Chapter 07: Biological anthropology in its relation to the anthropology of law

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Chapter 7: Biological anthropology in its relation to the anthropology of law

Systematically, anthropology can be divided in cultural and biological (= physical, physiological) anthropology. Historically, in all stages of its development, anthropology has its period-specific relationship between its cultural and biological side. The following four examples may illustrate this: The cultural-anthropological evolutionists were strongly influenced by the biologist Charles Darwin. Bronislaw Malinowski’s functionalism focused on behavioral and psychological side of human society. Later anthropological studies included biological data in their ethnographic, materialist, or structuralist studies. The biological-anthropological research on – apparently - innate universals such as incest avoidance, hierarchy, possession, and liberty to act pose legal issues. Are these human behaviors really innate? Or do they follow from education and other circumstances of environment?

The parallels in the histories of the sciences of biology on the one hand and of ethnology and cultural anthropology on the other as well as systematical behavioral implications of culture call for a chapter on biological anthropology in a book on a field of cultural anthropology, law. Apart from the general historical and systematical arguments, special questions of closer connections between legal anthropology and biology arise, for example: Do biological data such as health and diseases influence a legal culture? Is there an understanding of justice in our genes so that we are “born” with a sense of justice that should prevent us from committing a crime? Or do we internalize from our culture and its mode of thought what law and justice are so that a defendant in court may say: “I received a poor education.”? Therefore, to write about law and anthropology cannot but mention biology at least in some respects. Not all links between law, culture, and biology can be discussed here, but a selection is useful..

I. Relationship between cultural and biological anthropology. Terminology

As mentioned earlier, the most frequently used division of cultural anthropology is in five-fold: archeological, socio-cultural, linguistic, physical (= physiological = biological), and applied anthropology. For reasons explained above, instead of this pentalogy the book prefers to present culture and biology as the two sides of anthropology equally relevant to all subchapters. This leads to a system of anthropology as a social science that is discussed in Chapter 1. Obviously, this cultural-biological dichotomy of every anthropological issue is a substantial deviation from the anthropological systems in use. But empirical experience has shown that in practice every anthropological issue can be approached from the cultural and the biological vantage point, sometimes more from the one, sometimes more from the other side, and that in most cases this

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2 On the following survey see Alexandre von Rohr, Evolutionsbiologische Grundlage des Rechts, Berlin 2001: Duncker & Humblot; Carl Philip Graf von Maldeghem, 1998: Die Evolution des Gleichheitssatzes. Das Prinzip der Gleichbehandlung im Lichte der modernen Evolutionsbiologie, Frankfurt a.M./Berlin/Bern 1998: Peter Lang; also Bohannan (1992), 315: “Human beings are mammals who have specialized in culture as their basic mode of adaptation to the environment”. In these terms, the “specialization” in culture is firmly based in mammalian tradition which therefore forms the main contents of Chapter 7.

3 See Chapter 1 II. And V., above

4 See graph on system of anthropology, p. 75, above. C. George Boeree: „For every sociological explanation, we can find a cultural explanation as well“, however: “The important point is that we, (unlike animals) can always say no to our instinctual behaviors, just like we can say no to our learned ones!”, see cite in note 563, below, p.7 f.
procedure is most comprehensive and adequate enough to answer the anthropological questions.\textsuperscript{5} Physics, applied to humanity, is human biology. Thus, the term biological anthropology is preferred.

What about “supranatural” phenomena, such as witchcraft, or killing by bone-pointing?\textsuperscript{6} Do supranaturals belong to the “religious” and hence cultural side, or to the “natural”? For an Western anthropologist it goes without saying that supranatural appearances are not natural but cultural. This may “ethically” be correct. But emically this may be very doubtful. Asking the questions reveals the ethnocentric origin of the underlying distinction as such. This means that the distinction between cultural and biological anthropology as such needs to be seen in the light of the the etic-emic issue.

May the entirety of anthropology be subsumed under biology? In other words: Can everything in human life be explained by reference to a biological background? An extreme behaviorist standpoint would answer in the affirmative. But every even the smallest deviation from radical behaviorism would open the field for culture and its biology-independent rules, including the rules of law. In Germany, there was a time when art was prescribed, by the National Socialist government, to be exclusively realistic. Art had to render reality, no more. In Munich, the \textit{Haus der Deutschen Kunst} (House of the German Art) represented this realist movement in yearly exhibitions as a model for politically correct fine arts. At the time, a courageous critic remarked: “If art is only to describe life, we don’t need it” (\textit{wenn die Kunst das Leben nur beschreibt, dann brauchen wir sie nicht}). In the anthropology of law, applicable to the relationship between culture and biology, the statement can be rephrased: If law is only to describe life, we don’t need it. It makes no difference whether the description is of biological, sociological, historical, economical, linguistical, psychological nature, or taken from any other sector of life. Apparently, law is a human universal which at least to some degree exists independently from other factors that sustain life. This independence is a valid argument against any kind of legal realism, for example against economic analysis (“the more economic approach”), and against biological realities (a “more biological approach”). However, the anthropological analyses in Chapter 7 have shown that law always relates to facts of all kinds to be subsumed. Accordingly, biological facts must be relevant for law as well.

Whether research institutions should cover both culture and biology of mankind, or separately, is a frequently discussed topic in social science organizations. Yale University’s department of anthropology works in both fields, cultural and biological anthropology, and still seems to profit from the fact that this is done, despite all possible frictions, under one roof. Stanford proceded in the same manner until 1999 when both factions agreed to split into two departments.\textsuperscript{7} After a long and careful study of the historical\textsuperscript{8} and contemporaneous situation in Germany and abroad the Max-

\textsuperscript{5} Three examples: Whether possession is a cultural universal requires studies on possessive behavior in the animal word. And: The extent to which modes of thought behind the cultures depend on the interpretation of conceived environment, in turn depends on results of cognitive brain research. And also: What about freedom? Is the bevioral freedom to act a building-block of human culture, and if yes, to whci degree?— Said in a broader frame, with the words of Robert D. Cooter (personal communication): In anthropology, there are theories of behavior and of meaning. Another good formulation is in Wolfgang Marschall, Einleitung, in: Marschall (ed.) (1990), 7, who confronts culture as encompassing all human imaginations, kinds of behavior and their products as far as they are subject to change on the one hand, and bioianthropological research of the unchangeable “natural” human basic outfit on the other (my translation).

\textsuperscript{6} See Chapter 12 I, below.

\textsuperscript{7} Mitchell Leslie, Divided They Stand: A Messy Academic Scuffle Tore Stanford’s Anthropology Department in Two. The Unusual Breakup Reflects a Widening Schism in the Field – and Provides a Case That Itself is Worthy of Anthropological Study, Stanford, Jan./Febr. 2000, 56 - 59.

\textsuperscript{8} For the tragic, even criminal, aspect of history of anthropology in Germany, see.Chapter 3 VIII, near note 194, above.; in addition, see Forschungsstelle für Psychopathologie und Psychotherapie in der Max-Planck-Gesellschaft
Planck Society in 1998 founded the Max-Planck Institute for Evolutionary Anthropology in Leipzig and in 1999 the Max-Planck Institute for Social Anthropology (in German: für ethnologische Forschung) in Halle, a city so close Leipzig, both are served by a single airport.

II. Themes

Once the themes of biological anthropology are listed alongside the themes of cultural anthropology, as indicated on p. 75 above, an almost infinite number of subjects results relating one to the other. From this theoretically large number, here follow only five that have recently been discussed on a broader scale: (1) biological anthropology focusing on DNA research; (2) the search for “building-blocks” in animal behavior from which propositions of human behavior may be derived (with three sub-topics: epigenetics, cognition research, and sense of justice research); (3) the theme of human universals vs. cultural specificities; (4) the growth of natural law; and (5) moral and legal ethology.

1. Biological anthropology and DNA research

The origins of bipedalism (aufrechter Gang) in Africa are now dated back to six million years before our time. The earliest human fossils are said to be about four million years old. This means that humans were “mere” hunters and gatherers or reproducing people from four million years ago until the early axial age around 700 B.C.E.. The axial age ended the exclusive validity of animism. Therefore, humans were possibly not animists for only about 1/5000 of their existence. Since 700 B.C.E. they may have been followers of a total religion such as Hinduism, Judaism, Christianity, or Islam (but animism is still alive in many places of the world today). Thus, 4999/5000 of their history humans were animists. This must have left traces, in theory and practice of all other existing belief systems. It is surprising that in practically all interreligious conferences, meetings, and dialogs as well in many books on comparative religion animist representatives are absent. It is also surprising that the debate about essence and meaning of the axial age does not start with a presentation of animism. Many archeological discoveries require a more or less radical restructuring of formerly established assumptions of the development of mankind. However, an end of the steady increase of important discoveries in human development on the borderline between biology and culture is not in sight. So what has been said underlies the proviso of further confirmation.

2. Theories of evolution and behavior

a. Almost all known cultures have creation stories such as Genesis 1 and 2. Illiterate cultures have elders, female and male seniors, who tell the younger generation how the world came into being, how light and darkness became separated, who first man and first woman were, and how plants and animals entered the world. Often the creation of the world went through stages, either on a path from dark, cold and evil periods gradually to the light and less evil world of today, or – in reverse -

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from a bright, golden and peaceful time to the modern world of iron, blood, and tears. Animism, addressed to tribes and nations, enlivens these stories and lets sun and moon speak, and animals be punished for their misbehavior.

