Introduction

The overarching thesis of this book, when cautiously formulated, says that evolutionary theory, via the account of human behaviour and human psychological mechanisms it provides, can be a source of valuable insights in the context of legal-philosophical analyses. When formulated more boldly, it says that evolutionary theory can give rise to a new current in legal philosophy, which can be called an ‘evolutionary current in legal philosophy’. In order to justify the thesis in its cautious formulation, the following general argument seems to be sufficient. The argument says that this thesis is self-evident, as it is a corollary of two self-evident assumptions. The first assumption asserts that our behavioural dispositions are the products of natural selection, and so cannot be understood without recourse to evolutionary theory. The second assumption asserts that law deals with human behaviour, as it is in the first place a mechanism for shaping human behaviour. Accordingly, a philosophical reflection on law, in so far as it focuses on law qua a mechanism for shaping human behaviour (which is, arguably, the most natural focus of such reflection), has to take into account the results of evolutionary theory. In order to justify the thesis in its bold formulation, in turn, one must, first, define the concept of a legal-philosophical current, and, second, show that the ‘evolutionary current in legal philosophy’ satisfies this definition. Now, I propose to define ‘a current in legal philosophy’ as a set of well worked-out answers to the following (interrelated) questions:

1. The ontological question: what is law, that is, what is the nature of law?
2. The teleological-axiological question: what are the main goals of law and how should these goals be realized?
3. The normativity question, which has two aspects:
   a. the normative aspect: what are the sources of the normative aspect of the law, that is, of the fact that legal norms give rise to reasons for action?
   b. the motivational aspect: what is the explanation of the fact that humans can be motivated by legal norms, that is, that humans can act in accordance with norms?
4. The methodological-epistemological question: what methods should be used in the analysis of law?
In this book I shall argue that questions 1–3 can be gainfully addressed by recourse to evolutionary theory (clearly, the answer to the methodological question implied by the evolutionary approach to law is that an especially fruitful method of the analysis of law is evolutionary theory). Before providing a sketch of the main arguments of this book, that is, of the answers implied by evolutionary theory to the questions 1–3, let me make some general observations on the application of evolutionary theory in the social sciences.

As is well known, for a long period of time there was a strong scepticism among social scientists toward all attempts to apply evolutionary theory in their fields of research; law scholars were no exception here. This scepticism can be accounted for by three facts. First, many attempts of this kind of application were methodologically flawed (these attempts often omitted the difference between descriptive and normative levels of discourse). Second, these attempts often led to ethically unacceptable conclusions (they often resulted in justifying, for example, social and economic inequalities, eugenics, racism and sexism), which was partly a consequence of their aforementioned methodological defectiveness. Third, the evolutionary claim that human beings are born with a number of evolved behavioural and psychological dispositions is at odds with the claim – deeply entrenched among social scientists – that the human mind is shaped almost entirely by environmental and social factors (this model, a modern incarnation of the Lockean doctrine of tabula rasa, is sometimes called the ‘Standard Social Science Model’). It follows from the above that if the attempts to use evolutionary theory in the social sciences are made with caution (without obliterating the border between descriptive and normative discourse), and if the view of the human mind as being shaped almost entirely by environmental factors stops being treated as unquestionably correct, the aforementioned scepticism toward applying evolutionary theory in the social sciences should decrease. And this is exactly what has happened in recent years – the scepticism has decreased: a relatively large and still growing number of social scientists – again law scholars are no exception here – undertake efforts to apply the results of evolutionary theory in their fields of research. I see the present book as a part of this effort. As is apparent, the basic difference between my work and works of other scholars applying evolutionary theory to legal issues is that it is concentrated solely on legal-philosophical problems, not on concrete social problems. The literature on the application of evolutionary theory to concrete social problems is relatively rich, so that what I could write on this subject would be mainly summarizing and restating what has already been said by other scholars (I mention some results of this kind of application only briefly at the end of Chapter 2).
Introduction I provide a summary of the content of the book’s four chapters and of the Epilogue.

