

Questions of the legal scholar concerning the so-called sense of justice

MANFRED REHBINDER

*School of Law, University of Zurich, CH -8032 Zurich, Switzerland
(translated by Ulrike E. Lieder)*

With laypersons the sense of justice is one of the determinants of legal behavior. With lawyers it is a source of law. The origin and nature of this phenomenon are uncertain. For almost 100 years the debate in German jurisprudence marked time: is the sense of justice innate or acquired? The question sprang to life in 1979 when two suggestions were made: (1) that the sense of justice is related to what Freud called identification, and (2) that it is associated with a norm filter of the sort that Swiss neurologist von Monakow described in 1927 as the biological conscience. Extending these excursions of jurisprudence into neighboring disciplines, we ask: (a) is the sense of justice related to the internal rewards system? (b) does the sense of justice show different levels of maturation? and (3) is the sense of justice a biologically regulated iterative process that leads to self-conditioning? If we lawyers could have empirical answers to such questions, our understanding of the working of the law would be enhanced.

For almost 100 years legal scholars have looked to the neighboring disciplines for help in their controversy on the nature of the sense of justice and its role in assuring the righteousness of the law. This controversy which continues undiminished to this day started in Europe with a lecture by the eminent German scholar Rudolf von Jhering (1884) entitled 'On the Origins of the Sense of Justice', at a meeting of the Law Association in Vienna. Jhering spoke against nativism, a term coined by the physicist Helmholtz (Bihler, 1979: 3). Nativism claims that man has innate value concepts responsible for his legal behavior. Jhering countered with the maxim, 'It is not the sense of justice which created law, but rather, it is law which created the sense of justice.' (Jhering, 1877: xiii). Why this controversy developed among legal scholars needs same explanation. Laypersons probably

think that the sense of justice equals the common man's concept of right and wrong, and that it is something that lawyers do not need. After all, lawyers should know their law -generally speaking, at least or they should know where to find it. Then why do they need a sense of justice?

THE SENSE OF JUSTICE IN LEGAL SCIENCE

Although law is a rational instrument of social control, lawyers can -unfortunately- not do without emotion or a sense of justice, <cc>, their own as well as that of others.

Creating norms

This becomes evident when law as a device of social control does not provide a legal norm for the solution of a given problem. In this case, the lawyer as legislator must create a new norm. This is also true for judges if there are gaps in the law: like legislators, they must create a new norm. For example, Article I, Paragraph 2 of the Swiss civil code ~ provides that if the code does not contain an applicable rule, the judge is to rule in accordance with common law. If there is no common law, he is to decide according to the rules which he would establish if he were the legislator. In this case, judges will either 'find' spontaneously a just solution based on their intuition, and later give a rational explanation for their decision; or, if they initially do not prefer a specific solution, they will rationally examine the problem and find a solution based on certain rational aspects, and will then (more or less satisfied) accept this solution as 'just' and attempt to convince others. In the case of very 'technical' legal regulations the judge may not have any intuitive feelings at all, yet he must still consider the feeling of others as to what constitutes a fair and just decision. The sense of justice thus plays a significant role in the creation of new norms. It is important in assuring the effectiveness of these norms, since the degree of compliance will be low if the norms are not in accord with the concept of justice within the social group.

Application of the norms

The sense of justice within a society also is instrumental in determining the degree of compliance with a norm, and for this reason is a decisive factor in the application of existing legal norms. The consideration of the consequences of the application of legal norms is based on the fourth method of interpretation of law which—according to

prevailing opinion -is the most important of the four classical methods of interpretation. Existing legal norms can be interpreted grammatically, historically, systematically and teleologically. The teleological interpretation attempts to optimize the intent of the law. To this end, the judge must know which interpretation of an abstract rule will achieve the effect on society intended by that rule. This requires an awareness of the moral consensus of the particular social group in which the rule functions, and to what degree it fulfills the expectations of justice.

However, legal scholars do not agree on which of the four techniques of argumentation is the most persuasive and therefore most decisive for the solution of practical legal problems within the framework of existing rules. That is why, in the eyes of laypersons, the application of law is very unpredictable and thus 'unscientific'. According to today's prevailing view the choice of methods depends on the preconceived ideas of the judge and on whether those to whom the law is addressed share his preconceptions and will therefore accept his interpretation (Esser, 1972). The mechanism which was described as important in the creation of norms also plays a role in these preconceptions, that is the sense of justice of the judge and of the 'law consumers' plays an important role indeed, along with rational argumentation. Anglo-American case law, which accepts court decisions as concrete application of abstract rules - as new law (Geiger, 1970: 253 -261 is the best explanation) may well have been aware of this situation.