The creation story Westerners grow up with comes from a literate culture and it is found in the first two chapters of the first book of the Bible. It also has phases, seven days, and it links monotheism and theodicee, the good God and provides an explanation where the evil of the world comes from. These moral teachings are post-axial age and told to a world-wide audience as part of a total religion, but there is enough animistic tradition connected with them to make the story plain to the reader: the serpent talks, and trees have certain meanings. All creation stories tell where things come from, why they grow, and where they are bound to go to, and in their style are sound evolutionary theories.

b. In the Greek-Judaic-Christian tradition, empirical evolutionism, that is, to empirically ask for the truth has always been a human business. Doubt and investigation carry a Christian glorioso. Reformation, Humanism; Leibnizian polyhistorianism, natural law research and secularization promoted an interest in evolution of nature and mankind. Johann Wolfgang von Goethe’s (1749 – 1832) empirical discoveries in the natural sciences (geology, anatomy – the middle jaw bone -, color theory, and meteorology) took him to the threshold of modern evolutionism, however restrained by a gnostic (Spinoza-influenced) tendency to typological expanding and contracting, and inherent equilibrium. Without this philosophical burden, the credit for founding biological evolutionism would possibly have to be shared between Goethe and Charles Darwin (1809 – 1882). The first all-explaining theory of how living beings develop is attributed to Jean B. Lamarck (1744 – 1829). Accordingly environmental influences demand changes in the morphology of beings, and the ensuing changes are acquired inheritable properties: Living in a cold climate causes animals to grow fur, the offspring inheriting the fur from the parents. The theory, at least in its breadth, was soon questioned because a muscular man need not have muscular children, and swimming must be learned by every human generation anew, for example.

c. Darwin’s theory of the origin of all living species tries to solve this problem: the number and type of inheritable properties is determined through selection. This selection theory has three steps: (1) In principle, offspring has the same characteristics as the parents. (2) Once in while, at unpredictable intervals, there is a mutation in the inheritable stock of characteristics. (3) Environmentally favorable (=“adaptive”) changes caused by these mutations enable the parents to have more offspring, disfavorable changes less. Fitter animals have more offspring. Hence, morphological

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10 See, e.g., Mirceda Eliade, Images and Symbols: Studies in Religious Symbols, Princeton 1991: Princeton Univ. Pres (orig. Paris 1951); many Southwestern tribes of Northamerican Indians divide bygone times into four sections, or “worlds”, usually in the sense that things get better or at least more understandable in the next world. See the Navajo sandpainting “Creation Story” by Foster ©, about 1990, next page. (see next page). On a summer evening on the White Mountain Apache Reservation our host suggested that “let’s have some story telling tonight” Quietly preparing for the event, I was trying to think of stories of interest for our Apache friends and recalled a Mallorquin fairy-tale I happened to like and - knowing that the Apache value the flute and their magic enticement - the German story of the Pied Piper of Hamelin, the trickster who ends up stealing the town’s children. To my disappointment, my memorizing was of no avail since the stories to be told turned out to be Apache creation stories only. Stories of Apache creation must been all known to the listeners. The have been told since time immemorial. Obviously, re-telling these creation stories again and again (as if they were new) was an act of self-reassurance and identity-confirmation. I kept silent, pretending to know no creation story, assuming that the story of Adam and Eve was familiar to all present, from the Lutheran mission nearby, and that the gist of this story would earn me a humorous smile but make no deep impression otherwise.

11 1 Thessalonians 5. 21 (1 Thess. half): “…but test everything….” (respect of conflicting opinions), and 5.11 (encouraging dispute); a discussion at W. Fikentscher (1975a), 286 – 306, esp. at 297; idem, Die Freiheit und ihr Paradox, Gräfelfing 1997: Resch, last chapter; idem (2007), 137 – 165, at 143.
changes do not only occur through birth, but through selection after birth. If a species of animals moves north, it is not the fur grown on the parent that is transmitted to the young, but of the newly born those with a bigger fur grown through mutation will survive those youngs with a not so dense fur and by consequence have more offspring. After a longer period, only those animals will survive whose fur is dense enough to cope with the severe climate. Compared with Lamarck’s, Darwin’s theory of evolution is empirically less objectionable. However, it has its dilemmas. One of them is that mutations occur too seldom and the periods of reproduction last too long in order to explain the obvious and observable speed of evolution. However, there is still no better general theory to explain the origin and development of living species.

Independently of Darwin, Gregor Johann Mendel (1822 – 1884) found the exact rules of inheritance of properties. In school, every child is told that if a white bean “marries” a black bean and they have four “children”, one bean is white, another black, and two are gray. And if those two gray beans will marry and have four children, again one will be white, one black, and two gray. These discoveries in the 1870ies, affirmed by experiments, at first were given no attention. Around 1900, C. E. Correns, E. Tschermak, H. de Vries, and W. Bateson rediscovered Mendel’s law and made it known. Soon it was recognized that Mendel’s law and Darwin’s theory did not contradict each other. A combination of both was celebrated as the “big theory” of evolution for the next 60 years or so.

d. **Group (or kin) selection** became a step beyond that “big theory”. Darwin’s theory of evolution through selection of the fitter mutation carrier sounds individualistic in that it focuses on the relatively fittest among the offspring. In the 1960ies, this individualism was successfully questioned by Konrad Lorenz (1903 - 1982). He introduced the scientific study of animal behavior and observed in many “higher” animals an absence of intra-group killing. From this he concluded that fitness should rather be related to kin, not to the individual animal. Kin (or group) selection was to replace individual fitness as primary marker of evolution. W. D. Hamilton presented a model of inclusive fitness (or kin selection) that revolutionized the field; he observed animals fighting as a

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12 Darwin was a scientist far too cautious, integer, and careful to draw speculative social conclusions from his theory of fitness by selection. It was Herbert Spencer’s generalization that both natural and cultural evolution is being geared by the “survival of the fittest”. For details, see Günter Altner (ed.), Der Darwinismus: Geschichte einer Theorie, Darmstadt 1981: Wiss. Buchgesellschaft. On so-called Social Darwinism Franz Wieacker, Bemerkungen über Ihering und den Darwinismus, In: G. Altner, op. cit., 348 – 356.


group and sacrificing themselves in the defense of kin.\textsuperscript{15}

According to the theory of inclusive fitness, reproductive success could be maximized in getting group members support each other. Nepotism is adaptive behavior. This modified Darwin’s harsh approach, as it was felt, to some extent, all the more it could speculatively be expanded to a moral-analogous behavior of single animals and their groups.\textsuperscript{16} However, group selection theory suffered a hard blow when Jane Goodall observed deadly warfare between hordes of chimpanzees.\textsuperscript{17} Group selection lost even more ground when it was realized that in the course of animal evolution more than 90% of all species have died out.

e. What became known as \textit{genetic revolution} again revolutionized the issue of the origin of the species and their behavior.\textsuperscript{18} Kin is not what evolution has in mind, nor the individual animal, but the single “selfish” gene.\textsuperscript{19} Evolution became a “gene-centered principle”. Wolfgang Wickler and Uta Seibt called this the “\textit{Prinzip Eigennutz}” (principle of egoism).\textsuperscript{20} Biologists learned to watch the “behavior” of genes, and tested it. It turned out that genes often “act” in an individualistically selective manner. Male lions who take over a harem of females from a killed or found dead competitor kill the cubs sired by him, in order to make the harem members receptive for his own offspring. Kin are murdered for genes’ sake.

Yet, despite gene egoism, there is also “gene altruism”, giving rise to innate programmed behavior of mutual assistance, as in symbioses. Robert Trivers coined the keyword “reciprocal altruism”.\textsuperscript{21} Other studied help as provided between animals of different species.\textsuperscript{22} Another

\begin{itemize}
  \item \textsuperscript{16} Konrad Lorenz, Die Rückseite des Spiegels, 4\textsuperscript{th} ed. Munich 1983: Piper; idem, Das sogenannte Böse, 2\textsuperscript{nd} ed. Munich 1974: dtv. However, moral analogy between animal and human realm was strongly opposed by many authorities; on the discussions of this time and favoring group selection also V.C. Wynne-Edwards, Animal Dispersion in Relation to Social Behavior, Edinburgh 1962: Oliver & Boyd; in defense of Darwin’s theory with respect to human cooperation: Matt Ridley, The Origin of Virtue: Human Instincts and the Evolution of Cooperation, New York 1998: Viking/Penguin.; see the review by Frank J. Sulloway, Darwinian Virtues, 45 The New York Review of Books, No. 6, of April 9, 1998; a good allround summary of the high theoretical level and practical stretch of group-centered ethology: Klaus Immelmann (ed.), Grzimeks Tierleben, Enzyklopädie des Tierreichs, Sonderband Verhaltensforschung, Zürich 1974: Kindler.
  \item \textsuperscript{17} Jane Goodall (video) \url{http://ocw.mit.edu/NR/rdonlyres/Brain&Cognitive….}; idem, My Life with the Chimpanzees, New York 1988 (1996): Simon and Schuster.
  \item \textsuperscript{18} In 1964, James Watson, Francis Crick, and Maurice Wilkins discovered the DNA for which they received the Nobel Prize for Physiology and Medizin; James Watson, Molecular Biology of the Gene, New York 1965: John Maynard Smith (1964); idem, Evolution and the Theory of Games, Cambridge 1982: Cambridge Univ. Press; William D. Hamilton (1964).
  \item \textsuperscript{21} Robert Trivers, The Evolution of Reciprocal Altruism, 46 Quarterly Review of Biology 35 – 57 (1971), idem, Natural Selection and Social Theory, Oxford 2002: Oxford Univ. Press. One of Trivers’ example is the “altruism” between a small cleaner fish that picks its food from the teeth of a large fish and is thus cleaning the latter’s teeth, and is – reciprocally – not bitten and swallowed by the large one. Symbioses furnish other examples.
\end{itemize}
outcrop of this interest in what may be called “animal individualism” are Jane Goodall’s studies on animal characters.  

However, also in this period work on group behavior, group assistance, with special regard to humans, continued. Eibl-Eibesfeldt and his school kept Konrad Lozenz’ heritage of studying individual and group behavior alive and expand it to a general human ethology, defined by Eibl-Eibesfeldt as the “biology of human behavior”. Hereby, a door to intensive investigations of “innate” universals as opposed to “learned” cultural specificities was opened.

f. In the 1990ies, a new theory drew attention to the special role in human development parasites play. Parasite research became one of the much discussed fields. Humans “need” parasites to grow and to defend themselves against diseases, but whenever humans live in close quarters, the interactions of these parasites tend to sicken and kill people until they are enough sufficiently “thinned out” to reach a stable relationship defined by an equilibrium between being aided and being killed by parasites.

g. An epigenetic revolution followed and criticized the genetic one. Researchers of animal behavior remarked that genes can explain behavior of animals only to a very limited degree. They claim that genes are indispensable building elements for a certain behavior but that these genes receive their programming power only through their interaction with environment after birth. This research of gene interaction with the environment of genes is called “epigenetics” (the term is several decades old, though). More studies in this area are needed.

h. Co-evolution theory point the way to further discoveries concerning the interaction between genetic program and environmental influences. The genes and the memes, and William Durham’s

22 Volker Sommer (note 514, above); Report of Natural Symbiosis Research Center, Science Links Japan, http://sciencelinks.jp/east/article/200506/0000200050605A0151836.php; on reciprocity among humans see Raimund Jacob & W. Fikentscher (eds.), Korruption, Reziprozität und Recht, Be. One of Trivers’ example is the “altruism” between a small cleaner fish that picks its food from the teeth of a large fish and Irene 2000: Stämpfli. Frans de Waal, How Selfish an Animal? The Case of Primate Cooperation, in: Zak, Paul (2008), 63 – 76 distinguishes evolutionary and psychological altruism, and divides the latter in socially motivated and intentional altruism.


