When are Theories about the Phases of Legal Evolution Advanced and Why?

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1 Introduction

During recent years, the status and future of sociology of law have been the subject of a useful and interesting debate. In this debate, the point of view has been formulated that it is not a favourable time for legal sociology because research in this field is done in a sporadic and unharmonized way. In order to develop this field, it would be useful to concentrate on some common problems and theories and to work jointly on these during a period of some length. In all probability, this would result in a more cumulated knowledge in this field.[1]

I think with Thomas Mathiesen that it would be a bad idea to try to control legal sociology in the above-mentioned way.[2] In my opinion, it is important to give sociologists of law a possibility of working at the subjects and according to the theories that they find interesting and fruitful, which would be a good thing for the individual sociologist of law. Above all, however, I think that such freedom is an important precondition of their future concentration on the subjects which – seen from a legal as well as a social point of view – are the most important ones in the period concerned. From a pragmatic basic view, I think that to a high degree the evaluation of sciences, including legal sociology, ought to be based on their ability to elucidate the urgent problems in society, where a scientific analysis may form the basis of useful reflections on how to solve the problems in the best possible way.[3] In fact, this orientation towards the surrounding society has largely characterized Nordic legal sociology, and it may result in several different types of research. Accordingly, this may result in either a concrete examination of the conditions in society just now or a view of the present circumstances in a historical perspective. Correspondingly, the result may be the adoption of a micro or macro perspective on the law and its social relations. I find it most fruitful that sociology of law adopts all these different perspectives at the same time, thus permitting research into the different problems in society.

In the following I am going to take up a theme that Thomas Mathiesen also included in a brilliant way at the end of his latest edition of *Retten i samfunnet*: the general theories of the evolution of law.[4] During some periods, the interest in such theories has been an important topic for sociologists of law, with the very purpose of examining the modern time and especially the future in a larger perspective. And in these periods this topic has been regarded as very important, also from a practical point of view, because it enables you to analyze the nature of the problems that law has to deal with now and in the future and also the type of law suited for handling these problems.

In the following I intend to describe the different theories of evolution, but primarily place such theories in a perspective of evolution. Accordingly, I shall

1 *Cf.* Reza Banakar, *The Identity Crisis of a Stepchild*, in Retfærd No. 81, 1998, p. 3-22.

2 Thomas Mathiesen, *Is it all that bad to be a Stepchild?*, in Retfærd No. 83, 1998, p. 67-76; Jørgen Dalberg-Larsen, *Sociology of Law from a Legal Point of View*, in Retfærd No. 89, 2000, p. 26-39.

3 Jørgen Dalberg-Larsen, *Pragmatisk retsteori*, Copenhagen 2001.

4 Thomas Mathiesen, *Retten i samfunnet*, 4th ed., Oslo 2001, p. 203.

examine more closely the possible causes of the fact that the interest is concentrated on this theme in some periods, whereas other themes are preferred in other periods.

In particular, the interest in such theories can be found in two periods, which I shall concentrate on in the following two passages. The first one coincides with the earliest initial phase of legal sociology: the 19th century and the beginning of the 20th century. The second phase covers the 1970s and the 1980s. Subsequently, I am going to deal with the situation in the period from about 1990 and up to the present, which I think can be characterized as a period where the interest in theories of the evolution of law has gradually decreased. Naturally, it is followed by an attempt at explaining the reason why. Finally, I intend to discuss what a modern theory of evolution should include in the field of analysis besides the circumstances previously included.

It is not my mission here to deplore an evolution within sociology of law taking a direction away from an interest in a theme that I consider extremely interesting and important. On the contrary, I shall try to examine whether it is at all possible nowadays to build on the old foundation, and whether it is altogether possible in our time to say something sensible about the modern age and especially about the future by basing on this perspective.

2 The First Phase of Theories of Legal Evolution

In most descriptions of the development of legal sociology you will find passages about three great sociologists from the 19th century and the beginning of the 20th century who have played a decisive role for the development of legal sociology up to the present. These figures are Karl Marx, Emile Durkheim and Max Weber.[5] All three presented interesting and very different analyses of the evolution of law up to their own time.