Judging and normative error

There are numerous problems which the judge can only solve with the help of his sense of justice. This is always the case when a rule refers to normative standards as, e.g., when referring to public policy (the definition of the Supreme Court of the Federal Republic of Germany is the 'sense of justice of all those who think in terms of fairness and justice' BGHZ 52/17,20), morality or other undefined legal concepts such as human dignity or pornography. To illustrate this point, let us examine how law deals with a normative error. The proliferation of laws in the welfare state makes it impossible to know all the laws. To an ever increasing extent, the 'law consumer' can claim with good reason that he/she did not know the law. In earlier times, the Roman legal principle 'error iuris nocet' was acceptable. Today, however, we must look for more sophisticated solutions. In establishing an accused's guilt or innocence, the law now demands that the court inquires whether the accused had made a

reasonable effort to consider the legality of his actions. It is not expected that they know the exact terms of the law but that they must make an effort, within a layperson's ability, to understand the legal situation. This awareness of the legal consequences is called 'parallel evaluation in the layperson's sphere' in current criminal law (Jeschek, 1978: 236f). Because the layperson lacks professional expertise, their evaluation has to be based on emotions.

THE CONCEPT OF THE SENSE OF JUSTICE IN GERMAN LEGAL LITERATURE

Lawyers, of course, do not wish to give the impression that they work with the help of emotions. The legal scholars' professional arguments about the nature and significance of the sense of justice, therefore, have not focused much on the principal application of law and the creation of legal norms, the fields of legal logic (Ehrlich, 1918) and legal policy. Rather, the subject has been discussed among legal philosophers who have focused on the justice of positive law. It is interesting to note that - with a few exceptions to be discussed later - the basic ideas have hardly changed since Jhering's time, in spite of progress which has since been made in sociology, psychology, the behavioral sciences and - most recently - in biology.

Is the sense of justice innate or acquired?

In his time, Jhering fought against a school of philosophy whose most prominent representative was Gustav Ruemelin. Following the political unification of Germany in the Bismarck Reich, Ruemelin, in his 1871 speech 'On the Sense of Justice' (Ueber das Rechtsgefuehl), had stated that law had its basic root in an innate sense of order, 'which aims at the harmony of our lives and of the world'. This speech reflected the spirit of a new nationalism which supported the idea of a national codification of the existing law. Ruemelin felt that law should create an ideal order of life conditions which correspond to the people's concept of morality, expressed in the sense of justice and the conscience of the individual. Tensions would arise when the positive law no longer corresponds to society's basic moral ideas which are, of course, subject to historical changes. These tensions could be resolved by adjusting the law to the prevailing concept of justice. Opposed to this interpretation, von Jhering advocated a theory of the empirical, 'historical' evolution of the sense of justice. According to his theory, the experiences of the prevailing social conditions are 'mentally

inhaled', that is, internalized by the individual, and become part of their personality.

However, each of these theories on the origins of the sense of justice had to make considerable concessions to the other. Ruemelin could not claim that there exists a constant, invariable sense of justice rather, he assumes that the moral evolution of man outpaces existing law, and: as a consequence, existing law will no longer satisfy societies sense of Justice. Von Jhennig could not claim that the sense of Justice builds only on acquired concepts, but attributes the progress of law to the insights of 'great minds', the intuition of geniuses.

To this day, these two explanations of the origins of the sense of justice —innate (nativistic) as opposed to acquired (historical) —are still at the center of the controversy. In his *Psychoanalytical Jurisprudence*, Albert A. Ehrenzweig (1973: 219) does not call the sense of justice inherent in all men an instinct, because —as he states —its biological origins cannot be traced. He postulates, however, that in its function, the sense of justice determines the law just as hunger controls the intake of food, or the sex drive controls procreation. Nature is too wise to rely solely on man's intellectual capacities. rather, due to his genetic heritage and as a result of long periods of acculturation, man was endowed with a sense of justice, just as he inherited other drives, like hunger and sex. In this function, the sense of Justice had always been recognized both by the advocates of natural law (Naturrechtler] and those of positive law (Positivisten].

Erwin Riezler (1969: 40 -46), however, emphasizes in what was until recently the leading study on the subject that the sense of justice depends on cognitive (intellectual) concepts which are not innate, but historically conditioned and empirically acquired, yet law and the sense of Justice are interdependent.