28 See Usteri et al., preceding note.
co-evolution theory mark a new approach in the direction of a combined biological and cultural theory. In the 1980ies, three strands came together to form the current state of biological anthropology, each competing for a prime position: (1) (Biological) gene and animal individualism became researchable by huge advances in gene analysis and advanced primate studies mentioned before under 4., above. (2) Biological group research (represented by human ethology, chimpanzee and canine studies, and universalia research) continued, and reciprocal altruism was recognized but declared not fit to explain all relevant phenomena. (3) Finally, on the cultural side, theories of animal cultures, memes (as the genes of culture, so to speak), co-evolution, and sociobiology interacted with the two aforementioned (more) biological strands. Frans de Waal did not hesitate to attribute culture to primates – for better or worse. Jane Goodall’s publication on chimpanzee warfare contributed to moral or quasi-moral views on animal behavior, harking back to earlier long rejected moral analogies from Konrad Lorenz’ times.

A new branch of research concerning the relationship between contributions human evolution by biological “building blocks” on the one hand and by cultural environments on the other to devoted its efforts to combinations of both. William H. Durham successfully raised the issue of a co-evolution of biological and cultural factors, that, through interaction, both promote and hamper each other. Richard Alexander stressed the role of (generalized) reciprocity. Murray Gell-Man spoke of the explosive force of cultural possibilities that shapes natural development.  

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31 William H. Durham, Genes, Culture, and Human Diversity, Stanford 1991: Stanford Univ. Press; several “dual inheritance theories”, as they came to called, are to be found in the contributions to Nancy L. Segal, Glenn E. Weisfeld & Carol C. Weisfeld (eds.), Uniting Psychology and Biology: Integrative Perspectives on Human Development, Festschrift Daniel G. Freedman, Foreword I. Eibl-Eibesfeldt, Washington, D.C. 1997: American Psychological Assn.; see for this also Peter Hammerstein (ed.), Genetic and Cultural Evolution of Cooperation, Cambridge, Mass. 2003: MIT Press, and the review by Robert Trivers, Mutual Benefits at All Levels of Life, 304 Science of May 14, 2004, 964 f. There is a noticeable relationship between these dual inheritance theories, of which Durham’s co-evolution theory ought to be named in the first line, and the meeting of the genetic and the epigenetic revolutions (see e. and g. above): Both developments stress the interdependence of the biological and the cultural, including environmental, impact on the anthropological status of human beings, on their Befindlichkeit. To my knowledge, this relationship has not yet found literary attention. It seems worthy of further research.


i. Brain research and reconsideration of evolutionary psychology is another recent branch of biological anthropology that focuses on the borderline between nature and culture. Already Tinbergen had pointed to the need to reconsider the evolution of the human brain as a determining factor of cultural advance. This biological aspect – that of brain activity – re-emerged in the 1990ies and still is pursued by a number of researchers. One of the tasks is to locate perception, cognition, emotion etc. in the brain – in humans and animals – to register reactions and to combine from findings causal relations to cultural data of many sorts. Margaret Gruter, Robert Frank, Randolph Nesse, G. C. Williams, Oliver Goodenough, Semir Zeki, Hans-Peter Schwintowski and others published relevant literature. The proposition to building a transdisciplinary bridge to “evolutionary” ethology has become a reality.

j. Extensive – and at times bitter – controversy arose around sociobiology. E. O. Wilson was one of its first defenders, referring to animal “states” of ants and bees, and other social patterns of animal behavior. Others followed. But the political consequences of sociobiology – more assumed than real – caused researchers to drop the term that, at its surface, so closely linked biology and human sociality. The sociobiology debate deserves a closer look. In 1971, Robert Trivers published that seminal article on reciprocal altruism. The article triggered two scientific developments of considerable importance. One effect was a partial refutation of Charles Darwin’s theory of the better chance of evolution of the more adaptive offspring. This line of argument (“was Darwin right?”) is still under debate and will rest there for considerably more time. The other revolutionary insight from Trivers’s paper was that cooperation between different species of animals may have a biological foundation. This line of the post-Trivers-article debate was taken up by sociobiology. After flowering in the seventies and eighties of the last century, and coming under attack by a host of critics, it seems that sociobiology is somewhat on the retreat, at least for the moment. But it has

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527 See note 509 above.

36 E.O. Wilson, Sociobiology, Cambridge, Mass. 1975: Belknap


38 Philip Kitcher, Vaulting Ambition: Sociobiology and the Quest for Human Nature, Cambridge, Mass. 1985: MIT Press; see also the following text under i.

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left its imprint on all theories which cut across the alleged borderline between natural and social sciences (see Chapter 1, above). The sociobiology debate is one of the great scientific controversies of our time. In a book of 1976, E. O. Wilson not only coined the term sociobiology but also succeeded in explaining the evolutionary mechanics behind social behavior such as aggression, altruism, cooperation, and cultural and natural survival. The book caused a lively discussion and a deepened interest in alleged biological building blocks of human moral and legal behavior.

The search for the biological basis of law-relevant behavior has met scholarly challenges. Three of the more important objections are summarized below:

(1) The first disagreement is a denial of any significant biological influence on human behavior, factual or normative. Any reference to physical attributes - such as Lombroso’s studies of physical characteristics of criminals or the influence of genes on behavior - are criticized as pure and derogatory speculations. This criticism is not without historical precedent. Nazi abuse of physical anthropology in the concentration camps as well as in institutions for the mentally ill and epileptics are notorious examples. An early warning about the misuses of biology was issued by the anthropologist Franz Boas. More recently, Richard Lewontine, Philip Kitcher and Daniel Kevles have voiced similar concerns. There are other views on this point, however. Paul Bohannan, in the Introduction to Law, Biology, and Culture, says: “Although we were very sure of our ground, we nevertheless had some trepidation about the way the book (seil: Margaret Gruter and Paul Bohannan (eds.), Law, Biology, and Culture 1983: Ross Erickson, Inc.) would be received - we thought of the book as highly controversial. That book, together with other books and the many forces in world scholarship, changed things: the opposition to admitting the importance of biological dimensions in human behavior has diminished significantly. The disputes quieted down and our book ceased to be controversial”.

Still, the natural sciences, the social sciences, and the humanities are moving towards one another both in their interests and methodologically. Ours is a time in which legal scholarship cannot

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42 This point is made, e.g., by Richard Lewontine, Steven Rose & Leon Kamin, Not in Our Genes, Boston 1984, esp. pp. 52ff.; L. Kamin, The Science and Politics of I. Q., Potomac, MD, 1974. See also Marshall Sahlins, The Use and Abuse of Biology: An Anthropological Critique of Sociobiology, Ann Arbor, MI 1976; Alexander Alland, 80 American Anthropologist 947 - 949 (1978), (a review of Sahlins' book); Jerome H. Barkow, Culture and Sociobiologes, Hanover 1993, p. 55: "The biological theories used- or rather, misused - by Nazi ideologists to justify the Holocaust were probably not the sole.nor even the primary, cause of genocide."


ignore those biological findings that explain human behavior and its normative regulations. Neither should we allow previous abuses to inhibit impartial research. This is not to say that abuses will disappear. Yet, abuses can be predicted and guarded against: whenever biological data are used to discriminate against individuals or groups for purposes other than their own protection against the consequences of age or illness, abuse is likely occur. The more impartial the inquiry, the less the danger of abuse.

(2) A second objection deals with the idea of free will. If self-determination is a human privilege and destiny, how can this view be maintained in the face of biological findings suggesting that there are strongly predisposed behaviors as well as behavioral constraints? Explaining features of one’s behavior as products of natural selection as well as bias. The possible impact of genetic information is something many people dislike. Modern biology responds to such concerns in the following way: most of what human beings do is not genetically determined. Rather, capacities to carry out certain behaviors are “transferred” through genetic information. For example, humans are “prepared” to bond, to learn a language, to respond with anger if willfully hurt by others, and to make decisions on the basis of experience. What humans accept and reject is largely a matter of positive and negative experience. These experiences are transmitted to others, who in turn are free to learn and to accept and reject from their own experiences. That these events occur does not negate the existence of biological programs. Rather, the capacity to learn is one product of such programs. Children typically will touch a hot stove after having been told not to do so. Yet, after having done so, a child will learn on her or his own not to repeat the painful experience.

Biologists view behavior in the following way: natural selection has favored capacities to easily and quickly learn those things that are important for survival and reproduction. Examples include: recognition of kin, cheaters, predators, reciprocators, and poisonous foods; acquisition of language; deception; sharing and helping others; identifying melodies. One need not teach one’s children these behaviors. On the other hand, behaviors such as playing the piano have not been selected (digital coordination is required to produce the music). Playing the piano needs to be learned. When the preceding behaviors are closely tied to genes and associated with above-average reproduction, the behaviors will appear with above average frequencies in subsequent generations; when behaviors are not tied to genes, or only remotely tied, learning by transmission without genes is necessary. Both kinds of transmission are “biological”. Hence, biology includes a gene-and a non-gene biology.

As we will see under III., both biologies have informing functions for law, and there are four of them. Two of the biological functions of biology for law are liberating functions. They say how with the help of biological reasons certain freedoms exist in legal culture. This should be noted wherever the free-will argument is made against biology. For example, an implication of findings from modern biology is that one is free to choose one’s mode of thought. Only after a mode of thought is selected do constraints set in, and these will appear primarily as constraints on thinking, because they cause the thinker to think in consequential ways within the mode of thought de facto selected before. These constraints are not biological. The capacity to select a mode of thought is a product of our evolutionary past, the choice itself is an act of free will. Impositions on thinking and behavioral constraints result from the modes of thought themselves and the tendency of cultures to favor a specific mode while rejecting others. A similar point may be made for moral judgments. The


findings of biology neither prevent nor conflict with moral judgments. Rather, they clarify such judgments by providing data and giving a framework for interpretation. However, as we will see, two other functions of biology for law are indeed constraining functions, but they contain constraints outside of the issue of free will, see III., below.

(3) Probably the most serious objections to the use of findings from biology in law have to do with methodological and interpretive issues. The objections may be summarized under the headline of appropriate levels of information. The question is: On which level of scientific abstraction does biology inform moral judgment, the law, economic policy, and so forth? There is a tendency among biologists to move up and down levels of analysis without always informing others where they are: e.g., on the level of individuals, their genes, their DNA, their brains, the brain’s parts, etc. This point is particularly relevant in discussions between biologists and lawyers, and it raises a number of important questions. For example, are there optimal levels for biologist-lawyer communication? If yes, is there more than one optimal level? What does it mean when a biologist says that a behavior is strongly predisposed? Should the lawyer ask first and let the biologist reply? Or, should the biologist set up warning flags and let the lawyer find out their importance for a particular case?

