accurate when discussing law in evolutionary terms. This is because legal concepts can, like genes, express phenotypes (i.e. bodies or other organic structures in the case of biology and statute law in the case of legal concepts)606 whereas a legal rule is a ready-made thing, a product of legal will rather than legal imagination and can only be upheld, struck down or varied – it cannot give rise to other legal rules or legal phenomena. Also whereas legal rules might only address one thing (e.g. economic efficiency in the case of laws against anti-competitiveness), legal concepts are generally more cognisant of a number of factors. For example, the concept that market competition must be fair embraces more than just the notion of economic efficiency but a legal rule expressed in such terms would be too uncertain to be enforceable and would have to be more prescriptive such as saying that conduct must not substantially lessen competition607 which can only be read as aimed at the economic efficiency of the market place not really fairness in any real sense.

606 Deakin and Carvalhal suggest an equivalent idea to legal rules as phenotype with the notion of legal rules or norms as ‘interactors’ in which they suggest the legal concepts, the genes or ‘memetic replicators’ are embedded: ibid 121.
607 Competition and Consumer Act 2010 (Cth), s 46.
10.4 A Normative Basis for a Theory of Evolutionary Jurisprudence

Legal scholars do not expect to see the words ‘evolutionary’ and ‘normative’ uttered in the same sentence. However, Zamboni does not shy away from this notion but insists upon it if evolutionary legal theory is to be a proper jurisprudential theory, saying:

Therefore, in order for an evolutionary approach to law-making to be taken to work by legal actors or, in other words, in order for it to become a “legal” evolutionary approach, it needs not only to explain the past but also to be directed into the future, in particular by elaborating a normative theory capable of helping law-making actors create, select and stabilize future legal concepts adapted to changed circumstances. To summarize, evolutionary theory explains the change in the law and with this, it can be useful for lawyers, judges and scholars. However, this use by legal actors is heavily restricted by the fact that this approach tends to limit its attention to what has happened. At the very moment a lawyer working for a drafting committee needs a general theory for some guidelines, i.e. in order to face a legal dilemma caused either by a change of the surrounding environment or by internal development to the legal world (using Luhmann’s perspective), evolutionary theory as a possible legal theoretical first-aid kit fails, focusing on explaining what and why the change has happened instead of how to “remedy” it.608

Why must legal theory per se be normative and not just descriptive? Zamboni makes a compelling argument that as law is a human product, aimed at regulating human behaviour and how they ‘ought’ to behave, it is normative by necessity. Or in his words, after referring to law having a different quality to the hard sciences:

This quality of the legal discipline in its turn has to do with the specific nature of the law: law is a human product aiming at regulating the relations of human beings with each other and with the surrounding environment. As many legal scholars have pointed out, legal reasoning most of the time is a type of common sense reasoning, i.e. it often incorporates and uses moral, political, economic, or other kinds of values as criteria for regulating human behaviors. However, legal reasoning has special requirements, due specifically to its normative and conflict resolution roles. The regulation of human behaviors then is not based for instance on statements directed at convincing or persuading the addressees (as in politics). Legal reasoning is instead based on the use of specific language which, once it has transformed certain religious, cultural, moral, or economic values into legal concepts, indicates to the addressees (legal actors and/or the community at large) not models of behaviors they will “probably” embrace, but model of behaviors that the addressees “ought” to embrace. As seen already above, if one considers legal theory as that part of the legal discipline directed at explaining the law and the functioning of a legal system, legal theory necessarily carries with it a normative component.609

It is also submitted a theory of evolutionary jurisprudence will not only be descriptive but normative by necessity since the normative value of legal concepts often determines their survival value or adaptive fitness in upholding a legal system’s integrity and where they promote social goods like cooperation and altruism.