Is the sense of justice a source of law?

Innate and acquired —these are possible answers to the question of whether the emotional response of right or wrong is part of our genetic endowment or whether it has been learned in the process of socialization. Innate and acquired —these are also the answers to the socio-psychological question of priorities: law before the sense of justice or the sense of justice before law. To Jhering, the sense of justice is only a diagnostic tool for finding the existing positive law. To most other authors, the sense of justice, in addition to positive law, is also a source of law.

This applies in particular to all those who believe in a natural law,

superior to positive law. The modern -day advocates of natural law have introduced Max Scheler's and Nicolai Hartmann's concept of material ethics into the discussion (Bihler, 1979: 10). They consider the sense of justice a value -finding tool, a genuine source of knowledge revealing absolute objective values (Hubmann, 1977), even though they might be subject to historical changes. There is also a consensus among the majority of legal scholars who do not recognize any *apriori* standards, that the sense of justice works as a source of law in those areas we mentioned in the beginning—legislation and adjudication. Here, an important contribution was made by Erwin Riezler (1969), "who developed a tripartite partition of the sense of Justice in 1923 (see also Weimar, 1969; Geiger, 1970: 412 -415; Venzlaff, 1973). According to Riezler, the sense of justice can be:

- (a) a feeling of what law is at a given time (positive sense of justice)
- (b) a feeling of what the law should be (ideal sense of justice) and
- (c) a feeling that law should be obeyed (general sense of justice, respect for the legal Order).

Therefore only in the sense of (b) can the sense of justice be regarded as an independent source of law.

Is the sense of justice rational?

As an independent source of law, the sense of justice requires rational explanations in order to be accepted by others. This is as true for a constant natural law as for a natural law with changing contents. Rational criteria must be available to explain contradictory statements on a given concept of justice and to provide reasons documenting the error and supporting the chosen alternative (Bihler, 1979: 20). However, this also applies to the creation of norms by an ideal sense of justice as Riezler sees it, because the legal norm thus created requires a rational basis if it is to be accepted as binding. Therefore, it is not surprising that legal scholars agree that the sense of justice has, besides its emotional component, also a strong rational one with a clear preponderance toward the intellectual (Bihler, 1979: 22).

However, the *contradictio in adjecto* of an intellectual emotion should make legal scholars aware that something must be wrong. Before we direct questions to the neighboring sciences that are competent in this problem area, let us consider two examples of recently published German legal literature that document new insights developed in the fields of psychology and neurophysiology.

Sense of justice without law?

The first example is Michael Bihler's *Psychologie der Rechtsgewinnung* (Psychology of Acquiring Legal Norms) which appeared in 1979. It makes Riezler's work, which was until then the leading work on the sense of justice, obsolete. Bihler postulates a model in which the emotional and rational elements of the sense of justice are separate. He does not see emotion as a product of the sense of justice: rather, he suggests that the feeling of Justice is a psychological identification (in Freud's sense) with a one-sided bias. The sense of justice spontaneously favors one party over the other in a legal conflict. The person who takes sides is motivated by empathy. The sense of justice as an act of solidarity in this sense is 'the result of a process of identification which is triggered when a predetermined partial identity between the person involved in the conflict and the person taking sides is affectively cathected, i.e. when the case is provocative' (Bihler, 1979: 101).

Do these sense of justice have to go through a normative filter?

The second example of how non-legal insights have shed new light on old legal problems concerns the application of the so-called biological normative filter to the consideration of normative errors in law. In his 1979 study, *Zur juristischen Dimension des Gewissens* (On the Legal Dimension of Conscience), Ernst E. Hirsch utilizes the theory of a biological conscience which had been developed by Constantin von Monakow in 1927. Hirsch applies this theory to the legal system and especially to the assessment of lawyers' behavior during the Nazi regime. Should hard-core National Socialists have been told by their sense of justice to reject the then valid law if they had made what the German Supreme Court requires them to do an adequate effort to assess the legality of their actions'? Hirsch says that, according to von Monakow, man has innate behavioral programs, located in the limbic system. These programs are later internalized and appear to him as clearly evident commandments that must be obeyed. This so-called biological conscience determines his moral awareness. Every person thus has an innate biological normative filter. This filter is supplemented by another normative filter, acquired through learning, which reflects the moral norms prevalent in his social environment. 'Because man, due to his lack of instincts, is by nature a cultural being and therefore vulnerable and exposed to suggestive influences of all kinds, his biological normative filter can be restricted or even totally blocked by the cultural one. As a result, the individual's moral behavior is primarily or exclusively influenced by (the conditions of) the cultural

environment in which he lives' (Hirsch, 1979:82). 'Conscience' is a biologically programmed 'sense of justice' whose contents, however, can be modified and manipulated by the social environment.