These questions are important because biology often does not immediately and obviously "translate" into explanations of normative or atypical social behavior. Attempts at such translations have been coined the naturalistic fallacy. Moreover, there is not just one naturalistic fallacy, there are at least as many naturalistic fallacies as there are levels of information. What “translations” of this sort necessitate are careful step-by-step explanations on each level of analysis, each level to be bracketed by clarifications of interpretive options and their limitations.

This is not the place to discuss which levels of biological analysis are most relevant to law or which precautionary steps are necessary to assure that one has avoided one or more naturalistic fallacies. The point here is to identify and categorize important ways in which findings from biology can inform law, leading to insights that are valuable for that normative social science that is called law (law serving here as an example for other normative inquiries). My approach here is functional and heuristic, and it is one that will leave questions dealing with the appropriate levels of information and the optimal processing of such information unanswered. These two questions deserve separate treatment. In what follows, four ways in which biology can inform are elaborated below.

* Gene manipulation is a highly contested field of genetic science and economy. It cannot be discussed in the context of this book. Reference must be made to the numerous specialized literature. Four major topics seem to be in the foreground of public legal interest: (1) Is altered-gene food and food from animals fed by genetically altered fodder edible, or are there health risks? (2) There is the issue of creating a chimera. Are combinations of humans and animals producible? Are those creatures humans or chattels so that the law of persons or the one on property is involved? (3) Then there is the issue of reproducibility. If a gene-manipulated being – human, animal or plant - is created and it cannot reproduce, trouble is limited because that being will not live for ever. But if it can reproduce, how can further development of “chimarism” be controlled? (4) Antitrust problems follow from contractual possibilities, particularly in agriculture. When a pest-resistant animal or plant is “constructed” in such a way that in order to survive certain substances are needed, for example hormones, vitamins or fertilizer, and patent protection is obtained, the manufacturer of the gene-manipulated merchandise may be tempted to produce that substance as well and by using a tying clause “reap” twice, once for the gene product he has


549 The following lines are a revised and slightly condensed version of an article by Wolfgang Fikentscher & Michael T. McGuire, A Four-function Theory of Biology for Law, 25 Rechtstheorie 291 – 310 (1994).
invented, and a second time for the contractually tied product which he did not “sow” but subjected to his monopoly. Needless to say that there are many more problems involved. *

III. A four-function theory of biology for law

The four-function theory of biology for law provides a structure in which findings from biology can be assessed in terms of their potential relevance to law. The theory addresses the fact that findings in biology are neither deterministic nor constraining with respect to many behaviors. Modern biology is as much about behavioral plasticity as it is about predictable or invariant behavior. The four-function theory of biology for law is concerned with impacts biological facts and findings may have for substantive legal solutions. It is not concerned with the problem - important but on a different theoretical level - of learning from biology whether and how law as a normative order may or may not have developed from biological patterns of behavior.

Because the purpose of this paper is to illustrate how the findings of biology can work to the advantage of law, not to argue the merits of specific biological information, we give more weight to features of biological theory and its possible uses than we do to the details of biological findings. The four-function theory can be subdivided into two constraining and two liberating functions: Constraining Functions I and II; and Liberating Functions I and II. Constraining functions will be discussed first.

1. Constraining Function I

Constraining function I refers to avoiding legal-behavioral conflicts that are consequences of predisposed biological behaviors and which are likely to occur despite laws exist which have been designated to prohibit them.

As noted, the term predisposed behavior references behaviors that are influenced by genetic information. Strongly predisposed behaviors tend to occur irrespective of the ethnic, cultural, and upbringing conditions of individuals. For many of these behaviors, biology counsels against excessively strict legal prescripts. Examples include:

a. Kin-related conflicts, such as parent-offspring conflict, offspring-offspring conflict, and preferential Investment of time and resources in kin (relative to nonkin). For this category, actors are genetically related, in most instances known to each other, and the majority of conflicts center around behaviors that disrupt interpersonal relationships, constrain individual expression (e.g.,

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values, behavioral styles), or which are associated with actual or perceived inequities in resource allocation, each of which is viewed as working against the self-interest of actors.

While laws exist that are designed to punish extreme forms of kin-related aggression and deprivation (e.g., child abuse), the relative ineffectiveness of such laws is suggested by the frequency with which kin-related conflicts are reported (which is likely to grossly underestimate their true frequency).\(^{51}\) The law often acknowledges the biological basis of such behaviors by granting milder or otherwise specially regulated punishments.\(^{52}\)

For nepotism, constraining laws may exist, especially with respect to nepotism in the public sector. Such laws may even be enforced. However, they often do little more than stimulate the development of alternative strategies for kin investment, such as using intermediate parties for the transfer of resources.

b. Nonkin-related conflicts, such as the desire to retaliate against others who disregard social norms or implicit expectations. Key features of nonkin relationships include helping others and reciprocating received help. Behaviors in this category often occur among spouses, friends, and/or neighbors. Failure to reciprocate prior help results in anger (moral indignation) as well as thoughts and feelings of retaliation. Numerous laws prohibit retaliation. Moreover, severe legal consequences may result when one retaliates excessively. Laws and consequences notwithstanding, thoughts and feelings of retaliation occur independent from the severity of the legal consequences. Further, subtle forms of retaliation, such as psychological disregard, social ostracism, or the refusal to engage in business relationships are often practiced and exceedingly difficult to constrain legally.\(^{53}\)

c. Preventing assembly. Humans are strongly predisposed to associate with one another, and they do so for both self-interested and social reasons. Laws designed to constrain such behavior have been minimally successful. For example, Section 54 of the German Civil Code was enacted in 1900 to discourage the forming of unregistered private associations. The law failed largely because it disregarded human predispositions to associate.\(^{54}\) Similar examples can be found in the failed

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\(^{51}\) In poetry, this ineffectiveness is sometimes used for the invention of a tragic plot, see for example Gretchen's fate in Goethe's Faust, Part I; or Sophokles' Oedipus.

\(^{52}\) Legal history shows that intra-family killing often was punished with special severity.

\(^{53}\) The legal problems of these intricate situations are sometimes summed up under the category of "domestic violence," three examples: H. Homer Cläre, The Law of Domestic Relations in the United States, 2nd ed., Practitioner's ed., St. Paul, Minn. 1987, vol. 1, § 8.3 "The Battered Wife" p. 525: "The incidence of domestic violence between husbands and wives has been variously estimated, but by all estimates it occurs often enough to be a serious social problem. One study produced evidence that nearly four women out of one hundred are physically abused by their husbands every year. - When arrests are made, the police sometimes find that the wife later withdraws her complaint ...;" Ira Mark Ellman/Paul M. Kurtz/Ann M. Stanton, Family Law, Cases, Text, Problems; Charlotteville, Virginia 1986; p. 131: "Conjugal violence is prevalent in America today and can be considered a part of a physical violence continuum. - Furthermore, police records are inadequate indicators of the magnitude of the problem. ... the incidence of physical abuse was approximately ten times more frequent than medical files indicates;" Arnold H. Rutkin (Gen. ed.), Family Law and Practice, Albany N.Y., 1990, vol. 1, Chapter 6, "Handling Domestic Violence Cases" by Lisa G. Lerma J. D., 1992, Revision by Sheryl Gross-Glaser: "One might expect that women seeking legal advice because they were being beaten by their husbands would tell their lawyers about the violence. Abused women, however, generally do not discuss violence in their homes unless they are asked" (§ 6.01).

\(^{54}\) In trade regulation law, the right to refuse to engage in business relationships ("refusal to deal") is generally acknowledged: "Before the Sherman Act it was the law that a trader might reject the offer of a proposing buyer, for any reason that appealed to him; it might be because he did not like the other's business methods, or because he had some personal difference with him, political, racial, or social. That was purely his own affair, with which nobody else had any concern. Neither the Sherman Act, nor any decision of the Supreme Court construing the same, nor the
efforts of the Soviet Union to suppress assembly among persons with particular religious beliefs. Shortly following the fall of the “Iron Curtain,” it became apparent that a large percentage of the Soviet population had continued in their religious beliefs and engaged in clandestine religious practices over the preceding 70 years of Soviet rule. Law thus must give special attention to factual settings that occur in the context of secret societies, conspiracies, mafia, triades, terrorist organizations, “youth religions,” and gang

[Clayton Act, has changed the law in this particular. We have not yet reached the stage where the selection of a trader’s customers is made for him by the government”, Great Atlantic & Pacific Tea Co. v. Cream Of Wheat Co., Circuit Court of Appeals of the United States, Second Circuit, 1915. 227 F. 46; similarly: United States v. Colgate & Co., Supreme Court of the United States, 1919. 250 U.S. 300, 39 S.Ct. 465, 63 L. Ed. 992, 7 A.L.R. 443. There are limitations to the right of refusal to deal whenever it would work counter-effectively, such as in restraint of trade.]
Legally prescribing anarchy. This is an interesting if largely hypothetical example. Prescribing anarchy is unlikely to have a significant effect on day-to-day behavior. As noted, people are predisposed to develop informal groups, social-support networks, and formal social organizations, including status hierarchies. Such groups in part reduce uncertainty in interpersonal relationships, in part function to manage the allocation of resources, and in part serve to constrain aggressive acts by others (e.g., formalizing rules of reciprocity and developing coalitions to constrain aggressive individuals).

Proscribing religious and ethnic beliefs, personal values and/or conflicts among persons who do not share beliefs. Inter- and intra-group conflicts over ideologies, values, religious preferences, etc., not only occur continually, but often in total disregard of the law. The rapid escalation of ethnic, religious, political, and territorial conflicts (e.g., Balkans, Near East, Germany, United States) in recent years suggests that legal and/or physical suppression of beliefs and values and their associated behavior is minimally effective. A related point deals with prescribing tolerance towards certain groups. While laws may reduce direct attacks on others or the social and economic ostracism of persons of particular ethnic or religious beliefs, laws consistently fail to fully constrain such behavior, in part because such laws are difficult to enforce and in part because of political and social variables (e.g. politically stimulated conflicts among Arabs and Jews).

Property rights and market economy versus environment and non-market economy. Possessive behavior is a widely observable, strongly predisposed behavior. Birds sing to claim their territory; hamadryas baboon males are possessive of their females; and so forth. Possession requires a surrounding environment out of which the things to be possessed can be singled out. On this point, possession and environment are mutually constitutive. The attitudes and acts associated with possession among humans provides a model of property rights in law and economics, a model of what markets and competition within the market place are about.