Karl Marx examined the evolution from a materialistic perspective and in general paid special attention to the ideological functions of law. Basing on a functionalistic understanding of society, Emile Durkheim studied the role of law as unifying society. Max Weber examined the role of law in connection with the evolution of society towards new and more advanced forms of rationality. In Marx' opinion, the social conditions of that time were markedly negative for the majority of the population, and his theory was to be regarded as part of his endeavours at creating a new and better society. For Durkheim, too, sociology had an important practical aspect as it gave an understanding of what was necessary in order to make the new society cohere. In Weber's opinion, it was important to distinguish between the role of a researcher and that of a politician. However, he also used his theories for warning against dangerous tendencies in the evolution that might threaten the consolidation of a system of law characterized by formal rationality.

During certain periods, all these great sociologists were of great importance in the subsequent period. Marx thus played a decisive role in the 1970s, and so

5 *Cf.* Jørgen Dalberg-Larsen, *Lovene og livet*, 5th ed., Copenhagen 2005.

did Weber in the 1980s. Durkheim formerly played a great part, and he is now so to speak being rediscovered.[6] However, their theories of evolution were almost put aside until about 1970 – at least concerning legal sociology. It is thus natural to attempt to explain both this fact and the fact that they formed a very integral part of their own theories and also of other theories of society of that time.

As for the last point – the popularity of the theories of evolution in the period from Marx to Weber – I wish to point out two sets of factors: the scientific ones and the societal ones. As far as the first ones are concerned, one must say that the idea of evolution not only influenced social science, it was also an important theme in the philosophy of that time. And in the sphere of natural sciences, Darwin and his theory of evolution served as a brilliant model for the science of that time, and both directly and indirectly he came to leave his mark on legal thinking.

As regards social conditions, it was widely held at that time that a new type of society was in process of being established – a type of society differing greatly from the society of the past and consigning new tasks to e.g. law. Besides, this conception was also phrased in a very distinctive way by some legal scientists, like the German von Jhering (who was strongly inspired by Darwin) and the Norwegian Fredrik Stang, inter alia in his famous book *Indledning til Formueretten* (Introduction to the Law of Property).[7]

But why does the interest in these theories disappear? By investigating internal scientific factors, a very obvious reason can be found in the progress of a strict form of positivism, among others in the shape of logical positivism which simply rejects such theories of evolution as being totally worthless from a scientific point of view. Thus, during a period, a.o. sociologists of law devote their time to microsociological subjects, including detailed studies of the actual judicial behaviour. Such evolution is especially to be found in the USA.

More generally and socially, I am going to draw attention to the fact that the 1930s and the 1940s were periods influenced by so acute economic, social and political problems that it might look like almost excapism to revert to studies of the long historical lines of evolution. It must also have been extremely difficult to place for instance Nazi law in a general course of evolution. To most people, it would probably be more natural to consider it as a form of anomaly or disease and subsequently try to find the most efficient cure for this disease. In order to secure this end, however, legal rules will probably be of only limited value.

As I see it, it is possible to find conditions both within and outside the scientific society that may contribute to an explanation of why a theme like theories of the evolution of law comes on the agenda, and why it is cleared away again. As far as the internal conditions in science are concerned, very restrictive and reductionistic conceptions of science will show a tendency towards exclusively dealing with well-defined and mainly descriptive explanations of the real situation in a concrete field, for instance within legal sociology. Socially, I suppose, three types of conditions can be defined as leading away from evolutional thinking. Firstly, conditions being characterized by dramatic, acute

6 Roger Cotterell, *Law in a Moral Domain*, Edinburgh 1999.

7 Fredrik Stang, *Indledning til Formueretten*, Oslo 1910.

crises, like those mentioned above. Secondly – and completely opposite to the above – social conditions that appear entirely harmonious, and where nothing new seems to be in the pipeline. And thirdly, where something new is certainly in the pipeline, but where the situation seems so confused and unpredictable that it is difficult to discern a pattern resembling a general trend of evolution.