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608 Zamboni, above n 2, 526-7
609 Ibid
10.5 Evolutionary Approaches to Constitutional Interpretation

Before the writer submits a model for evolutionary jurisprudence, it is worth considering evolutionary approaches that have been suggested for constitutional interpretation. Evolutionary approaches are all but non-existent in the institution that makes laws, Parliament, although below will be suggested how this might be remedied. In case law, as we have seen, there is often a development of legal principles over a number of decisions in the development of common law principles. However, this is rarely consciously done on a case by case basis even though legal scholars study case law development which is to say they study evolution of the law rather than any evolutionary approach applied to deciding cases. However, courts do sometimes have the opportunity to consider longstanding principles and turn their mind to how they may have changed over time, particularly in cases involving very old pieces of legislation designed to stand the test of time, namely constitutions. However, it would appear in this jurisdiction (Australia) at least this has been a squandered opportunity as the three main approaches to constitutional interpretation appear to be decidedly anti-evolutionary. The first approach, originalism\(^{610}\) effectively freezes all meaning and intention of the words of the constitution to the time at which and the purpose for which the Constitution was drafted. The second approach, literalism\(^{611}\) respects and applies only the plain language of the Constitution ignoring its historical context. The third approach, dynamism,\(^{612}\) effectively ignores what happened in the past and looks at current trends when interpreting the language of the Constitution instead of applying its literal meaning.

\(^{610}\) Exemplified by the ‘implied immunities’ doctrine where the Commonwealth and State Governments are in general immune from each other’s legislation as laid down by the High Court in *D’Emden v Pedder* (1904) 1 CLR 1 or the ‘reserved powers’ doctrine where legislative powers are impliedly reserved to the States in *Peterswald v Bartley* (1904) 1 CLR 497 to accord with the original intentions of the framers of the Constitution that States’ legislative power be unimpeded by the Commonwealth.

\(^{611}\) Pioneered by the High Court in *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (‘the Engineers Case’) (1920) 28 CLR 129 which rejected the ‘implied immunities’ and ‘reserved powers’ doctrines and continues to date, the most notable recent example being *New South Wales v the Commonwealth* (‘the Work Choices case’) (2006) 229 CLR 1.

\(^{612}\) An approach used by the High Court at some stages of its history most notably the Mason High Court in *Commonwealth v Tasmania* (‘the Tasmanian Dam case’) (1983) 158 CLR 1 and favoured by dissenting High Court Justice Michael Kirby (now retired) in subsequent cases including the *Work Choices case*. 

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Although it is not within the scope of this thesis to survey jurisdictions other than Australia to see if an evolutionary approach is being taken to Constitutional interpretation, Wendel Bradley speaks of a new type of *historicism* in interpreting constitutional rights in the NZ context to apply the rule of law, ‘ahistorical historicism’, which he explains thus, in contrasting this approach to US constitutional interpretation:

By contrast with the persnickety American originalism which treats the words and intentions of the Framers as holy writ, the approach of the Waitangi Tribunal is informed by history, but at a sufficiently high level of generality that, in a sense, the precise words spoken by Hobson, the meaning and inter-translatability of sovereignty and rangatiratanga, and the intentions of all the actors are beside the point. The genius of the New Zealand approach is what might be called ahistorical historicism. The historicism of the approach acknowledges that courts, investigatory tribunals, and Parliament do not write on a blank slate. Māori-Pākehā relations have a long history in this country, and contemporary decision-makers can do better by taking that history into account. Nevertheless, the approach is sufficiently ahistorical to avoid getting bogged down in endless arguments over an event that took place long before the rise of the types of technology, institutions, and practices that lead to conflicts today between the two founding peoples of New Zealand. Sales of state-owned assets, large-scale commercial fishing, concerns about biodiversity, protection in international law for intellectual property, offshore gas drilling, and other matters that have been the subject of Waitangi Tribunal reports could not possibly have been within the contemplation of the signatories of the Treaty. It would be foolish to pretend that anyone in 1840 would have had a view one way or the other on any of the problems that now present themselves under the general rubric of “issues involving Māori.”