Despite the importance people place on possessions, and despite the degree to which individuals will compete with each other to acquire and retain possessions, many claimed possessions of property also have negative consequences. Examples include pollution and destruction of species and habitats. In order to legally protect the environment, a number of people have proposed cutting the environment into marketable pieces and establishing property rights for the pieces; in turn, the market is being left to its competitive forces which will take care of environmental protection. Yet there is a flaw in this logic. Pollution typically hits “free goods,” such as water, air, ground water, landscape, zoning policy goals, etc. Free goods are difficult to conceptualize in terms of property rights. Physically, they cannot be assigned to private individuals; thus legally, they should not be. As a consequence, they tend to escape traditional tort law protection as well as marketability. “Auctioning-off the environment”


This is part of the policy of the EPA, see, e.g., the critical evaluation by R. W. Hahn & G. L. Bester, Where Did All the Markets Go? An Analysis of EPA’s Emissions Trading Program, in: 6 Yale K. Reg. 109 (1989).

can only mimic market forces, and does not solve the problem of setting a limit on the total allowable pollution, let alone its undesirable effects. Laws that would prescribe or permit comprehensive marketing of the environment (“to internalize negative external effects”) would at least partly fail because they neglect what possession means and requires in biology.

g. The right to one’s homeland versus “ethnic cleansing.” An individual is born and raised in a family in a place and with a group of people who usually share a common language, religion, and culture. This “belonging somewhere” should be given attention in international and national law. There is both a biological and a cultural legitimacy in an ethnic group’s claim to a “Recht auf Heimat (right to one’s homeland)”. This right is disregarded - along with other personal rights such as habeas corpus - by those who engage in “ethnic cleansing”.

In summary, Constraining Function I deals with two types of trade-offs: between those behaviors that are likely to occur among persons irrespective of laws, and the ways in which legal means might best be used to constrain extreme and personally damaging forms of such behavior; and behaviors that most but not all members of society follow and support, and how best to use legal means to reinforce law-following behavior among the law-following part of the society while simultaneously constraining illegal behavior.

2. Constraining function II:

Constraining function II consists in heeding biological dispositions in making the laws. Laws can sometimes be devised that offset or temper disposition. Whereas Constraining function I warns against attempts to excessively or inconclusively suppress human behavioral predispositions, Constraining function II invites law-makers to develop laws that are not only sensitive to the biological constraint inherent in the first category, but also appropriate to deal with them. To give examples, the following sets of legal provisions belong to this category:

a. Laws guaranteeing individual rights that apply independently of kin or nonkin relationships, such as the Magna Charta, the Bill of Rights, and Habeas corpus (by the was, a biological expression). Laws providing and protecting individual rights are likely to win approval because they may apply to anyone in the future. Related are procedural rules of liberty. Procedures can be devised to take into account behavioral predispositions, such as the tendency of individuals to interpret events in self-interested ways without being aware that one is doing so.

b. In family law, laws can be established which by recognizing biological behavioral predispositions do justice to stressful decisions that one would not make otherwise, such as in engagement, marriage, adoption, and surrogate mother cases. Another example is divorce law. The biological fact that people live longer than in former centuries seems to have promoted a world-wide tendency in the law to reduce the importance of “guilt” (legal sense) as a ground for divorce.

c. In competition law, statutes protect the human disposition to engage in competition (whatever competition may mean in different cultures) and, within limits, laws encourage competition in ways that are designed to be successful. A classical example of a law that did not acknowledge the nature of self-interest and the strong relationship between self-interest and reciprocity is found in German competition law in which there was the requirement of a binding contract for a common interest agreement in restraint of trade to be illegal (§ 1 German Law Against Trade Restraints of 1958). Firms which wanted to develop cartels simply avoided binding contracts and still had their way without offending the law. 60 Although an earlier leading case had sug-

60 BGHSt 24, 54 = WuW/E BGH 1147, 1153 - Teerfarben -.
gested that a common interest agreement does not presuppose a binding contract among the interested partners, German legislators in 1958 overlooked the fact that ethologically the pursuit of individual yet identical interests does not necessitate reciprocal arrangements. As a consequence, in 1973 the Law against Trade Restraints had to be amended and extended to concerted practices in restraint of trade.\textsuperscript{61}

d. \textit{Immigration and asylum laws} offer more examples. Xenophobia is a biological datum. Immigration and asylum laws need to be formulated in ways that ensure and facilitate a culturally desirable and necessary assignment of immigration or asylum Status as against the “xenophobic program” of the human mind.\textsuperscript{62} Constraining Function II teaches the legislator and administrator to be particularly careful and inventive to cope with “natures’ temptations”.

e. \textit{Social Norms beyond the law} should be taken into consideration. Nonlegal means, established through education and the development of new social norms outside of the law, can be used to influence behavior where laws are likely to be only partially effective and/or enforcement is economically prohibitive. In the United States, (absent local smoking laws) smoking in prohibited areas is regulated almost entirely by social norms. Indeed, we are unaware of any instance in which a violator has been arrested or prosecuted, yet literally no one now smokes in designated non-smoking areas. The positive effects of social norms can be contrasted to situations which are managed by a “show of force,” as for example, where police make their presence obvious at sports events and political rallies where rioting and aggressive behavior are frequent. People are not unaware of the implications of force. However, the fact that shows of force are often required suggests two points: social norms are ineffectual in constraining such behavior for a percentage of the population; and the probability of illegal physical and destructive behavior increases among large social groups.

In summary, the basic idea informing Constraining Function II is that, when possible, laws should be framed in ways that reinforce behavior that is likely to take place because it is predisposed, provided others are not disadvantaged.\textsuperscript{63} Such laws often build on foresight. For example, people may support specific rules of evidence even though they are not embroiled in a legal dispute because such laws may turn out to be personally advantageous at a future time. In effect, laws that are written and enforced even though they are potentially self-serving not only are likely to be passed but also relatively uniformly followed (e.g., speeding laws). In contrast, laws that do not regard predispositions are likely to fail. Some of the most obvious of these are environmental laws requiring companies to dispose of waste products in ways that, if carried out according to the law, would force a significant percentage of companies out of business. The fact that such laws are only marginally obeyed is not surprising.

3. Liberating Function I:

Human ethology also has liberating functions, not merely constraining ones. Liberating function I

\textsuperscript{61} The complete story in W. Fikentscher, Wettbewerb oder Markt oder beides? Gewerblicher Rechtsschutz und Urheberrecht Internationaler Teil 2004 Heft 9 (Festschrift Rudolf Krasser), 722 - 731


invites to learn biological alternatives. Therefore, biology can be viewed as a school of freedom in that it teaches a great variety of possible orderings and behaviors that can be found in nature. This does not mean that this variety must be copied: societies need structure; social interactions need to be predictable; and there may be moral reasons against nature’s ways. There are a near infinite number of ways in which these basic needs can be achieved, but knowledge of nature’s solutions is often informative.

a. For example, laws that constrain participation in assemblies whose members share beliefs can lead to unrest, injustice, and invite failure. Such laws may suppress variability, and in doing so may violate the liberating functions of biology. An increase in individual as well as social responsibility is both the reward and the cost of an increased knowledge of the historical development of our species, along with its options and its constraints. By learning from biology, culture becomes richer in content and broader in scope. Features of the preceding category are implied in the Liberating Function I category, which emphasizes that laws can be learned and improved through the study of findings from disciplines that reveal basic proclivities of human behavior. The freedom of assembly is such a case. Other examples include:

b. Large groups are a similar situation. Biology, and ethology in particular, are involved in the study of history from the perspective of previous legal, political, and economic solutions developed by large groups of humans (e.g., the Roman Empire, North American Indians, medieval feudal states). Many of these solutions facilitated living together, sharing, improving the quality of living, and extending longevity. Moreover, they address many of the conflicts that are encountered among large groups. For example, many of the options for environmental legislation can be deduced from examining how humans lived together, how they responded to social pressures, the conditions under which they heeded laws, and the conditions under which they disregarded them. The more frequently legislators distill the key principles of previous Solutions and apply them to the laws that they are developing, the more likely laws will achieve their desired ends. Such efforts will also contribute to what may be called “cross-cultural learning”, that is, learning the ways other societies use to solve problems that are common to humankind. Different solutions apply better in some situations than in others. For example, as a rule, legal prohibitions, education, and changing social norms are more effective in bringing about behavioral change in single-ethnic, single-religious groups than among multiple-ethnic and multireligious groups where there is often more than the average conflict over values, status, and resources.

c. Correspondingly, there have to be liberties for small groups. Anthropology, or the study of individuals and small groups and their Solutions to survival, political, economic, and legal issues in the context of different cultural values and ideologies, offers similar options. Anthropological studies reveal that many features of culture, which at first seem remotely related, are highly interdependent. The complexity of even very small groups is thus established, and in turn, questions are raised about laws which do not consider the interdependent features both within and across groups. For example, all known cultures engage in some form of child adoption and forms of artificial family ties. These ties may be recognized by the law or via social norms. Provisions for such behavior should be made available in the law, and consequently, certain legal codes should not be developed. For example, in the United States, teenagers who are in conflict with their parents may be “temporarily adopted” by another family, usually a family in which one of the children is a close friend of the teenager. In many instances, this solution works to the advantage of all involved. The introduction of laws, such as those requiring bureaucratic evaluations of parent-offspring conflict and legal sanction for temporary adoptions would constrain such behavior.

d. Control of excessive self-interest presents a further example. The study of strongly predisposed human traits helps to identify techniques for controlling excessive self-interested behavior and/or
legally deviant behavior. A number of these predispositions were mentioned in the first category (e.g., preferential investment in kin): people will tend to disregard laws when their survival or the survival of their kin are threatened, under adverse economic conditions, during periods of persistent political corruption, and when social, resource, and human rights inequities are excessive. The obvious, although not necessarily easy Solution in such situations, is to reduce those behaviors or events that are associated with increases in self-inter-es'ted behavior and a reduction of social participation. Learning from nature’s many ways implies openness for equilibria.

e. **Taboos** often reflect innate dispositions, as appears to be the case with the incest taboo. But taboos have another side, namely they are contrary to concepts of freedom and behavior variability. How should law position itself on such matters? Our view is that it should take a functional approach. For example, incest strongly correlates with psychological trauma. Hence, efforts to constrain such behavior should be undertaken.

In summary, the range of examples of possible applications in this category is wide. They include finding “biologically relevant” Solutions to problems of cross-generational conflict (instead of contract regula-tions); revitalization of energy supply (instead of legal prescription of non-use); composting by city ordinance (instead of ineffective waste avoidance laws); division of labor, copied from biology (instead of culturally introduced non-cooperation); etc. Comparative law, socioöogy, anthropology, and ethology are established ways to learn about the means others solve problems similar to those which have to be solved at home.