3 The Second Phase of Theories of Legal Evolution

We have now reached the 1970s – a period where macrosociology is making great progress within most social sciences, including sociology of law. At first – at least in the Nordic countries – it particularly relates to Marxism, including Marxist legal theory. This theory turns very critically on the predominant positivistic paradigm of that time and calls for completely new types of science, including studies of processes of evolution within periods of some length. It also calls for a science that can be used for revealing problems in society and that can recommend a solution of these problems. As mentioned above, however, such research has been very characteristic of early Nordic legal sociology, and it is thus difficult to consider it as something new. However, the interest in studies of evolution is not found within the established sociology of law, and accordingly the new Marxist theory of law focuses especially on this. The consequence is that in a manner of speaking the ancient Marxist theory of law is modernized by being used as a basis of an analysis of the phases characterizing the evolution in the 20th century. Based on a particular legal perspective, however, the problem of most of these theories is that only to a negligible extent they deal with the specifically legal field and to a too high degree consider the evolution of law as a mere by-product of the general evolution.

Anyhow, theories of evolution have come on the agenda again, and in the late 1970s and the beginning of the 1980s something new happens, which Gunther Teubner specifically refers to in his famous article from 1982: "The theme about the evolution of law has been dead for long. However, during the last ten years the debate has been alive again on both sides of the Atlantic."[8]

The novelty in this connection is especially some theories inspired by Max Weber's theory on the evolution of law. The first theory has been adduced by Nonet and Selznick in their book *Law and Society in Transition. Towards Responsive Law* from 1978. Subsequently follows Jürgen Habermas' theory on the four phases of legalization in *Theorie des Kommunikativen Handels* from 1981. In 1982 Teubner's article on the evolution towards reflexive law is published – an article founded partly on the theories just mentioned and partly on Niklas Luhmann's theories of the evolution of law and society.

All these theories can be regarded as an attempt at characterizing the evolution of law after Weber, and especially Nonet/Selznick and Teubner take a direct position on Weber's conceptual universe. Nonet and Selznick thus choose "responsive law" as the designation of a new form of law, which combines the

8 Cit. Gunther Teubner, *Reflexives Recht. Entwicklungsmodelle des Rechts in vergleichender Perspektive*, in A.R.S.P. 1982, p. 13 (here translated into English).

goal-oriented form of regulation in the welfare state with tendencies to respond to the citizens' own desires and needs. In Teubner's opinion, the evolution in the 20th century can best be described by distinguishing between two phases: partly the one pertinent to the welfare state and characterized by directly intervening regulation, and partly the new phase of reflexive law characterized by more indirect intervention by law in society, where representatives of the citizens are placed in a central position in the regulatory institutions.

When looking at these new theories in a European and Nordic context, the distinctive new feature is a clear impression that the traditional form of regulation in the welfare state has run into a decisive crisis and that it is in great need of a reorientation. In fact, Teubner's theory has been formulated in direct continuation of Habermas' and Luhmann's very critical analyses of the operation of law within the welfare state. They both find that only to a very limited extent this type of law has performed the tasks that it is created for, and in addition to this, they both call attention to some very crucial unintentional and negative effects of this form of law. As for Luhmann, these effects consist in destroying the vital self-regulatory mechanisms of law, and as for Habermas, they consist in having a detrimental effect on the individuals by colonizing their life world and thus making them passive objects instead of active citizens because their lives are formed by rules of law and not by themselves.

Accordingly, all three of them see the need for a change of course, but they totally disagree as to what ought to be done. As for Luhmann, the solution would be that law reverts to the old forms being dominant before the welfare state, and as for Habermas that law is removed from the life world. However, as for Teubner, the solution is the promotion of a new form of law that is already developing: reflexive law.

In this place I can only give a very brief description of these very complex ways of thinking and drafts of theory, which largely characterized the legal sociology and the legal theory in the beginning of the 1980s. Instead, I shall comment slightly on my own attempts in this genre and thereby on my own interest in the subject.[9] The fact is that these new theories played no important role as a source of inspiration when I tackled this subject in 1981, among other things because Teubner's theory was not formulated until 1982. In particular, my theoretical background was Marx and Weber.

My interest rather originated in a wish to plunge into a project concerning the evolution of law in outline – partly basing on a book I wrote in the 1970s on the large lines of the evolution of jurisprudence. I believed that it is possible to say something meaningful about the evolution and importance of the very value-laden concepts: constitutional state and welfare state, which were hardly used within the existing positivistic Danish jurisprudence. And I found that by examining the relation between evolution of law and society from about 1850 down to the present it ought to be possible to throw light on the history of these concepts, which could have significance for the understanding of essential legal-sociological problems.