While both the US and NZ have seen victories for justice and the rule of law, Bradley recommends the more evolutionary approach of NZ. In the concluding words of this article, Bradley says:

"[T]he best way to capture the distinction may be, ironically, from a political philosopher arguing that doing justice in New Zealand may be to stop worrying so much about justice and “continue to muddle and fudge along” – albeit in a principled way. One of the admirable features of American “rights talk” is the hope that justice may be done. We love to quote Martin Luther King Jr’s maxim that “the arc of the moral universe is long, but it bends toward justice.” Ironically, however, aiming at ideal notions of justice may cause Americans to overlook the importance of process and its associated virtues such as respectful engagement, flexibility, compromise, and tolerance for ambiguity. New Zealand law and history reflect a greater appreciation for these virtues, and this is something from which American lawyers could learn a great deal."[614]

Jeffrey Goldsworthy advocates a form of moderate originalism for constitutional interpretation contra to what he describes as ‘radical non-originalism’ (the same as *dynamism*), the latter being an approach in which the intentions of the constitutions founders are effectively ignored and the values subsisting at the time of the

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614 Ibid 701-2.
constitution’s foundation are substituted by the judiciary for those of the current generation. Goldsworthy describes his version of moderate originalism thus:

[t]he process of evolution must start from, and continue to be guided by, its original, intended meaning.\(^{615}\)

Goldsworthy also refers to a version of moderate originalism which he calls ‘evolutionary originalism’ that holds:

[T]he meaning of the text is to be understood as originally intended, with some potential for evolution from this, subject to the outer constraint of being within the realm of what can reasonably be characterised as the original idea or concept.\(^{616}\)

An evolutionary approach to judicial constitutional interpretation or any form of judicial decision making is a worthy aim, but judges are not usually very receptive to being told what sort of approach to take in the highly personal matter of deciding cases apart from following precedent in applying the principle of stare decisis. There is also a question that any attempt by the executive to lay down some sort of decision making rubric based on evolutionary principles might contravene the separation of powers principle. Regrettably, the model I will now propose is not for them. However, the making of legislation is an administrative process that would be amenable to some input to ensure the integrity of the legal system is preserved by the introduction of a new law (in the same way Cabinet and various Parliamentary committees scrutinising proposed new laws do). In other words, how might a Parliament use a model of evolutionary jurisprudence to inform them in the making and implementation of proposed new laws? What might a model of evolutionary jurisprudence look like in such a process?

10.6 A Model of Evolutionary Jurisprudence

To do justice to the task of propounding a workable model of evolutionary jurisprudence, it is necessary to come up with a sound workable concept of evolution. In Chapter 1, a working definition of evolution was proposed, namely: an entity or being’s continuous, spontaneous, adaptive change and development over time within


a system (itself within another or other systems) from one state to a different state. We also saw that seven key components were identified as necessary for a proper concept of evolution: universal flux, historicism, dialectic, selective adaptation, path dependence, spontaneous order and systems theory. Throughout western history, various of these components have informed evolutionary thinking yet it is probably true to say that at no time has there ever been a complete synthesis of these components. Nor have these components been consistently interpreted and applied objectively but more often than not subjectively (e.g. Social Darwinism and its distorted notion of the evolutionary component selective adaptation) which made evolutionary thinking appear underdone or wrongheaded. Or as Zamboni more charitably suggested at the beginning of this chapter, people have just been ‘confused’ about evolution.

If a sound concept of evolution must be proposed before propounding a workable theory of evolutionary jurisprudence and this involves incorporating the seven components of evolution mentioned above, we have learned from our survey as much about what not to include in our theory as what to include. So, the correct concept of evolution using the above definition and these seven components and learning from we what have surveyed we might outline the concept of evolution in the following broad brush strokes:

- everything changes,
- change has a history that must be objectively not subjectively interpreted,
- many forces inform the change which, again, must be objectively and not subjectively interpreted,
- the prevailing force is selected for based on its adaptive suitability to its environment,
- adaptation occurs spontaneously, but
- adaptation is not purely random and will be influenced and constrained by environmental factors to make it path dependent, and
- other systems must be taken into account in this process of change not just the system under direct consideration.
Thus, a theory of law which purports to be ‘evolutionary jurisprudence’ must be anchored to a sound concept of evolution - something that is not rigorously thought through or a caricature of the notion of evolution does not count.