QUESTIONS TO THE NEIGHBORING SCIENCES ON THE NATURE OF THE SENSE OF JUSTICE

In the case of the two examples mentioned above, it took 50 years to introduce the insights of neighboring sciences into legal reasoning. This is by no means an exception; rather it is symptomatic for jurisprudence. The conservatism of this discipline should certainly not be seen merely in a negative light, for the latest fad is not always the best. Yet we wish that questions would be addressed to the neighboring sciences on a more updated basis to explore the relevance of new discoveries for law and that we would devote more comprehensive studies to this subject. In the following, I will concentrate on some approaches that might help to explain the sense of justice.

Sense of justice as social interest?

In the legal literature, the sense of justice has a dual character. Emotional and rational elements are inseparable and intermingled, albeit with a clear emphasis on the intellect (Bihler, 1979:22). This epistemological duality of an intellectual emotion is probably due to the tendency to compromise inherent in legal reasoning. If the sense of justice is a source of law, then, according to the famous Article 1, Paragraph 2 of the Swiss Civil Code, the creation of law would have to follow Kant's categorical imperative. However, Kant considers this action to be in the world of the *a priori*. Thus, the spontaneity of reason and not emotions, as proposed by Adam Smith in his theory of moral sentiment, determine such judgments. However, legal scholars are unable to choose between the idealistic and the naturalistic ethic (a controversy that goes back to Plato and Aristotle), and they therefore attempt to combine the two. But a scientific approach to law has to include the social sciences. Therefore it seems appropriate to disregard the world of the *a priori* for the time being and to ask empirical questions about 'the sense of justice'. The sense of justice is thus a psychological process. As was mentioned before, Bihler characterizes it, with Freud, as an emotional process of identification. I wonder if it might not be better to characterize it - with Alfred Adler (1928:267 - 272) - as social interest (*Gemeinschaftsgefuehl* — 'feeling of community').

Adler's *Gemeinschaftsgefuehl* is, in principle, also an identification

with one point of view or another. Adler describes it as the ability 'to see with the eyes of another person, to hear with the ears of another person, to feel with the heart of another person' (Adler, 1928:267). However, if we rely on Freud, as Ehrenzweig did in his psychoanalytical jurisprudence, we would focus too much on the individual and his psychological problems. By contrast, as he says himself, Adler's individual psychology is, in reality, a social psychology because it focuses primarily on the relations between the individual and the community. This interpretation comes close to the concept of law as a device of social control. It seems to be more adequate to explain legal processes using the concepts and theorems of individual psychology than using those of psychoanalysis. It has already been emphasized elsewhere that the sense of justice is not so much the identification with one's own self, but that it also means empathizing with someone else's situation according to the principle 'one man's words are not another man's words, you have to listen to both sides' (Rehfeldt & Rehlinger, 1978:142).

If one looks at the sense of justice as social interest, the question remains why a given legal solution, i.e. a certain point of view, is considered to be right and just. Bihler believes that here the intellect is not actively involved, but that we can see a transference of emotional evaluation at work, which is familiar from studies of early child development. The child does not make a distinction between internal feelings and external objects; rather, he/she perceives his/her feelings as characteristics of the object. The adult experiences much the same way during the psychological process of making value judgments. In the learning process, he/she emotionally internalizes the values prevalent in society and considers them part of the object [Haftwertkonzept] (Bihler, 1979: 135 -145). A solution is considered just because the criterion 'just' is perceived as a part of the object being evaluated. Since Theodor Geiger's detailed discussion of the practical nihilism of values, the sociology of law knows that speaking of a just solution is theoretically unfounded and merely an illusive justification of an emotional judgment. But the Haftwertkonzept explains at the same time why this illusion is a psychological reality.

Can the sense of justice trigger or express a sense of well-being?

If the sense of justice is no more than social interest and if there are no reasonable grounds for calling the resulting decisions 'just', the question arises as to why this statement is made always and everywhere. Let us say that we put ourselves in someone else's position and

decide whether he is right or wrong. Then we would like to see the world organized according to these evaluations. In extreme cases, this desire goes to the point of self-destruction (as is shown, for instance, by Heinrich Kleist in his novella *Michael Kohlhaas*). Could this desire for 'justice' possibly be connected to a psychological gratification, to a sense of well-being? This idea already appears in Adam Smith's theory of moral sentiment: Smith called the sensual feeling of lust the root of morality (Cassirer, 1918: 250). From the rat experiments of Olds and Routtenberg we have learned that this sense of well-being is located in the so-called pleasure centers of the brain. In the legal literature, Gruter (1980: 108) was the first to print to this as the possible motivation and reward for compliance with norms.