9 Jørgen Dalberg-Larsen, *Retsstaten, velfærdsstaten og hvad så?*, Copenhagen 1984, and *The Welfare State and its Law*, Berlin 1987.

However, the decisive background was that a crucial change in the evolution of law was actually taking place in the Nordic societies, where a widespread confidence in familiar legal forms was being replaced by a well-founded distrust, inter alia by way of legal-sociological research, and that it would be a task of practical importance to try to make out whether new forms of regulation were needed in order to handle the actual problems in a better way.

It was of vital importance for me to formulate a review of the social and legal evolution that as far as possible gave an exact account of the actual historical evolution. For that reason, it became crucial to be in a position to point out in detail, especially in Denmark, what happened in the respective phases of the evolution and how it could be explained. As for myself, it meant a rejection of both very general theories of evolution dealing with the entire evolution from the first human societies and until now, and also theories being shrouded in the mist of abstraction and where the creation of the perfect structure of theory overshadows the endeavours to use the theories as tools for the understanding of what has actually happened and what is going to happen.

On the other hand, however, it is also obvious that theories of evolution cannot describe all details in the evolution. They have to look at the state of things from specific angles and cannot include everything, but they also have to strive to emphasize where something is inconsistent with the tendencies seeming to be predominant. This clearly results in one or even more dilemmas – just like all kinds of research not simply consisting in registering everything as precise as possible.

For that reason, my ideal for a theory of evolution is particularly the theory of Max Weber, whose descriptions are often very close to reality, and who does not hesitate to indicate where his own general conceptions of evolution are not in line with what happens in real life in certain countries or certain periods.

However, what evolution has actually taken place? In my opinion, there are fortunately decisive similarities in the conceptions to be found both with several theorists of legal evolution and with many others having dealt with the general evolution of society, inter alia in Denmark in the period in question. Just like many others, I have of course had to lean on what others have written about the evolution in general or specifically within economics, politics etc. What is new in this context is especially my examination of the evolution and functions of law in the respective phases, and it is quite natural to try to leave one's mark on the general conception of the evolution and its mechanisms.

I choose to characterize the evolution from about 1850 until about 1970 in not less than five phases – the first one is called "the happy moment of the constitutional state" and the last one "the happy moment of the welfare state". Between these two there are three phases, which can be regarded partly as a reaction against the consequences of the law of the constitutional state and partly as phases in the evolution towards the fully developed welfare state. After 1970 follows a period with crisis and self-examination, and in this period I especially regard the introduction of planning and the citizens' participation as new elements in a regulation pointing forward.

I end up with reflecting on the future and outlining different scenarios, all of which can be realized when circumstances permit. However, I consider an

evolution towards something like reflexive law to be the most probable one, and I certainly regard such evolution to be the best one for both society and citizens

Thus, in an article from 1988 I try to describe the entire evolution as a circle or rather a spiral, in which you move from one state of law, especially based on customary law where the citizens themselves are the rulemakers, over periods characterized by state regulation within especially contract law or public law, and towards a situation where elements of reflexive law play an important role.[10] And I consider reflexive law to be a (partial) return to a regulation by the citizens themselves, however, adding new – for instance democratic – elements.[11] In the nature of things, the relevance of such very simplified models is open to discussion. As mentioned before, however, I have tried to keep as close as possible to reality and also to take a position on others' conception of the same evolution.

As regards the conditions of the formulation of such theories, I once again want to categorize them in scientific and societal theories, respectively. Scientifically, the 1970s is a period where the hitherto dominating positivistic paradigms are being severely critized and also a period characterized by considerable pluralism. On one hand, it means that research, especially social research, is menaced by interior disintegration tendencies because there seems to be no joint frames of reference nor joint quality criteria. On the other hand, such situation opens the way for new research tasks that have hitherto been difficult to take up scientifically, and not least it opens the way for taking up the thread of the old tradition of social science preceding the epoch of strict positivism. Thus, this period means a renewal of the interest in Marx, Durkheim and Weber, which the majority today regards as positive, and this makes an interest in macrosociological theories on law and evolution most legitimate and natural.

From a social point of view I think, as implied above, that this situation is comparable with the situation at the end of the 19th century. On many levels, there are indications that a new phase is beginning; however, the outlines are still blurred, both in general and within law. Now, only a few think that society is well-established and constant, and on the other hand, the observable crises are not comparable with the situation in the 1930s and the 1940s.