**A Hypothetical**

What might a complete theory of evolutionary jurisprudence look like and how would it be applied? Perhaps the best way to answer this question is set out in the following hypothetical scenario.

There has been much lively public discussion in recent years in Australia about whether a law should be introduced to change the *Marriage Act*\(^{617}\) to provide for marriage between persons of the same sex.\(^{618}\) How would such a proposed law fair under the model of evolutionary jurisprudence propounded by this thesis? Should such a law be enacted or not? And, if so, in what manner?

A proposed law to change the definition of marriage to that of persons of any gender will be considered in light of the seven evolutionary components discussed in this thesis that comprise the model: constant change, historicism, dialectic, selective adaptation, spontaneous order, path dependence and systems theory. Before considering each of these in turn, we need to clarify the relevant legal concept that the proposed new law pertains to as we have seen that it is more useful to talk about legal concepts rather than legal rules in an evolutionary theory of law. We also need to ask what is the pedigree of this legal concept? What is its rationale? How useful is it for society or what social norm does it represent? How will changes to the legal concept feed into that? In deciding whether to introduce a new law or an existing law, evolutionary legal theory is firstly concerned with the underlying legal concept or legal concepts as identified by Zamboni earlier in this Chapter.

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\(^{617}\) *Marriage Act 1961* (Cth).

\(^{618}\) Ibid. Section 5 provides that “*marriage*” means the union of a man and a woman to the exclusion of all others, voluntarily entered into for life’.
So, what is the *legal concept* in our hypothetical? Marriage itself is a legal *institution* with manifold legal consequences. Marriage as a legal institution is to be left intact by the proposed new law. However, the proposed new law will change the nature of this institution, insofar as to who is entitled to participate in it. The *legal concept* under investigation is therefore that which currently governs the rule of participation in marriage: that is, between only a man and a woman, not between persons of any gender. In jurisdictions where same sex marriage has been permitted, the *legal concept* underpinning the institution of marriage is now between two persons of any gender whereas previously it was between a man and a woman. So, the question is, do we adopt this broader *legal concept* by a proposed new law enabling same sex marriage? And, if so, how?

As the law in Australia still defines marriage as between a man and a woman, the *legal concept* of marriage is currently framed in those terms. So, marriage between a man and a woman is the *legal concept* that will be examined and subject to the seven evolutionary components of the model of evolutionary jurisprudence propounded by this thesis. The question is whether following that analysis it is desirable for a proposed new law to change the *legal concept* from that of marriage being between a man and a woman to that of between persons of any gender as in other jurisdictions.

*Constant Change*

Legal concepts are not immutable and inviolable physical facts so are amenable to change. Marriage between a man and a woman is not a physical fact as, say, gravity is. Gravity is a fact, a cold hard reality that cannot be changed. However, marriage between a man and a woman is a social and legal institution underpinned by *legal concepts* and is not a brute fact. Ex-president George W Bush famously declared that marriage is between a man and a woman in a way that suggested it was an immutable and inviolable fact but this is to commit a naturalistic fallacy as marriage, being a social and legal institution and not a fact and is whatever we say it is. Marriage doesn’t have an independent physical existence of its own, unless you believe in a conservatively minded God in which case marriage is what *He* says it is, which is probably a better reading of George W Bush’s abovementioned comments given his well-known religious convictions.
However, save for those who live in a theocracy or under constant disillusionment about what has an independent physical existence and what does not, the legal concept underpinning the social and legal institution of marriage as between a man and a woman is subject to change and has indeed changed in numerous jurisdictions around the world, not least in the US where not only is it permitted in a number of States, but is now constitutionally mandated making it illegal anywhere in the US to refuse to issue marriage licences to same-sex couples or recognise same sex marriages.  

