

Anthropology, law and genetic inheritance

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Although anthropology has accepted organic evolution as established fact for more than a century, anthropologists have made few serious attempts to anchor human institutions in the specific social behavior of animal aggregations. Throughout the first half of this century, American and

British social and cultural anthropologists with few exceptions rejected cultural evolutionary theory in favor of structural-functional study of directly observable societies. Contemporary anthropologists tend to reject or downgrade the significance of panhuman genetic factors in favor of the dogma of culture as *suigeneris*. However, law as a phenomenon of social structure can probably be linked fruitfully to behavioral research with genetic implications —with cautious stretching of the limits of naivety, through examination of the so-called imperatives of social maintenance, and the 'law jobs'.

In approaching the problem of whether the ordering of social behavior in human populations may in part be rooted in our genetic inheritance, we accept as established fact that all human beings are basically the product of organic evolution. We acknowledge with Dobzhansky (1962:115) that 'many features of human ontogeny make no sense at all except on the assumption that they are retentions of developmental patterns of remote ancestors. This is clear enough and has been accepted by anthropologists for more than a century —but only with respect to anatomy and certain physiological processes.

In the early years of post-Darwinian enthusiasm, Western anthropologists such as Tylor, Lubbock, Frazer, Westermarck, Bachofen and Morgan built theoretical systems of social and cultural evolution enunciating developmental sequences for the emergence of human subsistence techniques, mating, kinship, property, government and religion. In a more modest way, Sir Henry Maine did the same for the evolution of law. In no instance, however, was any serious attempt made to anchor human institutions in the specific social behavior of animal aggregations, although hypothetical assumptions concerning prehistoric forms of mating, kinship and 'horde' organization were advanced.

Early in the present century, as ethnology became self-consciously empirical, anthropologists, except archaeologists, became increasingly hostile to theories of cultural evolution. In the United States, Robert Lowie (1920:107) proclaimed, 'There is no royal road to the comprehension of cultural phenomena and painstakingly demonstrated that the social history of a particular people cannot be reconstructed from any generally valid scheme of evolution but only in the light of its known and probably cultural relations with neighboring peoples'. Morgan's and Frazer's deductive interpretations of the sororate and levirate forms of marriage as cultural relics of group marriage were dismissed as 'empty guesses, which may be disregarded. They are real

institutions intelligible in their context; they are not rendered one ~ whit more intelligible by conceiving of them as a survival of a condition which has never been observed' (Lowie, 1920: 185).

From 1910 to 1930 American anthropology limited itself to intensive ethnographic work in field studies and in limited historical reconstructions of culture growth among Indian tribes. In Britain, both Malinowski and Radcliffe -Brown rejected cultural evolution and historical reconstruction as scientifically bootless because they dealt with empirically unverifiable data. Radcliffe -Brown turned British, and part of American, social anthropology into a search for regularities ~ in social structure based largely on Durkheim's proposition that social reality is external and *sui generis*, and that behavior and personality are the product of individual internalization of the *conscience collective* the cultural ordering of norms and values. Although Radcliffe -Brown acknowledged both organic and social evolution, in practice he evinced no interest in either, holding that social anthropology is concerned only with *persons* in reciprocal relations based on mutual interests and values socially determined.

In sum, social anthropologists in the United States and England, except for Malinowski's naive and highly generalized use of bio -genetic 'needs' and 'drives' as culture-generating forces, tended to restrict their researches to social structure and social facts. They either dogmatically reject the possible significance of panhuman genetic factors or more modestly assume that the question is one of such low priority in research strategies that it is better for them not to devote limited energies and resources to pursue it of the question.