Of course, it is difficult to evaluate unambiguously whether the evolution of the theories of phases in law can be said to have been valuable to legal sociology and the surrounding society. However, at least it can be established that in the Northern countries these theories have been the basis of some very lively debates about the future of law, for instance in the periodical Retfærd. It is also arguable that the discussion of these theories has contributed to making legal sociology more attentive and relevant for many jurists, and it has thus led the legal-sociological debates on to jurisprudence and moreover to other social sciences, and even to some politicians and some administrators.

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10 Jørgen Dalberg-Larsen, *Lige linjer, cirkler, trekanter eller spiraler i rettens og samfundets udvikling*, in Asmund Born et al. (red.), Refleksiv ret, Copenhagen 1988, p. 175-198.

11 In section 5 below this view of the evolution of law as being characterized by circular courses is further developed.

Finally, I wish to emphasize that in my opinion theories like Teubner's have actually made essential contributions to a total understanding of important features of the evolution of law in the 1980s. In some fields, there is actually an evolution that can easily be interpreted as an evolution towards something resembling reflexive law. And the theories state some new ideals of legal regulation which can influence – and have in actual fact influenced – the debate about how to approach "the good society" by means of law.

4 The Situation from About 1990 Seen from a Perspective of Legal Evolution

When looking at the situation from the end of the 1980s and forward, you will find a clearly decreased interest in the general theories of the evolution of law. This does not imply, however, that nobody works on this field, but rather that other themes are given more attention, at the same time as the way of thinking underlying the propounding of the phase theories is increasingly criticized. Therefore, it must be proper to study once more the factors behind this evolution and begin by examining the internal scientific factors.

Firstly, I want to mention the type of criticism that has all along been levelled against these theories: That they are too general for fitting in with the evolution in all countries and in the many individual fields. When beginning to apply phase theories as patterns of explanation in a concrete way, it often appears that some fields have not at all been through the process of evolution stated by the general theories. Perhaps you will still be in the phase of the constitutional state characterized by formal law or the welfare state with a dominant position of intervening law, or perhaps you will return to something that can best be described as formal law after having left the welfare state, or perhaps you will find different hybrid forms of the pure types of law within the individual fields. For instance, when trying to operationalize the ideal type of reflexive law, several elements must be taken into account that can be characterized as partly being ideological, partly concerning the wording of the rules, and partly dealing with their actual mode of operation in society. And maybe reflexive tendencies can be found on one or two levels, but not on the third one.

Secondly, in this period you will experience an increasing approach on part of legal sociology to anthropology and accordingly an inspiration from the theories and methods of this field of knowledge. And within anthropology the propounding of general theories of evolution is often connected with an old and severely criticized phase in early anthropology where very general theories were advanced which subsequently were criticized for not at all being in accordance with the factual knowledge gradually collected through empirical studies. In fact, many of these old theories of evolution glorified the Western society and its law as being the absolute height of the processes of evolution to be found in the world. Finally, it is arguable that the propounding of theories of evolution is often regarded as part of a natural science inspired conception of science, which

anthropologists are often dissociating themselves from still more than legal sociologists are.

Thirdly, you will experience a large progress for a view of science that radically rejects the established social science: postmodernism, which also characterizes parts of legal sociology.[12] Within postmodernism one of the main points is a clash with the great stories of the past, and above all the theories of evolution can be regarded as great stories telling about the course of history towards new and better times.

However, not all legal theories of evolution glorify the evolution in this way, and not all refer to general forces as determining the course of evolution. But the critique levelled by the postmodernists has also affected such theories, simply because the postmodernists often completely refuse to discuss social conditions on a more general level. They also refuse to advance general theories which explain the conditions in society and within law, and generally they expose the traditional explanatory ambition of legal sociology to radical criticism. Instead, you will have to study the individual concrete situations and in the concrete case determine which conflicts are taking place. And the result of the many small conflicts cannot be predicted at all.

Accordingly, influenced by postmodernism legal sociology is taken away from dealing with the general lines of evolution, the general conflicts and the general power structure in society and instead led towards an interest in the quite concrete manifestations of law on a microlevel.