Historicism

The evolutionary approach recognises that it is important to study the pedigree and change of a particular legal concept. As Zamboni observes:

> The basic goal for each evolutionary theory is then to provide legal scholars, law makers, and last not but not least, judges, with clearer knowledge as to the background of legal concepts in force in a certain legal system.

Given the legal concept underpinning marriage as between a man and a woman, the history of the change of that concept to one of as being two persons of either gender is important to consider. The notion of same sex marriage did not just emerge overnight. It has usually been prefaced by laws recognising the rights of same sex couples as de facto, which is currently the situation in Australia given the Marriage Act’s restriction on marriage to heterosexual couples. As for all de facto couples, same-sex de facto enjoy the same rights under the Family Law Act as marriage so that following separation the courts can intervene to protect the financial rights of the parties based on their contributions to the relationship and relative needs of support. This scaffolding of marriage-like rights is an important precursor to consideration being given to taking the next step in allowing same sex couples to partake in the institution of marriage. This much seems to have been recognised and embraced without too much difficulty.

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621 Family Law Act 1975 (Cth). For the avoidance of doubt, s 4AA(5)(a) provides ‘For the purposes of this Act: (a) a de facto relationship can exist between 2 persons of different sexes and between 2 persons of the same sex’.  

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Also, various States and Territories in Australia have enacted civil union legislation to formally recognise these de facto relationships and to avoid any perceived stigma of the term ‘de facto’. However, the Marriage Act prevents, constitutionally, States and Territories going the next step to allow marriages between same sex persons since the Commonwealth has concurrent (but not exclusive) jurisdiction over the legal institution of marriage in Australia,622 and any State or Territory legislation which is inconsistent with Commonwealth Law on marriage is invalid to the extent of such inconsistency.623 And that includes marriage between same sex couples.

The law in every jurisdiction of Australia has conferred the same legal rights on same sex couples as heterosexual couples. What the law has not yet fully recognised is the increasing cultural and social acceptance of same sex couples with the claim that they should be able to participate in all social (not just legal) institutions available to heterosexual couples so that, in the case of the institution of marriage, they can make the same public commitment to each other in the presence of loved ones and be considered the same as any other committed couple. Being denied the opportunity to participate in the institution of marriage can be seen as a form of gender discrimination.

Dialectic

The history of change of the legal concept of marriage as a union of a man and a woman to between persons of any sex has involved a dialectic of opposing viewpoints, attitudes and social forces. The resistance to change has predictably come from religious quarters quoting scripture or from more secular conservatives who are simply uncomfortable with a notion so novel given the long term cultural and social standing of heterosexual marriage. On the other side of the debate are the same sex couples themselves citing individual freedom, equality and anti-discrimination, as well as their supporters who sympathise with minorities such as same sex couples or know someone in a same sex relationship. Indeed, those in favour of same sex marriage argue that there is no good reason not to change the law and that such change is long overdue.

622 Commonwealth of Australia Constitution Act 1901 (the Constitution) s 51(xxi).
623 Ibid s 109.
While there no doubt has been increasing acceptance of same sex marriage as a *legal concept*, an evolutionary legal theorist studying the history of change of the *legal concept*, is mindful of both voices of the debate.

These voices roughly represent two major opposing positions. Firstly, there is the position taken by those who argue that same sex marriage destroys the institution of marriage and the nuclear family (where a mother and a father are seen to be essential) and will lead to general social decay and make society unworkable with indirect economic costs (e.g. increased crime and unemployment from confused children of same sex parents). The other position is that the reality is that there have been for a number of years same sex couples in civil unions and de facto relationships successfully raising children and to deny these people the opportunity to fully participate in society including in the institution of marriage seems mean and discriminatory.

*Selective Adaptation*

How does one resolve the dialectic?