4. **Liberating function II**

The wealth of natural, including biological, possibilities suggests numerous law-relevant options that lead to the application of **concrete biological alternatives**. This goes a step farther than just learning about possible liberties. Biology is not only teaching a wealth of alternatives how something can be regulated, it also instructs **how** this could be done in a societal promising manner. Examples include:

a. **Global warming** may cause a number of biological changes, such as disease-carrying insects moving north, or weeds being spread to new areas. Environmental laws trying to cope with these changes are well informed when they observe the chances biology offers. In other areas, it may be wise to meet public uncertainty or skepticism about correct procedures and then proceed. through improving public understanding of processes and decision-making rules; facilitating direct reciprocity, such as reducing the complexities of contract law; and facilitating indirect reciprocity, such as recycling through developing social norms in preference to or in conjunction with laws.

b. **Systematically reviewing controversial laws** is a task to be included in Liberating Function II. Laws frequently become obsolete or conflict with prevailing social norms because of changes in norms and/or ideologies that provide the infrastructure for legal behavior. Adultery laws in Western Europe and the United States are examples: social norms applicable to the 19th Century are no longer viable. Systematically reviewing laws in the public domain facilitates public discussion and brings laws in


line with current norms and ideologies.

c. *Restraining behaviors in areas where they are “biologically” destructive* is a similar instruction given by Liberating Function II. While this paper has taken the view that knowledge, education, and social norms are important features of society to which most members respond, this is not always the case. Under certain conditions behavior needs to be constrained. We refer to behavior that is primarily enacted by individuals, not groups, where there are often wide ranging consequences for “innocent” individuals. Examples include arson, theft, embezzlement, failing to adhere to health laws in food production, and drug peddling to children and adolescents. Given that this behavior occurs at the frequency it does, a reasonable alternative is that of significantly increasing punishment to individuals who engage in such behavior.

d. *Early and intense education.* This category cannot be too strongly emphasized. The clues biology may contribute to good education have yet to be systematically studied.

Thus, Liberating Function II draws attention to the wide range of ways in which a biological understanding of a human being’s freedom can be used to improve law. Comparatively speaking, necessary natural constraints seem to affect human freedom considerably less than unnecessary cultural constraints. This is one of the take-home messages biology is able to give to law.

In conclusion, the four-function theory of biology for law provides a framework in which the findings from biology can be used to the advantage and improvement of law. That law has been slow to embrace biology is a seldom disputed fact. That there are consequences from this failure is also a fact. Yet the failure to include biology among law-relevant facts promises more unpleasant consequences than its alternative.

IV. Sense of justice

The preceding subchapters demonstrate that biology has undeniable influences on many branches of the law. Does it also have influence on justice? As shown earlier, justice is an integral part of the law as a whole. Therefore it should be expected that biology also has an impact on justice. This is indeed the case. The central question is whether the sense of justice is innate in the human brain (soul, heart, kidneys, or whatever visible or invisible part of the human being is assumed to be the carrier of such senses), or not and has therefore to imprinted upon the human mind by learning, education, environment, culture (or whatever outer circumstance is assumed to be the vehicle of such imprints). The study of the anthropological subject of the sense of justice is the focal point of legal anthropology. It reaches into both of the two sides of anthropology (if one follows the system chosen in this book), culture and biology. There are many studies dealing with the sense of justice in anthropology and related sciences. Not every theory on the sense of justice can be presented and discussed in the present context. An earlier study, some parts of which are being reprinted here in a revised version, may be used as an introduction. The importance of the subject of the sense of justice for the anthropology of law will give rise to its resumed mention at the end of the book.

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66 At least, it is the position taken in this book. On the issue and its pro and con, see Chapter 1 A. 1. and Chapter 3 X.

The position of the issue of the sense of justice right on the dividing line between the cultural and biological approach to the whole field of anthropology of course gives rise to two conflicting theories: the cultural “relativist” theory of “historicism” which teaches that the sense of justice is a product of historical cultural development and works therefore without immovable absolutes, and the “instinctivist” or “nativist” theory that holds that the sense of justice is rooted in the human mind and therefore contains certain absolutes that are common to all living people for genetic, and thus biological, reasons. It is further possible that there exists a middle road between instinctivist doctrine and the relativist or historicist view of the sense of justice.

The questions which theory is correct and whether there is an intermediate position are posed from the perspective of legal anthropology, with particular emphasis on the difference between theorists who have stressed the emotional and cognitive elements underlying the sense of justice. Although due emphasis must be placed on cultural variation in the judgments and feelings associated with law and justice, the existence of a universal foundation for legal behavior is consistent with the theoretical understanding of cultural universals. to what can be called cultural justice, understood as justice that is due to another culture.

1. Nativism vs. historicism

From its very beginnings, the discussion of the “sense of justice” among European philosophers and jurists has been characterized by the antagonism of two extreme positions. Since the last quarter of the 19th century, these opposing views have been labeled, respectively, nativist and historicist. In Germany, the term nativism was first used in a controversy among psychologists about whether the categories of perception as an ability of the human being are innate and thus programmed in human nature (nativist), or whether they are rather a matter of education and cultural development (historicist; Graumann, 1966). Accordingly, the nativists claim that experience and empirical observation in human history show that there is an inborn drive in humans directed toward harmony in life and good order in the world at large, and that therefore nature must have planted a sense for justice in the human heart. Thus everyone is interested in justice and can be made aware of this hidden fountain simply by being asked about feelings concerning justice or by more sophisticated means, such as psychological analysis. The defenders of this view are found in the first half of the 19th Century in the vicinity of the Historische Rechtsschule and of German idealism and romanticism, and in the latter half of the 19th and in the 20th Century in the neighborhood of the then young and rapidly growing science of psychology. The chief holding of the nativist theory in all its forms is that an innate sense of justice enables human beings to create, criticize, and improve the law. Just law is a function of human existence.

68 See Chapter 10 I.

69 For the following see Michael Bihler (1979) in his first chapter. According to Graumann (1966, 1031-1096), the controversy was begun by Hermann L. F. Helmholtz. F. C. von Savigny’s (1840) concept of the Volksgeist may be quoted as the main example for the idealistic tradition. The earliest use of the German expression for the (emotional side of the) sense of justice, Rechtsgefühl, was located (by Riezler, 1969) in Anselm Feuerbach’s Kritik des natürlichen Rechts (1796, 3), where Feuerbach identified law as the object of our “Rechtsgefühl.” Other “nativists” are Gustav Rümelin (Über das Rechtsgefühl, 1871) and Leon Petrazycki (Law and Morality, 1955). Ehrenzweig (1971) held that nature has been too wise to rely on the human intellect and therefore has bestowed on man a sense of justice just as it has given him the sense of hunger and the sense of sex. Bihler (1979) also made a strong case for the psychological roots of Rechtsgefühl. A rather complete account of the authorities contributing to the subject of Rechtsgefühl was given by Riezler (1969) and Meier (1986).
In a lively reply to Rümelin’s (1871/1948) nativist approach, von Ihering took the opposite stance by denying an inborn sense of justice (von Ihering, 1877/1883, Vol. 1, p. xiii; 1884/1965a). He pointed to law as primary, developing in time and differing from place to place. If a child grows up at a given period and in a given place, he or she “spiritually inhales” the law and forms its Rechtsgefühl correspondingly. Therefore, first there is law and then the sense of justice. Human existence and consciousness is a function of the law. It is “not the sense of justice that has generated the law, but the law has generated the sense of justice,” added von Ihering in one of his posthumous publications (von Ihering, 1965b). It was von Ihering who, in attacking Rümelin, dubbed Rümelin’s position “nativist,” availing himself of a term that had been used in a psychological controversy. Because of the historically developed law that he identified as the source of an accordingly relativistic sense of justice, von Ihering called his own view “historic.”

Ihering conceived of his point of view as a discovery of his own. Notwithstanding, he ceded to John Locke the fame of being the only one next to himself to have derived the sense of justice from the law rather than the reverse. But Riezler (1969) and Bihler (1979) demonstrated that there were even more “historicists” in addition to John Locke before von Ihering, such as David Hume, Blaise Pascal, Michel E. de Montaigne, John Stuart Mill, and Johann St. Pütter. The historic faction won an important follower in Riezler, who in 1923 was the first to sum up the great debate. Riezler extended the connection between Rechtsgefühl (as the emotional side of the sense of justice) and the concepts of value and evaluation. He held that deciding in favor of a value has more to do with the intellect than with an innate feeling and that therefore the sense of justice is primarily nurture, not nature (to use the formula of Margaret Mead). For sociological reasons, Rehbinder (1989) is one of the most recent voices that favors the historic approach to the sense of justice instead of a speculative play with metaphysical concepts. He distinguishes between the cognitive and the emotional side of the psychological appearance of the law, and calling the former (with Geiger) Rechtsbewußtsein and the latter Rechtsgefühl. This is a valid dichotomy that will also be used here as the “cognitive side of the sense of justice” and the “emotional side of the sense of justice.”

In Europe, therefore, there was a lively discussion over the sense of justice among German, British, and Swiss authors from the turn of the 18th Century to the 19th Century. Nativists and historicists still oppose each other, with the former believing in an innate feeling for the good and the just given to a human being as a universal biological trait, and the latter deriving the sense for justice from the law that governs a given time and place.

The biological position is defended mainly by psychologists and those who rank psychology high in the making of the law. Their opponents come from various camps—history (von Ihering), modern “value jurisprudence” (Riezler), and sociology (Geiger and Rehbinder). The question may be raised whether nativism versus historicism is really a problem. An answer to this question may be given from the point of view of anthropology. As far as research has shown, no attempt has yet been made to cast light on the sense of justice with the aid of the lantern of anthropology. Of course, this chapter’s space constraints permit only brief and firsthand impressions. The subject of the sense of justice is vast, diffuse, and hard to get to, even in a specific legal culture such as that of Germany, let alone in a comparative context that includes the traditions of other countries like the United States of America.

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70 It is this “intellectual value feeling” that caused Bihler to contradict Riezler, and it seems that Bihler had modern psychology on his side (Bihler 22 f.).

Although the results must therefore seem preliminary and highly debatable, the anthropological approach will demonstrate that the nativism-historicism dichotomy is not a real issue.