Within postmodernism you will often find the point of view that specifically modern society has such postmodern character that it cannot be studied by using traditional, social-scientific approaches. This brings us to another possible type of explanation of the decline of the theory of evolution: the character of the society which developed especially during the 1980s and ahead. As I see it, something seems to indicate that the society assumed another character in essential fields. In this context, it is natural to draw attention to the increasing tendency to individualization indicated by many sociologists. To a progressively minor degree, people feel defined by their belonging to particular social groups or classes, and they do not vote according to traditional political groupings; altogether their conduct is no longer always as the theories prescribe.

Even though the influence of such tendencies ought not be exaggerated, I actually think that they have contributed to making society more disunited and unpredictable. In this connection, it ought to be pointed out that the institutions of society have a tendency to develop in a so disconnected and unpredictable way that it is difficult – also at this level – to find conditions creating cohesion and predictability. In this way, the public administration tends towards an evolution in many different directions depending on political fashions, different management theories and new complex problems.

However, in my opinion it is still worth seaching for general tendencies behind the surface,[13] but nevertheless, I think that there are many indications that

12 *Cf.* Jørgen Dalberg-Larsen, *Ret, tekst og kontekst. Postmodernisme og ret*, Copenhagen 1998.

13 *Cf.* Thomas Mathiesen, *Industrisamfunn eller informasjonssamfunn*, Oslo 1999.

it has actually been more difficult to take a position on society by basing on traditional social science theories and methods.

However, the globalization tendency is a more immediate social explanation of the decreasing value of explanation and prediction in the theories of evolution up till now. The theories of legal evolution mentioned above mainly deal with the evolution within the individual national legal systems; but it now becomes evident that it is necessary to look at law and its evolution in a wider international or global perspective, which obviously makes it far more complicated to explain and predict the evolution. Of course, it is open to discussion whether the evolution in the 1990s means a radical settlement with the past as regards tendencies of globalization both generally and economically. However, it is impossible to ignore the fact that globalization within law becomes much more distinctive than previously, and it is also impossible to ignore the fact that this global view of law in the 1990s came to characterize theory of law and legal sociology in a crucial way. And this in itself has removed the focus of research from older themes like the phases of legal evolution.

As regards the interest in legal matters not being purely national, one should rather wonder that it arises so late both what theory of law and what legal sociology are concerned. In Denmark, for instance, there has been very little interest until recently in dealing with the theory of EU-law, which after all has substantially characterized Danish legal matters since the 1970s. This lack of interest may partly be due to the fact that EU-law seems to be very technical and boring, but probably especially due to the national research paradigm which through centuries has characterized social research and especially legal research.

In Denmark, one of the first researchers to deal with globalization seen from a legal-sociological and legal-theoretical perspective is Sten Schaumburg-Müller in his book *Internationale handelsrelationer i retsteoretisk belysning* (International commerce relations in the light of legal theory), which deals with the demand for and the possibility of a global law, and the book was published as late as in 1997. In this book he proves how artificial it is to set narrow national limits to research of law when the realities are that national legal matters are crucially influenced by different forms of international law, and vice versa: the influence of national rules of law reaches far beyond the national borders.

In all probability, the internationalization and globalization of law cannot be explained by referring to one or a few decisive factors. It is naturally connected with the economic courses of evolution, but it is also rooted in political and more legal-internal factors and processes. It is evident that EU has meant a great deal to for instance the dependence of the Danish juridical system on – and partly its fusion with – a non-national judicial system. However, many other legal systems influence legal matters in for instance Denmark. In this connection, it is natural to stress the evolution within commercial law, which Sten Schaumburg-Müller brought into focus in his book. In this field, law is developed internationally, both by different formal decision-making centres, but also in a more informal and almost spontaneous way. Two of the most important decision-making centres are GTO and the World Bank, which in a crucial way elaborate the framework of a.o. the commerce relations between the wealthy and the poor part

of the world. Informally, the so-called lex mercatoria has been developed in connection with the increasing importance of commerce across the frontiers.

No doubt, the study of this new international commercial law and its principle of operation is a new important legal-sociological field of research. In the same way, the international human rights make up a new important field of research, with which more and more people have been occupied during recent years.