Zamboni speaks of three phases that point to resolution of the dialectic (leading to selective adaptation): variation, selection and stabilisation (or retention).

Of the variation phase, Zamboni describes this as the moment of creation of several possible *legal concepts* (or in this case two: a concept limited to marriage between man and a woman and a concept providing for marriage between two persons of any gender) which is a stage often ‘commenced by factors external to the legal world, e.g. needs or changes occurring in the economic and political environments.’\(^{624}\) In the days before same sex couples lived together as an economic unit and their unions were looked upon with derision and in many places constituted an illegal act, one cannot imagine the economic or political environment providing any pressure for a variation in the *legal concept* of marriage between exclusively between a man and a woman.

\(^{624}\) Above n 620, 282.
Speaking of the selection phase, Zamboni suggests that those *legal concepts* selected for are those that fit within the legal system’s normative structures. For instance, anti-discrimination is a feature of the legal system’s normative structures and a *legal concept* that helps to promote anti-discrimination such as same sex marriage is likely to be a better fit within those structures than a *legal concept* that is discriminatory.625

Discussing stabilization (or retention), Zamboni suggests the legal systems normative structures are important for this phase, as well as legal reasoning.626 To equate same sex married couples with heterogeneous married couples is not only normative in the sense, as mentioned above, it complements the law’s normative structures regarding anti-discrimination, but it also complements the law’s reasoning on certain levels such as the economic rights of a person living in a long term relationship with another which the law came to recognise when abolishing what appeared to be the arbitrary difference in economic status of individuals in a de facto relationship to those in a marriage as contrary to good legal reasoning.

However, is the ‘better adapted’ *legal concept*, which a same sex marriage concept may be, *already* the best fit? Has it evolved enough or does it still need to evolve? This is crucial from an evolutionary legal theorist’s viewpoint. The argument is not won until it is won, which takes time. Views that are forced through rather than spontaneously allowed to gain broad acceptance cannot be said to be the best adapted ones. An evolutionary legal theorist will not only pay mind to the opposing voices, but also the opposing attitudes and how these evolve over time.

*Spontaneous Order*

Same sex marriages would logically follow on from civil unions and de facto relationships in the same way de facto rights logically followed on from the rights of married persons. (Indeed, in the days when de factos did not have the same rights as married couples, this seemed anomalous given the prevalence of de facto relationships and the conferring of the same rights on de facto couples seemed long overdue). The

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625 Ibid 283.
626 Ibid 284.
key word here, however, is ‘flow’. The recent decision in Obergefell in the US by a majority of 5 to 4 reversed a position where the individual US States could take or leave a change to their laws allowing for same sex marriage to one where no State could refuse to issue marriage licences to same sex couples or recognise same sex marriages. There were comments by the minority that the majority in their decision had effectively forced their views on the nation, not allowing them to win on their own merits (which they probably would have in due course), thereby robbing the winning argument of its own momentum. As dissenting Roberts CJ put it:

Indeed, however heartened the proponents of same-sex marriage might be on this day, it is worth acknowledging what they have lost, and lost forever: the opportunity to win the true acceptance that comes from persuading their fellow citizens of the justice of their cause. And they lose this just when the winds of change were freshening at their backs.627

Path Dependence

Although evolution is not teleological with no necessary aim to realise, more often than not there is often a discernible pathway that evolution of a thing follows. The development in the law of individual rights, anti-discrimination and same sex couple legal rights and the increasing cultural acceptance of different sexual orientations and same sex unions suggests a path that is eventually pointing to same sex marriage. However, just as those who attempt to impose their ideology, religious or cultural, on others by saying that marriage must be between a man and a woman, those on the other side can also be accused of being equally ideological when they insist that marriage must be between anyone of any sex on the basis of untrammelled individual freedom and zero tolerance of discrimination. What is often not acknowledged by proponents of same sex marriage is that the discernible path cannot be manufactured or forced, it must find its own way. Neither can the idea of same sex marriage be untimely ripped from such path as this idea is governed by its own history and is bound to keep following it. As Paul David explains:

‘Path dependence’ is an important concept for social scientists engaged in studying processes of change, as it is for students of dynamic phenomena in nature. A dynamic process whose evolution is governed by its own history is ‘path dependent’.628

627 Obergefell, above n 619, 27.
628 Above n 620, Chapter 4, Paul David ‘Path Dependence: A foundational concept for historical social science’, 88.
A law on same sex marriage will be informed by and will inform other systems such as the cultural sphere or even the economy. More acceptance of sexual diversity and same sex unions in the social sphere puts pressure on the legislators in the legal sphere to enact laws permitting same sex marriage. In turn, the existence of such an option and the message of social acceptance that the legal sphere now sends out encourages more in the social sphere to ‘come out’ and express their unique sexuality and express such a lifestyle openly. Indeed, arguments are sometimes put that society risks becoming predominantly gay, as if everyone will suddenly become gay with freer laws (the same slippery slope argument used against the decriminalisation of illicit drugs). While this is a dubious argument about the law’s interaction with the social sphere, more sound perhaps is the argument that there is likely to be an effect on the economic sphere by the law’s acceptance of same sex marriage with thousands of additional wedding ceremonies conducted every year. Positive and negative impacts of the proposed new law on all aspects of society need to be carefully weighed and assessed for its overall usefulness, normative value and effect on the integrity of the law and the legal system. As Zamboni notes:

Modern legal theory is always expected to offer a normative component ie a part in which the direction to be used for future law and law-making not only are indicated but “justified” as to be the one that ought to be taken, therefore because they save the consistency and therefore the legitimacy of the legal system, or because by following it, welfare will be maximised or gender discrimination will be eliminated.629

Bringing all this together, it is the writer’s view that although the legal concept of marriage as being between a man and woman is and has been subject to change as shown by the history or unfolding of relationships between the same sex, the voices for and against changing the concept of heterosexual marriage to same sex must be heard and not gagged. It is the writer’s view that the voices for, although often just as loud and brutal (and at times more so) than the voices against, reflect a view that is ultimately better adapted to modern society, the argument must be won in a manner conducive to the spontaneous order of the legal system and a path dependence of an overall but gradual social trend towards same sex marriage, not by forceful sanction.

629 Ibid 279.
Thus, same sex marriage is not an ideological necessary aim to which society must be catapulted as appeared to be the thinking of the majority in Obergefell. It must continue to evolve and find its own way. Thrusting a law on society making it accept same sex marriage when a significant minority are opposed to it is not the evolutionary way.

*Obergefell* was a good example of why judges should only interpret and not make law. But would Parliament do better in this instance? The US at the federal level cannot even soften their gun laws to common sense levels due to powerful political interests. It is doubtful they could be trusted to get it right on same sex marriage. Which it is why it was better to leave it to the States.

In Australia, the proposed mechanism to introduce same sex marriage is a plebiscite. If a law was introduced into Parliament, it is likely the disparate group of cross-benchers in the Senate (who hold the power to pass or block laws) not really committed either way, would just vote according to what other concessions they could extract on other matters. Rent seeking would make a joke of what is an important issue. Even if one were to put these unfortunate political realities to one side, there is the fact that this is an issue where it is unlikely an elected member’s constituents are likely to have the same view on the issue making it impossible for an elected member of parliament to properly represent the views of his or her constituents, not to mention the fact that the elected member of parliaments may personally have a different view to most of their constituents even if the latter are of the same mind with each other on this issue.

It is submitted that while a proposed law to change marriage to include same sex couples has much to recommend it applying the evolutionary jurisprudence model propounded by this thesis, the manner of its introduction would be best implemented by a plebiscite in accordance with the principles of the model that require a suitably adapted law to evolve spontaneously rather than be forced on the populace. People need to have a say on this and those opposed to such a law on what are suspected to be highly personal grounds are more likely to accept the outcome having had their say then entrusting the matter to their political representatives. A law passed without their direct input is not ideal. If the plebiscite is unsuccessful in supporting the new law, a further one should be held within 3 years, not buried and forgotten, as society’s view
appear to be changing in this area towards acceptance of same sex marriage according to the path tendency just discussed and need to be monitored at a future point in time.