The logical foundations of this position have been spelled out in a symposium volume, *Closed Systems and Open Minds: the Limits of Naivety in Social Anthropology* (1964) edited by Max Gluckman. It deals with two issues of importance too ~ fundamental problem here: can the assumptions and findings of biophysical behavioral research on the one hand and those of the sociology and anthropology of law on the other, be fruitfully linked? These two issues are (1) limiting one's field of study and (2) making naive assumptions outside one's special field. He identifies five procedures used in scholarly formulations of comprehensive endeavors: incorporating complex facts without analysis; circumscribing a field; abridging the conclusions of other sciences; making naive assumptions about aspects of reality other than those under investigation; and simplifying events within the field of investigation (Gluckman, 1964: 17).

We all do these things. Only by narrowing the field of inquiry can

we achieve expertise and advance empirical knowledge of reality. We all incorporate certain facts as given —an anthropologist will accept the fact of a rain forest as a tribal habitat without attempting a meteorological explanation of it. We abridge the findings of atmospheric —and astrophysics when we attempt to deal with important long range climatic cycles in the Pleistocene era. We assume a need for individual identity, which is outside the area of our competence. And of course we simplify the facts within our field of investigation —any ethnographic report is a more or less generalized construct of what is going on in tribal society.

The problem is; how tightly can we maintain our closed systems if without stultifying development to a grand theory of human beings, and how much openness and naivete can we accept in cross —disciplinary incorporation without muddying our perceptions with dubious trash?

Sociobiology is in bad repute. Setting aside widespread emotional prejudice emanating from political bias, repugnance to sociobiology" rests on its proclivity to reject circumscription of its field while making, innumerable assumptions about aspects of reality outside the fields of biology and ethology of insects and lower orders of animals. Worse, it excessively simplifies organic phenomena within, its own field.

Lumsden & Wilson's recent volume (1981) strives to rectify this last failing and they have made some progress in linking genes and culture. However, Washburn, one of our most innovative physical anthropologists and a pioneer in studies of primate behavior, warns that modern genetics is radically different from the kind described by Wilson (1978) and that sociobiology omits any reference to the complications of modern evolutionary theory. We are told that over the past 20 years molecular biology has revolutionized evolutionary theory. Dobzhansky *et al.* (1977: 156) state that recent research shows a seeming deluge of genetic variability' that 'proves the classical theory is clearly invalid', and that determination of the relative importance of selection and chance or neutral facts stands as 'the most important unsolved [emphasis added] problem in our understanding of the mechanisms that bring about 'biological evolution'. Yet Chagnon and Irons's *Evolutionary biology and Human Social behavior* (1979) in Washburn's view rests on 'the synthetic theory of the 1940s plus inclusive fitness', while its 78 pages of bibliography contain 'almost no ~reference to even the most important developments in evolutionary theory (Washburn, 1982).

We must tread cautiously, for few anthropologists (including this

author) know anything about contemporary scientific evolutionary theory. Although Stent (1980: 4-10) devotes respectful attention to social anthropologist Sahlins' polemic attack on sociobiology, physical anthropologist Konner (who does know the field) dismisses Sahlins' critique on the ground that 'his grasp of the basic scientific issues is so poor that discussion of his critique is really impossible' (Konner, ~1982).

It is imperative that we all recognize and respect the limits of our naivete.

Now, can law fruitfully be linked to behavioral research with genetic implications? I would say: only with a cautious stretching of the limits of naivete. This, I, for one, am willing to do with open interest and limited expectations.

Much has been achieved in behavioral science research in comparative jurisprudence in the last five decades. 'Law is one of the best-studied subdisciplines of anthropology; the literature is small but of high quality' (Bohannan, 1963: 284). It has a strong empirical base, emerging from a series of carefully executed field studies of a variety of tribal systems in North and Central America, Africa, and Oceania, ranging from simple to complex in subsistence economy and social organization. It has a common approach rooted in the so-called trouble case method—the observation and recording of issues of dispute and conflict, and how they are perceived, conceived and resolved by the members of a given society. It has at the same time generated considerable healthy dispute among its theoreticians over such questions as to how law may best be conceived and identified, to what extent it is a real phenomenon in its own right or a mental construct of the observing analyst. The criteria for identification of law—the nature of norms, dispute handling processes, sanctions, authority and levels of hierarchy within a social system to which any body of law may apply—have effects that differentially narrow or broaden the domain of law, according to the preferences of the researcher.