It may thus be asserted that globalization of law has become one of the most important new fields of research for legal sociology, whether law is studied on the international level or the studies deal with the influence of internationalization on legal matters in the individual countries.[14] And if you want to develop new theories on the phases of the evolution of law today, you cannot evade to include these aspects.

The above-mentioned conditions collectedly can contribute to an explanation of why theories of the evolution of law, and especially those formulated about 1980, have only occasionally been the subject of discussion during recent years. Personally, I have to admit that in my opinion these conditions have called for a closer examination of these theories in order to make out what is still left to be used as building stones for new drafts of theory.

5 New Theories of Evolution? On Circular Courses in the Evolution of Law

As mentioned above, it has become more complicated nowadays to look at law in a perspective of evolution. However, this is not to say that the old theories suddenly lose all their value. Fortunately and naturally, there are still sociologists of law who turn to Marx, Durkheim and Weber in order to find a key to an understanding of the evolution of law at a general level. I also think that the evolution theories from the second phase can still be of great value. Firstly, they do not lose their capacity for clarifying the conditions up to about 1990 because something new has happened, and secondly, traces from this evolution naturally continue down to the present. For that reason, for instance Teubner's ideal types can still be applied to analyze the evolution of law ahead,[15] and I even think that the theory about reflexive law as a future form of law in certain branches of jurisprudence has been even more empirically supported both globally and nationally than it was before 1990.

However, as mentioned above, it will also be natural to take other theories and ways of thinking into consideration and use them as inspiration nowadays. Especially, I think that it is possible to derive great benefit from examining legal matters and the course of legal evolution on the basis of the theories about legal

14 Knut Papendorf, *Advokatens århundre? Globaliseringen og dens følger for advokatmarkedet*, Oslo 2002.

15 *Cf.* Carsten Henrichsen, *Retssikkerhed og moderne forvaltning*, Copenhagen 1997; Inger-Johanne Sand, *Styring av kompleksitet*, Bergen 1996.

pluralism that have gained ground during recent years[16] and not least from being inspired by the postmodernist Boaventura de Sousa Santos' version of legal pluralism.[17] In this place, I am not going to give a more definite review of this theory but only to point out the fact that his theory specifically deals with a form of legal pluralism dealing with conflicts and interactions between the legal systems at three different levels: the international, the national and the local one. This theory – or rather antitheory – is good at illustrating the complicated legal matters in a world where the rules of law are worked out in many different places and in an uncorrelated way and often come to play together in exerting an influence on legal matters.

Being a postmodernist, Santos has no explanatory ambition with his pluralistic conception of law. However, I actually think that it is possible to use this new view of law as a starting point for thoughts about the evolution of law, which in a natural way can supplement the type of evolution theories mentioned above.

Theories about law being pluralistic can be regarded as distinct from monistic conceptions of law, in which it is regarded as a – usually nationally defined – unit. When looking at legal matters in different periods during the historical evolution, I consider it natural to organize them in periods where law can best be understood when using monistic glasses, and periods in which it can best be regarded as pluralistic. As I see it, the Middle Ages can be regarded as a period that can best be perceived from a pluralistic view of law, whereas the evolution of law in the period from about 1500 and up to the middle of the 20th century has a number of elements which can best be understood by regarding this period as characterized by a trend towards a monistic law and a monistic view of law.

When looking at modern age in continuation of the above, I find it reasonable to argue that the evolution once again is characterized by an increasing degree of legal pluralism, which among other things is due to the internationalization of law. And this means that in certain respects the evolution from the Middle Ages until now can be regarded as forming a circle where the terminal point ends in the starting point.[18]

In this place, I do not intend to go into details regarding this way of thinking, but only to mention it as an example of the fact that it is not absolutely necessary to formulate theories of evolution within the framework defined in the two previous phases.

Finally, I want to mention another two circumstances in the modern evolution of law that as far as I can see can justify a comparison with earlier phases in the evolution of law and thereby once again tend towards a conception of the evolution as forming a circle or rather a spiral, because the situation today is of course not completely the same as the previous one, cf. section 6 below.

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16 Jørgen Dalberg-Larsen, *The Unity of Law. An Illusion?*, Berlin 2001.

17 Boaventura de Sousa Santos, *Law - a Map of Misreading. Toward a Post-Modern Conception of Law*, in Journal of Law and Society Vol. 14, 1987, p. 279-302.