2. Meier and Bihler

Having defined the object of our inquiry as a human drive rather than a philosophical explication of the meaning of something, we may now ask what content has been given to the sense of justice by writers who took up this topic. Meier (1986) offers a list of 14 different meanings for the German term Rechtsgefühl alone. As demonstrated earlier, Rechtsgefühl Covers only the emotional side of a person’s sense of justice. The cognitive meaning of it, called Rechtsbewußtsein (Geiger’s proposal) and forming a variety in itself (Rehbinder, 1989, pp. 165ff.), would have to be added. It is not necessary to reiterate all 14 meanings and the constellation of facts and values that may be, and have been, discussed as senses of justice. Rather one definition of the (emotional) sense of justice will be chosen as a point of departure. This definition was developed by Bihler (1979).

Bihler started his definitional chapter by noting that the original discussion about Rechtsgefühl proves to be, at closer investigation, a side theater of the eternal debate over natural law, carried forward with psychological arguments. The rise of psychology toward the end of the 19th Century caused lawyers to ask for the psychological bases of the law, hoping to receive information about the roots of justice that were hitherto assumed to be found in the value systems of natural law (pp. 1, 5ff.). From this beginning, Bihler obtained a definition of Rechtsgefühl (p. 59) that stresses the emotional side of the sense of justice, accepts the psychological approach of identification, and concentrates on the concept of a spontaneous partisanship in a legal conflict. This procedure leading to the definition of Rechtsgefühl seems convincing because it separates elements that for many writers flow together in an unclear melange.

3. The cognitive component. Manfred Rehbinder

Bihler was not concerned with the “cognitive” (M. Rehbinder’s) component of the sense of justice, which remains to be discussed here and turns our discussion partly away from psychology. No doubt, an individual not only feels but thinks about justice. In Greek, such an individual, equipped with emotional and cognitive abilities, is called anthropos. Therefore, perhaps anthropology can make remarks on the debate about the sense of justice. Sociology is aware of both the cognitive and the emotional side of an individual’s mental occupation with justice. As pointed out, Rehbinder distinguished Rechtsgefühl and Rechtsbewußtsein as the emotional and the cognitive components, respectively, of the sense of justice. But sociology hardly looks to cultural differences.\(^7\) This is one of the reasons why it has not paid attention to the assumption that the sense of justice, even if it can be identified as a human universal, is not only specific in relation to an individual but specific in relation to a certain culture. This is the domain of anthropology.

\(^7\) M Rehbinder (1989, 167ff.) points to the desolate state of the discussion of the “Rechtsgefühl” that hardly permits effective discussion. He himself offered a useful system of concepts from his sociological point of view under the headline of “effectivity of the law.”
4. No society without law
A well-known controversy in anthropology of law deals with what was first: religion, then morals, and then law (Maine, 1861/1931), or morals first and then religion (A. S. Diamond, 1935). Another doctrine holds that at the beginning of culture, there existed a mononorm that combines morals and law. While there was no religion, this mononorm splits into its two components after a certain period of time (Pershits, 1977). Other authors claim that law consists of enforceable sanctions that are accompanied by morals as the desirable behavior. Both elements are valid for the earliest cultures (Pospisil, 1971, 1978, 1980, 1982). Again, another doctrine holds that first there was religion and all behavioral norms derive from it (Pannenberg, 1983).

The controversy of the primacy of normative sets and the ensuing debate on the fora need not be restated here. According to a great number of authorities who engaged in debates of this sort, it is sufficient to note that all human beings have law. Radcliffe-Brown (1952), however, disagreed. Defining law in the tradition of Roscoe Pound as “social control through the systematic application of the force of politically organized society,” he concluded that such tribes as the Yurok Indians of California and the Ifugao of Luzon had no law. However, law need not be an “all embracing, omnipotent custom” (Pospisil, 1978, p. 9). If there are any sanctions sustained by a this-worldly authority, one has to acknowledge that there is law (see Fikentscher, 1988). By this definition, then, the Yurok and the Ifugao have law. Every member of humankind has law, needs law, participates in making law, and breaks the law. It is at least not arbitrary to start from this hypothesis: All human beings have law.
5. No law without the ideal of justice

Other controversies—not so much in anthropology of law, but in legal philosophy—deal with the relation between law and justice. The defenders of classical natural law do not see any sense in law if it is not tied inseparably to its constitutive element of justice. From their point of view, justice is part of the law. As St. Augustine said: “Remota iustitia quid sunt regna nisi magna latrocinia?” (Justice removed, what are kingdoms but big robber bands?). In substance, this conforms with Lord Devlin’s (1962,1965; see also Wilson, 1965) stance in his famous debate with the Oxford philosopher H. L. A. Hart (1958,1963). Hart, the positivist, has always taken the view that justice is a good and inevitable matter, but that law per se must be kept clean of such moralizing and evaluating concepts. In Anthropology of Law, Pospisil (1982) wrote on the various cultural concepts of justice and what is common to them as a human universal, but his definition of law, distilled from more than 60 different legal cultures, excluded justice as an element of law (pp. 136,197). Rather, it is a positivist definition of law.

Thus the natural-law approach includes justice in the concept of law, whereas positivism excludes it. This seems to lead to the conclusion that anthropology of law would have to share the natural-law approach in order to make a contribution to an inquiry into the sense of justice, rather than share the positivist approach. However, in order to permit anthropology of law to deal with the sense of justice, it is not essential to make a concluding decision for either the claims of natural law or those of positivism. The fact that many authors, such as Hart and Pospisil, who share the positivist view, insist on the importance of justice even though they consider justice to be “outside” the field of law underlines this thesis. In order to let anthropology contribute to the debate about the sense of justice, it is necessary to concede that law “has something to do with justice” or that law “implies” justice in one way or another. It is my personal opinion that an anthropological definition of law should include the element of justice as an integral part. This is a kind of definition that rejects positivism. Unlike the classical natural-law definitions, however, my concept of law for anthropological purposes includes justice not as a material and fixed system of values that could be read from the Bible, from nature, from reason, or from a universal human “sense” for it, but rather as an inherent aim, a telos to be looked for and to be pursued (Fikentscher, 1988, 25,27). For that reason, and in order to further the argument, let us assume not only that all human beings have law but that all law implies justice. This means that all human beings are subject to justice in whatever sense this may be understood.

6. No human beings without cognitive and emotional abilities

Psychological anthropology teaches that no sane human being can be conceived of who does not use both cognitive and emotional abilities (see Barnouw, 1973, p. 10; Kottak, 1987, p. 290). In other words, every person without serious mental defects can think and feel. The combination of the cognitive and the emotional abilities may be called “the senses” of a human being. There are a number of senses proper to a person. The child first learns the five basic senses. But wherever Cognition and emotion can be directed to an object of human reach, we can talk of a “sense,” such as the sense for danger, for a risk, for a change of the weather, for a business adventure, for the law, or for justice.
7. The sense of justice and the distinction between imposed and internalized law

Authorities differ as to the reasons - more precisely, as to the categories of reason - why people obey laws. Galbraith (1967) gave four reasons for legal obedience: (a) compulsion, (b) pecuniary motivation, (c) identification (by which he implied personal consent) as a motivation to voluntarily follow the rules of the law, and (d) adaptation.

Manfred Rehbinder (1989) refers to three reasons: (a) fear of sanctions (Sanktionsorientierung, apparently comprising Galbraith’s first two reasons), (b) identification (Identifikation, mainly based on the knowledge of the law), and (c) internalization (Internalisierung, primarily induced through being convinced by the ethical appeal of law). Referring to these three reasons for legal obedience, Rehbinder derived three “mechanisms” that cause the Citizen to pay respect to the law. Apart from the personality structure of the addressee of the norm, the urge to follow the rules of the law depends on the three subjective reflections of the law in the citizen’s psyche: knowledge of the law (Rechtskenntnis), legal consciousness (Rechtsbewußtsein), and legal ethos (Rechtsethos; p. 165). This is quite plausible: Knowledge of the law corresponds with orienting oneself to the sanctions, legal consciousness leads or may lead to identification with the law (thus identification in Rehbinder’s text comes close to Galbraith’s adaptation), and being guided by ethical Standards of law causes a person to internalize it.

Pospisil (1971,1982) specifies only two reasons why people obey the laws: -imposition (e.g., by a rule) and internalization. He ended up with this simple dichotomy by concentrating both on the effect and the outcome of a culture that is being confronted with law. Furthermore, he disregarded the psychological deduction that leads to such a result. With this self-constraint, Pospisil’s dichotomy is the most convincing Statement of the reason why people follow the law. Pospisil held that it does not matter whether imposed law is applied by brute compulsion or by a more refined inducement, such as fear of monetary sanctions. Neither does it count whether the voluntary and therefore internalized obedience to the law is cognitively (by Rechtsbewußtsein) or emotionally (by Rechtsethos) based. Pospisil’s bipolarity model has the additional advantage of explaining the various developments from imposition to internalization and the reverse, and of illustrating the imperceptible degrees and shades by which these developments occur. For that reason the model offered by Pospisil is the most adaptable one for a discussion about the sense of justice with its sometimes “more cognitive” and sometimes “more emotional” elements. If a person or a group of people, even a whole culture, is guided by a sense of justice, and if this sense of justice is grounded on personal or collective convictions, this sense of justice is an emanation of what Pospisil called internalized law. In other words, from the anthropological concept of the internalization of law, as developed by Pospisil and other anthropologists and researchers (e.g., Kohlberg, 1963; Lessa, 1950; Vinogradoff, 1922), an anthropological concept of the sense of justice may be inferred. It comprises what members of a specific culture experience and think of as just law.

There is, however, one caveat: Does imposed law, as the opposite of internalized law, have no sense of justice? The dictator who imposes rules on his or her subjects certainly follows his or her sense of justice (or injustice). Thus imposed law may be identified by a sense of justice, too. Of course, the subjects on whom the law is imposed and who have not yet internalized it—or never will—disapprove by definition of the sense of justice of the imposed law. They have their own sense of justice, and there may be quite a number of senses of justice among the victims of the imposed law. The result of this discussion is that by anthropological means, the concept of the sense of justice makes sense. Parallel to the distinction between imposed and internalized law is an imposed—and therefore disapproved—sense of justice that contrasts with the sense of justice of those who approve the law that they have internalized. When the Federal Republic of Germany introduced the compulsory use of seat belts, there was at first little compliance with that law. The internalization took place after a fine was introduced for the nonuse of seat belts, and particularly after insurance companies started to deny claims for damages aggravated by non-compliance.
Sections 8 and 9 on more examples for the sense of justice and Aristotelian principles are *not included* here, but omitted as less important illustrations.
10. Timely justice

There is a saying that is appropriate here: *Protracta iustitia negata iustitia* (justice delayed is justice denied). The factor of time is an integral part of the sense of justice. Spain has no constitutional principle that every act of the State or of a public authority may be challenged in court by someone who can prove the necessary Standing. Instead, and for the same purpose, the Spanish Constitution provides a *defensor del pueblo*, which is an Institution modeled after that of the Scandinavian ombudsman. The *defensor del pueblo* is conceived of as a person who enjoys equally the trust of the people and the administration and is in Charge of investigating the reasons for complaints about administrative inactivity and misconduct raised by a Citizen or a group of Citizens. To this end, the *defensor del pueblo* addresses letters to the offices and officials identified by the complaints, in which the incriminated authorities are asked to justify their behavior. This procedure often takes so much time that the Spanish Citizens are increasingly reluctant to use this legal Institution to get relief; as a result, the *defensor del pueblo*, a democratic Institution set up with good intentions, threatens to fall into disuse. Because of delay, it may no longer sufficiently satisfy the sense of justice of the majority of the Spaniards. The distinction between the justice of the decision and the justice of law, and the sense of justice. In a critique of Max Weber’s (1967) sociological classification of rational (i.e., rule-oriented) and irrational (non-rule oriented) Systems of justice, Pospisil (1971, 1982) favored another distinction that was first made by Llewellyn and Hoebel (1961).