Here I offer a compact abridgement of my own views of what legal anthropology has to offer on the nature and function of law in human societies and the degree to which it may be rooted in the organic nature of man and subhuman species. Law is a cultural phenomenon that cannot be studied apart from the entire social entity of which it is a part. Law is a human invention developed as an adaptive mechanism for the maintenance (effective survival) of the individuals, subgroups and the entity that constitute as society. It is that aspect of social

structure that serves to standardize behavior and to regulate relations between individuals and groups. It can be focused on as a loosely discrete phenomenon but never to the neglect of its cultural matrix and never without linkage to all other aspects of the productive and social system of which it is but a small part.

Its attributes, for purpose of identification are:

- (1) Regularity. Law consists of social norms identified as modal behavior characteristics in ill defined situations. Regularity is rarely absolute; behavior is variable around a clustered mode, and most legal systems make allowance for 'permissible leeway'. Regularity introduces the element of predictability.
- (2) Sanction. All social norms are sanctioned. Conformance evokes rewarding (positive) responses, internal and/or social; deviance evokes punishing (negative) social and, perhaps, internal individual responses. Legal norms are sanctioned by the forceful application of physical injury or the confiscation of material goods - restitution or the payment of damages or fines.
- (3) Legitimate ('official') authority. The legal process is initiated and carried through by either the wronged person and members of his subgroup or by designated officials (headmen, chiefs, priests, judges, councils) explicitly representing the societal interest as a whole. Due process means that the procedures used are socially recognized and accepted as right and proper and that the sanctions are appropriate and acceptable.

There are indeed functional prerequisites for survival: organically and genetically determined and culturally conditioned for the individual human organism, culturally adapted in the main for human populations as societies. Whether there are genome presets that underlie a few cultural adaptations remains an open question. Certainly, biology imposes limitations on what may be culturally achieved; more than that, it mechanically controls much of the essentially organic field of individual behavior (neurological, metabolic, reproductive etc.).

A socio-anthropological formulation of the functional prerequisites for societal maintenance, which builds on the earlier work of Malinowski and Talcott Parsons, sets out the following:

- (1) to maintain the biologic functioning of the group members;
- (2) to reproduce new members of the group;

- (3) to socialize new members into functioning adults;
- (4) to produce and distribute goods and services necessary to life;
- (5) to maintain order within the group and between it and outsiders;
- (6) to define the 'meaning of life' and maintain the motivation to survive and engage in the activities necessary for survival, (Bennett & Tumin, 1948),

Legal institutions are directed to function (5) above. Four specific maintenance tasks of law may be identified.

- (1) To define relationships among the members of a society, to identify what activities are permitted and what are ruled out, so as to maintain at least minimal integration between the activities of individuals and groups within the society: the ordering of the fundamentals of living together.
- (2) To allocate authority and determine who may legitimately exercise physical coercion as a socially exercised privilege/right - and how. This point is derived from the necessity of channeling aggression, of taming naked force and directing ~ for ce to the maintenance of order within the social system.
- (3) To dispose of trouble cases as they arise; to heal social breaches when breaches of defined relations are alleged to have occurred.
- (4) Explicitly, to redefine relations between individuals and groups as the conditions of life change; to maintain adaptability.

The specific substantive contents of primitive law systems have been found to be highly variable in accordance with the numerous manifestations of social structure around the world. But they are not infinite. Social evolutionism is once again in vogue among American anthropologists. As for myself, I have long held that it can be discerned in broad and general terms in the area of law (Hoebel, 1954: ~ Chapter 12). I believe that the postulate of coevolution in organic and cultural development holds good. How much of social ordering is genetically predicted for human beings is no moot question. My mind is open to the search for epigenetic patterns in the multifarious formation of legal cultures, but let us note each in our separated disciplines fail to hold at tight rein on our respective limits of naivete.