Until now, sociology of law only considered part of the problem, namely social security in the sense of freedom from risk (Rehbinder, 1977: 149). Compliance with the norms would thus result in diminishing fear, for conscience, according to Freud, means social fear. However, if we consider the decrease of social fear as the only motivation for compliance, then we focus too much on the negative sanctions of law, i.e. the various disadvantages, e.g. lower social prestige as a consequence of deviance. But there are positive sanctions as well—tax advantages, subsidies—which motivate compliance and provide expectations of rewards. And, finally, there are cases when people tend toward an ideal of justice. Certainly, law must rely for its enforcement on the law consumers' self-interest and their fear of punishment. However, law succeeds best by triggering the sense of justice. In that case, complying with the law generates a sense of well-being that is independent of the feelings of security and self-interest.

Sense of justice as criterion of Socialization ?

Compliance with the law is thus motivated not only by social fear, but also by moral conviction. A stance such as Martin Luther's—'Here I stand, I cannot help myself'—shows a standpoint resulting from the conquest of social fear. Freud and, following him, Hans J. Eysenck thus defined the concept of conscience too narrowly. According to David Riesman's famous distinction between internally and externally controlled people (Riesman, Denney & Glazer, 1953), people are controlled by external motivations. Their sense of Justice is thus dictated by social fear. However, there are also people who are

directed by motivations that are not controlled heteronomously, but, rather autonomously. This group complies with the law not because of social conditions and social fear, but rather because of their own insights

Jean Piaget (1932[1965: 395]) also makes a distinction between heteronomous rules which exercise authoritative control, and autonomous rules, which are based on the acceptance of the reciprocity of social relations in the sense of indispensable cooperation. He sees the development of a child as a shifting from authoritatively controlled behavior to autonomous behavior. On this basis, Lawrence Kohlberg (Lickona, 1976: 31-53) distinguishes six steps in the development of moral concepts. These steps are stages in a person's maturing process and indicate to which point his socialization has succeeded (Lickona, 1976: 219-40). To be sure, the various stages of development are reached by cognitive, not emotional abilities. However, a rational attitude can be internalized to such an extent that it becomes an emotional compass. Sociologist Robert K. Merton's model (1957) of anomie also demonstrates that a deficient sense of justice is due to insufficient socialization. To comply with a norm without accepting its intent is anomic behavior. Merton calls this behavior ritualism. It might better be called pseudo-conformity or anomic conformity. This behavior characterizes an authoritarian personality and leads to social tensions because it leaves room for alternative value judgements which can cause group conflicts (Rehbinder, 1977: 162).

The sense of justice as a biological mechanism

We can prove empirically that the sense of justice enables us to embrace and live by certain concepts of justice. However, we do not know anything about its determinants—that is, what determines its contents. Gruter (1980: 97) calls legal ideals the results of an interaction between society's concepts of justice and the individual's sense of justice. Since society's concepts of justice can only influence a person's emotions if they are internalized due to fear of sanctions, self-interest, or love for a certain ideal, we must imagine this interaction as follows: pre-existing and new emotional reactions are balanced on a case-by-case basis. This is possible because man, being a deficient being (Gehlen, 1962), can make up for missing or inappropriate genetic dispositions by learning. His memory retains what he has learned (Dawkins, 1976); and the newly acquired knowledge influences his genetically directed behavior and can, if it is adaptive, become part of his genetic material. The sense of justice should thus

be seen not statically only as the result of an interaction between the individuals' expectations and the demands of society, but rather dynamically as biological iterative process. In this process, a primary evaluation { Geiger, 1970: 318) passes through innate and acquired normative filters until a feeling of satisfaction { internal reward) sets in, which then conditions the primary evaluation of the future.

For theoretical as well as practical reasons, it would be most important for the jurist to find out how the psychosomatic interactions between hereditary dispositions and individually acquired experience take place, to what extent this affects the individual's primary evaluation and how much room there is for individual decision making. Even if the biological theories are presently of only heuristic value, it will be important for legal scholars to formulate them in more detail so that legal scholars could address relevant questions to the biological sciences.