In Chapter 1, *The evolutionary view of human nature*, I provide elementary information about evolutionary theory and try to reconstruct the view of human nature implied by this theory. I argue that a view of human nature is to provide answers to two main questions: what is the dominant *moral motive* of our actions; what is the dominant *mode* of our actions. The answer to the former question specifies whether human beings are genuinely moral, narrowly altruistic, egoistic, or malicious (immoral). The answer to the latter one specifies whether human beings are perfectly prudent or imperfectly prudent. By combining possible answers to these two questions, we receive eight views of human nature. I also mention a special view according to which the human mind is almost entirely socially constructed and thus extremely malleable, that is, a *sui generis* view of human nature which implies that there is no human nature at all (this is the above-mentioned Standard Social Science Model). This classification can be further enriched by specifying whether a given view of human nature is naturalistic (in the strong, intermediate, or weak sense) or non-naturalistic. The naturalistic views assume that the human mind is a part of the natural world and thereby can, at least in principle, be fully explained by means of scientific methods. The non-naturalistic views assume that the human mind transcends the natural world and thereby cannot be fully explained by means of scientific methods. On the strong understanding, the naturalistic views assume that there is no qualitative difference between human beings and animals, and that all – or the overwhelming majority of – our actions can be explained on biological grounds, that is, that our capacity for abstract thinking and cultural factors play only a subsidiary role in shaping these actions. On the weak understanding, in turn, the naturalistic views assume that there is a qualitative difference between human beings and animals, and that many of our actions cannot be explained on biological grounds, that is, that our capacity for abstract thinking and cultural factors play an important role in shaping these actions (I also introduce the intermediate versions of naturalism, which accept part of the claims of strong naturalism and part of the claims of weak naturalism). I defend the claim that evolutionary theory implies the view of human nature according to which human beings are narrowly altruistic and imperfectly prudent; I call this evolutionary view of human nature ‘moderately optimistic (variant 2)’. I also defend the claim that this view is naturalistic in the weak sense.

In Chapter 2, *The ontological question*, I try to reconstruct the answer inspired by evolutionary theory to the question about the nature of law by analysing the evolutionary account of the historical origins of law.
I discuss three models of the origins of law, which I call ‘Hobbesian’, ‘Hayekian’, and ‘Darwinian’, and try to assess them from the evolutionary perspective. The Hobbesian model is based on three assumptions: (1) human beings are deprived of cooperative dispositions – they are egoistic; (2) the state of nature – the state of stateless societies – was a state of social chaos in which people pursued their egoistic ends; (3) the origins of law lie in a social contract and are simultaneous with the origins of the state. Thus, the Hobbesian model implies that law cannot be seen as an expression of our natural cooperative dispositions but, rather, it is an invention of egoistic, but rational, individuals aimed to secure most efficiently their self-preservation and thereby enabling them to realize their interests in a more efficient way. The Hayekian model is based on the following assumptions: (1) the natural instincts of human beings are collectivist, small-group; (2) the state of nature – the state of stateless societies – was not a state of chaos but a state of social order; (3) there is a qualitative difference between primitive law and non-primitive-modern law: primitive law is an expression of our natural collectivist, small-group instincts, while modern law is a mechanism for repressing these instincts and thereby for counteracting much of our human nature that developed in the process of biological evolution. Finally, the Darwinian model assumes that: (1) human beings are narrowly altruistic; (2) the state of nature – the state of stateless societies – was not a state of social chaos but a state of social order; (3) all types of law – both primitive and modern law – can be viewed as an expression of our natural cooperative dispositions and as a mechanism supporting them and extending their scope. I argue that the Darwinian model is properly so called, that is, that it is supported by evolutionary theory. The analyses pursued in this chapter are aimed to justify the conclusion that law is an emergent entity directly supervening on social practices of cooperation and indirectly – or ultimately – on human evolved cooperative dispositions.