11. The Cheyenne Way

It is the distinction between justice of the fact and the justice of the law. By “justice of the fact,” Llewellyn and Hoebel mean the justice applied in deciding a case in regard to its facts. Pospisil thinks Llewellyn and Hoebel’s distinction better fits the purpose of cultural comparison and that Weber’s Classification cuts across the dichotomy it established. Again, it seems that Pospisil’s judgment should be accepted, at least for the present discussion about the sense of justice in the light of anthropology. This would constitute a distinction between a sense for factual justice and a sense for the justice of the law as a normative setting. Examples are not difficult to find. Justice in the decision of a case is concerned with the proper—and therefore just—application of a given rule to the facts of the case that are presented to the decision-making authority, which may consist of a judge, a panel of the eiders, a leopard-skin chief of the Nuer (Evans-Pritchard, 1940), or the *tonowi* of the Kapauku Papuans (Pospisil, 1978). Furthermore,

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73 as has, for a comparison, the Federal Republic of Germany, Art. 19 al. IV Basic Law (of 1949).

74 There is no appeal from the decisions of the *defensor del pueblo*. The number of complaints to get the *defensor del pueblo* has dropped sharply since 1983. In the Madrid region, 5,377 complaints were raised in 1983. In 1988, the number was down to 2,800. In the region of Catalonia, the decline was even more drastic: The number decreased, from 1983 to 1988, from 4,097 to 1,106; in Andalusia, from 4,798 to 2,132; and in the Baleares, from 453 to 216, with a low of 154 in 1987. A possible explanation for the drop of administrative complaints could be the general satisfaction of the Spanish people with their administration. Others think that it is the delay often connected with the assistance given by the *defensor del pueblo* that is threatening its efficiency; see *Mallorca Magazin*, 1989, 15, 9-15 and 28, where the statistics are reported.
witnesses must be heard, the defendant must be given the right to speak, the corpora delicti need to be presented, the conclusive traces tracked, the prescribed ordeals performed, the permitted oaths or self-maledictions sworn, and so on. Whatever rules of just application of the law may be valid for a specific society, they must be brought to bear.

On the other hand, the justice of applied law is violated if either the law fit to decide a given case of legal conflict is incorrectly ascertained (for reasons of incompetence, laziness, corruption, and the like; see Pospíšil, 1971, 1982) or the law per se and its principles or rules are unjust and therefore unfit to be applied (see Pospíšil, 1971, 1982). Thus the sense of justice of the law as a normative setting appears to be composed of two “subsenses”: the sense of justice as to the selection of the proper principle or rule with respect to the case under consideration, and the sense for justice as to the applicable principle or rule of the law itself.

By summarizing in terms of continental European jurisprudence (which does not use different basic concepts, rather a different terminology), it can be concluded that the sense of justice may either revolt against a wrong subsumption (which amounts to a violation of the justice in deciding a case with respect to its facts), against the wrong ascertainment of the applicable principle or rule (which amounts to a violation of the justice of the proper legal basis of the decision), or against the injustice of the principle or rule itself. In short, there is unjust subsumption, unjust ascertainment of legal principles or rules, and unjust law. In the first situation, the decision-making authority has identified the proper principle or rule, but it is unable or unwilling to apply it properly. In the second situation, it has failed to find the proper principles and rules to decide the case because it could or would not find them. In the third situation, the law itself has prevented it from applying a just and proper principle or rule; the judge might even say: “I know that my decision will be unjust, but the law binds me to decide in this way.”

In all three situations, a pertinent sense of justice will react or revolt and will criticize (and, if possible, correct) the decision that was made.

12. The principles of static and dynamic justice and the sense of justice.

Obviously, the sense of justice is bound to be a part of all the varieties of justice that are offered by the philosophers.” Wherever there is justice, there can be a sense of justice. Thus St. Augustine’s sense of justice would have conformed with his belief in material, fixed, and epistemologically accessible values of ontological divine justice. Also Thomas Aquinas assumed divine and natural law to contain cognizable and followable precepts of the law (Sabine, 1952, p. 219). Both Augustine and Aquinas thought that the sense of justice was a human ability that can be learned in faith.

This idea does not apply to authors who doubt that an individual is able to discern the good and the bad, the just and the unjust, as it is inflicted by an imperfect sense for the cognizant values. Descartes defined the human existence by the human ability and necessity to put everything in doubt: Cogito, ergo sum (Sabine, 1952, p. 363). The sense of justice is subject to debate and to being controlled by the Socratic method. At this point, the sense for justice borders on the sense for truth. Truth and justice are subject to either “static” or “material,” “Substantive” epistemological accessibility, or to “dynamic” (“procedural”) search and debate according to one’s personal religious or
13. The sense of justice of persons within the legal bureaucracy (not included)

14. The critical function of the sense of justice

The different senses of justice of the members of the legal staff as just mentioned are of immediate practical relevance for the development and improvement of the law. Especially, the sense of justice of the public at large is of—perhaps utmost—relevance. In most instances, changes in law have occurred because change in some sense or senses of justice has taken place. In reference to earlier remarks, it is, of course, the approved sense of justice and therefore the sense of justice belonging to internalized law that is, in most circumstances, responsible for a change in the law. If people do not approve of the existing law, a disapproved sense of justice will bring about a change of any law—approved or disapproved—only by imposition.

There is an extreme case of a critical attitude toward the law based on a strong sense of justice: It is the querulist, the person “abnormally given to suspicion and accusation” (Webster). Rehbinder (1989) noted that in cases of an insane exaggeration (kranzhafte Ubersteigerung) of the Rechtsgefühl, the afflicted person is called querulous, and that in most cases the judiciary treats these persons not only with resignation but with respect to the rule of law (Rechtsstaatlichkeit; p. 199). The querulist has his or her own sense of justice as well, however defective, incomprehensible, or radical it may be—but nevertheless he or she has a sense of justice. Heinrich von Kleist’s “Michael Kohlhaas” is the most renowned literary example in German poetry.\footnote{On conflicting forums in general, see Chapter 4, above, and Heeschen (1989, p. 232). If the inference outlined above is correct, there ought to be found other senses, and these senses have to be related to other normative fora or their elements. By consequence, there is a sense for law, that is, a person’s cognitive and emotional Coming to grips with law as a whole, not just its constitutive element called justice. If somebody says: “I’m afraid I’ll lose this battle in court,” he or she senses a legal risk, quite apart from its aspects of justice. The sense for justice and die sense for law may come into serious conflict. When Shakespeare has the rebel Dick the Butcher say, “The first thing we do, let’s kill all the lawyers,” and the rebels’ leader, Jack Cade, adds, “Nay, that I mean to do,” Jack and Dick may be driven by an urgent sense of (violated) justice, but it can hardly be said that their monstrous plan witnesses a sound sense for the law (Henry VI, Part U, Act IV, Scene II, Verse 74). There may be even greater or more frequent differences between the sense for law, or for justice, and the sense for the moral good, or between the sense for law, or for justice, and the sense for the respect that is claimed by religious norms. Gluckman (1967) remarked that among the Lozi there are actually two standards for behavior. One is that ofmuta yangana, “the sensible man,” and the other is that ofmuta yalukjle, “the upright man” (pp. 125-126). Although the standard of the upright man is an ideal toward which people should strive, the standard of the sensible or reasonable man is the minimum of correct behavior expected of everyone and, of course, demanded by law (p. 128). Consequently, a Lozi man behaves legally if his behavior falls between the minimal permissible standard of a reasonable man and the ideal Standard of the upright (moral) man. Pospíšil (1971, p. 244, 1982, p. 312) discussed Gluckman’s Observation and confirmed them with respect to his own studies with the Kapauku. Aeschylus’s Oedipus is the tragic example of a defendant (Oedipus) who committed capital crimes by legal Standards (the murder of his father and his incestuous liaison to his mother), yet could not morally be blamed because he did what he did innocently. Some conclude that these Greek tragedies (particularly Oedipus and Oresteia) were the beginning of the separation of the moral and the legal fora. Others find that these tragedies are the inception of the distinction between the objective legal wrong and the subjective culpability (intent or negligence). See the discussion of...}
15. Cultural Justice

To conclude, there is a universal sense for justice that is innate in humans. But the contents of it may “historically” differ from culture to culture and has to be learned. This culture-specificity gives rise to a culture’s specificity of justice, and thus to a claim of respect for a cultural understanding of justice and hereby for the relevant cultural entity. The nativist and the historist points of departure can be fruitfully combined.

V. Bibliography


this theory in Fikentscher’s Methoden des Rechts (1975a, 156, 246, 250, with references). For many observing Roman Catholics, the civil law marriage, constructed as a contract, still is an obstacle to their good conscience (see H. Lehmann & Dieter Henrich 1967, p. 21). On conflicting forums, see also Pospišil (1971,p. 195, 1982,p.249). Internalized law has, of course, a better chance to be morally accepted. The relations of laws to morals and the subsequent distinctions of moral, amoral, and immoral law, as well as the possibility of morals beyond the law, pose a set of different issues. Pospišil (1980) drew the line between law and morals by saying that law is a “must” and morals are the “desirable.” To be postulated is a process of authorization for the legal forum, but not for the moral forum, see Chapter 1 above. This will later give rise to a resumption of the discussion, and the assertion, of the concept of cultural justice; see Postscript to this book, below.


Ruprecht.


Some literature on archeological discoveries giving rise to new insights of human development is listed and discussed in subchapter III, 1, above, and not repeated in this bibliography.