18 Jørgen Dalberg-Larsen, *Circles and Spirals in the Evolution of Law*, in Rüdiger Voigt (Hrsg.), Evolution des Rechts, Baden-Baden 1998, p. 181-192.

The *first* circumstance concerns the significant role of the principles of law from the period of the constitutional state in the 19th century, in combination with the confidence in the market as being the proper form of regulation, and the evidently increasing importance of contract law and its way of thinking. Already in the 1980s, the trend of evolution was that many countries led by non-Socialist governments aimed at a policy with slogans like deregulation and return to the markets as the most important regulator.[19] However, at that time the situation could be explained as being solely contingent on policy, and the evolution could be expected to reverse shortly. But there is now a much broader basis for regarding the general evolution to be influenced by this tendency. The tendency can be found within international law, it is an important element in the basic principles of the EU, it is evident in Eastern Europe after the fall of the Wall,[20] and it is also to be found in the Nordic countries, where administrative law is also tending towards this direction.[21]

This fact makes it natural to regard the actual evolution as a form of recurrence to the evolution taking place in the 19th century in countries like Denmark and Norway, where jurists and the principles of contract law played an important role in the construction of modern society in the form of a civic constitutional state.[22]

The *second* circumstance concerns the increasing importance of an informal legal system within modern international commercial law in the shape of a lex mercatoria. In several respects, this situation resembles the legal system of the Middle Ages: the international dimension of the evolution, the existence of a form of legal system not being based on legislation or other authoritative sources of law, and finally the fact that the internationalization has special reference to business conditions.[23]

19 Gunther Teubner, *After Privatisation? The Many Autonomies of Private Law*, in Thomas Wilhelmsson and Samuli Hurri (eds.), From Dissonance to Sense: Welfare State, Expectations, Privatisation and Private Law, Aldershot 1999, p. 51-82.

20 Ole Hammerslev, *The Construction of a Dominant Position in an International Field of Legal Assistance*, in Retfærd No. 114, 2006, p. 64-79.

21 Hans Petter Graver, *Forvaltningsrett i markedsstaten*, Bergen 2002; Carsten Henrichsen, *Forvaltningsretlige udfordringer i det 21. århundrede. Fra reguleringsstat til markedsstat?*, in Juristen 2002, p. 363-378.

22 *Cf.* Vilhelm Aubert, *Rettens sosiale funksjon*, Oslo 1976. Another similarity between the 19th and the 21st century might be that the legal profession is placed in a central position again after a century with declining influence where other professions have arisen and replaced lawyers in many areas. *Cf.* Papendorf (note 14) and Jørgen Dalberg-Larsen, *Forholdet mellem ret og politik i retsstaten og velfærdsstaten*, in Politica No. 1, 2004, p. 5-10.

23 Frederik Thuesen Pedersen, *Efter staten - globale netværk og retspluralisme*, in Slagmark No. 30, 2001, p. 55-72.

6 Closing Remarks

When considering the evolution of law as characterized by circular courses, as I have tried to do just above and also in section 3, we certainly have some rudiments for a new kind of theories of legal evolution. However, there is no normative element like the one to be found in most of the theories of legal evolution mentioned in section 2 and 3. Therefore, the question may be asked whether it would be possible in the present situation to form some theories with a normative dimension?

I absolutely consider this a possibility – the more so as the evolution is characterized by quite different tendencies. On one side, you find the evolution within commercial law described above; on the other side, however, you will find the evolution and increasing importance of international human rights.

You might say that the present situation differs from the situation in the 19th century and the Middle Ages by the fact that we have experienced periods characterized by an increasing democratization and a general spreading of the values of the welfare state. We have also experienced that considerations for the environment have begun to play an important role, also legally. It can be taken for granted that these considerations and values do not cease playing an important role, even if certain courses of evolution seem to attach only little importance to them. Therefore, the normative task can be defined as an examination of how these values and considerations, which are closely related to international human rights, come to play an important part in the future legal evolution. In this respect, the essential thing is to influence the global evolution of law in that direction, but also to have such evolution realized in the individual countries, whether it is Denmark, Norway or quite different countries, whose legal matters we have not been very interested in before in the Northern countries, but which are closely bound up with us nowadays in many ways, also as far as law is concerned.