In Chapter 3, *The teleological-axiological question*, I argue that evolutionary theory may help define the goals of law, that is, to select the principal values to be realized by law. I contend that while addressing this problem, one can use evolutionary theory in two radically different ways. First, one can reason from the empirical observation that evolution operated according to the principle of the survival and reproduction of the fittest to the normative conclusion that survival and reproduction of the fittest is good and therefore ought to be the main goal of law. This approach cannot be sustained because it commits the so-called ‘naturalistic fallacy’ (as it unjustifiably identifies the predicate ‘good’ with the predicate ‘contributing to the survival and reproduction of the fittest’), and leads to conclusions that are entirely at odds with our basic moral intuitions.
Second, one may proceed in a more refined way, that is, by reflecting on which political-philosophical conception the evolutionary view of human nature can be said to underlie or, to put it equivalently, with which political-philosophical conception this view is coherent. Now, given that each political-philosophical conception determines directly or indirectly the goals of law, one can say that the evolutionary view of human nature, by influencing the choice of a political-philosophical conception, indirectly determines the goals of law. This second approach seems to me much more promising. I argue that the evolutionary view of human nature is incompatible with such political-philosophical conceptions as anarchism, communism, libertarianism and contemporary conservatism, and is best compatible with social liberalism. This analysis argumentation is the most speculative part of this book. In the final part of this chapter, I present a different way of applying evolutionary theory in the context of the goals of law, namely, not in choosing the goals of law, but in realizing given goals of law, that is, in resolving concrete social problems.

In Chapter 4, *The normativity question*, I examine possible contributions of evolutionary theory to the analysis of the normativity question. It seems that the only way in which one can use evolutionary theory in the context of the analysis of the normative aspect of the normative question is the way suggested in Chapter 3. As we already know, this way consists of reconstructing the view of human nature implied by evolutionary theory and reflecting on which political-philosophical conceptions are consistent with this view. Such consistency would be a minimal condition of the plausibility of a given political philosophical conception and thereby of legal rules realizing this conception. As is apparent, evolutionary theory can contribute to the analysis of the motivational aspect of the normativity question in at least three ways. First, it highlights our tendency to obey authority equipped with means of coercion, which partly explains our capacity to be motivated by norms. Second, as is argued in Chapter 2, law should be construed as an expression and extension of our natural cooperative tendencies rather than as a remedy against human anti-social tendencies. This fact seems to explain to some extent why human beings can be motivated by legal norms. I develop this general insight by analysing in greater detail one of those cooperative dispositions – our sense of justice. My analysis revolves around the distinction between the rudimentary and the genuine sense of justice. I contend that the former is a biological adaptation, that is, that it has been selected for because it increased the chances of survival and reproductive success of those who were equipped with it in comparison with those who were not equipped with it. I argue that the rudimentary sense of justice is Janus-faced – it is both intellectual and emotional in character, as it consists of greed constrained by our capacity to anticipate
Evolutionary theory and legal philosophy

reactions of other people and of a bundle of emotions (envy, the instinct for retaliation, gratitude and the sense of guilt). I also examine the relationship between both forms of the sense of justice by reflecting on how the genuine sense of justice can develop out of its rudimentary form. Third, evolutionary theory sheds light on our cognitive capacities which enable norm-conforming behaviour. There seem to be three main capacities of this kind. The first one is theory of mind – our capacity to ascribe mental states to other persons. The second one is our capacity to make normative judgements. The third one is the normative module: evolutionary theory suggests that our mind is equipped with a special cheater-detection or normative module, which makes us especially responsive to norms regulating reciprocal exchanges (for example, aimed to punish cheaters).

In the Epilogue, *The evolutionary current in legal philosophy against a background of traditional currents*, I juxtapose the evolutionary current in legal philosophy with traditional currents in legal philosophy and suggest some further directions of research within this current.

NOTES

1. Understood in this book broadly, namely as general evolutionary theory (the theory of natural selection and the theory of sexual selection), middle-level theories (the theory of reciprocal altruism, the theory of parental investment, and the theory of parent-offspring conflict), and evolutionary perspectives on human behaviour which are based on general evolutionary theory and middle-level theories (namely, evolutionary psychology, sociobiology, human behavioural ecology and gene-culture co-evolution theory).
3. Especially the scholars grouped around *The Society for Evolutionary Analysis in Law* (SEAL) and *The Gruter Institute for Law and Behavioural Research*, but also many representatives of the *Law and Economics* movement who wish to work out better anthropological foundations for their approach to law.