To sum up the application of the evolutionary jurisprudence model proposed by this thesis and the seven evolutionary components discussed to a proposed law for same sex marriage (ie a change to the *Marriage Act* that marriage is between a man and a woman to being between persons of any gender), the argument for a plebiscite as the preferred mechanism would go something like this: While it is acknowledged that the *legal concept* of marriage between a man and a woman is subject to *constant change* one has to be mindful of the way the legal concept has in fact only gradually changed *historically* in jurisdictions where same sex marriage is now legal and the *dialectic* that has informed that change as between the voices for and against such change, respecting both points of view. The winner of the argument is under the principles of *selective adaptation* the view that best reflects changing society and is best adapted to it. However, arguments are only convincingly won over time *spontaneously* and in line with a *path dependence* of the position they advocate, not by force or by ideological considerations. The winning argument will lead to a change in a *legal concept* that will be structurally coupled with other *systems* be they political, social or economic and its positive and negative impacts must be carefully and accurately assessed.

A judicial pronouncement that the legal concept of marriage is that it is now between persons of any gender clearly deprives society of having the argument they need to have. A vote in parliament does not achieve this effect, either, as this is a particularly personal subject and elected representatives who normally represent their constituent’s interests will find that their constituents have very mixed positions on this issue to each other and to their elected member. To let the outcome of the argument evolve properly, it must be played out in public in a plebiscite. True, the majority’s view will be imposed on the minority but the minority is less likely to be disenfranchised and accept the outcome of the argument, even one not of their choosing, if they have had a say. Also true is the hurt feelings that may be experienced by same sex couples and their children when the rhetoric flies during public debate surrounding the plebiscite, but gagging the debate and forcing through same sex marriage laws will only fuel resentment towards them – they may not hear it being said out loud but they will feel it for years to come.
10.7 Conclusion

This thesis has examined ideas about evolution throughout western history to the present day and how they have informed legal theory with discussion also on political, economic and social theory which have co-evolved with legal theory.

The arrangement of these ideas into the seven evolutionary components of *universal flux, historicism, dialectic, selective adaptation, spontaneous order, path dependence and systems theory* was not intended to bracket off all ideas about evolution into these set categories but has been, it is argued, a convenient a way to think about how ideas about evolution have emerged over time. This is because the concept of evolution has not come to us all apiece, but rather in stages with each of these evolutionary components making an appearance at different times in western history until something close to a complete theory emerged with Darwin (but then systems theory was not fully appreciated then, so it is true to say that even Darwin’s theory had some evolving of itself to do).

It has also been argued in this thesis, however, that more than being just a useful description of ideas about evolution, these components even if not exhaustive of ideas about evolution (there are likely to be others in future, although it is beyond the writer’s imagination to suggest exactly what, but history shows ideas about evolution themselves evolve) they are in fact all necessary for a working definition of evolution in particular a concept of evolution that might be of useful service in a theory of evolutionary jurisprudence.

As has been seen from this thesis and this chapter, a survey of past ideas about evolution helps us to understand what evolution is not as much as what it is. It is important to avoid being seduced by the scientism surrounding evolution, as history shows some have, and view the concept of evolution impassively as a process of change occurring within various contexts. If law is viewed as a *process* and not a thing, as the writer submits it should be, then a workable theory of evolutionary jurisprudence is essential if one is to do epistemological justice to what law is and what legal systems are.
Evolutionary jurisprudence should not only become a respected member of the legal theory family. Since it is the only legal theory that really understands the true nature of the law and legal systems (ie as a process) and is necessary to preserve their integrity and guide their process and imbue them with normative content, it probably should be at the head of that family.
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